

Transnational Business Law

Part C.2 : COMPANIES MOBILITY IN THE EU

University of Strasbourg
Faculty of Law – Master 1

Prof. Jochen BAUERREIS

Avocat & Rechtsanwalt

Avocat spécialisé en droit de l'Arbitrage

Avocat spécialisé en droit international et de l'Union Européenne

PRESENTATION OUTLINE

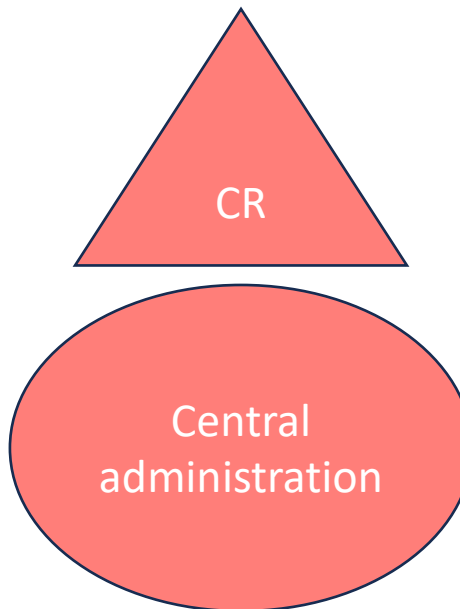
- I. The foundations of corporate mobility**
- II. Two main theories : incorporation vs. real seat**
- III. The legal sources of European law**
- IV. Freedom of establishment in the case law of the CJEU**
- V. Mobility of companies under European law**
- VI. Validity of corporate mobility operations**
- VII. Mergers & Acquisitions**

I. The foundations of corporate mobility

- **Concerned operations**
 - International transfer of seat
 - Cross-border merger
 - Cross-border conversion of companies
- **Concerned companies**
 - Companies under European law
 - Companies under national law

I. The foundations of corporate mobility

- **Transfer of the seat : duality of the notion of “seat”**
 - Statutory seat (formal aspect) : Statutes – Commercial Register (CR)
 - Real seat (material aspect) : Central administration

