# THE PRIMARY LEGAL ENTITY ESTABLISHMENT IN EUROPEAN COMMUNITY LAW: DIFFICULTIES OF IMPLEMENTATION PROCESS

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**Abstract**

Right of establishment is ascribable to principal freedoms of common market. Though majority of law specialists agree that EC Treaty firms primary establishment right for companies, so far in practice the implementation of this right is limited. The article analyses two main aspects of European Community firms' rights: Treaty provisions for primary legal entity establishment and several judgements by Court of Justice, concerning the discussed problem. It is stated that for regulating companies factual place transfer it is necessary to pass an appropriate EC directive, concretizing the provisions in EC Treaty Articles 43 and 48 and assuring legal capability for companies.

Key words: freedom of establishment, legal entity, primary establishment, formal and factual establishment of company, settlement theory, incorporation theory, principal place of business, registered office, central administration.

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## Introduction

The right of establishment is the corner stone of persons movement. It is ascribable to principal freedoms of common market. In order for such market to function, legal entities must have a possibility to perform the activity freely in the whole territory of EC: to establish subsidiary enterprises, firms in any EU member state. The concept of freedom of establishment is interpreted very broadly and gives the possibility for all members of market to participate in other Member State's economical life and to receive the profit from this activity. In legal aspect there is no such requirement for self-employed person to live and settle in that Member State, in which he/she performs economical activity. Thus, a person can live in other country as well. His/her activity should be economical and striving for profit. It should be emphasized that it is not so important to gain profit. In the scientific papers (e.g. I. Vėgėlė, 2002; S. Žaltauskaitė – Žalimienė, 2002; B. Knoble-Keuck, 1999, M. Lutter, 1999 and others) relevant problem of the primary establishment of companies is emphasised. Although the specialists of law point out that the Treaty of EC confirms the right of primary establishment, so far in practice the implementation of this right is limited.

**The aim of the research** is to reveal and assess the content of freedom of the primary legal entity's establishment and to identify the main aspects of freedom implementation process in the territory of EC.

To achieve this aim, three tasks should be implemented:

1. To define the concept of establishment freedom established in EC Treaty.
2. To analyse the process of formal and factual establishment of company.
3. To assess the main judgments of Court of Justice concerning the discussed problem.

**The object of the research** is primary legal entity establishment.

The research methods are the analysis of this field's scientific literature, EC secondary legal acts and Judgments of EC Court of Justice.

## General Provisions

The freedom of establishment is not abstract. It is regulated by particular rules both as the freedoms of goods and labour movement. This freedom is regulated by EC Treaty provision and confirmed in Article 43[1]:

> "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 will be prohibited. Such prohibition will 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 will include the right to take up and pursue activities of self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject of the provisions of the chapter relating to capital."

This article consists of two parts. The first part prohibits restrictions of the freedom of self - employed persons in starting and performing economical activity (the prohibition of discrimination). The second part of the article emphasizes that establishment will be under conditions of accepting country law. This article does not give many privileges. It is worth mentioning that EC Treaty does not regulate the establishment. The freedom of establishment confirmed in EC Treaty is only a mere equality of establishment, and other questions

[1] Konsoliduota Europos Bendrijos sutartis. - Valstybės žinios, 2004, Nr. 2-2

concerning establishment are left under the competence of EU Member States, as establishers have to follow the law of the accepting country. In this case only discrimination is prohibited: foreigners and local citizens must be treated equally. It should be emphasised that article mentioned above should be explained together with EC Treaty Article 48, which treats companies in the same way as natural persons.

In order to separate the establishment of freedom from others main difficulties rise in regard to freedom of services. It should be mentioned that in some cases it is difficult to separate these freedoms from each other. The establishment is related to the permanent activity in another Member State's economic field. On the other hand, it means that national subjects strive for benefit and dispose their right to do economic activities independently, on the same time motivating to do regulated and balanced economic activities in other Member states. Moreover, it helps to seek convergence of big economic functioning and participation in economic life of Member State. Thus, the product, which is made by person who works in acceptance state permanently, reaches the consumer without crossing borders. In the case of free service movement, the supplier of service and its receiver are established in different states because of that, service crosses national borders. While separating these two freedoms a lot of difficulties arise , especially when a person, who provides services according EC Treaty Article 50 (3), can temporary perform his/her activity, in the territory, for which this service is designed. Permanent activity includes not only the duration of providing these services, but also their frequency, periodicity and succession. Besides, supply of these services is regulated by the provisions of establishment of freedom (A. Junevičius, 2005).

