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Freedom of Establishment of Corporations, Relocation of Seats and the Phenomenon of Societas Europea: Implications for Corporate Nationality and Investment Protection

Tomáš Mach[12]

'[I]t may be acceptable for a Member State to set certain conditions before a company constituted under its own national company law can transfer its operational headquarters abroad. It might, for instance, be possible for the Member State to consider that it will no longer be able to exercise any effective control over the company and, therefore, to require that the company amends its constitution and ceases to be governed by the full measure of the company law under which it was constituted.'

Opinion of AG Madura in C-210/06 Cartesio

I. Introduction

I.1. Objectives of the Article

The (European) Court of Justice, (hereinafter the "ECJ") has for decades been occupied by developing case law related to the freedom of establishment of legal persons, with a particular focus on corporations. For the most part case law has been related to rules of private international law (conflict of laws), predominantly laws applicable to companies (*lex societatis)*. Besides that, it has repeatedly been shaping and modifying the relationship between national (municipal) laws of the member states and European Union law.

Much has been written about the development of case law in connection to private international law. There exists, however, one area of law that has not substantially been touched upon, one that may, at times, prove to be of paramount importance to corporations and their shareholders. It is the arena of corporate nationality in the context of companies relocating within the Union and the implications that is arena has in relation to investment protection.

This is an area distinct from that of private international law, one that predominantly belongs on the level of public international law, hereafter, simply, international law. Due to the very nature of EU law[3] and the prohibition of discrimination on the basis of origin, the ECJ[4] has not needed to directly address the question of corporate nationality. Naturally the ECJ lacks any substantial interpretative right in the field of international law, yet it has been increasingly venturing towards the borders of international law with the BIT cases[5] being prime examples of how the ECJ makes sure that no other forum gets a say in matters that could,

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[2] The current writer would like to thank Jennifer Fallon for her helpful comments on an earlier draft of this article. Any inaccuracies or omissions naturally remain the current writer's own.

[3] i.e. primary and secondary law of the European Union /hereinafter Union law/.

[4] The author will remain using the abbreviation ECJ for „the Court of Justice" as it is now called after the Treaty of Lisbon.

[5] C-205/06 Commission v. Austria [2009] ECR I-1301; C-249/06 Commission v. Sweden [2009] ECR I-1335; C-118/07 Commission v Finland

while originating under international law, endanger its exclusive position vis-à-vis EU law.

It is submitted here that an area upon which ECJ will sooner or later have to declare its point of view is that of corporate nationality, be it of relocated companies or be it of the *Societas Europea*.

When doing so, the court will be unwillingly competing with bilateral investment treaty based tribunals.[6] This gain importance, once the EU replaces its respective Member States in bilateral investment treaties with non-member states, as it currently aims at doing under the Lisbon Treaty.[7]

This article aims at discussing the issue of corporate nationality of relocated corporations which exist under their respective Member States' legal systems, as well as the EU-law based experiment of the SE. While keeping in mind the difference between rules determining *lex societatis* and rules determining a company's nationality (private international law rules v. public international law rules), taking into consideration their similar approaches and the fact that the levels of law that govern the respective two areas are different (general international law v. European Union and national laws) this article's objective is to analyze the existing state of the law of the European Union and to answer the question of how to determine the nationality of companies that have been fully relocated[8] to other Member States and what implications it has on the plane of international law.

The relevance of this exercise, so to speak, is clear: trans–boundary mergers have become a reality[9] and so have relocations of the European Companies (SEs). As regards companies incorporated under municipal legal systems, such relocations will become a reality in a near future; until clear rules of assessment of nationality exist, the relocation of a company that may potentially want to make use of a BIT provision is risky business, one that is hard for a corporate lawyer to recommend to its customer as it lacks a predictable outcome.

I.2. Structure of the Analysis

This article is divided into three main sections. The first, Article II represents a short analysis of existing case law of the ECJ in the field of freedom of establishment; the analysis is submitted in the context of legal persons, constituted under laws of EU Member States, attempting to relocate or primarily conduct business in another Member State. It is argued that the current state of EU law provides no set of rules of its own that would influence determining corporate nationality.[10]

Next, Article III discusses rules for determining nationality under international law, concluding (as opposed to various norms of private international

[6] On the discussion of the relationship between the ECJ and arbitral tribunals see: Lavranos, N. New Developments in the Interaction between International Investment Law and EU Law. 9 The Law and Practice of International Courts and Tribunals 2010. P. 409 at 424

[7] See Art. 207 TFEU

[8] This is to be distinguished from mere relocation of primary seat of administration, while a company would retain its registered office in another Member State (such as was the case in C- 167/01 *Amsterdam v. Inspire Art*). For discussion of these areas of law see: Lowry, J. Eliminating Obstacles to Freedom of Establishment: The Competetive Edge of UK Company Law. 63 Cambridge LJ 2004, p. 331

[9] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies

[10] Nor does it provide any set of rules that govern relocation of seats of corporations, despite long time attempts to enact a directive that would govern this area.

law) that unless during a state of war or otherwise stated in a particular norm (such norm can be a particular BIT) the determination of nationality is governed by the rule of incorporation as a customary norm.

The final main section, Article IV, then turns back to European law and discusses areas of EU legislation that have dealt actively with trans-border movement of companies, in other words, trans-boundary mergers and the phenomenon of *Societas Europea*.

The last section, Article V, is a direct follow up to the Article IV and aims at suggesting *de lege ferenda,,* how to determine the nationality of relocated companies. This suggestion is based on the presumption that only international law can have somewhat general authority that goes beyond authorities of national legal systems, as well as upon the presumption that the EU law should neither trump general international law, nor provides its own set of rules (nor can or should it do so, given concurring position to extra-EU BIT tribunals that can be expected).

II. Existing ECJ Case Law

The starting point for our discussion is EU case law relating to the relocation of business activities. We shall start with the ECJ decision in Case No. 270/83 *Commission v France* [1986] ECR 273. In this case, which in its substance dealt with discriminatory taxation, the court concluded the following:[11]

'It must […] emphasized in that regard that Freedom of Establishment, which Article 52 grants to nationals of another member state and which entails their right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected, includes, pursuant to Article 58 of the EEC Treaty, the right of 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 to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their registered office in the above-mentioned sense that serves as the connecting factor with the legal system of a particular state, like nationality in the case of natural persons […]'

In other words, the court took into consideration the principle of the registered office as a link to a particular legal system, drawing a parallel between a natural person's nationality and the registered office.

Slightly dubious is, however, the meaning of the used term *connecting factor*, as the court put it. The question that presents itself is whether this term ought to mean *connecting factor* pursuant to terminology of private international law (conflict of laws) – one that determines applicable law, or whether it ought to have meant the recital of customary international law and its test of

[11] 270/83 *Commission v France* [1986] ECR 273, para. 18. Online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0270:EN:HTML (7/6/2010 9:56 PM)

nationality of corporations[12] with a poor choice of terminology.

In favor of the latter argument, customary international law seems to be the fact that the key question was one of freedom of establishment of nationals of other Member State – not the question under what law internal matters of the company in question should be judged upon or governed by. Thus, although it is generally upon states (including EU Member States) to determine their own rules on nationality, such determination must take place within the framework provided for by customary international law. It is therefore submitted, that the ECJ should have looked towards international law for rules to determine a company's nationality.[13] This is also supported by the fact that some countries allow relocation of companies to their territory (relocation of seat)[14] while permitting such companies to be internally governed by laws of the (*status of the company / lex societatis)* jurisdiction where they were incorporated. It is therefore not exact to draw a parallel between nationality and the laws applicable to the existence of the company in all cases.

[12] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)

[13] Irrespective of the fact that some Member State's legal systems tend to look towards the doctrine of incorporation and some towards the seat theory; after all, only a unified approach that is not arbitral in term show the conclusion has been arrived to (for which international law provides good ground by the fact of having its own rules) should have been strived for.

[14] Czech Code of Commerce s. 26 para 1 and para 2 (Act No. 513/1991 Coll.) read:
'1.Legal person incorporated under laws of a foreign State for the purpose of conducting business, one which has its seat abroad, can relocate its seat to the territory of the Czech Republic as long as an international treaty […] provides for it. The same applies to relocation of a Czech legal person abroad.
2. Internal legal affairs of a person defined in paragraph 1 are, subsequent to its relocation into [the Czech Republic] governed by the legal order under which it was incorporated. Such legal order also governs guarantees by its shareholders or members vis-à-vis third parties, whereby such guarantees, however, may not be smaller than those foreseen by Czech law for such or a similar legal person.'

The first argument (i.e. that the court meant *connecting factor stricto sensu* under private international law) seems to be supported, however, not only by the term used as such, but also by the fact that the court avoided talk of the nationality of corporations and that it actually merely drew a parallel to nationality as another *connecting factor.* Also, theory seems to express no doubts about the fact that the court had in mind the framework of private international law (see i.e. *Pauknerova*)[15].

Another argument that supports the view that the court was dealing with the sphere of private international law is the subsequent case law on the topic, one that provides completion and recital of the above quotation.

