

# International and European company law



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# **PRESENTATION PLAN**

- **Introduction**
- **General aspects**

## **Introduction :**

- **Comparative law – Private international law**
- **National law – Community law**
- **Theoretical approach – Practical approach**

# General aspects

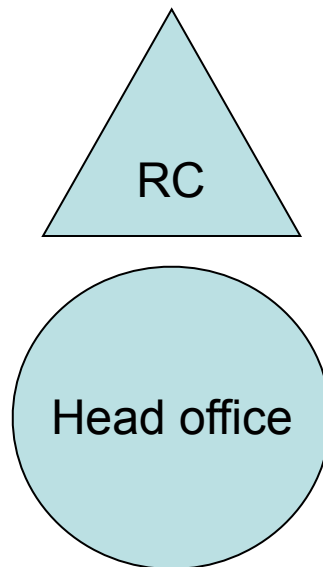
- **The basics of company mobility (I.)**
- **Community sources (II.)**
- **The two most important theories : Incorporation theory vs. real seat theory (III.)**
- **Freedom of establishment in the ECJ case-law (IV.)**
- **Mobility of Community companies (V.)**
- **Validity of company mobility operations (VI.)**

# I. The basics of company mobility

- **Intended operations**
  - International seat transfer
  - Cross-border merger
  - Cross-border transformation of companies
- **Companies affected**
  - Community companies
  - National companies

# I. The basics of company mobility

- **Seat transfer : duality of the notion of « seat »**
  - Statutory seat / registered office (*formal aspect*): Statutes - Register of commerce (RC)
  - Real seat (*material aspect*): Head office

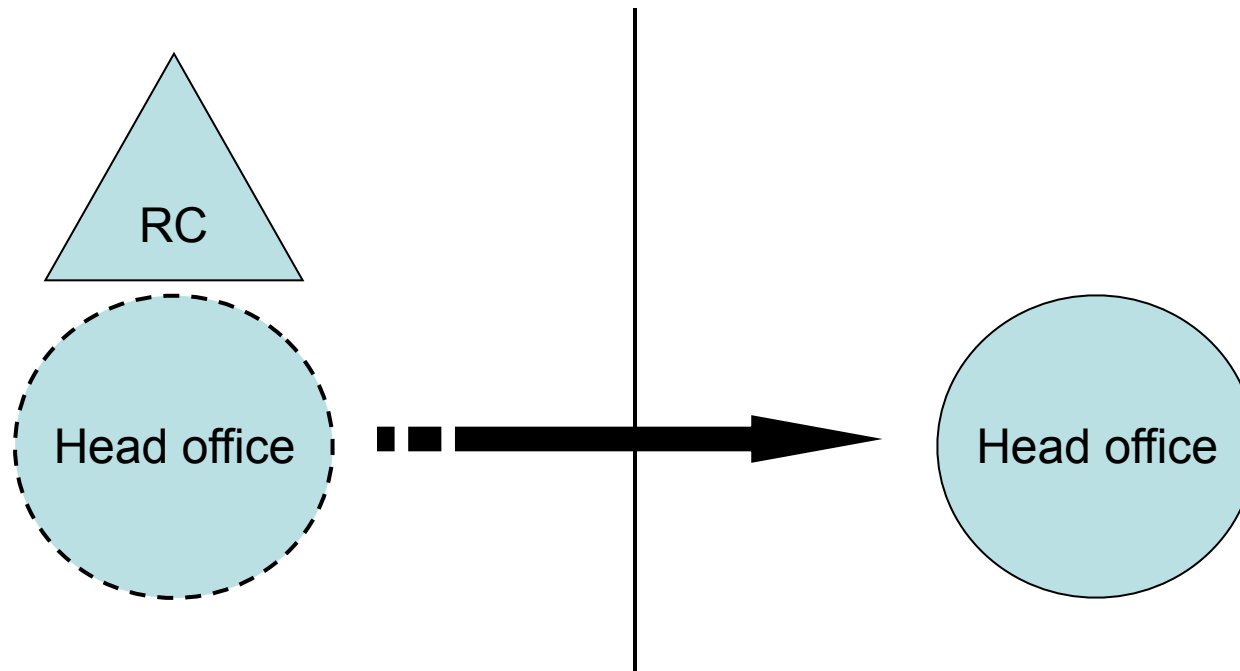


# I. The basics of company mobility

- **Transfer of seat : various operations**
  1. Transfer of the real seat
  2. Transfer of the statutory seat
  3. Full seats transfer (real and statutory)

