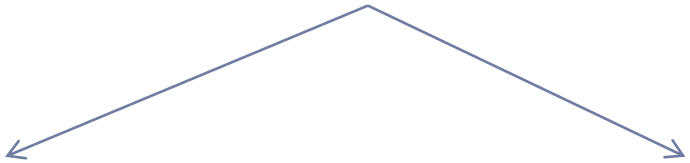
EUROPEAN COMPANY LAW

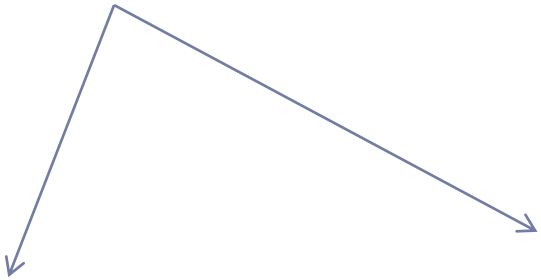
RIGHT OF ESTABLISHMENT

EUROPEAN COMPANY LAW



EUROPEAN LEGISLATION

COURT OF JUSTICE



REGULATIONS

DIRECTIVES

RIGHT OF ESTABLISHMENT

Article 49 TFEU (ex Article 43 TEC)

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.

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.

Article 54 TFEU(ex Article 48 TEC)

"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."

Article 52
(ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

De Luca, European company law

PRIMARY ESTABLISHMENT

- The right to set up and manage companies or firm in any member States, under the same condition laid down for their own nationals

SECONDARY ESTABLISHMENT

- The right to set up agencies, branches or subsidiaries in any Member States, under the same conditions laid down for their own nationals

The reference for a preliminary ruling

The reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union. This procedure enables national courts **to question the Court of Justice on the interpretation or validity of European law**. The reference for a preliminary ruling therefore offers a means to guarantee **legal certainty by uniform application of EU law**.

General scope of preliminary rulings

The Court of Justice Decision has the force of res judicata. It is **binding** not only on the national court on whose initiative the reference for a preliminary ruling was made but also on all of the national courts of the Member States.

In the context of a reference for a preliminary ruling concerning validity, if the European instrument is declared invalid all of the instruments adopted based on it are also invalid. It then falls to the competent European institutions to adopt a new instrument to rectify the situation.

(*http://eur-lex.europa.eu*)

JUDGMENT OF THE COURT 30 November 1995 in Case C-55/94, Gebhard

…

National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a **non-discriminatory manner**; they must be justified by **imperative requirements in the general interest**; they must be **suitable for securing the attainment of the objective which they pursue**; and they must **not go beyond what is necessary in order to attain it**.

…

DAILY MAIL, JUDGMENT OF THE COURT 27th September 1988, in C-81/87 (from the judgement)

- The applicant (DAILY MAIL), which is an investment holding company, applied for consent under the national provision in order to transfer its central management and control to the Netherlands, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices for its management in the Netherlands. Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties

- the principal reason for the proposed transfer of central management and control was to enable the applicant, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell. After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes

- After a long period of negotiations with the Treasury, which proposed that it should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom, the applicant initiated proceedings before the High Court of Justice, Queen's Bench Division, in 1986. Before that court, it claimed that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally

- The questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter refered to as 'the applicant'), and H.M. Treasury for a **declaration**, inter alia, that the applicant is not required to obtain consent under United Kingdom tax legislation in order to cease to be resident in the United Kingdom for the purpose of establishing its residence in the Netherlands

?

(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:

(a) payment of tax upon profits or gains which have already arisen may be avoided;

(b) 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?'

- The national court asks to determine whether Articles 52 and 58 of the Treaty give a company incorporated under the legislation of a Member State and having its registered office there **the right to transfer its central management and control to another Member State**. If that is so, the national court goes on to ask **whether the Member State of origin can make that right subject to the consent of national authorities**, the grant of which is linked to the company's tax position

DAILY MAIL

- claims essentially that Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52. The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity

UK

- argues essentially that the provisions of the Treaty do not give companies a general right to move their central management and control from one Member State to another. The fact that the central management and control of a company is located in a Member State does not itself necessarily imply any genuine and effective economic activity on the territory of that Member State and cannot therefore be regarded as establishment within the meaning of Article 52 of the Treaty

COMMISSION

- emphasizes first of all that in the present state of Community law, **the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move**. In that regard, the Commission refers to the differences between the national systems of company law. Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation. Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality. However, **all the systems permit the winding-up of a company in one Member State and its reincorporation in another**. The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty

COURT

- freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period
- Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58

- the rights guaranteed by Article 52 *et seq.* would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State
- In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52
- A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State.

- The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom **while maintaining its legal personality and its status as a United Kingdom company**.