The first substantial occasion on which the court did so was case No. C-79/85 *Segers v Bestuur van de Bedrijfsvereniging voor Bank* (hereinafter *Segers).* Here the court extended the list of connecting *factors* from mere incorporation (registered office) to real seat (siège social), stating:

'As far as companies are concerned, it should be recalled that according to the judgment of the court of 28 January 1986 (case 270/83 Commission v France (1986) ECR 273) the right of establishment includes, pursuant to article 58 of the EEC Treaty, the right of 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

[15] Pauknerová, M. Svoboda, Usazování obchodních společností a mezinárodní právo soukromé ve světle rozhodnutí ESD. 12 Právník 2004, p. 1165

to pursue their activities in another member state through an agency, branch or subsidiary. With regard to companies, it should be noted that it is their registered office in the above mentioned sense that serves as the connecting factor with the legal system of a particular state, as does nationality in the case of natural persons.[16]'

Another occasion in which the same formula was invoked was case No. *C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen.* Here, the discussion was whether or not a legal person incorporated in England and Wales could be allowed to register its branch in Denmark and carry out business there, while it actually did not carry on any business in England and Wales. (Moreover it had been formed by Danish nationals with the objective of circumventing the stricter incorporation requirements in Denmark).

While concluding that not registering a branch of the company would constitute a breach of the freedom of establishment (under Arts. 52 – 58 EC Treaty as it existed at that time), the court extended the above *Commission v France* formula, reciting it now in the particular context:

'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[.]'

With this third recital two things are clear. First, the court clearly talks of a *connecting factor* as the institution of private international law, stating two alternative connecting factors: registered office (i.e. place of incorporation) and central administration/principal place (sieges social) as connecting factors relevant to corporations.[17]

Second, the court does so in context of subject matter that relates to the freedom of establishment. In other words, the court, although using terminology of private international law, in fact merely develops and applies a *sui generis* test for the purpose of determination of the freedom of establishment, which in turn is based on the nationality of a particular corporation – one of a Member State. It does so, however, by drawing a parallel to applicable laws selected by one of the above two alternative *connecting factors,* and nationality, implying in other words, that laws applicable to the company's organization chosen pursuant to one of the two acknowledged connecting factors equals a way of determining the nationality of such a corporation – that is nationality of the state, whose[18] laws are applicable.

As has been illustrated with the above example of the Czech Code of Commerce, although this could be often considered to be true, it is inaccurate and does not always work. This way of determining nationality must therefore be rejected as theoretically false. In this context one should point

[16] C-79/85 Segers v Bestuur van de Bedrijfsvereniging voor Bank [1986] ECR 2375

[17] In this context is to be noted that it is unclear why the Court in this latter decision departed from the wording of the test as was put forward in *Commision v. France* as a cumulative test of incorporation under a Member State's law (as first of the two conditions) and (second) either central administration / principal place of business (siège social) or registered office.

[18] Or one of its legal systems

out that although similar concepts are used in (a) the *sui generis* freedom of establishment test, (b) under private international law (in general), and (c) public international law for determining the belonging of a company, these concepts lead towards primarily different aims: non/existence of freedom of establishment, laws applicable to internal affairs of a corporation, and nationality of a juristic person, respectively.

Returning back to the genesis of the ECJ's case law, however, one's attention must turned to a key decision of recent years, case no. *C-210/06 Cartesio Oktató és Szolgátató bt.*[19] In this case, a Hungarian partnership was trying to relocate its corporate seat to Italy, while willing to retain its „Hungarian nature"[20], and attempted to do so by modifying the entry in the Hungarian business register. When the case arrived, by means of preliminary question, to the ECJ, the Court took the opportunity to restate in clear terms its current view on matters of corporate relocation, stating:

'107 In Case C-208/00 Überseering [2002] ECR I-9919, paragraph 70, the Court, whilst confirming those dicta, inferred from them that the question whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated. The Court concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.

108 It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, 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 (see, to that effect, Daily Mail and General Trust, paragraphs 21 to 23, and Überseering, paragraph 69).

109 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

[19] C-210/06 Cartesio Oktató és Szolgátató bt., OJ C 165, 15.7.2006
[20] Term used by the current writer to describe that the company was intending to remain registered in the Hungarian business register, while neither nationality nor laws applicable to its internal matters were intended to be changed.

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.

110 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 reorganize 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.

111 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.

112 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.

113 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 (see to that effect, inter alia, CaixaBank France, paragraphs 11 and 17).' (underlining added)

The last four paragraphs of the citation are crucial. The court distinguished between the relocation of a company while changing the *lex societatis* to that of the Member State of destination, and the relocation of the registered seat, while attempting to retain the *lex societatis* as that of the Member State of origin.

This is naturally a decision of paramount importance, yet it remains to be seen, if the ECJ holds to this ruling. There are two paramount difficulties with this decision, ones that will need further clarification in subsequent case law of the ECJ.

The first difficulty rests in the fact, that although the ECJ has now made it clear that the rights of freedom of establishment of companies (so long sought to be anchored in the nearly abandoned 14th directive) derives directly from the Treaties,[21] unless supported by another decision of the same nature, it seems to remain to be a relatively toothless one, as it has not been brought to life by either the Commission or the Member States. It has been almost three years since the court handed down its decision, yet no progress on secondary law that would bring framework for exercising this freedom in practices has been made.[22] It can thus be argued that unless the courts point about directly vested rights of corporations steps out of the shadow of mere *obiter* into the light of clearly and decisively articulated *ratio* in a further case, no factual progress will be made in practice.

Having said this, while no progress is being made on the plane of European law, one can see that individual Member States are not in rush to modify their company laws to comply with the above *obiter*. Again, the same remark applies.

In this context, the court also noted in this very decision that the Commission

'[m]aintains, however, that the absence of Community legislation in this field – noted by the Court in paragraph 23 of Daily Mail and General Trust – *was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European cooperative society (SCE) (OJ 2003 L 207, p. 1), as well as by the Hungarian legislation adopted subsequent to those regulations.'*[23]

The court however fell short of expressing its view on the Commission's position that would perhaps have given more authority to the above cited *obiter*, either by concluding that the Commission is right (and thus Member States are indeed, expressly, required to either be creative in using analogy of the SE and cross-border mergers and applying this to situations of genuine relocations) or the Commission is wrong, thus one better hurry in creating a feasible legislative framework for the subject matter (most likely a Directive and corresponding national legislations) so that the companies can effectively make use of the freedom vested in them by the Treaties.

[21] Korom, V. – Metzinger, P. Freedom of Establishment for Companies: the European Court of Justice confirms and refines its *Daily Mail* Decision in the Cartesio Case C-210/06. 6 European Company and Financial Law Review 2009, p. 155

[22] The last reasonable trace of works on this Directive trace back to 2009, i.e. over a year ago, when the European Parliamanet, must likely under the pressure of the development of the case law, called upon the comission to prepare corresponding legislation by end of March 2009. No visible progress that the current author would know of has been made since. See. http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2008/2196 (8/4/2010 11:17:48 AM)

[23] Case C-210/06 Cartesio Oktató és Szolgáltató bt, para. 115

The second difficulty that this decision bears is that of determining corporate nationality. As has been said, the court made a distinction between a company relocating to another Member State by virtue of transferring its registered seat – as the court construes it, changing the *lex societatis* to that of the Member State of destination, and between transferring the registered seat to another Members State while willing to retain the *lex societatis* of the Member State of origin (the latter being considered by the ECJ as something the Member States of origin are permitted not to allow on grounds of public policy).[24] The court however has not been explicit on how the nationality change ought to come to existence, so only, as will be discussed in part V below, interpretative conclusions of how to solve such a situation can be drawn. Before doing that, however, one needs to briefly review the relevant international law on this matter.

III. Corporate Nationality and International Law

One could argue that international law ought to have no say in the determination of nationality, be it of natural or legal persons, as it ought to govern relations between states. Private persons are traditionally not considered to have personality under this level of law. Such an argument is indeed valid, yet, for practical reasons it does not correspond to the current state of international law.

For practical reasons related to international investment, on the plane of international law, mostly in relation to bilateral treaties, post-war settlement treaties, or mere diplomatic protection, both courts and arbitrators have had to deal with the issue of corporate nationality.

Three doctrines have generally been discussed, two of which in broader terms correspond to frameworks used by the ECJ in determining applicable law. These doctrines are those of control, incorporation, and of siège social, the latter two being the ones findable also in ECJ case law in regards to private international law.

III.1. The Doctrine of Control

Our discussion starts with a doctrine that plays a rather minimal role in contemporary international law; having said that, this doctrine cannot be seen to be entirely obsolete.

This test's objective is to determine who is in control of the corporation, or to put it in lay words, to identify to whom the corporation belongs to or is owned by. By doing so, those applying the test need to ignore or rather lift the corporate veil (the principle of the corporate veil, we shall see, is recognized under international law). In history, partial application of this doctrine can be found in the *Canevaro* case.[25] Also some treaty law has provided for such determination.[26]

[24] Case C-210/06 Cartesio Oktató és Szolgáltató bt, paras. 123 and 124
'[123…] but, rather, the question whether or not that company – which, it is common ground, is a company governed by the law of a Member State – is faced with a restriction in the exercise of its right of establishment in another Member State.
124 In the light of all the foregoing, the answer to the fourth question must be that, 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.

[25] Although here we cannot talk of piercing the corporate veil as the entity dealt with was a partnership.

[26] An example thereof mentioned by Schwarzenberger is the Convention of 6 February 1922 in respect to the case of Warsaw

Generally, this test has most frequently been used particularly in times of war to determine the enemy status of corporations[27]. In fact, with some danger of over-simplifying, one could claim that now this test only finds application when those applying it are in a state of war or are attempting to deal with the consequences of a war. As it is generally being applied by national authorities pursuant to municipal law,[28] its importance on the plane of international law is rather minimal and need not concern us further for the purpose of the current discussion.