## EC Treaty Articles 43 and 48 and their Regulation Field

The provision of Article 43 is applied to natural persons and companies as well. In order a legal entity to practice this right, it should satisfy the company's definition laid down in Article 48 and have relations with community. In Article 48[2] it is said that:

> **"**Companies or firms formed in accordance to the law of a Member State and having their registered office, central administration or principal place of business within the Community will, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> "Companies or firms" are companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, except for those which are non-profit - making nationals of Member States".

The notion "Legal entities" is the notion of Community law and has a wider approach than persons defined in Member State national law. According to EC Treaty Article 48 paragraph 2, all these companies or firms must be constituted under civil or commerce law, including cooperative societies and other legal persons governed by public or private law, except for those which are non - profit – making.

EC Treaty Article 48 paragraph 2 establishes following provision "…and other legal persons governed by public or private law…" which includes companies without legal status. Different unions and associations are understood as such companies and the provisions of Article 43 are also applied for them. For example, in German commerce law general partnership and limited partnership is not understood as legal entities (although have majority of legal entities rights). Despite of this, general partnership and limited partnership are understood as the companies according the EC Treaty Article 48 paragraph 2. "Company" includes legal entities of public law as well. It is connected to frequency of states companies' participation in economic activity. In practise, legal entities mentioned above, can use establishment right only when they perform activity

[2] Konsoliduota Europos Bendrijos sutartis. - Valstybės žinios, 2004, Nr. 2-2

abroad. The provisions of this article are not applied for the companies, which are non – profit making or which pursue the cultural, social, political activities or charity. Profit making entities within the meaning of Article 48 is closely related to profit-making, self-employed entities, which are defined in EC Treaty Article 48. However the definition "profit making" is applied very widely. The provisions of this article will be applied for the company only when the company do household activities in order to make restitution. However it is not necessary for received incomes to cover outcomes or would be the existence source of company. It is not necessary for profit making to be the main aim of company as well. Otherwise, discussed article could not be applied for cooperative which has no such aim to be profit making and just help for its members to receive incomes.

This analysis shows that the freedom of establishment is treated broadly. It ensures not only the business establishment, but also includes general activity related with the readiness to start business: the rent of accommodation or implements of production as well as pursuing some installations work. EC Treaty Article 43 includes all economic activities and do not emphasize the type of specific activity.

## Treating Companies as Naturals Persons

The person can apply the right of establishment only when he/she has relations with Community. The relations of natural persons are implemented by citizenship. The citizenship institutes equivalent is applied for companies, and is divided into two dimensions, which should be implemented together:

- Companies or firms should be established by law of Member State.
- Companies or firms must be closely related to European Community.

The statement "Companies or firms established by law of Member State" means, that they compliance with the legal requirements of Member States companies establishment and registration. Particularly this influences a free movement within the territory of Community. Member States accept each others national law and order as well as the companies, which are established in the other Member State. Member States do not demur, that companies from other country would have the economic activity within the territory of EC. This requirement was strived to ensure, that only these companies that are registered in the European Community could apply the right of establishment within EC territory. It means that companies ruled by the third states were eliminated from the sphere of use where the provisions which defined the establishment were applied. Speaking about close relation with community it should be mentioned that this relation appears only when companies have:

i) registered office
ii) central administration
iii) the principal place of business

According to these three criterions citizenship of companies is set down. EC Treaty for these three factors gives the same meaning.

i) Registered office is official company's address in the state, where it is established. This address is registered in official registry. In the registered office official documents related to company's activity are kept. Official documents should be public available.
ii) Central administration is the place, where the important decisions for the company are accepted.
iii) Principal place of business is the main place of production or the factory. There implements of production and human resources are located.