- **unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning**

- the Treaty regards the differences in national legislation concerning the required connecting factor and **the question whether** — and if so how — **the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment** but must be dealt with by future legislation or conventions

The ECJ stated:

- *Articles 52 and 58 of the Treaty* ***cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State***.
- *The answer to the first part of the first question must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, confer* ***no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State***

Centros case (ECJ, 9 Mar. 1999, Case C-212/1997) (*from the judgement*)

- Mr. and Mrs Bryde, a Danish couple residing in Denmark registered a private company named Centros Ltd. in England and Wales;
- Centros **has never traded since its formation**. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde;
- During the summer of 1992, Mrs. B. requested the Erhvervs-og Selskabsstyrelsen (the Trade and Companies Board) under the Danish Department of Trade, to register a branch of Centros in Denmark;
- *Pseudo-foreign company*

- The Board refused that registration on the grounds, inter alia, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish not a branch but a principal establishment in Denmark, by **circumventing the national rules concerning, in particular, the paying-up of the minimum capital required for Danish private companies**;
- The Board submits that its refusal to grant registration is not contrary to Articles 52 and 58 of the Treaty since the establishment of a branch in Denmark would seem to be *a way of avoiding the national rules on the provision for and the paying-up of minimum share capital.* Furthermore, its refusal to register is justified by the need to protect private or public creditors and other contracting parties and also by the need to endeavour to prevent fraudulent insolvencies

- Centros brought an action before the court (Ostre Landsret) against the refusal of the board to give effect to that registration.
- Because of the court upholding the argument of the board, Centros appealed to the Supreme Court (Hojesteret);
- The Danish Supreme Court referred questions about the interpretation of the relevant articles of the EC Treaty to the ECJ for a preliminary ruling.

?

- Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?

- the national court is in substance asking whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned

Danish government

- Article 52 of the Treaty is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals have formed a company in the United Kingdom which does not carry on any actual business there with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances the formation by nationals of one Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment

Mr. and Mrs. Bride

- the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which its has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals.

COURT

- Under Article 58 of the Treaty 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 Community are to be treated in the same way as natural persons who are nationals of Member States
- The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person

Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.

Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions

- the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty

- the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee

The ECJ stated:

- *It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital;*

- *That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalizing fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned*

- a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law
- the national courts may, case by case, take account — on the basis of objective evidence — of **abuse or fraudulent conduct** on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions

- the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States **cannot, in itself, constitute an abuse of the right of establishment**. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty

ÜBERSEERING, JUDGMENT OF THE COURT 5 November 2002, in Case C-208/00 *(from the judgement)*

- The Überseering case originated from a conflict between Überseering *BV* and *Nordic Construction Company Baumanagement GmbH* (*NCC*).
- Überseering, a Dutch private company, acquired a piece of land in Dusseldorf (Germany), which it used for business purposes;
- By way of a project management contract, Überseering engaged *NCC* to refurbish a garage and a motel on the site.
- The contractual obligations were performed but Überseering claimed that the paintwork was defective;
- In December 1994 two German nationals residing in Düsseldorf acquired all the shares in Überseering
- Überseering unsuccessfully sought compensation from *NCC* for the defective work and it brought an action before the Regional Court of the *Lander* (Dusseldorf's Landgericht);

- The Landgericht dismissed the action, as did the Oberlandesgericht (Higher Regional Court):
- The Oberlandesgericht found that Überseering had transferred its actual centre of administration to Dusseldorf once two German nationals acquired its shares;
- It found that, as a company incorporated under Dutch law, Überseering did not have legal capacity in Germany.
- Überseering appealed to the German Supreme Court (Bundesgerichtshof), which referred the case to the ECJ for a preliminary ruling.

- The Zivilprozessordnung (German Code of Civil Procedure) provides that an action brought by a party which does not have the capacity to bring legal proceedings must be dismissed as inadmissible. Under Paragraph 50(1) of the Zivilprozessordnung any person, including a company, having legal capacity has the capacity to be a party to legal proceedings: legal capacity is defined as the capacity to enjoy rights and to be the subject of obligations.

- According to the settled case-law of the Bundesgerichtshof, which is approved by most German legal commentators, a company's legal capacity is determined **by reference to the law applicable in the place where its actual centre of administration is established** ('Sitztheorie' or company seat principle), as opposed to the 'Gründungstheorie' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany.

- Since a company's legal capacity is determined by reference to German law, it cannot enjoy rights or be the subject of obligations or be a party to legal proceedings **unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law**.

Real seat theory vs Incorporation theory

- where the connecting factor is taken to be the actual centre of administration, that prevents the provisions of company law in the State in which the actual centre of administration is situated, which are intended to protect certain vital interests, from being circumvented by incorporating the company abroad

- where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated

?

- 1 . Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?
- 2. If the Court's answer to that question is affirmative: Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?'

Question 1

- the national court is, essentially, asking whether, where a company formed in accordance with the legislation of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity, and therefore the capacity to bring legal proceedings before its national courts in order to enforce rights under a contract with a company established in Member State B.

COURT

- where a company which is validly incorporated in one Member State ('A') in which it has its registered office is deemed, under the law of a second Member State ('B'), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment

- although the conventions which may be entered into pursuant to Article 293 EC may, like the harmonizing directives provided for in Article 44 EC, facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions
- **No argument that might justify limiting the full effect of those articles can be derived from the fact that no convention on the mutual recognition of companies has as yet been adopted on the basis of Article 293 EC**.