III.2. The Siège Social Doctrine

This doctrine originates, on the municipal legal level, in France. It is test for determining nationality rests in determining the location where the company is effectively being managed from, i.e. where it has its real seat of administration. *Capitant* provides the following definition of the term *siège social*:

'The place where the legal life of a corporate body is concentrated, in particular, this is where its administrative organs function, and where its general meetings are held. The siège social may differ from the place where the corporate body pursues its principal business activities and where its industrial and commercial establishments are located. The domicile of the body corporate is at its siège social.'[29]

On the plane of international law, this test has been used by some tribunals to determine the nationality of corporations or other legal persons, but has not generally prevailed and under customary international law; it thus no longer plays any relevant role under customary international law.[30] In fact, in most cases, the test of *siège social* has always been combined with some other conditions to determine the nationality of a legal person.

One of the first cases to apply this test in combination with another – here the test of incorporation - was *Delogoa Bay Company*.[31] In this case, a Société Anonyme incorporated in Portugal under Portuguese law and with its main office in Lisbon was found to be purely Portuguese and thus no right for diplomatic protection could be granted by British and American governments. As Ginther[32] points out, the same approach took place in the *Alsop* case.

In another case mentioned by Schwarzenberger,[33] the *siège social* test was also used to determine the nationality of entities that may not *per se* have individual personality. Such a situation arose in

Electricity Company (1932) (France v. Poland); Schwarzenberger, G., *International Law*. Vol. I. 3rd Ed. London: Steven & Sons Ldt. 1957, p. 405

[27] For summary of US practices in this field refer to: Weidenbaum, P., *Corporate Nationality and the Neutrality Law.* In: Michigan Law Review 6/1938, p.881 – p. 905

[28] For England, the precedent is represented in the case of *Daimler Co v. Continental Tyre & Rubber Co* [1916] 2 A.C. 307. The control test was subsequently codified in the Trading with the Enemy Act 1939 (Hadari, Y. *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises.* In: Duke Law Journal. 1/1974, p. 22)

[29] Capitant, H (1936). *Vocabulaire Juridique*. Paris: Les Presses universitaires de France. Translation by (and cited from): Schwarzenberger, G. *International Law*. Vol. I. 3rd Ed. London: Steven & Sons Ldt. 1957, p. 393

[30] Not in treaty law, however

[31] Cited through Beygo, O. *Nationality of Corporations in International Claims Arising out of Foreign Investment Disputes.* In: Revue Hellenique de Droit International. 46/1993, p. 57 with his reference to Moore, J.B. (1906). *Digets of International Law*

[32] Ginther, K. *Nationality of Corporations.*In: Österreichische Zeitschrift für Öffentliches Recht. Band XVI/1966, p. 61

[33] Schwarzenberger, G. *International Law*. Vol. I. 3rd Ed. London: Steven & Sons Ldt.1957, p. 393

Canevaro[34] in context of a partnership pursuant to Peruvian law. In this dispute between Italy and Peru, the PCA avoided directly deciding the legal personality of the partnership in question, deciding instead that the firm was of Peruvian nationality due to its *siège social* and the nationality of its members.

III.3. The Doctrine of Incorporation

Amongst the tests that have been historically used on the plane of international law to determine nationality of corporations, the incorporation test plays a predominant role. This test eventually prevailed over, *inter alia*, the previously mentioned ones. Since it was upheld be the ICJ (that observed it to be part of customary international law), it has eventually become universally accepted.

It is being said[35] that the origins of this test date back to 1869 to the works of the Peruvian Claims Commissions established in 1868. In this commission's case of *Ruden&Co*[36] the umpire expressed the following view:

'It may be said, that business firms have a nationality; such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed.'

At this stage, however, one cannot talk of a pure test of incorporation, as we can see domicile as one of three conditions, the latter two being rather in favor of incorporation.

Schwarzenberger[37] further points to the Anglo-German Mixed Arbitral Tribunals ruling in the *Chamberlain and Hookham, Ldt. v. Solar Zählerwerke, GmbH* as to the first to purely apply the test of incorporation.[38] Similarly in the *Greenstreet*[39] case the incorporation test was adopted by the US-Mexican General Claims Commission.[40] However it was not customary international law *per se* that was the basis for this commission's approach.

Harris[41] points to *Agency of Canadian Car and Foundry Co. Ltd.*[42] which is in fact one of the first cases where a tribunal, not having a specific basis for the exact determination of nationality, was inclined to use the incorporation test.

So far we can conclude that the limited number of cases show that the sole incorporation test entered into use by the mid 1920s. Could one, however, come to the conclusion that the mere fact of frequent usage in treaties and occasional independent choice of tribunals to apply this test could attribute to an arising custom as to this test being "the one" under international law? The answer to this question would indeed be negative. However, cases have preserved accessible

[34] http://www.pca-cpa.org/upload/files/Canevaro%20claim%20English%20Award.pdf (24/10/2007 10:24)
[35] Schwarzenberger, G *supra*, p. 397
[36] Quoted from: Moore, J.B. *History and Digest of the International Arbitrations to which the United States has been A party.* Vol.2. Washington: G Verment Printing Office. 1898, p. 1654 (Schwarzenberger, G *supra*, p. 398).
[37] Ibid..
[38] Here on basis of both Germany's and Britain's similar domestic enactments to the Art. 398 of the Treaty of Versailles.
[39] 4 U.N.R.I.A.A., p. 462, cite via Harris, D. The Protection of Companies in International Law in the Light of the Nottebohm Case. In: ICLQ 18/1969, p. 284
[4040] Based on the General Claims Convention between the USA and Mexico of 1923.
[41] Harris, D. The Protection of Companies in International Law in the Light of the Nottebohm Case. In: ICLQ 18/1969, p283
[42] 8 U.N.R.I.A.A., p. 460

evidence that by the mid 1930s the incorporation test has become generally accepted. An example thereof is the *Anglo-Iranian Oil. Co's Licence matter.*[43] Here by means of bringing the Persia-Iranian Company's case to the Council of the League of Nations, the UK was executing diplomatic protection. In this matter dealing with the sudden Iranian cancellation of the concession of a company incorporated in England, followed by the UK bringing the matter to the Council of the League of Nations, Iran eventually re-issued the concession. One can thus conclude that by the 1930s not only arbitrary practice of different grounds but also international State practice acknowledged the principle of incorporation as a customary norm of international law. Subsequently, the ICJ dealt with this matter, confirming this conclusion.

The ICJ's rulings have no doubt, despite a limited number of cases, had huge impact on the confirmation of the prevailing nature of this principle.

In the previously mentioned *Anglo-Iranian Case,* referring back to the 1930s, the court observed that:

'The United Kingdom, in submitting its dispute with the Iranian Government to the League Council, was only exercising its rights of diplomatic protection in favour of one of its nationals.'

Another occasion when the ICJ was about to deal with corporate nationality was the previously mentioned *Interhandel*[44] case. Here, however, the court avoided doing so in the stage of preliminary objections, when it found local remedies not to have been exhausted, hence the case was inadmissible[45]. Subsequently, the dispute concerning The *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain)[46] arose. *Barcelona Traction* is in fact one of the key rulings of the ICJ.

In this decision, the court observed the following customary rule for determining corporate nationality for the purposes of diplomatic protection[47] 'The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.'

As one can see from the above quotation, the court sets two criteria for determining nationality, namely the law pursuant to which the company was incorporated and the location of its registered office.

One could argue, that despite of the court having expressed itself against the principle of a *genuine link,* in fact the condition concerning the office imposes, to some extent, such as criterion. One could ask whether merely the criterion of law under which the company was formed suffices, or

[43] Observed by the ICJ in the Anglo-Iranian Oil Co. case (UK v. Iran), judgment of 22 VII 1952, http://www.icj-cij.org/docket/files/16/1997.pdf (10/26/2007 4:44 PM), p. 111. Here the court refers to State practice of the UK and Iran, as well as to the practice of the League of Nations in 1932.

[44] *Interhandel* Case (Switzerland v. USA), http://www.icj-cij.org/docket/files/34/2297.pdf (10/26/2007 4:20 PM)
[45] *Ibid.*, Judgment of 21 III. 1959, p. 30
[46] http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=bt&case=41&k=4e (26/10/2007 17:06)
[47] Which in fact has developed into general rule for nationality of juristic persons

whether both these criteria have to be fulfilled simultaneously.

There seems no answer to be given to these questions by the ICJ. In fact, the ruling of the ICJ has been subjected to some severe criticism as to the merits of this decision and also because of its view on what can in fact be evidence of customary international law and how this can emerge.[48]

Being it anyhow, the test of incorporation has, despite the discussion that emerged subsequent to the *Barcelona Traction* ruling (or perhaps due to the attraction given to this test by these means), as a generally accepted rule on customary international law. Sornarajah[49] correctly points out that despite some questions that might arise from the courts view on the 'the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office'[50] as to whether one can in fact talk of a pure test of incorporation, he concludes that the general view taken by the commentators is that the court upheld the pure incorporation test.[51]

Subsequently, the incorporation test was confirmed by the ICJ, namely *ELSI* and *Diallo*[52], leaving no doubt that the ICJ considers the incorporation test to be the rule.

In fact, both *ELSI*[53] and *Diallo* can, in addition to confirming consistency in the ICJ's view also serve as evidence of continuing State practice.