Under mentioned two dimensions, companies or firms are treated in the same way as natural persons. However, because of these formations the corporate principles that are very easily applied to natural persons are very difficult applied to companies. The persons have clear citizenship, can cross the borders of states and as a rule, they can not face legality repudiation abroad. Meanwhile the acceptance is very important for companies. It is very important how state's legal acts treat the companies from other countries that want to move into state. Different from natural persons, companies are creations of national law. According to this, companies exist through different states' legal acts that set down the rules of establishment and activity. The existence of company abroad depends on how other state is ready to accept it (A. Junevičius, 2005).

## The Formal Establishment of Company

The movement freedom which is established in Articles 43 and 48 could be implemented in two ways - formally or factually transferring company in other place. Till now questions, connected to formal transference of company in other place, have not become the object of Court of Justice. In process of formal company's establishment raises plenty of specific problems. The problems of companies' law are connected just with transference of company's registration place. In this case the company is eliminated from the register of country, in which it was established (it is possible only when the company is liquidated) and is enrolled in the registry of accepting country. Competence automatically is given to foreign country's registration agencies while transferring the registration place in another country. Company starts to act under the laws of accepting country. The documents of company's establishment should be in compliance with this law.

Formally, transferring company to other country, its identity and continuity of law are not saved. The freedom of establishment, which is laid down in Articles 43 and 48, is understood as the possibility to transfer one and the same company. For this reason the main task is to ensure that company would remain as a legal entity, although its residence place is transferred from one state to other. Eliminating the company from the registry of the state in which it was established does not mean its liquidation and the registration in the other state does not have to mean as establishment of new company. This coordination could be implemented in the EU level, because the unique and concerted mechanism of regulation is required. Transference of the registration place of company in the other state means the change of law under which company acts. According to this, company absorbs the organizational and legal forms that are set in legal acts of accepting country. The change of organizational – legal form makes the transference of company in other country similar to it states national law. Company accepts the organizational-legal from of acceptance country.

However the change of organizational – legal form affects the interests of company's members (shareholders) and creditors. In spite of that, it should be mentioned, that in the case of formal establishment, company in territory aspect pulls of from its members and creditors that stays in previous residence place. According to this, the interests of such persons should be protected. But in this case, Community does not regulate this field, because it is not purposeful. The provisions which would protect the interests of members and creditors should be laid down by Member States legislators. They can better regard to the particularities of corporate law and create the preservative mechanism, which could better reflect concrete legal system.

As a rule, independently from company's law, the tax law of Member States the transference of company's registration place to another state equate to its liquidation. Regardless of that, all company's wealth and all hidden reserves are heavily taxed. Under these conditions, the transference of registration place to another state would be absolutely useless, even if it would be allowed by corporative law. Thus, legal regulation of company's transference should be complemented by provisions of tax law. This coordination should be in the European level; it

is difficult to imagine that every state refuses its tax requirement when company moves to other state. The humanization of law in the European level should ensure the "neutrality" of taxes in case of company's transferring in other country. The decision accepted in this level, in future would allow taxing the company. The state, from which company retreated, in this case, could save the right to toll from the hidden company's reserves not when registration will be transferred, but when these reserves will be realised (for example, when the wealth will be sold).

Transferring the registration place in another country, the barriers for the transference of company rise because of national employment law. In this case, in Europe "the bone of contention" is the employees' participation in the company's management processes. The Member States law is very different in this field. In one group of countries, such as Great Britain, Ireland, tariff contracts play the big role in setting of employees rights. In other countries this role comes to legislators. These differences are determinated by following factors (H, Hügel, 1999):

- Different number of employees in the company;
- Different questions which could be solved by employees;
- Different rights of employees (consulting right, veto right etc.).

## Factual Establishment of Company

The formal company's transference should be clearly distinguished from factual company's establishment. In the case of the latter, company's registration place stays the same just company's control centre or its real seat is transferred abroad. Many authors maintain that *real seat* is place, where the main decisions of company's office are accepted. Mainly it is the place, where company's control bodies act. According to this, relevant new viewpoint could be assessed and particularities of relations between subsidiary companies and mother companies could be evaluated. The main decisions are taken by Mother Company, but they are realized in the subsidiary company. According to contemporary conception, the subsidiary company has its own, managerial centre which is independent from Mother Company. Today because of developed communications, company's office has a possibility to take decision without being in concrete place. In this case company's control centre will be there, where taken decisions will be implemented.