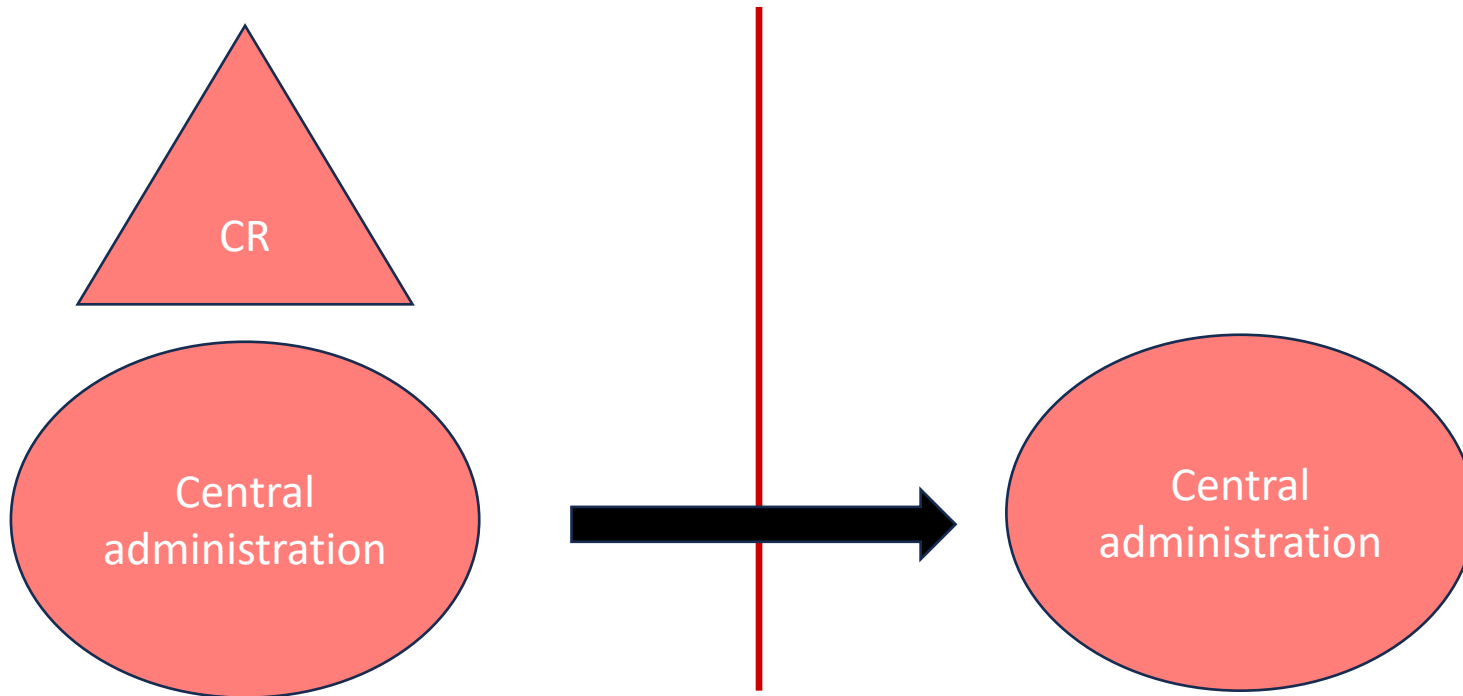


I. The foundations of corporate mobility

- **Transfer of the seat : variety of operations**
 1. Transfer of the real seat (central administration) only
 2. Transfer of the statutory seat (registered office) only
 3. Transfer of the entire company's seat (real and statutory seat)

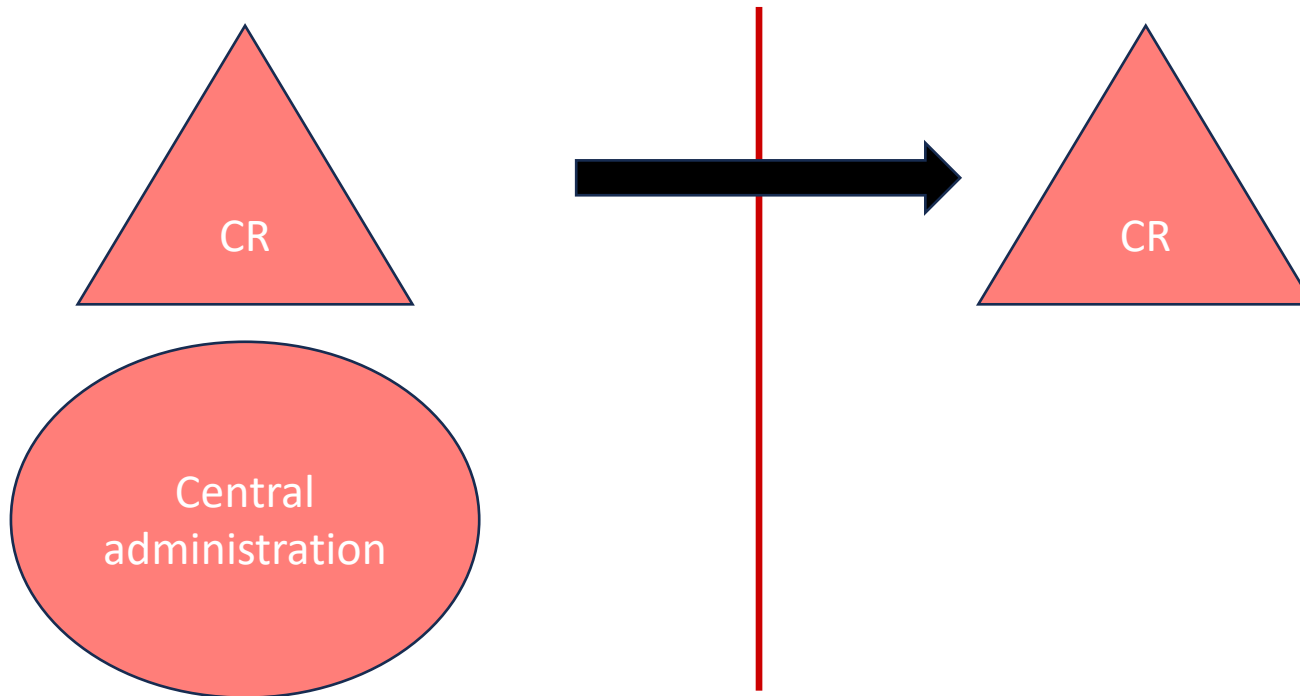
I. The foundations of corporate mobility : operations