- **general rule**: the acquisition by one or more natural persons residing in a Member State of shares in a company incorporated and established in another Member State is covered by the Treaty provisions on the free movement of capital, provided that the shareholding does not confer on those natural persons definite influence over the company's decisions and does not allow them to determine its activities. By contrast, where the acquisition involves all the shares in a company having its registered office in another Member State and the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities, it is the Treaty provisions on freedom of establishment which apply

Daily Mail vs Überseering

- Concerned relations between a company and the Member State under whose laws it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation
- concerns the recognition by one Member State of a company incorporated under the law of another Member State, such a company being denied all legal capacity in the host Member State where it takes the view that the company has moved its actual centre of administration to its territory, irrespective of whether in that regard the company actually intended to transfer its seat

The ECJ stated:

- *Where a company formed in accordance with the law of a Member State ("A") in which it has its registered office is deemed, under the law of another Member State ("B"), to have moved its actual centre of administration to Member State B, articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B;*
- *Where a company formed in accordance with the law of a Member State ("A") in which it has its registered office exercises its freedom of establishment in another Member State B to recognize the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ("A").*

INSPIRE ART, JUDGMENT OF THE COURT 30 September 2003 in Case C-167/01 *(from the judgement)*

- In the Inspire Art case, Inspire Art Ltd. a company governed by the law of England and Wales, requested registration of its branch in the Netherlands;
- proceedings between the Kamer van Koophandel en Fabrieken voor Amsterdam (Amsterdam Chamber of Commerce and Industry), Netherlands ('the Chamber of Commerce') and Inspire Art Ltd, a company governed by the law of England and Wales ('Inspire Art'), **concerning the obligation imposed on Inspire Art's branch in the Netherlands to record, with its registration in the Dutch commercial register, its description as a 'formeel buitenlandse vennootschap' (formally foreign company) and to use that description in its business dealings**, such obligations being imposed by the Wetop de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997

- In particular, Article 2 of the WFBV requires a company falling within the definition of a formally foreign company to be registered as such in the commercial register of the host State. An authentic copy in Dutch, French, German or English, or a copy certified by a director, of the instrument constituting the company must also be filed in the commercial register of the host State, and a copy of the memorandum and articles of association if they are contained in a separate instrument. The date of the first registration of that company, the national register in which and the number under which it is registered must also appear in the commercial register and, in the case of companies with a single member, certain information concerning that sole shareholder.
- Article 4(4) provides for directors to be jointly and severally liable with the company for legal acts carried out in the name of the company during their directorship until the requirement of registration in the commercial register has been fulfilled.
- Pursuant to Article 3 of the WFBV, all documents and notices in which a formally foreign company appears or which it produces, except telegrams and advertisements, must state the company's full name, legal form, registered office and chief place of business, and the registration number, the date of first registration and the register in which it is required to be registered under the legislation applicable to it. That article also requires it to be indicated that the company is formally foreign and prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person.
- the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited. The paid-up share capital must be at least equal to the minimum capital

?

- 1 . Are Articles 43 EC and 48 EC to be interpreted as *precluding the Netherlands*, pursuant to the Wet op de formeel buitenlandse vennootschappen of 17 December 1997, *from attaching additional conditions,* such as those laid down in Articles 2 to 5 of that law, *to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers* compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?

?

- 2. If, on a proper construction of those articles, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?'

- The national Court is asking whether Articles 43 EC and 48 EC must be interpreted as **precluding legislation of a Member State**, such as the WFBV, which attaches additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in that Member State of a company formed under the law of another Member State with the sole aim of securing certain advantages compared with companies formed under the law of the Member State of establishment which imposes stricter rules than those imposed by the law of the Member State of formation with regard to the setting-up of companies and paying-up of shares;

- whether the fact that the law of the Member State of establishment infers that aim from the circumstance of that company's carrying on its activities entirely or almost entirely in that latter Member State and of its having no genuine connection with the State in accordance with the law of which it was formed makes any difference to the Court's analysis of that question;
- and whether, if an affirmative answer is given to one or other of those questions, a national law such as the WFBV may be justified under Article 46 EC or by overriding reasons relating to the public interest

- several of the provisions of the WFBV fall within the scope of the Eleventh Directive, since that concerns disclosure requirements in respect of branches opened in a Member State by companies covered by the First Directive and governed by the law of another Member State
- some of the obligations imposed by the WFBV concern the implementation in domestic law of the disclosure requirements laid down by the Eleventh Directive
- Those provisions, the compatibility of which with the Eleventh Directive has not been called into question, cannot be regarded as constituting any impediment to freedom of establishment. Nevertheless, even if the various disclosure measures referred to at paragraph 57 above are compatible with Community law, that does not automatically mean that the sanctions attached by the WFBV to non-compliance with those disclosure measures must also be compatible with Community law
- the Eleventh Directive requires the Member States to provide for appropriate penalties where branches of companies fail to make the required disclosures in the host Member State