Having established that the incorporation test represents customary international law, a rather precise definition of nationality by incorporation should be attempted. The above quoted opinion of the ICJ seems not to be precise enough for the contemporary view (due to changes that company law of the developed world has undertaken in respect to the role of supranational organization as well as the role of some company law institutions such as that of corporate mobility).[54]

Therefore, the most precise seems the following summary:

'Under customary international law, a corporation or other juristic person is a national of that State, with consent authorities of which and under general framework legal system of which, such an entity is in existence.'[55]

The above definition seems to fulfill the general view on the principle of incorporation while still not deviating from the sense of the ICJ's finding. By defining nationality in this way, one keeps in effect some need for a link to a particular State, presuming that actions of its authorities, pursuant to respective constitutions, will apply domestic municipal law (corresponding to the quote: 'State under the laws of which […]') and at the same time, leaves the principles of sovereignty, territoriality,

[48] See for instance: Lilich, R.B. *Two Perspectives on the Barcelona Traction Case.*In: AJIL. 3/1971, p. 526
[49] Sornarajah, M. *The Settlement of Foreign Investment Disputes.* The Hague: Kluwer Law International. 2000, p. 197
[50] Case concerning Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, para 70, p. 43
[51] As examples of such views he points to: Lilich, R.B. *supra*, p. 534
[52] Case *Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo)
[53] Case *Concerning Elettronica Sicula* S.p.A (ELSI) (USA v. Italy) Judgment of 20 July 1989
[54] Discussed above
[55] The current writer's own definition

and non-interference to deal with the matter of the registered office, presuming that national laws generally require for legal persons to have a registered office or seat.

IV. Company Relocation under Contemporary EU Law; The Phenomenon of SE

Up to now, on the plane of EU law, we have only discussed situations when a company attempts, one way or another, to migrate its seat as it is. To this date, the EU has not provided legal framework for such conducts in respect to companies constituted under municipal legal orders of the respective Member States, as long time works on the so-called 14th Directive seem not to be, politely put, progressing (as discussed above in part II).

There currently exist two areas of legislation that deal with trans-boundary relocation of corporations. The first area is that of cross-border Mergers pursuant to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. The second one is rather specific – the framework for the *Societas Europea*, under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees accompanied by respective national/municipal laws complementing this framework in regards to the directive.

IV.1. The Framework of Cross-Border Mergeres

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies provides for three principal situations, none of which, however, specifically evokes questions of corporate nationality.

Pursuant to Art. 2 para. 2 sub a) a merger can have the form of the following situation:

'one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares'

Alternatively, pursuant to Art. 2 para. 2 sub b) there can exist the following merger scenario:

'o or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares'

Or, as per Art. 2 para. 2 sub c), 'a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.'

None of the above scenarios, however, deals with relocation of an existing company hence no issues of nationality arise. In the first case, all assets are transferred to a company that already exists, albeit in another Member State. In the second case, a new company is being organized in – and pursuant to – municipal company laws of a particular Member State.[56] As regards the third option, as this is actually the takeover of assets, no corporate relocation takes place. Thus, although these merger options can be of substantial use in terms of relocation of investment for BIT related asset planning (as discussed in the introduction of this article), it in no way deals with the relocation of an investor – or to put it in other words, with corporate migration. It is therefore an area of law beyond further interest of this article.

IV.2. Societas Europea and Corporate Relocations

Societas Europea is a juristic person incorporated in a Members State primarily based on secondary EU law. As has been mentioned above, the legal framework for the structure of this type of company is Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Under this Regulation (Art. 1 para 3 thereof) "An SE shall have legal personality." Interesting in this provision is that the basis for existence of the *societas* is one of EU law, thus not *per se* of municipal legal nature.

This naturally invokes several theoretical difficulties related to its legal personality and nationality, questions that can only be answered depending on how one pigeonholes secondary European law.

One can treat all of EU law (including the secondary plane) as a *sui generis* system, which however, constitutes part of several municipal laws, irrespective of how such norms come to existence. In such a case, this provision (although apparent in some 27+[57] municipal legal systems) is a purely municipal one, sourcing from the jurisdiction where a particular SE is incorporated.

One can also presume, that by virtue of EU law originating on the basis of several treaties on the plane of international law,[58] EU law needs to be treated as a self-contained system of international law[59], similar to that of the WTO, or, in parallel to secondary EU law, somewhat oddly similar to international labor standards adopted by the International Labour Organization. In such a case,

[56] See also Art 14 of the Directive 2005/56/EC

[57] For instance England and Wales, Scotland and Northern Ireland having three separate ones, despite the Current UK Company Law being valid in all three of them

[58] Another alternative seems to be that of EU law being a "supranational" *sui generis* one, and only stepping into the respective municipal legal orders, whilst departing from its international legal roots. Harratsch, Koenig and Pechstein provide a nice summary of the ongoing struggle between the *traditionalist* and *autonomist* theories (Haratsch, A. Koenig, C. Pechstein, M. *Europarecht.* 7th Ed. Tübigen: Mohr Siebeck. 2010, p. 158-159):
'Die Frage nach der Rechtsnatur des supranationalen Unionrechts ist umstritten. Einigkeit besteht insoweit, als das Recht der Europäischen Union völkerrechtlichen Ursprung ist, da es sich aus den Allgemeinen Völkerrechtlichen Rechtsquellen speist, insbesondere dem Vertragsrecht – die Gründungsverträge sin allesamt als völkerrechtliche Verträge geschlossen worden – und in eingeschränktem Maße auch dem Gewohnheitsrecht sowie den allgemeinen Rechtsgrundsätzen […]. Nach den sog. *Traditionalisten* hat das jetzige Unions- und früher Gemeinschaftsrecht seine Eigenschaft als Völkerrecht bewahrt, sowohl im Hinblick auf das überwiegend völkerrechtlich geschaffene und geänderte primäre Unionsrecht als auch bezüglich des auf dieser Grundlage durch die Organe der Union erlassene Sekundärrecht. Demgegenüber vertreten die sog. *Autonomisten* Auffassung, dass sich das supranationale Unionsrecht von seinen Wurzeln gelöst habe und eigenständige (autonome) Rechtsordnung bilde, die sowohl Vertrags- als auch „Verfassungscharakter" aufweise. Bedeutung erlangt diese Streitfrage im Zusammenhang mit den besonderen Eigenschaften des Unionrechts, ibesondere seiner Direktwirkung […]'

[59] See also: Wehland, H. Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle? 2009 ICQL 297 at 302

the Regulation would have to be treated as a particular norm of international law, one that only has effect inter partes amongst EU Member States and must not be necessarily respected by third parties. Although this theoretical approach may give shivers to many European law academics, it is submitted it is not entirely irrelevant and such an approach could feasibly appear.[60]

The third option of how to treat secondary law, including also the discussed provision of legal personality of a SE, is one that submits that the EU law, including the secondary law, is a sui generis supranational law,[61] one that is supreme to municipals legal systems of its Member States[62] and under which regulations are those parts of secondary law constituting this legal order, that are directly effective in all Member States. The distinction of the first of the three submitted ways of viewing EU law rests in the presumption that EU law is a separate level (or system) of law on its own.

The last of these options seems to be the only reconcilable with the case law of the ECJ on EU law's nature. In the context of the existence, and nationality, however, it is the most problematic one.

If a particular SE exists by virtue of a separate legal order, one that is neither of international legal nature nor of municipal legal nature (as would be the case if we presumed that EU law were to be a set of norms of municipal nature, merely oddly common to all Member States – and one with particular position in the Kelsen's pyramid of norms in these Member States) then a SE is, as far as international law is concerned, not a legal entity (as its legal entity is not derived from a particular municipal legal system and therefore not recognized within customary international law – as there are no customary rules for recognition of an entity that exits under other laws but international or national/municipal) and being non-existent (provided that by abstract legal fiction on would arrive at arguing it has got legal personality *sui generis)* it is moreover stateless (because it was not incorporated pursuant to any particular municipal legal order, thus on the plane of international law, it does not pass the *Barcelona Traction* test on customary rule of incorporation).

V. Corporate Nationality of EU Relocated Companies, Outlook and *De Lege Ferenda*

The above is naturally a conclusion, that although (it is submitted) correct in its reasoning, it cannot practically find support. Case-law, one way or the other, when the time comes, will have to arrive to some creative conclusion as to the nature and nationality of a SE.

The current writer presumes that by making use of Art. 7[63] of Council Regulation (EC) No 2157/2001, one will eventually arrive at the conclusion that a SE is a national of the Member State in which it was organized and has its head office (thus concluding an ambiguous combination of the

[60] Corresponding to the traditionalist theory as discussed in the previous footnote.
[61] In this regared the *Autonomist* view in the discussion in the previous footnotes.
[62] The *Costa v. Enel* doctrine of supremacy; (Case 6/64, Costa v. Enel [1964])

[63] Art 7 of Regulation No 2157/2001 reads:
„The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place."

incorporation and the siège social test, one that with some stretch could be, due to the facts of the duties imposed by said Article 7, is in fact subsumable under the *Barcelona Traction test*).

There are related secondary doubts though. Would this interpretation mean that every time the SE relocates itself (i.e. seat and headquarters) to another Member State, it *ipso facto* changes nationality?

And what would be the case of a public limited company or *Aktiengeselschaft* / *Societa Anonima* that would have transformed itself into a SE pursuant to Art. 37 of the Regulation? Would it automatically change its nationality upon, subsequent to the transformation, relocating itself to another Member State?

These are naturally questions that only take importance in connotation to either diplomatic protection under general (customary) international law or to various bilateral investment-protection treaties. (In the latter case, a relocated SE would have to pass a particular test provided for determining the nationality of an investor).[64] Yet the factual situations of cases such as *Barcelona Traction,* or even *Costa v. ENEL* show that these issues, ones that might *prima facie* seem marginal, can become of paramount importance, at least until a new generation of EU-negotiated BITs comes into existence, one that vis-à-vis third parties will probably have to tackle this issue explicitly in the treaty texts.