- Transfer of the real seat only



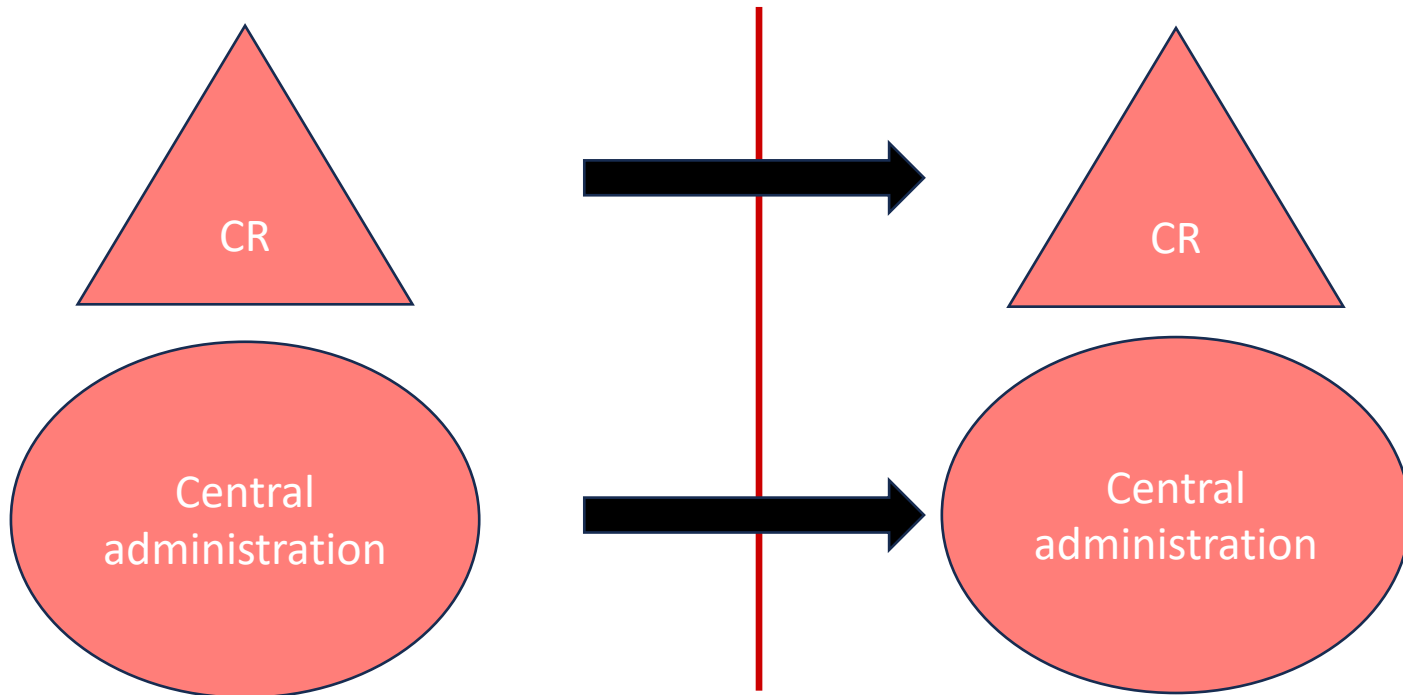
I. The foundations of corporate mobility : operations

- Transfer of the statutory seat only



I. The foundations of corporate mobility : operations

- Transfer of the full seat (real and statutory)



I. The foundations of corporate mobility : what are the reasons ?

- **Strategic / economic reasons**

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

I. The foundations of corporate mobility : what are the reasons?

- **Tax reasons**

- Taxation at the level of the permanent establishment (= real seat/central administration) and not the statutory seat (registered office)
- Exit tax strategy
- Tax neutrality of cross-border operations
 - Transfer of the statutory seat
 - Cross-border merger

I. The foundations of corporate mobility : what are the reasons?

- **Legal reasons**
 - Determination of the law applicable to the company (*lex societatis*)
 - « *Law shopping* » strategy
 - Special application of local law due to specific connections : employees, insolvency, competition, tort liability of directors, etc.)