- On the other hand, the list set out in Article 2 of the Eleventh Directive does not include the other disclosure obligations provided for by the WFBV, namely, **recording in the commercial register the fact that the company is formally foreign**
- It is therefore necessary to consider, with regard to those obligations, whether the harmonisation brought about by the Eleventh Directive, and more particularly Articles 2 and 6 thereof, is exhaustive
- It must therefore be concluded on this point that it is contrary to Article 2 of the Eleventh Directive for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive
- several of the provisions of the WFBV do not fall within the scope of the Eleventh Directive. Those provisions must therefore be considered in the light of Articles 43 EC and 48 EC

Court

- it is immaterial, having regard to the application of the rules on freedom of establishment, that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or indeed entire, business is to be conducted. The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment
- the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State

Court

- those companies are entitled to carry on their business in another Member State through a branch, and that the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person
- the fact that Inspire Art was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares does not mean that that company's establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 EC and 48 EC

Court

- The argument that freedom of establishment is not in any way infringed by the WFBV inasmuch as foreign companies are fully recognised in the Netherlands and are not refused registration in that Member State's business register, that law having the effect simply of laying down a number of additional obligations classified as 'administrative', cannot be accepted.
- The effect of the WFBV is, in fact, that the Netherlands company-law rules on minimum capital and directors' liability are applied mandatorily to foreign companies such as Inspire Art when they carry on their activities exclusively, or almost exclusively, in the Netherlands.

Court

- It follows from the foregoing that **the provisions of the WFBV relating to minimum capital** (both at the time of formation and during the life of the company) **and to directors' liability constitute restrictions on freedom of establishment as guaranteed by Articles 43 EC and 48 EC**

The ECJ stated:

- *"1. It is contrary to Article 2 of the 11th Council Directive 89/666/EEC of December 1989, concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the Wet op de Formeel Buitenlandse Vennootschap (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive;*

- *2. It is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the treaty, on a case-by-case basis."*

Judgment of the Court (Grand Chamber) 16th December 2008, in C- 210/06 CARTESIO (*from the judgement*)

- Cartesio was formed on 20 May 2004 as a 'betéti társaság' (limited partnership) under Hungarian law. Its seat was established in Baja (Hungary). Cartesio was registered in the commercial register on 11 June 2004.
- Cartesio has two partners both of whom are natural persons resident in Hungary and holding Hungarian nationality: a limited partner, whose only commitment is to invest capital, and an unlimited partner, with unlimited liability for the company's debts. Cartesio is active, inter alia, in the field of human resources, secretarial activities, translation, teaching and training.
- On 11 November 2005, Cartesio filed an application with the Bács-Kiskun Megyei Bíróság (Regional Court, Bács-Kiskun), sitting as a cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's company seat in the commercial register.
- By decision of 24 January 2006, that application was rejected on the ground that the Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law.
- Cartesio lodged an appeal against that decision with the Szegedi Ítélőtábla (Regional Court of Appeal, Szeged).

?

(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?'

- The referring court essentially asks whether Articles 43 EC and 48 EC are to be interpreted as 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

- Cartesio – a company which was incorporated in accordance with Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary – transferred its seat to Italy but wished to retain its status as a company governed by Hungarian law.
- Under the Hungarian Law on the commercial register, the seat of a company governed by Hungarian law is to be the place where its central administration is situated.
- The referring court states that the application filed by Cartesio for amendment of the entry in the commercial register regarding its company seat was rejected by the court responsible for maintaining that register on the ground that, under Hungarian law, a company incorporated in Hungary may not transfer its seat, as defined by the Law on the commercial register, abroad while continuing to be subject to Hungarian law as the law governing its articles of association.
- Such a transfer would require, first, that the company cease to exist and, then, that the company reincorporate itself in compliance with the law of the country where it wishes to establish its new seat.

- In defining, in article 58 of the EEC Treaty, the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether — and, if so, how — the registered office (siège statutaire) or real seat (siège réel) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions

- Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, ***the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article*** – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved ***by the applicable national law***. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, ***can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom***

- Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes 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,** thereby *breaking the connecting factor required under the national law of the Member State of incorporation*

- Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be ***distinguished*** from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.
- In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, **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.
- 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

- it should be noted that although those regulations, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (siège statutaire) and, accordingly, also their real seat (siège réel) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer

The ECJ stated:

- *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.*

JUDGMENT OF THE COURT 12th July 2012, in C-378/10, VALE (*from the judgment*)

- VALE Costruzioni Srl (a limited liability company governed by Italian law) ('VALE Costruzioni'), established on 27 September 2000, was registered in the Rome (Italy) commercial register on 16 November 2000. On 3 February 2006, VALE Costruzioni asked to be removed from that register on the ground that it intended to transfer its seat and its business to Hungary, and to discontinue business in Italy. In accordance with that request, the authority responsible for the commercial register in Rome deleted the entry relating to VALE Costruzioni from the register on 13 February 2006. As is apparent from the file, an entry was made in the register under the heading 'Removal and transfer of seat', stating that 'the company ha[d] moved to Hungary'.
- Given that the company established originally in Italy under Italian law had decided to transfer its seat to Hungary and to operate there in accordance with Hungarian law, on 14 November 2006, the director of VALE Costruzioni and another natural person adopted, in Rome, the articles of association of VALE Építési kft (a limited liability company governed by Hungarian law) ('VALE Építési'), with a view to registration in the Hungarian commercial register. Moreover, the share capital was paid up to the extent required under Hungarian law for registration.