Formal establishment of company is usual juridical procedure. In the case of factual establishment, the company is not eliminated from the company's registry as well as it is not registered in other state. In the best way, the company can register its control centre as branch in other state. One group of scholars maintain that it is not necessary for such transferences be regulated by specific EU directive but the other group of scholars emphasize that transference of control centre should be registered in the state registry. Therefore the demand of directive emerges. However, this procedure would weight the factual transference and would make this procedure unattractive. Despite of this, the advantage of transference is simplicity, which does not require special formality. Nevertheless, if it was requirement to register this transference, it would be equated to formal transference.

The transference of companies' or firms' seat from one country to another is not regulated by EC Treaty Article 43. This action is regulated by EC Treaty Article 293 in which the importance of agreement between states is mentioned. Member States will enter into negotiations with each other with a view to securing for the benefit of their nationals the mutual recognition of companies or firms, since it is necessary, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by laws of different countries. The problem of factual transference is the legal acts of countries limiting such transfer. It could be the provisions of tax law, when in the event of manual transfer from one country to another the permission is necessary from the states (in which is established company) tax

bodies. Many states project the possibility of the change of applied law transferring the real seat of company. Concerning this, many companies want to transfer their seat from one country to another rarely, and questions connected with rights of company's primary establishment are rarely heard in the Court of Justice. Member States often refuse to recognize the status of company and set down different requirements for companies. Meanwhile, EC law does not regulate the problems of companies' recognition. Member States deal with a problem of recognition in different ways.

There are states where the rules applied to company are the rules of the state where this company was established and where the centre of this company is. This provision was called ***settlement theory***. According to this theory, the factual transference of company determinates the changes of applied law. In this case legal status of company is determinated not by the law of state in which company is established, but the law of state in which company was transferred. Saying in other words, the changes of legal status occur. For legal entity this status is very important, because the recognition of legal entity as legal subject, structure and responsibility of members are based on its' status. After change of status the question of company's capability is solving under the law of accepting country.

***Incorporation theory*** is in contrast to settlement theory. The core of this theory is the provision, that company's status is determined according to the law of state in which company is registered. Concerning this, factual transference of company to another state does not change its status and company's capability is regulated by the law of state in which company is registered. In European Community these two above mentioned opposite theories are accepted. Such countries as Germany, France, Austria, Belgium, Luxemburg, Greece, Portugal and Italy are supporters by "settlement theory". Meanwhile incorporation theory is supported in Great Britain, Ireland, Denmark, Sweden, Finland and Netherlands.

The main idea of incorporation theory - company which is established in one of Member States should be recognized in other states even though its real seat is not in the state, in which company is established. When the real seat of company is transferred, the company does not lose its capability. This provision gives mobility for company which is the aim of incorporation theory. It could be explained according to historical circumstances of this theory origin. Incorporation theory originated at 18$^{th}$ century in Great Britain. It ensured the realization of economic interests of colonial empire, provided by the possibility to incorporate the companies under English law and ensured company's protection in their real seat. Incorporation theory was very acceptable for the countries, which exported capital. This theory protected the foreign investors, who pursue to occupy new markets. Nobody disregarded the interests of the state in which acts company (G. Schwarz, 2000).

The main advantage of the incorporation theory is company's personal status which is very easy determined. Meanwhile, the biggest disadvantage is the possibility to establish company avoiding the law of state in which company acts. Second one - choosing the law of incorporation is chosen law, under which interests of creditors, small shareholders, and company's employers are not protected so well. According to this, in many countries that apply incorporation theory legislative and practice developed others mechanisms of interests protection. For example, strong state supervision of companies' activity were developed in Great Britain. Besides, the strong English law is applied for foreign companies if they are connected with Great Britain.