II. Two systems : incorporation vs. Real seat

- Incorporation system
 - The company is governed by the law of the State in which it has been validly incorporated
 - Connecting *lex societatis* to the law of the statutory seat
 - The transfer of the real seat alone does not challenge the recognition of the legal personality of the company
 - States : (e.g.) Denmark, Ireland, UK, Czech Republic, Finland, Hungary, Sweden, Slovakia (Commission Report, 12 December 2007)

II. Two systems : incorporation vs. Real seat

- Real seat system
 - The company is governed by the law of the State in which the real seat (central administration) is located
 - Connecting *lex societatis* to the law of the real seat
 - The transfer of the real seat alone leads terminates the recognition of the legal personality of the company
 - States : (e.g.) Belgium, Germany, Spain, France, Luxembourg, Portugal, Austria

III. The legal sources of European Law (EU)

- Sources of European law:
 - The Treaty on the Functioning of the EU (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.
(...)»*

III. The legal sources of European Law (EU)

- Sources of European law:
 - The Treaty on the Functioning of the EU (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. »

III. The legal sources of European Law (EU)

- Sources of European law:
 - The Treaty on the Functioning of the EU (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.»

III. The legal sources of European Law (EU)

- Council Regulations relating to European companies:
 - Regulation (EC) No. 2157/2001 of 8 October 2001 on the European Company (SE)
 - Regulation (EC) No. 1435/2003 of 22 July 2003 on the European Cooperative Society (SCE)
 - Proposal for a Council Regulation on the European Private Company (EPC / SPE)

III. The legal sources of European Law (EU)

- Directives relating to cross-border operations:
 - 10th Directive 2005/56/EC of 26 October 2005 on cross-border mergers
 - Directive (EU) 2019/2121 of 27 November 2019 on cross-border mergers, divisions and conversions
 - Transposed in France by :
 - Law n°2023-171 of 9 March 2023
 - Ordonnance n° 2023-393 of 24 May 2023
 - Decree n° 2023-430 of 2 June 2023

IV. Freedom of establishment in the case law of the CJEU

- **Perspective to be adopted**
 - Point of view of the Home State
 - Point of view of the Host State

- **Concerned operations**
 - Transfer of real seat only
 - Change of tax residence (natural person)
 - Cross-border merger
 - Transfer of statutory seat only (by way of conversion)

IV. Freedom of establishment in the case law of the CJEU

- **Articulation between “point of view” and “transfer of real vs. statutory seat”**
 - **Transfer of real seat only**
 - Home State (“*departure State*”)
 - Host State (“*arrival State*”)
 - **Transfer of the statutory seat only**
 - Old Home State (“*departure State*”)
 - New Home State (“*arrival State*”)

IV. Freedom of establishment in the case law of the CJEU

- **First Period (1999 to 2003): Kick off phase**
- **Second Period (2004 to 2005): Intermediary phase**
- **Third Period (2006 to 2008) : Turning point phase**
- **Fourth Period (2009 to 2012): Finalisation phase**
- **Fifth Period (2017 and 2025): Consolidation phase**

IV. Freedom of establishment in the case law of the CJEU

- First Period (1999 to 2003): Kick off phase

- Transfer of central administration
- View of the Host Member State
- Legal cases: *Centros*, *Überseering*, *Inspire Art*

IV. Freedom of establishment in the case law of the CJEU

- **Second Period (2004 to 2005): Intermediary phase**
 - Transfer of the central administration from the perspective of the Home Member State : no specific case law
 - o Question of the validity of the former case law *Daily Mail* (1988)
 - Transfer of the central administration for tax reasons
 - Perspective of the Home Member State (vs. Host Member State)
 - o Freedom of establishment for natural persons (for professional/tax reasons): *Hughes de Lasteyrie du Saillant* (2004)
 - o Question: Applicability to companies
 - Cross-border merger: *Sevic case* (2005)