# I. The basics of company mobility: operations

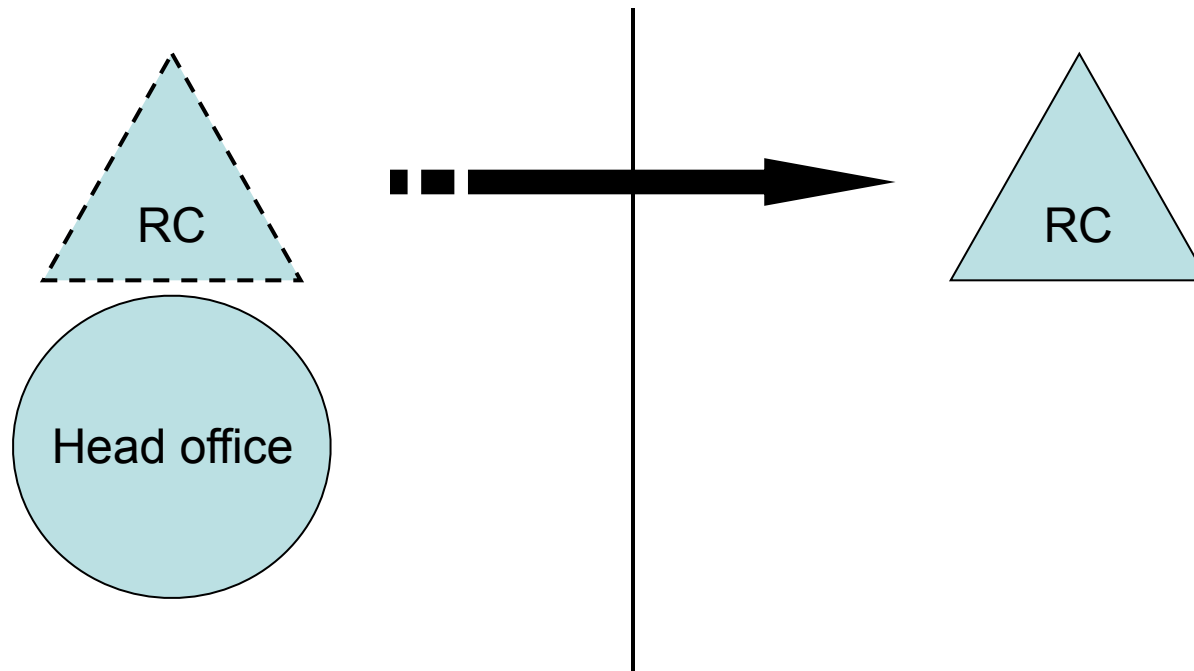
- **Transfer of the real seat**





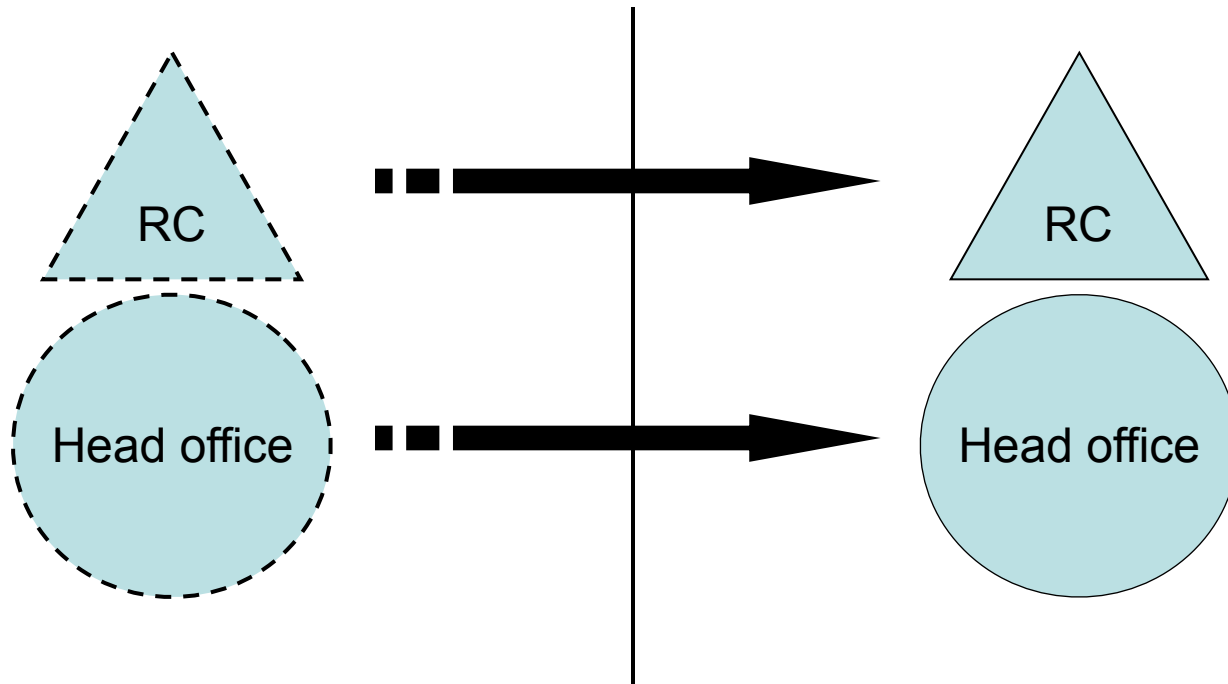
# I. The basics of company mobility: operations

- **Transfer of the statutory seat**



# I. The basics of company mobility: operations

- **Full seats transfer (real and statutory)**



# I. The basics of company mobility: mobile

- Strategic / Economic reasons

- Brand image
- Group logic
- Operational activity
  - Suppliers
  - Infrastructure
  - Customers/market

# I. The basics of company mobility: mobile

- Tax reasons
  - Taxation at permanent establishment level
  - *Exit tax* strategy
  - Tax neutrality of the cross-border operations
    - Seat transfer
    - Cross-border merger

# I. The basics of company mobility: mobile

## — Legal reasons

- Applicable law to the company (*lex societatis*)
- “*Law shopping*” strategy
- Special application of the local law (employees, collective proceedings, criminal liability of managers etc.)

## II. Community sources

- **The Community sources :**
  - Treaty on the Functioning of the European Union (TFEU)
    - Art. 49 TFEU (= art. 43 TEU)
    - *Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited*
    - *Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

## II. Community sources

- **The Community sources :**
  - Treaty on the Functioning of the European Union (TFEU)
    - Art. 49 TFEU (= art. 43 TEU)
    - *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*

## II. Community sources

- **The Community sources :**
  - Treaty on the Functioning of the European Union (TFEU)
    - Art. 54 TFEU (= art. 48 TEU)
    - *Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this 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.*



## II. Community sources

- **The Council regulations related to Community companies**
  - Regulation (CE) n° 2157/2001 of 8 october 2001, related to the European Company (SE)
  - Regulation (CE) n° 1435/2003 of 22 july 2003, related to the European Cooperative Society (SCE)
  - Proposal for a Council regulation on the Statute for a European Private Company (SPE)

## II. Community sources

- **The directives related to the cross-border operations**
  - The 10th directive 2005/56/EC of 26 october 2005 on the cross-border mergers of limited liability companies
  - The 14th directive (project) related to the cross-border transfer of company seats
    - à European Parliament resolution of 2<sup>nd</sup> february 2012 with recommendations to the Commission on a 14th company law directive related to the cross-border transfer of company registered office.