- On 19 January 2007, the representative of VALE Építési applied to the Fővárosi Bíróság (Budapest Metropolitan Court), acting as the Cégbíróság (Commercial Court), to register the company in accordance with Hungarian law. In the application, the representative stated that VALE Costruzioni was the predecessor in law to VALE Építési.

- The Fővárosi Bíróság, acting as a commercial court at first instance, rejected the application for registration. VALE Építési lodged an appeal before the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest), which upheld the order rejecting the registration. According to that court, a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. According to that court, under the Hungarian law in force, the only particulars which can be shown in the commercial register are those listed in Paragraphs 24 to 29 of Law V of 2006 and, consequently, a company which is not Hungarian cannot be listed as a *predecessor in law*

?

- (1) Must the host Member State pay due regard to Articles [49 TFEU and 54 TFEU] when a company established in another Member State (the Member State of origin) transfers its seat to that host Member State and, at the same time and for this purpose, deletes the entry regarding it in the commercial register in the Member State of origin, and the company's owners adopt a new instrument of constitution under the laws of the host Member State, and the company applies for registration in the commercial register of the host Member State under the laws of the host Member State?
- (2) If the answer to the first question is yes, must Articles [49 TFEU and 54 TFEU] be interpreted in such a case as meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State?

?

- (3) With regard to the response to the second question, is the basis on which the host Member State prohibits the company from registration of any relevance, specifically:

if, in its instrument of constitution adopted in the host Member State, the company designates as its predecessor the company established and deleted from the commercial register in the Member State of origin, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host Member State?

in the event of international conversion within the Community, when deciding on the company's application for registration, must the host Member State take into consideration the instrument recording the fact of the transfer of company seat in the commercial register of the Member State of origin, and, if so, to what extent?

- (4) Is the host Member State entitled to decide on the application for company registration lodged in the host Member State by the company carrying out international conversion within the Community in accordance with the rules of company law of the host Member State as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions (e.g. drawing up lists of assets and liabilities and property inventories) laid down by the company law of the host Member State in respect of domestic conversion, or is the host Member State obliged under Articles [49 TFEU and 54 TFEU] to distinguish international conversion within the Community from domestic conversion and, if so, to what extent?'

- By the first two questions referred the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which, although enabling a company established under national law to convert, does not allow a company established in accordance with the law of another Member State to convert to a company governed by national law by incorporating such a company

- By its third and fourth questions the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU must be interpreted, in the context of a cross-border conversion, as meaning that the host Member State is entitled to determine the national law applicable to such an operation and thus to apply the national law provisions on domestic conversions governing the incorporation and functioning of a company, such as the requirements of drawing up lists of assets and liabilities and property inventories. More specifically, it seeks to determine whether the host Member State *may refuse, for cross-border conversions, the designation 'predecessor in law'*, such a designation in the commercial register being laid down for domestic conversions, and whether and to what extent it is required to take account of documents issued by the authorities of the Member State of origin when registering the company

Questions 1-2

- As regards the existence of a restriction on the freedom of establishment, the Court notes that the concept of establishment within the meaning of the Treaty provisions on the freedom of establishment involves the *actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period*. Consequently, it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there

- The Court considers that, in so far as the national legislation at issue in the case in the main proceedings provides only for conversion of companies which already have their seat in the Member State concerned, that *legislation treats companies differently according to whether the conversion is domestic or of a cross-border nature, which is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment laid down by the Treaty* and, therefore, amounts to a restriction within the meaning of Articles 49 TFEU and 54 TFEU

- Hungarian law precludes, in a general manner, cross-border conversions, with the result that it prevents such operations from being carried out even if the interests, mentioned in the preceding paragraph, are not threatened. In any event, such a rule goes beyond what is necessary to protect the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions

The ECJ stated:

- *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*

Questions 3-4

- the company concerned enjoys a right granted by the European Union legal order, in this instance, the right to carry out a cross-border conversion, the implementation of which depends, in the absence of European Union rules, on the application of national law

- the determination, by the host Member State, of the applicable national law enabling the implementation of a cross-border conversion is not, in itself, capable of calling into question its compliance with the obligations resulting from Articles 49 TFEU and 54 TFEU

- in many areas, it is settled case-law that, in the absence of relevant European Union rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the domestic legal order of each Member State, provided that they are not less favourable than those governing similar domestic situations (**principle of equivalence**) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (**principle of effectiveness**)

- the refusal by the authorities of a Member State, in relation to a cross-border conversion, to record in the commercial register the company of the Member State of origin as the 'predecessor in law' to the converted company is not compatible with the principle of equivalence if, in relation to the registration of domestic conversions, such a record is made of the predecessor company. The Court notes, in that regard, that the recording of the 'predecessor in law' in the commercial register, irrespective of the domestic or cross-border nature of the conversion, may be useful, in particular, to inform the creditors of the company which has converted

- Consequently, the refusal to record VALE Costruzioni in the Hungarian commercial register as the 'predecessor in law' is incompatible with the principle of equivalence