IV. Freedom of establishment in the case law of the CJEU

- Third Period (2006 to 2008) : Turning point phase

- *Cartesio* case (2008) from the perspective of the Home Member State with two different statements:

- o (1) Transfer of the central administration
 - No protection under EU freedom of establishment (Art. 49 and 54 TFEU)
 - Effectiveness dependent on the *lex societatis* of the Home Member State
- o (2) Transfer of the registered office (statutory seat)
 - Company may subsequently change *lex societatis* in order to obtain greater mobility (law shopping)
 - Protection under EU freedom of establishment (Art. 49 and 54 TFEU)
 - Transfer of the registered office = cross-border conversion
 - Condition : admissibility under the Host Member State (arrival State)

IV. Freedom of establishment in the case law of the CJEU

- **Fourth Period (2009 to 2012): Finalisation phase**
 - *Vale Építési case* (2012)
 - o Finalisation of the companies' mobility case law
 - Transfer of registered office = cross-border conversion
 - View of the Host Member State (arrival State)
 - o Argumentation of the CJEU
 - Effectiveness according to the *lex societatis* of the Host Member State (arrival State)
 - BUT: EU principles of equivalence and effectiveness
 - Prohibition of discrimination between domestic and EU cross-border conversions
 - Indirect protection through EU freedom of establishment

IV. Freedom of establishment in the case law of the CJEU

- **Fifth Period (2017 and 2025): Consolidation phase**
 - *Polbud case* (2017)
 - Transfer of the registered office
 - View of the Host Member State (arrival State)
 - Simultaneous transfer of the actual central administration not required!
 - *Edil Works II case* (2024)
 - Transfer of the registered office
 - View of the Home Member State (departure State)
 - Powers of the management bodies are governed by the new *lex societatis*, even if the exclusive business activity (administration of a castle) takes place at the central administration of the Home Member State (departure State).

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the Host State / arrival State (1999-2003)
 - Transfer of real seat only : « *Centros – Überseering – Inspire Art* »
 - Registration of a branch as principal establishment (*Centros*, 9 March 1999)
 - Transfer of registered office (share transfer) and legal capacity to act in court (*Überseering*, 5 Nov. 2002)
 - Discrimination of a « pseudo-foreign company » (*Inspire Art*, 30 Sept. 2003)

IV. Freedom of establishment in the case law of the CJEU

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

IV. Freedom of establishment in the case law of the CJEU

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

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the Home State (“departure State”)
 - Transfer of real seat (« *Cartesio* », 16 Dec. 2008)
 - From the confirmation of *Daily Mail* case law...

« 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 case law of the CJEU

- From the point of view of the Home State (“departure State”)

- Transfer of real seat (« *Cartesio* », 16 Dec. 2008)
 - ... to the (principled) recognition of the transfer of statutory seat (with change of *lex societatis*)

« (...) That power including the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter (...) 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. »

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the Home State ("departure State")
 - Transfer of real seat (« *Cartesio* », 16 Dec. 2008)
 - ... to the (principled) recognition of the transfer of 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 » (para. 113)

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the new Home State (“arrival State”)
 - Full transfer of real and statutory seat (*Vale Epitesi*, 12 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 case law of the CJEU

- From the point of view of the new Home State (“arrival State”)
 - Full transfer of real and statutory seat (*Vale Epitesi*, 12 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 case law of the CJEU

- From the point of view of the new Home State (“arrival State”)
 - Full transfer of real and statutory seat (*Vale Epitesi*, 12 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. »

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - Full transfer of statutory seat without transfer of real seat and without liquidation of the first company (« *Polbud* », 25 Oct. 2017)

« Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company. »

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - Full transfer of statutory seat without transfer of real seat and without liquidation of the first company (« *Polbud* », 25 Oct. 2017)
 - Required condition : compliance with the law of the Home State :
cf. *Vale Epitesi* : no discrimination for cross-border (vs. domestic) conversions
 - Not required : transfer of the real seat

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - Full transfer of statutory seat without transfer of real seat and without liquidation of the first company (« *Polbud* », 25 Oct. 2017)

« Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company. »

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - Full transfer of statutory seat without transfer of real seat and without liquidation of the first company (« *Polbud* », 25 Oct. 2017)
 - Restriction of freedom of establishment when a national legislation requires for the validity of the transfer of the statutory seat (registered office) from one MS to another MS that
 - ✓ Real seat shall be transferred at the same time
 - ✓ Dissolution of the company in the old Home State
 - Such restrictions cannot be justified by the protection of creditors, minority shareholders, and employees (there is no « *overriding reason of general interest* »)

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - The transfer of the statutory seat leads to the change of the “*lex societatis*” so that acts of management are governed by the “*lex societatis*” of the new Home State (*Edil Works II*, 25 April 2024)

« Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides generally for its national law to apply to the acts of management of a company established in another Member State but carrying on the main part of its activities in the first Member State. »

IV. Freedom of establishment in the case law of the CJEU

- From the point of view of the old Home State (“departure State”)
 - The transfer of the statutory seat leads to the change of the “*lex societatis*” so that acts of management are governed by the “*lex societatis*” of the new Home State (*Edil Works II*, 25 April 2024)
 - The CJEU states that even when a company carries out the majority of its activities in one MS (old Home State = Italy), after transferring its statutory seat to another MS (new Home State = Luxembourg), it becomes subject to the legislation of that country (new Home State = Luxembourg) with regard to the acts of its directors (in this case: transfer of ownership of the Italian castle).

V. Mobility of companies under European law

- **Cross-border merger**
 - European Company (*Societas Europaea* = SE)
 - European Private Company (*Societas Privata Europaea* = SPE)
- **Transfer of statutory seat**
 - European Company (*Societas Europaea* = SE)
 - European Private Company (*Societas Privata Europaea* = SPE)

V. Mobility of companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law company
 - European Company (SE) : Arts. 7, 64 and 66 of Regulation (EC) 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 companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law 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 Dec. 2009, p. 260 et ss.

→ Two main arguments :

- Organization of an European group of SEs with only one (identical) statutory seat and different central administrations (according to the national activity of each SE)
- Neutrality of the Tax treatment of a transfer of statutory seat only in the case of “business” remaining in the former Home State (= separation between statutory and real seat is unavoidable!)

V. Mobility of companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law 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 companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law company
 - European Private Company (SPE) :

« An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office. »

V. Mobility of companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law company
 - European Private Company (SPE) :
 - 30 May 2012 : failure of Council « competitiveness » negotiations
 - Current situation :
 - Abandonment of the project to draft a new regulation proposal
 - New approach: proposal for a *directive* (4 April 2015) for a single-member company (« *Societas Unius Personae* » = « SUP ») with limited liability for establishments in another Member State

V. Mobility of companies under European law

- Transfer of registered office : separation between statutory and real seat of a European law company
 - EU project for a « *Societas Unius Personae* » (SUP) directive
 - Initial proposal by the European Council in 2015
 - European Parliament refused in 2017 to adopt the directive since the principle of online registration of SUPs would allow the establishment of « letterbox companies » without being able to verify the identity of the company's founders
 - The European Commission no longer mentioned an « SUP » project in its 2018 agenda

VI. Validity of corporate mobility operations (summary)

- **Companies under European law (SE – SPE)**
 - European Company (SE)
 - Cross-border merger (+)
 - Transfer of statutory seat (+)
 - Ability to separate statutory and real seat: **(-)**
 - European Private Company (SPE)
 - Cross-border merger (+)
 - Transfer of statutory seat (+)
 - Ability to separate statutory and real seat: **(+)**

VI. Validity of corporate mobility operations

- **Companies under national law**
 - **Transfer of real seat**
 - From the point of view of the home State (“departure State”)
 - Operation not covered by freedom of establishment (« *Cartesio* »)
 - Validity of the operation depends on the national conception of PIL (incorporation system vs. real seat system)