### III. The two most important theories : Incorporation theory vs. real seat theory

#### – Incorporation theory

- The company is governed by the law of the Member State in which it was validly constituted
  - ⇒ Connection of the *Lex societatis* to the law of the **statutory seat**
- The only real seat transfer does not question the recognition of the legal personality
- States : (e.g.) Denmark, Ireland, United Kingdom, Czech Republic, Finland, Hungary, Sweden, Slovakia (Report of the Commission, 12 december 2007)

### III. The two most important theories : Incorporation theory vs. real seat theory

#### – Real seat theory

- The company is governed by the law of the Member State in which the real seat is located (head office)
  - ⇒ Connection of the *Lex societatis* to the law of the **real seat**
- The only real seat transfer terminate the recognition of the legal personality
- States : (e.g.) Belgium, Germany, Spain, France, Luxembourg, Portugal, Austria

## IV. Freedom of establishment in the ECJ case-law

- The perspective to take
  - Point of view of departure State
  - Point of view of host State
  
- Envisaged operations
  - The only real seat transfer
  - Change of tax domicile (natural person)
  - Cross-border mergers
  - Statutory seat transfer by the transformation

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the host State (1993-2003)
  - The only real seat transfer : « Centros – Überseering – Inspire Art »
    - Registration of a branch as a principal place of business (**Centros**, 9 march 1999)
    - Seat transfer (transfer of shares) and capacity to take legal action (**Überseering**, 5 nov. 2002)
    - Discrimination of a « formally foreign company » (**Inspire Art**, 30 sept. 2003)

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the host State (2005)
  - Cross-border mergers : « Sevic Systems AG »
    - Cross-border merger is guaranteed by the freedom of establishment (**Sevic Systems AG**, 13 dec. 2005)

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the departure State (1988-2004)
  - From the refusal of the free movement of companies ... (***Daily Mail*, 27 sept. 1988**)
  - ... to the recognition of the free movement for the natural persons (***Hughes de Lasteyrie du Saillant*, 11 mars 2004**)



## IV. Freedom of establishment in the ECJ case-law

– From the point of view of the departure State (2008)

- Transfer of the real seat « Cartesio » (16 dec. 2008)

– From the Daily Mail law-case confirmation ...

« On those grounds [...]

*4. As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.»*

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the departure State (2008)
  - Transfer of the real seat « Cartesio » (16 dec. 2008)
    - ... to the recognition (of principle) of the transfer of the statutory seat (with change of *lex societatis*)
    - « [...] *The power not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter [...] cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.* » (points 110 to 112)

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the departure State (2008)
  - Transfer of the real seat « Cartesio » (16 dec. 2008)
    - ... to the recognition (of principle) of the transfer of the statutory seat (with change of *lex societatis*)
    - « Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC [...]. (point 113) »

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the host State (2012)
  - Full transfer of seats (real and statutory) « Vale Építési » (16 july 2012)
    - « Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company »

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the host State (2012)
  - Full transfer of seats (real and statutory) « Vale Építési » (16 july 2012)
    - « Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from....

## IV. Freedom of establishment in the ECJ case-law

- From the point of view of the host State (2012)
  - Full transfer of seats (real and statutory) « Vale Építési » (16 july 2012)
    - - *refusing, in relation to cross-border conversions, to record the company which has applied to convert as the ‘predecessor in law’, if such a record is made of the predecessor company in the commercial register for domestic conversions, and*
    - - *refusing to take due account, when examining a company’s application for registration, of documents obtained from the authorities of the Member State of origin. »*

## V. Mobility of Community companies

- **Cross-border mergers**
  - European company (*SE*)
  - European private company
- **Transfer of the statutory seat**
  - European company (*SE*)
  - European private company

## V. Mobility of Community companies

- **Transfer of seat : disassociation between statutory and real seat of a Community company**
  - European company : art 7, 64 and 66 of Regulation (CE) N°2157/2001

*The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.*



## V. Mobility of Community companies

- **Transfer of seat : disassociation between statutory and real seat of a Community company**
  - European company : reform of art. 7 (art. 66)

*Ernst & Young, Study on the operation and the impacts of the Statute for a European Company (SE), final report, 9 december 2009, p. 260 et ss.*

- Organisation of a SE European group endowed with one single statutory seat (identical) and having different head offices (according to national activity of each SE).
- Tax treatment of a statutory seat transfer