Should these questions, one way or another, arrive before the ICJ, it would indeed be interesting to see how the court tackles the situation.[65] It is submitted that that court will follow the above suggested solution by making use of the above quoted Art. 7[66] of Council Regulation (EC) No 2157/2001. Thus, given the *supranational* doctrine of the nature of EU Law, it is to be expected that the court will attribute nationality of a SE to the Member State in which it will be at the particular time registered with its seat. Art 7 of Regulation No 2157/2001 reads: 'The registered office of an SE shall be located within the Community, in the same Member State as its head office.' In other words, it is expected that the Court will read a situation of a particular SE within the scope of the incorporation doctrine, somewhat *largo sensu,* perhaps. The reasoning for this conclusion rests in the fact that there is no better (or formally any cleaner) way out of a situation when we have secondary law providing for the existence of corporations without dealing with the question of their nationality.

Yet it remains to be seen how *fora* independent from the ECJ, namely arbitral tribunals, will tackle this problem. Unless this matter is resolved by

[64] These generally being either base on the doctrine of incorporation, siege social, or their combinations, with few cases of domicile being the key, and some cases of exceptions to one of the most commonly used doctrines (incorporation / siege social) in favor of the control test trumping them in some specific cases; see eg. Final provisions of the current USA – Czech Republic BIT

[65] An example as this could drive before the ECJ is for instance a situation under which, once intra-EU BITs are gone, companies will have to rely on national provisions on protection of foreing direct investments, as some member states have it in thein domestic legislativ. An example of that is art. 25 of the Czech Code of Commerce. Under such a framework, a SE would have to rely on local courts to implement judicial review to such rights, which in turn may present a preliminary question to the ECJ.

[66] Art 7 of Regulation No 2157/2001 reads:
„The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place."

settled case-law, as regards investment protection planning, one cannot recommend the use of SE as an *investor,* be it direct or indirect as the legal certainty in this area is currently minimal.

If we turn our attention back to the question of relocation of corporations created exclusively under the municipal legal orders of Members States (relocation of seat as discussed in the *Cartesio),* here the matter is even more complicated.

The court's repeated reference to the '*connecting factor' which* determines the belonging of a corporation to a particular Member State clearly indicates that it is tempted to discuss nationality of a Member State (an attribute necessary for a corporation to be able to make use of freedom of establishment) *promiscue* with *lex societatis* pursuant to private international law. It can thus be expected that the court will at some point in the future arrive at the conclusion, safe it substantially alters its current language, that a company, by means of relocation to another Members State under the condition of submitting itself to the *legi societati* of the destination state (as per *Cartesio*), in fact changes its nationality to that of the Members State of destination.

This concept, however, carries with it some substantial theoretical difficulties.

The first rests in corporate analogy of the very definition of European Citizenship. In context of natural persons, European Citizenship now needs to be understood as supporting framework for making use rights of the basic four freedoms; in other words, it is the framework of European nationality. If corporations are to be nationals that have the right of establishment (derived directly from the Treaties – *Cartesio*), they, as European nationals, need to be understood to have rights similar to those of natural nationals. There is probably no controversy in this conclusion. Yet, being a European national /or citizen, is merely a secondary, complementing category.[67] Corporations therefore cannot be understood as European nationals, ones that would somewhat "by the way" also be nationals of a particular Member State, depending on where one is currently registered in a business register. Put in slightly different words, it would be false to presume that a corporation (as primarily EU national) freely moves around and by merely dropping anchor in this or that Member State becomes *ipso facto* always a national for the "port of anchoring" unless the same framework exists, by virtue of municipal legal systems of the Member States, also for natural nationals of Member States, i.e. those to whom companies are being compared to by analogy.

It thus needs to be concluded that this matter must be resolved by means of pro-active law making, most likely via a Directive. Such a Directive that would be transposed in Member States should provide for a framework on basis of which the anchor-dropping rule of changes to corporate nationality could be, in a theoretically plausible way, legislated for.

The second theoretical difficulty, one that is much harder to resolve, yet that is crucial for the practical

[67] Art. 20 para. 1 of the Treaty on the Functioning of the European Union

limits of corporate nationality of relocated companies in relevance to international law, rests in determining nationality under customary international law (or within framework of particular BIT's definition of national/investor by incorporation).

Let us take the phrasing of the USA-Czech Republic BIT as an example. Under this Treaty, a corporate investor of one of the high contracting parties (Company of a Party) means:[68]

'corporation, company, association, state or other enterprise, or other organization, legally constituted under the laws and regulations[69] of a Party or a political subdivision thereof whether or not for pecuniary gain, or privately or governmentally owned'

Thus, a company initially incorporated in the Czech Republic is clearly an investor pursuant to this BIT.

However, if a corporation was, say, created – constituted in the United Kingdom and later relocated under the *Cartesio* full relocation doctrine to the Czech Republic, is it a national of the Czech Republic as far as the above treaty is concerned? In other words, was it legally constituted under the laws and Regulations of the Czech Republic as far as arbitrators might be concerned? The current writer is rather skeptical about such a conclusion.

Argentina-Czech Republic BIT is another good example of challenges that relocated companies need to be aware of in context of investment protection issues under international law. A relocated company would probably not pass this treaty's definition of corporate investor:[70]

'any legal person constituted or incorporated in any other way under the laws and regulations in force in either Contracting Party and having its seat in the territory of that Contracting Party.'

Now, it is to be noted that this definition, is one of those that most closely resemble the original wording of the ICJ's wording in *Barcelona Traction*, despite later theoretical interpretation of this judicial decision towards purely accenting the attribute of incorporation (laws of a particular jurisdiction under which a company is incorporated) without any mention of seat of any sort. One would be even tempted to conclude that if the general test of incorporation were to be interpreted, again, closer to the original meaning of the ICJ words in *Barcelona Traction*, then a relocated company would not be able to pass such a test. This view goes as far as evoking ones imagination about the possibility that a company can also become stateless.

On the other hand, a relocated EU Company could *prima facie* pass the incorporation test if phrased similarly like in the Bahrain – Czech Republic BIT:[71]

'The term "legal person" shall mean, with respect to either Contracting Party, any entity incorporated or

[68] USA-Czech Republic BIT, Art. I para. 1 (b). (http://www.mfcr.cz/cps/rde/xbcr/mfcr/USA_DPOI_anglicky.pdf) (8/9/2010 6:08:44 PM)
[69] Regulation in this context must be understood administrative normative act of general validity (one passed on basis of a law by the executive branch of government, rather then any EU Regulation.
[70] Argentina-Czech Republic BIT, Art. 1, para. 2(b). (http://www.mfcr.cz/cps/rde/xbcr/mfcr/Argentina_DPOI_anglicky.pdf) (9/12/2010 10:46:40 AM)
[71] Bahrain-Czech Republic BIT, Art. I para 2 (b). (http://www.mfcr.cz/cps/rde/xbcr/mfcr/Bahrajn-angl.pdf) (8/9/2010 6:49:06 PM)

constituted in accordance with, and recognized as legal person of that Contracting Party by its laws.'

All of the above means one thing, namely that the current state of customary international law provides no clear indication as to what extent determing a relocated company's nationality can be reconciled with the rules of international law in a way that would provide legal certainty. It remains to be seen how the matters of nationality of relocated companies will develop in practice. What is certain is that corporate relocation cannot be recommended in those cases, when for whatever reason a company might have to make use of a bilateral investment treaty, or when it might want to demand a particular government to make use of diplomatic protection. This conclusion needs to be taken in consideration in course of tax planning, in situations when corporate relocation were one of considered options.

VI. Concluding Remarks

The objective of this article was to draw attention to the matters of relocated companies within the framework of EU Law. The arguments presented in the context of companies existing primarily on the basis of incorporation under municipal law and subsequently relocating to another Member State extend also to cases of relocation under various municipal legal systems beyond the EU, predominantly in offshore jurisdictions.

The clear message that this article aims at sending is as follows: neither EU law, nor international law have arrived at a state that would solve the puzzle of nationality of relocated companies. Both in cases of SE and of companies incorporated under municipal laws of EU Member States, there is only one way out, namely the pro-active creation of municipals laws determining clearly, and in a pan-EU synchronized way, the nationality of relocated companies. Only such a solution can stand in light of international law. And only when such a solution emerges it will be safe to use corporate relocation in situations, where investment protection issues might, in one way or another, arise.

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Parent Liability Test in European Competition Theory and Practice

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The question of which entity within a corporate group properly bears liability for an infringement has significant consequences as the cap on the amount of the fine applies to the annual turnover of the addressee of the fine. Moreover, with the increased prospect of private damages claims a parent company may be a more attractive target for claimants than its subsidiary. Much of the difficulty of parent liability within EU competition law arises because of the dichotomy between economic entities ("undertakings") and legal entities. In general terms, the imputation of liability to a parent company for its subsidiary's participation in a cartel is permissible where the subsidiary lacks autonomy with respect to commercial policy. The imputation of liability to a parent company for its subsidiary's participation in a cartel forms part of a field of law which has been ploughed almost exclusively by the EU Courts. Most of the judgments addressing parent liability concern annulment actions against the European Commission cartel decisions (however the issue has risen in other areas of competition law (e.g. Clearstream case).[3] The jurisprudence shows that the "old" wording of the legal test for parent liability has been widely developed by EU courts in recent years. This article aims at covering the history and recent developments of the parameters of the parent liability test used by the EU courts as well as the consequences for legal and economic intrusions.