- a practice on the part of the authorities of the host Member State *to refuse, in a general manner, to take account of documents obtained from the authorities of the Member State* of origin during the registration procedure is liable to make it impossible for the company requesting to be converted to show that it actually complied with the requirements of the Member State of origin, thereby jeopardising the implementation of the cross-border conversion to which it has committed itself.
- Consequently, the authorities of the host Member State are required, pursuant to the principle of effectiveness, *to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin* certifying that that company has indeed complied with the conditions laid down in that Member State, provided that those conditions are compatible with European Union law

The ECJ stated:

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:*

— *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.*

POLBUD, JUDGMENT OF THE COURT 25th October 2017, in C-106/16 (from the judgement)

- Polbud is a limited company established in Łąck (Poland). By a resolution of 30 September 2011, an extraordinary general meeting of shareholders of that company decided, under Article 270, point 2, of the Companies Code, to transfer the registered office of that company to Luxembourg. According to the request for a preliminary ruling, that resolution made no reference to a transfer of either the place where Polbud's business is managed or the place where that company's business is actually carried out

- On the basis of that resolution, on 19 October 2011 Polbud lodged a request that the opening of a liquidation procedure be recorded by the court responsible for keeping the commercial register ('the registry court'). On 26 October 2011 the opening of the liquidation procedure was recorded in that register and the liquidator was appointed.
- 10 On 28 May 2013 the meeting of shareholders of Consoil Geotechnik Sàrl, whose registered office is in Luxembourg, adopted a resolution which, inter alia, implemented the resolution of 30 September 2011 and transferred the registered office of Polbud to Luxembourg, with a view to the application of Luxembourg law to it, without loss of its legal personality. According to the resolution of 28 May 2013, the transfer was to take effect on that date. On 28 May 2013, therefore, Polbud's registered office was transferred to Luxembourg and that company was no longer named 'Polbud' but became 'Consoil Geotechnik'.

- On 24 June 2013, Polbud lodged an application at the registry court for its removal from the Polish commercial register. The reason stated for that application was the transfer of the company's registered office to Luxembourg. For the purposes of the removal procedure, by decision of 21 August 2013, Polbud was asked to produce (i) the resolution of the general meeting of shareholders containing the indication of the name of the depositary of the books and documents of the undertaking being wound up, (ii) the financial accounts relating to the periods from 1 January to 29 September 2011, 30 September to 31 December 2011, 1 January to 31 December 2012, and 1 January to 28 May 2013, signed by the liquidator and by the person responsible for keeping the accounts, and (iii) the resolution of the general meeting of shareholders approving the report on the process of liquidation.

- Polbud stated that it did not see any need to produce those documents since it was not being wound up, its assets had not been distributed to the shareholders and the application for removal from the register had been lodged because of the transfer of the company's registered office to Luxembourg, where it was continuing its existence as a company incorporated under Luxembourg law. In those circumstances, by decision of 19 September 2013 the registry court refused the application for removal on the ground that the abovementioned documents had not been submitted.

- Polbud brought an action against that decision before the District Court of Bydgoszcz, Poland, which dismissed the action. The company brought an appeal against that dismissal before the Regional Court of Bydgoszcz, Poland, which dismissed the appeal by order of 4 June 2014. Polbud then brought an appeal on a point of law before the referring court.
- Before that court, Polbud claims that, when its registered office was transferred to Luxembourg, it had lost its status as a company incorporated under Polish law and had become a company incorporated under Luxembourg law. Consequently, according to Polbud, the liquidation procedure should have been closed and its name should have been removed from the commercial register in Poland. In addition, Polbud states that compliance with the requirements of the liquidation procedure laid down under Polish law was neither necessary nor possible, since it had not lost its legal personality.

Referring Court

- The referring court, for its part, states, first, that a liquidation procedure is focused on the end of a company's legal existence and implies certain obligations in that regard. In this case, however, the company is continuing its legal existence as a legal person under the law of a Member State other than the Republic of Poland. The referring court asks whether, therefore, the imposition on that company of obligations comparable to those required to bring its legal existence, as a company, to an end do not improperly restrict its freedom of establishment. Further, that court seeks to ascertain whether the fact of the company's reconstitution, based solely on the decision of shareholders to maintain the legal personality it had acquired in the Member State of origin, and of its being registered in the commercial register of the host Member State pursuant to that decision, can be relied upon against the Member State of origin, in spite of the ongoing liquidation procedure in the latter State.

Referring Court

- Second, the referring court states that, while, as a general rule, a Member State may not refuse to recognise legal personality acquired in another Member State and may not undertake an assessment of the correctness of the measures adopted by the authorities of that Member State, removal from the former commercial register is a matter for the law of the Member State of origin, which must ensure that the interests of creditors, minority shareholders and employees are protected in the liquidation procedure. That court considers, consequently, that the registry court ought not to abandon that procedure.
- Third, the referring court states that, according to the Court's case-law, it is, as a general rule, permissible to check whether an undertaking intends to establish a lasting economic connection with the host Member State and, for that purpose, to transfer its registered office, understood as meaning its place of actual management and the place where it carries on its business. It is unclear, however, whether it is the host Member State or the Member State of origin that should undertake that check.