In Germany and France the settlement theory started to dominate in 19$^{th}$ century. The main aim of this theory was resistance to penetration of foreign companies in the territory of country and protection of companies that were established under less strong corporative law. As it was mentioned above, the status of company is determined by the law under the settlement theory of the state in which company's real seat is. The changing of place influences changes of company's status. These provisions could be appended by strong material law, which blocks recognition of foreign company as well as it blocks the possibility for national companies to establish in other states. Some examples are given below:

***Example 1:*** The company transfers its real seat in the other country, which supports the settlement theory. In this instance the company's status is changing independently of supported theory of the state from which it is transferred. The material law of that state in which company is transferred, becomes the personal company status. Under this law the decision is taken on company's status as legal subject declaring. That is why the corporative law require keeping the internal requirements of accepting country which are connected to company's registration: without registration legal entity can not exist. Above mentioned requirements are not fulfilled automatically although the company is established in another state. This foreign company is not declared as law subject. The loss of legal subjectivity is the subsequence of material law of settlement theory. This subsequence should be separated from others which are influenced by the material law of accepting country related to the loss of company's capability. The subsequence could be different, for example, Belgium, Luxemburg, Spain, Portugal and France allow the existence of foreign company if:

a) a state, in which the company is registered, do not insist its liquidation;
b) the constituent documents do not contradict the provisions of accepting country

The law of these countries allow no to establish the companies newly. The other countries such as Germany or Greece in any case require to establish the company newly.

***Example 2:*** Company, established in Member State, which supports settlement theory, transfer its real seat to another country. Transferring company's real seat from one country, which follows settlement theory, to another country, its status is changing. The law of accepting country becomes the own company's law. Others things depend on applying theory of accepting country. If state follows the statements of settlement theory then it declare the changes of company's status and apply for company state's material law. According to this, the legal capability of company is not acknowledged. If accepting country support incorporation theory when determining company's legal capability, state act in compliance with state's law, in which company is established. In this case so called reverse sending occurs. Is it possible for company to keep its capability and escape the liquidation procedures? It depends on the subsequence which rises in country due to company's exiting abroad. For example, under the law of France, Greece, Italy, Luxemburg and Belgium, company can be transferred to anther country without its liquidation. But if after the factual transference of company to another country, law does not declare the establishment and insist to liquidate the company (e.g. Germany and Spain) then *renvoi* situation can not rescue the company. Usually the company's liquidation is related to tax. In that case, is not taxed so called "hidden reserves" (in balance the increasing of company's wealth during all period of activity is not planned). Many authors mention, that it is the main reason, why company is not interested in transference of residence place.

## Case "Daily Mail"

The followings of settlement theory emphasize, that this theory has a function of protection. This function protects the company's creditors, shareholders and employees interests from the problems, which could rise because of foreign company which get to the territory of state. It is very important that the Member States which follow the settlement theory preserve the interests of above mentioned persons in the primary phases of company's establishment (e.g. determining the requirements of company's minimum capital). Member States law can not plan similar mechanisms and activities of transferred companies in the state can violate the interests of company's creditors and stakeholders. On purpose avoiding this situation, the settlement theory specifies repudiation of such companies and blocks their establishment process.

Europe companies' transference is cumbered by settlement theory and legal acts of Member States. For this reason transference becomes less attractive. Firstly, state following

settlement theory does not acknowledge foreign company's legal suability, which was gained during establishment process. Secondly, company, established in its origin state, lose the possibility to transfer its real seat to another state and therein to save its' previous legal suability. Here with settlement theory limits companies' freedom of mobility laid down in Articles 43 and 48 of EC Treaty. It is obviously in that case, when state following the settlement theory, requires that establishing national company abroad would be liquidated or does not allow company to harmonise its establishing documents with national law of accepting country. This also restricts the company's free movement. Restrictions are evident in the requirements to change the company's status and not acknowledge foreign company automatically, if it was established under the law of other Member State. Further developing this idea, it could be mentioned, that any rule, under which the legal status is determined not according states law, in which company is established, but according other law, limits the free movement of companies and makes it less attractive. Questions, related to settlement theory conformity with EC law as well as nationals provisions, which limits factual transference of company, were many times the object of Court of Justice. First time this question was heard in 1987 in "Daily Mail" Case (81/87), second time - in 1997 "Centros" case (C-212/97), third time - in 2000 "Uberseering" case (C - 208/00). Two cases will be analysed in this article.