So when are parents and subsidiaries part of a single economic entity? The wide definition of the term "undertakings" set out by the EU Courts more than thirty years ago is effect-based. It follows that the traditional test has been a bit "mercurial". In accordance with test established in the ICI case,[4] which has been repeatedly used in subsequent judgments, the EU Courts allow the Commission to impute liability to the parent as part of the undertaking which committed the infringement where, "in particular", the subsidiary does not decide independently upon its own conduct on the market, but carries out, "in all material aspects", the instructions given to it by the parent company.

The EU Courts apply to "undertakings" a term that "encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed".[5] Its meaning is independent of any national law definitions of what constitutes a company. Subsidiaries may have independent legal personality, but for the purposes of competition law a subsidiary is treated as a single economic entity along with the parent company where the

[1] Head of Unit, DG Competition, European Commission
[2] All views expressed in this article are strictly personal, and should not be construed as reflecting the opinion of the European Commission.
[3] Judgment of the Court of First Instance ("CFI") of 9 September 2009 in case T-301/04, Clearstream Banking AG and Clearstream International SA v. Commission

[4] Case 48/69 ICI v Commission (1972), ECR 919
[5] Case C-41/90 Klaus Hofner and Fritz Elser v Macrotron GmbH (1991), ECR I-1979, para. 21

subsidiary has no ability to determine its conduct on the market.[6]

As to the level of (non)liability of the parent company, sometimes conflicting approaches have been advocated based on a long history of case law that has not always been clear and consistent. To simplify, parent companies saw the relevant question as being under what circumstances could they be held for the illegal actions of their subsidiaries. Subsequently, parent companies, usually citing older case law, have argued that the parent company is only liable for the illegal actions of the subsidiary when the subsidiary does not decide independently upon its own conduct on the market but carries out, in all material aspects, the instructions given to it by the parent company.

The Commission, on the other hand, had taken the view that the infringement was committed by the undertaking and not just by the subsidiary which directly participated in the offensive behaviour. It is therefore not a question of one legal person being responsible for the behaviour of another legal person, but of an economic unit being responsible for its own behaviour.

Relevant considerations in the past included both the number of shares the parent company controlled (the Community Courts set out several principles at that time[7]) and the composition of the board of directors of the subsidiary.

[6] Case C-73/95 Viho Europe BV v Commission (1996), ECR I-5457

[7] For example in case Viho (ibid) 100 per cent shareholding meant the parent and subsidiary was a single economic entity, in case Gosme/Martell-DMP (1991), OJ L 185/23, 50 percent ownership of a joint venture was insufficient to treat the two as a single entity and in case T-228/97 Irish Sugar (1999), subsidiary in which Irish Sugar held 51 per cent of the shares held to be a separate undertaking etc.

Akzo Nobel[8] test

In September 2009, the EU Courts provided further guidance on the parental liability test. The most important of these judgments is the ECJ's ruling in the Akzo Nobel (Choline Chloride) appeal which marks the end of one wave of litigation with respect to the application and strength of the presumption of actual exercise in the case of 100 per cent shareholding. The judgment is also significant because it confirms that the Commission should look at all relevant economic, organisational and legal links which tie the subsidiary to the parent in order to assess whether they are part of one undertaking.

Background: The case concerns a cartel between the main European producers of choline chloride operating in the 1990s. The European members of the cartel agreed between themselves on prices and price increases, in general, as well as for particular national markets and for individual customers. The 2004 Commission decision considered the cartel as a very serious infringement of Article 81 of the Treaty (now Art. 101 TFEU) and imposed fines worth 66 million Euros on the European members. Akzo Nobel had previously been fined ca. 21 million Euros. In evaluating liability for the infringement the Commission noted that "the undertaking" is a concept that is not identical to the notion of corporation in national commercial or tax law and followed previous jurisdiction. Akzo appealed to the Court of the First Instance (CFI, now the General

8 Case C-97/08 Akzo Nobel NV and Others v Commission (2009).

Court). The appeal was dismissed in its entirety as unfounded in 2007.[9]

When appealing the dismissal Akzo put forward two arguments: 100% shareholding doesn't create a sufficient presumption of liability for the parent company. Akzo Nobel quoted the CFI's judgment in Bollore which stated "that 100% shareholding is not itself sufficient".[10] Secondly, the Court allegedly defined the concept of commercial policy of the subsidiary too broadly (since autonomy was only required with respect to commercial conduct on the market). The Court of Justice has dismissed the appeal in its entirety. Through this judgment, the Court of Justice has provided considerable clarity in the debate on parental liability that has been going on for many years between parent companies and the European Commission.[11]

The first issue on which clarity has been provided concerns the question of the elements the Commission must show to create a rebuttable presumption of liability of the parent company. The Court clarified that it suffices for the Commission to demonstrate 100 percent ownership to create the rebuttable presumption that the parent company exercises decisive influence over the commercial policy of the subsidiary and that the parent company can therefore be held jointly and severally liable together with the subsidiary that was directly involved in the anticompetitive behaviour. Nothing more than 100 percent shareholdings need to be shown.

Secondly, the Court has clarified the question what the parent company or the subsidiary must show to rebut the presumption of liability of the parent company or alternatively, in cases where there is no such presumption because the parent company's shareholding in the subsidiary is too low, what the Commission has to show to hold the parent company liable (or not). In the Akzo case, the Court took taken a final stand and accepted the logic that any reasoning must necessarily start with the wording of Article 81 of the Treaty (now Article 101 TFEU) and therefore, from the fact that infringements are committed by "undertakings", in the sense of single economic units, not just by subsidiaries that are only constituent elements of the undertaking. As a consequence, a parent company and its wholly owned subsidiaries, even if they have distinct legal personalities, are a priori considered to form a single economic entity. It follows that this judgments has taken account of the economic reality and sent a strong signal to the business community at that time.

"Post-Akzo Nobel" tests

Since 2009 several important judgments have been issued by EU courts. This part of the article focuses mainly on these which have further shaped the definition of the parent liability test (or tests). Unfortunately, some of the recent jurisprudence has been as "mercurial" as the Akzo judgment. Perhaps the truth is that the EU Courts are not thinking in terms of grand theory, but are actually simply deciding, on a case-by-case basis, the reasonableness of national measures. The EU Courts do not particularly have an eye for

[9] Case T-112/05 Akzo Nobel NV and Others v Commission (2007)
[10] Joint Cases T-109/02 etc. Bollore and Others v Commission (2007)
[11] See also Copetition Policy Newsletter 1/2010: European Court of Justice confirms Commission Approach on parental liability from Frederique Wenner and Bertus Van Barlingen

theoretical considerations, and it is worth recalling that judges are more concerned with sorting out disputes than with forming a coherent doctrine, even though they try to be consistent as much as possible.

Methacrylates Cartel[12]

Background: In its decision in May 2006, the Commission found that Arkema France (then Arkema SA), its subsidiaries (Altuglas International SA and Altumax Europe SAS) and their parent companies at the time (Total SA and Elf Aquitaine SA) had participated in a cartel in the methacrylates sector from January 1997 to September 2002. The parties had infringed Article 101 TFEU by discussing prices, agreeing, implementing and monitoring price agreements and exchanging commercially important information, confidential market and company information. Upon two separate actions brought by the companies before the General Court for the annulment of the Commission's decision or a reduction in the fines, the General Court confirmed the liability of Total and Elf Aquitaine for the infringement, and rejected the arguments seeking the annulment of the Commission's decision.

The former judgment confirms and clarifies the Court of Justice's milestone judgment Akzo, establishing the principle of a rebuttable presumption that a parent company exercises decisive influence over the commercial policy of its subsidiaries where it owns 100% of its subsidiaries' shares. In the Elf Aquitaine case[13] the General Court had already applied this legal presumption not only in case of a wholly-owned subsidiary, but also in a situation where the undertaking held almost all of its subsidiary's capital (in that case, Elf Aquitaine was found to hold more than 97% of the shares in its subsidiary, Arkema France). In this case, the General Court explicitly confirms the applicability of the legal presumption in cases where the subsidiary is not wholly-owned, but where the parent holds almost all of its subsidiary's capital.

The Court confirmed the legal presumption that a subsidiary which is wholly-owned by its parent company does not decide independently on its conduct in the market. It considered it as settled case-law that in such a case, the Commission may issue a decision imposing a fine on the parent company, without having to establish the individual involvement of the latter in the infringement, unless the parent company presents sufficient evidence to rebut the legal presumption. The General Court stated that this presumption also applies where a parent company holds almost all of the capital of its subsidiary.

As regards the request for a reduction of the fine imposed on Arkema France and its subsidiaries, the Court noted that, in calculating the fine, the Commission imposed an increase of 200%, based on Total's worldwide turnover, in order to ensure a sufficiently deterrent effect considering the undertaking's size and economic strength.

[12] Judgments of the General Court of 7 June 2011 in Cases T-206/06, Total SA and Elf Aquitaine SA v European Commission and T-217/06, Arkema France and Others v European Commission

[13] Judgment of the General Court of 17 May 2011 in Case T-299/08, Elf Aquitaine SA v European Commission and judgment of the General Court of 17 May 2011 in Case T-343/08, Arkema France v European Commission

However, the Court considered that as Arkema and its subsidiaries were no longer controlled by Total and Elf Aquitaine as of May 2006 and therefore the 200% increase in the interest of deterrence was not justified in respect of them. The Court said that a sufficiently deterrent effect required tailoring the impact of the fine also to the undertaking's financial capacity, so as to render the fine neither negligible nor excessive, and that the objective of deterrence could thus only be attained by reference to the situation of the undertaking on the day of the imposition of the fine. However, since the economic unit which linked Arkema to Total was broken before the date on which the decision was adopted, Total's resources could not be taken into account in determining the increase in the fine imposed on Arkema and its subsidiaries. The Court therefore considered the 200% increase excessive in respect to Arkema and its subsidiaries, and reduced it to a 25% increase.