VI. Validity of corporate mobility operations

- **Companies under national law**
 - **Transfer of real seat**
 - From the point of view of the Host State (“*arrival State*”)
 - Operation covered by freedom of establishment (« *Centros* », « *Überseering* », « *Inspire Art* »)
 - Freedom of establishment can only be restricted in the case of proof of fraud *in concreto* (not *in abstracto* !)
 - **Real seat system is incompatible with EU Law !!**

VI. Validity of corporate mobility operations

- **Companies under national law**
 - **Cross-border merger**
 - CJEU case law : operation validated on the basis of freedom of establishment (« *Sevic* »)
 - European legislation : operation valid within the framework of the 2019 “*mobility*” directive (cross-border mergers, conversions)

VI. Validity of corporate mobility operations

- **Companies under national law**
 - **Transfer of statutory seat** : (old Home State → new Home State)
 - From the point of view of the old Home State (“departure State”) :
 - Operation covered by freedom of establishment (« *Cartesio* »)
 - Transfer of statutory seat implies a change of *lex societatis*
 - International transfer carried out through the mechanism of cross-border conversion of the company
 - Transfer of statutory seat does not require transfer of real seat (« *Polbud* »)

VI. Validity of corporate mobility operations

- **Companies under national law**
 - **Transfer of statutory seat** : (old Home State → new Home State)
 - From the point of view of the old Home State (“departure State”) :
 - In the case of transfer of statutory seat, the company is not subject to dissolution (« *Polbud* »)
 - Restriction of freedom of establishment can only be justified by an overriding reason of general interest. However, protection of creditors, minority shareholders, and employees is not sufficient *per se* to constitute such a reason.

VI. Validity of corporate mobility operations

- **Companies under national law**
 - Transfer of statutory seat :
 - From the point of view of the new Home State (“arrival State”) :
 - Operation covered by freedom of establishment since national legislation cannot create a difference of treatment between domestic and cross-border conversions (« *Vale Epitesi* »)
 - New Home State is competent to apply its national rules to conversions, subject to respect the principles of
 - Equivalence
 - Effectiveness

VI. Validity of corporate mobility operations

	Transfer of real seat only	Transfer of statutory seat
DEPARTURE STATE ➤ Home State ➤ Old Home State	Art. 54 TFEU (-) Connection to national law (incorporation vs. real seat)	Art. 54 TFEU (+) except for overriding reason of general interest
ARRIVAL STATE ➤ Host State ➤ New Home State	Art. 54 TFEU (+) Except : Proof of fraud <i>in concreto</i>	Art. 54 TFEU (-) Connection to national law subject to respect the EU principles of equivalence and effectiveness

VII. Mergers & Acquisitions

I. Mergers

II. Acquisitions

I. Mergers

A. Types of mergers

B. Private International Law aspects

A. Type of mergers

- 1) Domestic vs. international (cross-border) merger**
- 2) Upstream vs. downstream merger**
- 3) Inter-company vs. external merger**

B. PIL aspects

- 1. European Court of Justice Case Law (Sevic 2005)**
- 2. Merger Directive (2005/56/EC) - Mobility Directive (2019/2121/EU)**
- 3. SE Regulation (articles about cross-border mergers)**

II. Acquisitions

- Two main forms :
 - Asset Deal : Sale and assignment of a company's operating business (assets)
 - Share Deal : Sale and assignment of shares

II. Acquisitions

- Asset Deal

- Preliminary transaction : creation of a legal entity under the local law of the target for the purpose of acquiring the operational activity (principle of territoriality)
- Consequence in private international law :
 - Asset Deal, as concerns the process of the transaction, is exclusively governed by the local law of the target (= domestic character of the transaction)
 - Asset Deal, as concerns the context of the transaction, has a cross-boarder character since a foreign company (new parent company) is the indirect owner of the assets through its local subsidiary (= direct owner of the assets).

II. Acquisitions

- **Share Deal**
 - Jurisdiction
 - State Court litigation
 - International Arbitration

II. Acquisitions

- Share Deal

- Applicable law : classification of the transfer of shares
 - Application of the “*lex contractus*” for the legal aspects related to the sale of shares
 - Art. 3 Rome I : choice of law
 - Art. 4 Rome I : objective connecting method
 - Application of the “*lex societatis*” (national law of the target company) :
 - Legal effects of the sale/assignment of shares towards company and third person
 - Appreciation of contractual/independent « representations and warranties » based on accounting principles (balance sheet) governed by the national law of the target company

II. Acquisitions

- Share Deal

- Application of Rome I Regulation
 - The exclusion of matters relating to company law by Article 1, paragraph 2 :

« (...)