QUESTIONS

- '(1) Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

QUESTIONS

- If the answer to that question is in the negative:

(2) Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out — including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted — which precedes the winding-up of the company, that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?

(3) Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which — for the purpose of its conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?'

- the referring court seeks, in essence, to ascertain whether 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 incorporated under the law of one Member State to the territory of another Member State, with a view to that company being converted to a company under the law of that other Member State, when there is no change of location of the real head office of that company.

THE COURT

- Article 49 TFEU, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union. Accordingly, a company such as Polbud, which was formed in accordance with the legislation of a Member State, in this case, with Polish legislation, may, in principle, rely on that freedom.

- Under the second paragraph of Article 49 TFEU, read in conjunction with Article 54 TFEU, **the freedom of establishment** for companies or firms covered by the latter article **includes,** inter alia, **the right to set up and manage such companies or firms under the conditions laid down, by the legislation of the Member State where such establishment is effected, for its own companies or firms**. Freedom of establishment therefore encompasses the right of a company or firm formed in accordance with the legislation of a Member State to **convert itself into a company or firm governed by the law another Member State** (see, to that effect, judgment of 27 September 1988, Daily Mail and General Trust, 81/87, EU:C:1988:456, paragraph 17), provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter State to determine the connection of a company or firm to its national legal order is satisfied

- In that regard, it must be recalled that, in the absence of harmonisation of EU law, the definition of the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 TFEU, within the powers of each Member State, that article having placed on the same footing the registered office, the central administration and the principal place of business of a company or firm as such connecting factors (see, to that effect, judgment of 27 September 1988, Daily Mail and General Trust, 81/87, EU:C:1988:456, paragraphs 19 to 21).
- It follows, in this case, **that freedom of establishment confers on Polbud, a company incorporated under Polish law, the right to convert itself into a company incorporated under Luxembourg law, provided that the conditions laid down by Luxembourg legislation are satisfied and, in particular, that the test adopted by Luxembourg to determine the connection of a company or firm to its national legal order is satisfied**

- The Court has held that freedom of establishment extends to a situation in which a company formed in accordance with the legislation of one Member State, where it has its registered office, wants to set up a branch in another Member State, even where that company was formed, in the first Member State, solely for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to that effect, judgment of 9 March 1999, Centros,C-212/97, EU:C:1999:126, paragraph 17). Equally, a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the test applied by the second Member State in order to determine the connection of a company to its national legal order, falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State.
- It must be recalled that the question of the applicability of Articles 49 and 54 TFEU is different from the question of whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation, given that, in accordance with settled case-law, it is opento a Member State to adopt such measures (judgments of 9 March 1999, Centros,C-212/97, EU:C:1999:126, paragraphs 18 and 24, and of 30 September 2003, Inspire Art,C-167/01, EU:C:2003:512, paragraph 98)

- However, it must be observed that, as the Court has previously held, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse (see, to that effect, judgments of 9 March 1999, Centros,C-212/97, EU:C:1999:126, paragraph 27, and of 30 September 2003, Inspire Art,C-167/01, EU:C:2003:512, paragraph 96).
- It follows that, in the main proceedings, the fact that it was decided to transfer to Luxembourg the registered office alone of Polbud, that transfer not affecting the real head office of that company, cannot, in itself, mean that such a transfer does not fall within the scope of Articles 49 and 54 TFEU.

- Second, as regards the judgments of 27 September 1988, Daily Mail and General Trust (81/87, EU:C:1988:456), and of 16 December 2008, Cartesio (C-210/06, EU:C:2008:723), it does not follow, contrary to the submissions of the Polish Government, that the transfer of the registered office of a company should necessarily be accompanied by the transfer of its real head office in order to fall within the scope of freedom of establishment.
- On the contrary, it follows from those judgments, and from the judgment of 12 July 2012, VALE (C-378/10, EU:C:2012:440), that, as EU law currently stands, **each Member State has the power to define the connecting factor required of a company if that company is to be regarded as incorporated in accordance with its national legislation**. In the event that a company governed by the law of one Member State converts itself into a company under the law of another Member State while satisfying the conditions imposed by the legislation of the latter if it is to exist within its legal order, that power, far from implying that the legislation of the Member State of origin on the incorporation or winding-up of companies enjoys any immunity from the rules relating to freedom of establishment, cannot provide justification for that Member State preventing or deterring the company concerned from undertaking a cross-border conversion by means of, in particular, the imposition, with respect to such a cross-border conversion, of conditions that are more restrictive than those that apply to the conversion of a company within that Member State itself (see, to that effect, judgments of 27 September 1988, Daily Mail and General Trust, 81/87, EU:C:1988:456, paragraphs 19 to 21; of 16 December 2008, Cartesio,C-210/06, EU:C:2008:723, paragraphs 109 to 112; and of 12 July 2012,VALE,C-378/10, EU:C:2012:440, paragraph 32).

- the answer to the third question is that 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

- By its first and second questions, which can be examined together, the referring court seeks, in essence, to ascertain whether 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, with a view to its conversion into a company under the law of the latter Member State, in accordance with the conditions imposed by the legislation of the latter Member State, is subject to the liquidation of the former company.