Air Liquid Cartel[14]

This judgment is remarkable as it provides the first example of a parent company escaping liability for the anticompetitive conduct of their wholly owned subsidiaries. In this judgment the General Court put a strong emphasis on the rebuttable nature of the presumption of decisive influence based on full control and made it clear that the Commission should take seriously and with great care the arguments adduced by the parties for the purpose of rebutting the presumption. While the burden of rebutting the presumption is on the applicants, the Court underpins that the Commission has the obligation to take a concrete position on the evidence. It appears that the Commission is expected to sort out those matters that are relevant for the assessment of the subsidiaries' autonomy and then take a clear-cut stance on them. It is still to be seen in the future jurisprudence what depth of analysis the Court will require from the Commission and where the line will be drawn between the Commission's obligation to take a position on the evidence and the legal burden of proof which should remain with the applicant. This might be an area of controversy in view of the fact that the EU Courts have not limited the type of evidence that parent companies can put forward but have left it broadly phrased as "evidence relating to the economic and legal organisational links" between the parent and subsidiary.

Background: In its decision of May 2006, the Commission found that a number of undertakings participated in a single and continuous infringement of Article 101 TFEU regarding hydrogen peroxide and its downstream product sodium perborate. The period of infringement retained in the decision was from January 1994 to December 2000. The infringement consisted mainly of competitors exchanging commercially important and confidential market and/or company relevant information, limiting and/or controlling production as well as potential and actual capacities, allocating market shares and customers, and fixing and monitoring (target) prices.

[14] Judgments of the General Court of 16 June 2011 in Cases T-85/06 L'Air liquide v Commission; T-186/06 Solvay v Commission; T-191/06 FMC Foret v Commission; T-192/06 Caffaro v Commission; T-194/06 SNIA / Commission; T-195/06 Solvay Solexis v Commission; T-196/06 Edison v Commission; T-197 FMC v Commission.

The General Court held that in view of the indisputable full control that the applicant L'Air Liquide had over its subsidiary Chemoxal, the Commission had correctly, and in line with the existing case law, presumed that L'Air Liquide exercised decisive influence over its subsidiary. However, the General Court held that the Commission failed to adopt a detailed position on the evidence which L'Air Liquide had offered in order to rebut the presumption that it exercised a decisive influence over the conduct of its wholly owned subsidiary. Although the General Court, recalled that the Commission is not required to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance, it held that in this case, the arguments brought by the applicant were not irrelevant with regard to the assessment of the autonomy of Chemoxal.

The General Court noted that in fact the applicant relied on a set of circumstances that characterized its relations with Chemoxal at the time of the infringement. In particular the Court drew attention to the arguments brought by the applicant that its subsidiary's activity was very specific in relation to other activities of the group, that there was no overlap at the level of managers and staff of the parent company and the subsidiary, that the powers of the managers of the subsidiary were broadly defined, that the subsidiary had its own services in connection with commercial activities, as well as autonomy in the preparation of strategic projects. In addition, the Court noted that the evidence presented by the applicant was not limited to statements but contained a number of specific elements.

According to the Court's ruling, in such circumstances the Commission is required to take a position on the applicant's arguments, verifying whether, in light of all the relevant evidence related to the economic, organizational and legal ties between the companies, the applicant has demonstrated that its subsidiary determines its market behaviour independently.

The General Court explained that the Commission's obligation to state its reasons on this issue clearly stems from the rebuttable nature of the presumption in question.

The General Court concluded that the Commission had failed to adopt a detailed position on the evidence which L'Air Liquide had offered in order to rebut the presumption that it exercised a decisive influence over the conduct of its wholly owned subsidiary Chemoxal SA.

Fuji (part of so called GIS Cartel)[15]

In T-132/07 *Fuji*, the Court confirmed the Commission's attribution of joint and several liability to Fuji Electric Holdings ('FEH') and Fuji Electric Systems ('FES') for the conduct of an undertaking managed by a Joint Venture ("JV"), in which FES directly, and FEH indirectly - as holding company of the Fuji group - held 30%. However, as opposed to situations with (almost) 100% shareholding (C-7/08 P *Akzo Nobel:* 100%, T-299/08, *Elf Aquitaine SA*:

[15] Judgments of the General Court of 12 July 2011 in Cases T-112/07 Hitachi and Others v European Commission, T-113/07 Toshiba v. European Commission, T-132/07 Fuji Electric Holdings and Fuji Electric Systems v European Commission and T-133/07 Mitsubishi Eletric v European Commission

97%), for which the Court had confirmed a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary, the Court stated in *Fuji* that as a rule, the when addressing the existence of decisive influence by the parent company or companies, the burden of proof rested upon the Commission. This is the first case in which the Commission pursued the shareholders of a JV with such low shareholdings. Specifically with regard to the low-level shareholders, the Court confirmed that, notwithstanding its earlier judgment in *Tréfileurope*[16] wherein it stated that in cases of a minority interest held by a parent it can generally not be held that parent and subsidiary form an economic unit, a minority interest may nevertheless enable a parent to exercise decisive influence on its subsidiary where it "is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct".[17] As clarified in this judgment, a JV can be part of one undertaking with its parent(s), i.e. when, together with the parent or parents, it forms an economic entity. In order to be able to impute a JV's conduct to its parents, the Commission needs to prove the actual exercise of decisive influence/management power by the parents over the JV (§196 of the judgment); the ability to exercise such influence, which could amount to control under the Merger Regulation, however, is insufficient. The consequences of finding that a JV and its parent(s) form part of one undertaking are two-fold: (i) parental liability can be imposed on the parents where the JV commits a competition law violation and is subject to a fine; and (ii) Article 101 TFEU does not apply to agreements between the JV and its parent(s) (see in particular §180). Article 101 TFEU will, however, continue to apply to agreements between the parents of the JV as they have not become part of one undertaking by establishing the JV.

Siemens Austria[18] (part of so called GIS Cartel)

The most important issue raised by the General Court in this judgment has been the question of joint and several liability, in particular the obligation imposed by the General Court on the Commission to apportion a decision imposing joint and several liability for a fine on a number of companies forming part of one undertaking, the respective shares of the fine for which the joint debtors are ultimately liable amongst themselves. Such an obligation – which would be of practical relevance for joint debtors in particular where a subsidiary was sold to a new parent – would be novel and, if it became law, could give rise to a number of legal and practical questions. The Court held that joint and several liability between companies for the payment of fines for an infringement of Article 101 is an ipso iure legal effect where those companies form part of the same "undertaking" within the meaning of Article 101(1) and where that undertaking has infringed Article 101. The Court pointed out that joint and several liability for the

[16] T-141/89
[17] §183 of the judgment
[18] Joined Cases T-122/07 to T-124/07, Siemens AG Österreich and others v European Commission.

payment of fines contributes to the effective recovery of those fines and is therefore part of the objective of deterrence which is generally pursued by competition law. The formation of joint and several liability among legal entities needs to follow the attribution of liability for the infringement, including its duration and the "degree of liability". This means that if a company participating in a cartel belonged first to one and later to another undertaking (as was the case for SEHV and Magrini); there should a fine for each period of activity reflecting the company's activity and liability within each cartel.

Moreover, the Court considered that the respective share/responsibility of each joint debtor vis-à-vis other joint and several debtors has to be determined by the Commission in its decision. The extent of possible compensation claims among such joint and several debtors could not be left to the national courts but would fall within the exclusive competence of the Commission pursuant to Article 23(2) of Regulation 1/2003. Where such a share is not explicitly determined by the Commission, each joint debtor is in principle liable for an equal amount. Moreover, the Court held that a joint and several debtor which pays the fine to the Commission may, on the basis of the Commission's decision, make a claim for recovery against each of the other joint and several debtors in respect of its share.

Elf Aquitaine[19]

A very important Elf Aquitaine judgment[20] has been published in September 2011, annulling the previous "Elf Aquitaine judgment" of the Court of First Instance.[21]

By annulling Elf Aquitaine's liability for a chemicals cartel, the Court of Justice has substantially changed the way the European Commission should attribute liability to parent companies in cartel investigations. Furthermore it seems that this judgment can to some extent overrule the "canonical" landmark "Akzo" judgment and make whole parent liability concept more understandable for public. On the other hand, the European Commission is now expected to much better justify its decisions that find holding companies accountable for the cartel conduct of subsidiaries.

Background: In 2005 the Commission fined several manufacturers of monochloroacetic acid for forming a cartel on the market. In this decision, the Commission imposed fines on several companies, including Elf Aquitaine and its subsidiary, Arkema, for an agreement to maintain market shares of the participants through a volume and customer allocation system. The cartel participants also exchanged information on prices and examined, at regular multilateral meetings, actual sales volumes and prices so as to monitor the implementation of the agreements. A fine of EUR 45 million was imposed, jointly and severally, on Elf Aquitaine and Arkema (Elf Aquitaine owned 98% of Arkema).