*Case 81/87 {Daily Mail}, English company wanted to transfer its central management and control to another Member State - Netherlands. The main purpose of transference is less taxes. The rules of United Kingdom prohibited to transfer this company to Netherlands without its liquidation in United Kingdom, although it is provided the secondary establishment right in the another state. Court of Justice emphasized that the requirement to liquidate company before transferring its central control is absolutely compatible with Community law. So, in this case Court of Justice accepts United Kingdom rules, which make barriers for the primary establishment law. Although the EC Treaty provides the establishment right for natural persons and legal entities, this right is restricted under secondary establishment. The establishment right does not provide the right to transfer company's seat from one Member State to another. According Article 293 paragraph 3 of EC Treaty, if negotiations between Member States fail and countries not accept any agreements, establishment in the other state is possible only after liquidation of company in one state and establishing the new company in another. For this reason the Minister of Finance of United Kingdom rightly prohibited the transference of company seat from London to Netherlands. Firstly, such company had been formally liquidated. But in the later cases Court of Justice, according to the argument of EU companies law specialists, changed its opinion and provided for companies primary establishment right ( Centros Ltd Case, 1997).*

## Case "Centros Ltd"

In the case of "Daily Mail" the Articles 43 and 48 were not declared as the directly valid and national restriction for free movement were declared. According to this decision one part of scholars decided that to move freely can only these companies which legal capability is declared according Member States national law. This conclusion was based under the provision of Article 48 of EC Treaty, according to which, the company having movement right "should be constituted under the Member States law". According to the opinion of the scholars, it means that not the law of state, in which company was constituted, was having in mind, but the collision law of accepting country and the material law, in which is directed. Just imagine, if the company which is established in United Kingdom (incorporation theory), transfer its central management to Germany (settlement theory). The collision law of Germany will direct to material law of the country in which is located company's real seat, i.e. German law. According to it, company will not be declared as established, and then it could not move freely. The parallel situation will be in the same case if company constituted

in the country which follows settlement theory, will transfer its real seat to another state. In this case, the state declares, that the companies which transfer their real seat abroad "are not established". Saying in other words, the transference of real seat possible only then, when the company's origin country and accepting country follow incorporation theory and there are not other restrictions. The opposite to the decision of case "Daily Mail" was accepted in case of "Centros Ltd".

*Case C 212/97 {Centros Ltd}, Company "Centros LTD" was established in 1992 and registered in England and Wells as "private limited company". It is the same as in Germany "limited liability Company". The company capital's payment was not paid because it was not determined under the United Kingdom's Company Law. Two Danish have some stocks of this company. 'Centros Ltd" has never trade in England or Wells. In 1992 this company decided to register the branch of company in Denmark. But the State Central Board refused to register the branch, because under the Danish law limited liability company's capital should be not less 200 000 Danish crone. Under the opinion of Danish Central Board, company tried to slide over the law, because company does not act in United Kingdom. "Centros LTD" appealed the decision of Broad not register the branch of company. The Broad's response was to break its rights under Article 43 of EC Treaty. Mentioned article prohibits the restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Court of Justice mentioned, that "Centros LTD is established under the law of one Member State. Its registered office, central administration and principal place of business is in the territory of European Community. Such companies are equated to the natural persons, which have the citizenship of Member State. According to this, if state refuses to grant registration for company's branch, which's office is in another state, in this case raises the restrictions on setting-up of branches. Besides this case crosses the national borders of states and for this reason the Article 43 should be applied. Establishing branch is not important to do the head company pursue its activity.*

In cases of "Centros" and "Daily Mail" both countries follow the incorporation theory. Applying the prohibitions countries tried to protect interests of creditors. Formally in case of "Centros" the main problem was not transference of company but the establishing of branch. But under latter practise of Court of Justice it does not play any role. Firstly, the Treaty of EC does not make the difference between primary and secondary establishment. Secondly, the border between primary and secondary establishment is not clear. Although in the case of "Centros" the branch establishment is analysed, but actually company wanted to transfer its real seat. The prohibition of such transference should be avoided establishing the branch. For this reason, the differences between primary and secondary establishment are not significant.