Whether there is a restriction on freedom of establishment

- Article 49 TFEU requires the abolition of restrictions on freedom of establishment. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom (judgment of 29 November 2011, National Grid Indus,C-371/10, EU:C:2011:785, paragraph 36 and the case-law cited).
- In this case, it is apparent from the request for a preliminary ruling that the transfer of the registered office of a company incorporated under Polish law to a Member State other than the Republic of Poland does not entail, in accordance with Article 19(1) of the Law on private international law, the loss of legal personality. As stated by the Advocate General in point 46 of her Opinion, Polish law accordingly recognises, in this case, that Polbud's legal personality may, in principle, be continued by Consoil Geotechnik.
- Nonetheless, under Article 270, point 2, of the Companies Code and Article 272 of that code, a resolution of the shareholders on the transfer of the registered office to a Member State other than the Republic of Poland, adopted pursuant to Article 562(1) of that code, entails the winding-up of the company on the conclusion of a liquidation procedure. In addition, the effect of Article 288(1) of that code is that, if it is not liquidated, a company that wishes to transfer its registered office to another Member State other than the Republic of Poland cannot be removed from the commercial register.

- Accordingly, although it may in principle transfer its registered office to a Member State other than the Republic of Poland without the loss of its legal personality, a company incorporated under Polish law, such as Polbud, that wishes to make such a transfer, can obtain the removal of its name from the Polish commercial register only if it has been liquidated.
- It must, in that regard, be made clear that, according to the request for a preliminary ruling, the process of liquidation extends to the completion of current business, recovery of debts owed to the company, performance of its obligations and sale of its assets, satisfaction or securing of its creditors, submission of a financial statement on the conduct of that process and indication of where the books and documents of the company in liquidation are to be deposited.
- In those circumstances, the Court must hold that the national legislation at issue in the main proceedings, by requiring the liquidation of the company, is liable to impede, if not prevent, the cross-border conversion of a company. **It therefore constitutes a restriction on freedom of establishment** (see, to that effect, judgment of 16 December 2008 Cartesio,C-210/06, EU:C:2008:723, paragraphs 112 and 113).

Whether the restriction on freedom of establishment is justified

- According to the Court's settled case-law, such a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary that it should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (judgment of 29 November 2011, National Grid Indus,C-371/10, EU:C:2011:785, paragraph 42 and the case-law cited).
- First, the referring court considers that the restriction on freedom of establishment is justified, in this case, by the objective of protecting the interests of creditors, minority shareholders and employees of the company transferred.

- In that regard, it must be recalled that the Court has recognised that overriding reasons in the public interest include the protection of the interests of creditors and minority shareholders (see, to that effect, judgment of 13 December 2005, SEVIC Systems,C-411/03, EU:C:2005:762, paragraph 28 and the case-law cited). The same is true of the protection of workers (see, to that effect, judgment of 21 December 2016, AGET Iraklis,C-201/15, EU:C:2016:972, paragraph 73 and the case-law cited).
- Accordingly, Articles 49 and 54 TFEU **do not, in principle, preclude measures of a Member State intended to ensure that the interests of creditors, minority shareholders and employees** of a company, that has been incorporated under the law of that Member State and is to continue to carry on business in the national territory, are not improperly affected by the transfer of the registered office of that company and its conversion into a company under the law of another Member State.
- However, in accordance with the settled case-law cited in paragraph 52 of the present judgment, it must also be determined whether the restriction at issue in the main proceedings is appropriate for securing the attainment of the objective of protecting the interests of creditors, minority shareholders and employees and does not go beyond what is necessary to achieve that objective.
- In this case, the Polish legislation requires the mandatory liquidation of a company that wishes to transfer its registered office to a Member State other than the Republic of Poland.

- It must be observed that that legislation prescribes, in general, mandatory liquidation, there being no consideration of the actual risk of detriment to the interests of creditors, minority shareholders and employees and no possibility of choosing less restrictive measures capable of protecting those interests. As regards, in particular, the interests of creditors, as stated by the European Commission, the provision of bank guarantees or other equivalent guarantees could offer adequate protection of those interests.
- It follows that the mandatory liquidation required by the national legislation at issue in the main proceedings **goes beyond what is necessary to achieve the objective of protecting the interests** referred to in paragraph 56 of the present judgment.
- Second, the Polish Government relies on the objective of preventing abusive practices in order to justify the national legislation at issue in the main proceedings.
- In that regard, it is open to the Member States to adopt any appropriate measure for preventing or penalising fraud (judgment of 9 March 1999, Centros,C-212/97, EU:C:1999:126, paragraph 38).
- However, in accordance with the case-law cited in paragraph 40 of the present judgment, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the **purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse.**
- Moreover, **the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty** (see, by analogy, judgment of 29 November 2011, National Grid Indus,C-371/10, EU:C:2011:785, paragraph 84).
- since a general obligation to implement a liquidation procedure amounts to establishing a general presumption of the existence of abuse, the Court must hold that legislation, such as that at issue in the main proceedings, which imposes such an obligation, is **disproportionate**.

- In the light of the foregoing, the answer to the first and second questions is that 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.

The ECJ stated:

- 1. 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.
- 2. 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.