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

(...) »

/ Lex societatis

II. Acquisitions

- Share Deal

- Application of Rome I Regulation
 - The principle of autonomy of law: choice of applicable law by the parties (Article 3, paragraph 1) :

*« 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
(...) »*

II. Acquisitions

- Share Deal

- Application of Rome I Regulation
 - Failing that: the objective affiliation method (Article 4, paragraph 2) :

« (...)

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

(...) »

II. Acquisitions

- Share Deal

- Case Law Example : Com., 10. Sept. 2010, n°12-15.930
 - Summary of the facts: a partner (residing in France) in a Luxembourg-registered company transferred the remainder of his stake in the company's capital to another partner free of charge. The transferee then sued the transferor and the company to have the transfer declared null and void.

II. Acquisitions

- Share Deal

- Case Law Example : Com., 10. Sept. 2010, n°12-15.930
 - Case law solution :

*« Et attendu, en second lieu, qu'après avoir relevé, par motifs adoptés, que les parties à l'acte de cession de parts sociales du 10 juillet 2001 **n'avaient pas fait de choix exprès quant à la loi applicable à ce contrat**, l'arrêt retient, de l'analyse des stipulations de cet acte et des circonstances de la cause, parmi lesquelles la clause des statuts de la société invoquée par le moyen, qu'il existait un doute quant à ce choix; que de ces constatations et appréciations, la cour d'appel a justement déduit qu'il y avait lieu de **déterminer la loi applicable conformément aux dispositions de l'article 4 de la Convention de Rome** »;*

II. Acquisitions

- Share Deal

- Case Law Example : Com., 10. Sept. 2010, n°12-15.930

- Case law solution :

*« And secondly, having noted, on the grounds adopted, that the parties to the deed of transfer of shares dated July 10, 2001, had not expressly chosen the law applicable to this contract, the judgment finds, from an analysis of the provisions of that deed and the circumstances of the case, including the clause in the company's articles of association invoked in the ground of appeal, that there was doubt as to that choice; that from these findings and assessments, the Court of Appeal rightly concluded that it was necessary to **determine the applicable law in accordance with the provisions of Article 4 of the Rome Regulation** »;*

II. Acquisitions

- Share Deal

- Case Law Example : Com., 10. Sept. 2010, n°12-15.930
 - Commentary on the ruling : M. Menjucq, Revue des sociétés 2014, p. 193
 - Principle: The **law applicable to the (contractual) terms and conditions of a transfer of company rights** is determined by the rules of the Rome Convention (Rome I Regulation)
 - Exception: The “*lex societatis*” continues to govern the **effects of the transfer of company rights on the acquisition or loss of shareholder status**

II. Acquisitions

- Share Deal

- **Our recommendation :**

- Express choice of the applicable law to the transaction (sale / assignment of shares)
- Avoid the co-application of several applicable laws (*lex contractus* + *lex societatis*)
- Prefer for pragmatical reasons the *lex societatis* as the applicable law for the entire transaction (sale + assignment of shares)
- Even (or especially) if seller and purchaser are established in the same country, the choice of the applicable law (*lex societatis*) is highly important

II. Acquisitions

- **General conclusion for Asset Deal & Share Deal**
 - Respect territoriality in “*Asset deal*” type transactions
 - Favor the law of autonomy (Art. 3 Rome I) over objective connections (Art. 4 Rome I)
 - Prefer simple, less complex solutions (avoid the possibility of “splitting” the contract and multiple connections)
 - Give priority (for pragmatical reasons) to an exclusive application of the *lex societatis* (applicable law to the target company)

Thank you for your attention !



Sans limites.

Ohne Grenzen.

Without limits.

ABC International Selarl
ABCI Rechtsanwaltsgesellschaft mbH
jochen.bauerreis@abci-avocats.com
www.abci-avocats.com