In case of "Centros" the Court of Justice ruled, so that Articles 43 and 48 are directly valid. The settlement theory lost its immunity. The settlement theory was the barrier of free movement and after "Centros" case it should be excused only for society interests that were determined in cases "Kraus" and "Gehhard". Truly, Court of Justice agreed that Member State should apply the restrictions if it is abused of the provisions determined in EC Treaty. But under the Court of Justice, the establishment of companies in the countries with liberal legal norms susceptible to establish the branch in the state is result of movement freedom laid down in Treaty of EC. The fact, that company does not pursue any activity in registration place but act in the state which his established the branch, does not mean the abuse and the last - mentioned state must follow the norms of free movement.

The judgment taken in "Uberseering" case is the compromise between two from first glance conflicting decisions of Court of Justice. Transference from the foreign country is regulated by "Centros" formula which prohibits the restrictions of establishment right. However, transference into foreign country is regulated under "Daily Mail" formula which declares the possibilities and legality of the restrictions of establishment law. If state in which company is established allows transferring abroad the real seat saving its legal capacity

(incorporation theory), then accepting country must declare such country, independently which theory it follows. If the state of company's origin supports settlement theory, then accepting country may not to declare the company, independently from fact which theory it is following. This attitude is reasoned by the fact that company transferring its real seat abroad loses its legal capability which is acquired by establishing it. (W.Meilicke, 2000).

Summarizing all attitudes mentioned above it should be emphasized, that under the Treaty of EC the company established in one Member State has the right to transfer its real seat to another Member State; this transference is regulated by provisions of establishment freedom. The norms of internal law which restricts such transference should be excused only on society interests. Such prohibitions as the defeat of company's legal capability during transference real seat abroad means denial of companies' free movement and cannot be excused by society interests. That means that settlement theory, which supposes the possibility of such prohibitions contradict with Articles 43 and 48 of ECT. On purpose of avoiding restrictions of such provisions legal capability of companies that are established in Member State and wish to transfer its real seat to another state is preserved under the internal law of Member States. For regulating companies factual place transfer it is necessary to pass an appropriate EC directive concretizing the provisions in EC Treaty Articles 43 and 48 for defining the exact transfer order and assuring legal capability for companies.

## Conclusions

1. The article notes that the freedom of establishment is a corner stone for person's movement. It is ascribable in principal freedom of common market. In order for such market to function legal entities must have a possibility to perform the activity freely in the whole territory of EC.
2. It is worth mentioning that EC Treaty does not regulate the establishment in principle. Freedom of establishment confirmed in EC Treaty is only a mere equality of establishment and other questions concerning establishment are left under the competence of EU Member States, as establishers have to follow the law of accepting country. In this case only discrimination is prohibited: foreigners and local citizens must be treated equally.
3. The notion "legal entity" is the notion of Community law and has a wider approach than persons defined in Member State national law acts. All these companies or firms must be established under civil or commerce law including cooperative societies and other legal persons governed by public or private law except for those which are non-profit-making. This notion is also applies to firms having no legal status. Such firms are various unions and assemblies which are as well regulated under EC Treaty provisions. Finally the notion "company" includes legal entities of public law.
4. In practice freedom of movement noted in EC Treaty may be realized in two ways: by transferring a company either formally or factually. In the first case only the company's place of registration is transferred to a foreign country. The competence automatically is given to foreign country's registration agencies. The company applies the right of accepting Member State. Meanwhile under factual company transfer the registration place of company remains the same and only the control centre or factual residence is transferred. A problem for factual transference is the provisions of Member State law that limits such transfer.
5. State inner law provisions limiting company's right to transfer its factual residence to another Member State may be justified only on the grounds of public interests. Such restrictions as firm's legal capability abolition by transferring its factual residence to a foreign country means free movement negation of the firm and cannot be justified on the grounds of public interests. For regulating companies factual place transference it is necessary to pass an appropriate EC directive concretising the provisions in EEC

articles 43 and 48 for defining the exact transfer order and assuring legal capability for companies.

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