## V. Mobility of Community companies

- **Transfer of seat : disassociation between statutory and real seat of a Community company**
  - European company : reform of art. 7 (art. 66)
    - Position of the European Commission
      - *« A number of respondents to the public consultation find the requirement that the registered office and the head office of an SE shall be located in the same Member State (or, in some Member States, in the same place) an obstacle in practice. ... »*
      - *« ...Nevertheless, the Commission sees no reason at this stage to change the current rule. »*

## V. Mobility of Community companies

- **Transfer of seat : disassociation between statutory and real seat of a Community company**
  - European private company :

*« [...] An SPE is not bound to establish its central administration or main establishment in the Member State in which the registered office is located. » (art. 7 Proposition of regulation)*

## V. Mobility of Community companies

- **Transfer of seat : disassociation between statutory and real seat of a Community company**
  - European private company :
    - 30 may 2012 : failure of the negotiations of the Council « Competitivity »
    - Nowadays : European parliament asked the European Council to draw up a new proposition of regulation

## VI. Validity of company mobility operations

- Community companies (SE – SPE)
  - European company
    - Cross-border merger : (+)
    - Transfer of statutory seat / registered office : (+)
    - Power of disassociation between statutory and real seat : (-)
  - European private company
    - Cross-border merger : (+)
    - Transfer of statutory seat / registered office : (+)
    - Power of disassociation between statutory and real seat : (+)

## VI. Validity of company mobility operations

- National companies
  - Real seat transfer
    - From the point of view of the departure State :
      - ⇒ The operation is not covered by the freedom of establishment « Cartesio »
      - ⇒ The validity of the operation depends on national vision of PIL (incorporation vs. real seat theory)

## VI. Validity of company mobility operations

- National companies
  - Real seat transfer
    - From the point of view of the host State :
      - ⇒ The operation is covered by the freedom of establishment «Centros», «Überseering», «Inspire Art»
      - ⇒ Limits of the freedom of establishment in the event of fraud
      - ⇒ The real seat system is incompatible with Community law

## VI. Validity of company mobility operations

- National companies
  - Cross-border merger
    - ⇒ ECJ Case-law : the operation is validated on the basis of the freedom of establishment «Sevic»
    - ⇒ Community legislation : the operation is validated within the context of the 10th directive related to the cross-border mergers



## VI. Validity of company mobility operations

- National companies
  - Statutory seat transfer
    - From the point of view of the departure State :
      - ⇒ The operation is covered by the freedom of establishment «Cartesio»
      - ⇒ The statutory seat (registered office) transfer involves the change of the *lex societatis*
      - ⇒ The realization of the transfer through the mechanism of the company cross-border transformation
      - ⇒ Justification of restriction of the freedom of establishment only for a overriding reasons related to the general interest

## VI. Validity of company mobility operations

- National companies
  - Statutory seat transfer
    - From the point of view of the host State
      - ⇒ The operation is covered by the freedom of establishment when a national legislation can not establish a difference of treatment between the operation of internal transformation on the one hand and international transformation on the other hand «Vale Épitési»
      - ⇒ The host State shall be competent to establish the domestic law and enforce standards (from its national law) to the internal transformation, subject to the respect with the principles
        - ⇒ of equivalence
        - ⇒ of effectiveness

## VI. Validity of company mobility operations

	Real seat transfer	Statutory seat transfer
Departure State	<b>Art. 54 TFUE ( - )</b> Connection to the national law (Incorporation vs. Real seat)	<b>Art. 54 TFUE ( + )</b> Except : overriding reasons of general interest
Host State	<b>Art. 54 TFUE ( + )</b> Except : fraud	<b>Art. 54 TFUE ( - )</b> Connection to the national law subject to the respect with the principles of equivalence and effectiveness

## VI. Validity of company mobility operations

### Conclusion and discussion

- Community companies :
  - ⇒ Disassociation between statutory seat (registered office) and real seat (head office) in the Community companies (SP and SPE)?
- National companies :
  - ⇒ Recognition of the only real seat transfer (from the point of view of the departure State) for the national societies by virtue of art. 54 TFEU application

## Contact

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**Thank you for your attention !**