[19] Judgment of the Court of Justice of 29 September 2011 in case C-521/09 Elf Aquitaine v European Commission.
[20] Judgment of the Court of Justice of 29 September 2011 in case C-521/09 Elf Aquitaine v European Commission.
[21] Judgment of the Court of First Instance of 30 September 2009 in case T-174/05 Elf Aquitaine v European Commission.

Elf Aquitaine and Arkema brought two separate actions before the General Court, seeking annulment of the Commission decision.

In 2009 the General Court rejected all the arguments put forward by Elf Aquitaine and Arkema in these appeals. It held, inter alia, that where all or nearly all of the share capital of a subsidiary is owned by its parent company the Commission is entitled to presume that the parent company exercises a decisive influence over the commercial policy of its subsidiary. In order to rebut that presumption, the burden is on the parent company to offer adequate evidence to show that its subsidiary acts independently on the market. The General Court held in this respect that the Commission was correct in considering that joint and several liability for the infringements committed by Arkema should be imputed to Elf Aquitaine, since Elf Aquitaine had failed to offer sufficient evidence.

On 29 September 2011, the Court of Justice set aside the judgment of the General Court and the Commission decision in so far as the latter imputed to Elf Aquitaine participation through its subsidiary, Arkema, in the cartel.

With regard to Elf Aquitaine, the Court of Justice noted that where a decision in a competition case relates to several addressees and concerns the imputability of an infringement, it must include an adequate statement of reasons with respect to each of the addressees. Thus, in the case of a parent company held liable for the illicit conduct of its subsidiary, such a decision must, in principle, contain a detailed statement of reasons justifying the imputability of the infringement to that company.

The Court found that the Commission had not given sufficiently reasoned answers to several of the arguments put forward by Elf Aquitaine in order to establish that Arkema determined its conduct on the market independently.

The Court held that the statement of reasons for the Commission Decision on those arguments consisted "solely of a series of mere assertions and negations, which were repetitive and by no means detailed". In the particular circumstances of the case, in the absence of further details, that series of assertions and negations was not such as to enable Elf Aquitaine to ascertain the matters justifying the measure adopted or to enable the court having jurisdiction to exercise its power of review.

The Court states that, as regards more particularly a Commission decision which is based exclusively, with regard to certain addressees, on the presumption of the actual exercise of a decisive influence over the conduct of a subsidiary, the Commission is in any event required - if that presumption is not to be rendered irrefutable in practice - to set out adequate reasons why the facts or law relied upon were not sufficient to rebut that presumption. The Commission’s duty to give reasons for its decisions in this regard results inter alia from the rebuttable nature of the presumption and the rebuttal of such a presumption requires interested parties to adduce evidence of economic, organisational and legal links between the companies concerned.

The Court of Justice has particularly criticised the Commission for not having satisfactorily justified why certain arguments by companies to counter parental liability were rejected. For example, owing to the way in which a key paragraph of the Commission Decision was worded, it was according to the Court very difficult, or even impossible to know whether the body of evidence adduced by Elf Aquitaine to rebut the presumption applied to it by the Commission was rejected because it was insufficient to carry conviction or if instead the mere fact that Elf Aquitaine owned nearly all the share capital of Arkema was sufficient for liability for the conduct of Arkema to be imputed to Elf Aquitaine, irrespective of the evidence adduced by the latter in response to the Commission's allegations.

The judgment also concludes that the Commission's approach to attributing liability changed over time and therefore its decision should be better reasoned.

"Dutch Beer" cartel[22]

Background: In its decision of 18 April 2007, the Commission imposed fines totaling EUR 273.7 million, having found a cartel lasting three years and eight months, and involving coordination of prices and other commercial conditions and customer allocation for beer sold on-trade (in bars etc.) and/or off-trade (in supermarkets etc.). In this case, a fine of EUR 31.6 million was imposed on Koninklijke Grolsch ("Grolsch"). Grolsch appealed the decision on several procedural and substantive grounds as well as grounds relating to the calculation of the fine. In particular, Grolsch questioned the evidence for its direct participation at the start of the infringements. Grolsch in essence denied that it participated directly in the infringement. It argued that the employees of its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland BV, attended most of the meetings at issue and that consequently the Commission should have attributed liability for infringement to its subsidiary.

The General Court annulled the part of the decision relating to Grolsch in full. The judgment found that the Commission adduced insufficient evidence to establish the direct participation of Grolsch (rather than its subsidiary Grolsche Bierbrouwerij Nederland BV) nor did it explain, in the decision, its reasons for attributing to Grolsch the conduct of its subsidiary, which would have allowed Grolsch to rebut the presumption of parental liability.

First of all, the Court considered certain documents concerning the meetings between companies and concluded that the evidence available to the Commission was not sufficient to establish the direct participation of Grolsch in the cartel. The Court said that where the decision concerns a number of addressees and raises a problem of attribution of liability for the infringement identified, it must include an adequate statement of reasons with respect to each of the addressees, in particular those who, according to the decision, must bear the liability for the infringement. Thus, in the case of a parent company held liable for the conduct of its subsidiary, such a decision must contain a detailed

[22] Judgment of the General Court of 9 September 2011 in case T-234/07 Koninklijke Grolsch v European Commission.

statement of reasons for attributing the infringement to that company.

Furthermore, the Court stated that the current decision treated the parent company (Grolsche Bierbrouwerij Nederland BV) and the Grolsch as one and made no mention of economic, legal and organisational links between the parent company and its subsidiary, whilst nowhere in the statement of the reasons was the subsidiary's name mentioned. The Commission therefore failed to explain the reasons which led it to determine the legal person responsible for running the undertaking at the time when the infringement was committed, so as to enable that person to answer for the infringement or, as the case may be, to rebut the presumption that the parent company actually exercised decisive influence over the conduct of its subsidiary.

The ruling said that the European Commission had failed to explain its reasons for attributing to Grolsch the conduct of its subsidiary, denying the parent company any opportunity to reverse the presumption of liability and challenge it before the courts

The role of the European Court of Human Rights in regards to the parent liability test

In July 2011, the European Court of Human Rights ("ECHR") was asked to rule on whether it is legal to hold a parent company liable for behaviour of a wholly owned subsidiary and thus challenging the Court's Akzo precedent. The complaint had been made to the ECHR by an unnamed Dutch company thought to be implicated in a construction cartel. It maintains that the parent liability principle breaches the fundamental rule of presumption of innocence. The General Court gave its first indications in the elevators/escalators cartel case.[23] In this case, the applicants had also argued that the imputation of liability to parent companies based on their exercise of decisive influence over the subsidiary ran counter to the presumption of innocence established by Article 6 (2) ECHR.

The Court rejected the argument that the Akzo jurisprudence on the imputability of infringements on parent companies ran counter to Article 6 (2) ECHR, pointing to the ECHR's jurisprudence in Salabiaku v. France[24] and Grayson and Barnham v. the United Kingdom[25]. In these judgments, the ECHR stated that Article 6 (2) ECHR does not preclude presumptions of fact or of law provided for in criminal law, but requires them to be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. While not commenting on Article 23 (5) Reg. 1/2003, the Court referred, by analogy, to AG Kokott's Opinion in C-8/08 T-Mobile Netherlands and Others in support of its conclusion that the presumption of innocence is not disregarded where, in competition proceedings, certain conclusions are drawn on the basis of common experience, provided that the

[23] Judgments of the General Court of 12 July 2011 in Cases T-138/07 Schindler Holding Ltd and Others; Joined Cases T-141/07 General Technic-Otis Sàrl, T-142/07 General Technic Sàrl, T-145/07 Otis SA and Others, and T-146/07 United Technologies Corp.; Joined Cases T-144/07 ThyssenKrupp Liften Ascenseurs NV, T-147/07 ThyssenKrupp Aufzüge GmbH and Others, T-148/07 ThyssenKrupp Ascenseurs Luxembourg Sàrl, T-149/07 ThyssenKrupp Elevator AG, T-150/07 ThyssenKrupp AG and T-154/07 ThyssenKrupp Liften BV; and in Case T-151/07 Kone Oyj and Others v Commission.
[24] Judgment of 7 October 1988, Series A no. 141, § 28.
[25] Nos. 19955/05 and 15085/06, judgment of 23 September 2008, Reports of Judgments and Decisions 2008, § 40.

undertakings concerned are at liberty to refute those conclusions.

In the context of discussing the prerequisites of a fair trial in T-138/07 Schindler, the Court seems to have considered that the ECHR had laid the foundations for a progressive extension of the penal law element of Article 6 ECHR to subject matters not forming part of the traditional categories of criminal law, such as fees imposed for the infringement of competition law.

However, proceedings at the ECHR tend to be lengthy and it is suspected that the court may take up to a year to decide upon whether to take up the action.

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The Rights Granted to Persons/Workers According to the Directive 2004/38/EC

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The article provides a thorough analysis of the Directive 2004/38/EC. The paper examines the fundamental rights granted to persons/workers and the gaps embedded.

1. Introduction

The freedom of movement is one of the main areas of European Union law which is crucial for the creation of one common economic area and internal market. There have been several legal acts that have tried to regulate the given area by providing crucial rights to EU citizens and residents. The Directive 2004/38/EC[2] is the main legislative tool which seeks to embrace the key concepts and rights enabling European Union citizens and their family members to move and reside freely within the Union. It provides the right to European Union citizens and their family members of free entry, exit and residence in a Member State without additional administrative procedures, the only requirement would be the possession of a valid ID card or passport.

The Member States were expected to transpose the Directive by implementing national laws to reflect the spirit and content of the Directive. The transposition of the Directive has been guided by the Commission. This paper will examine and offer a critical appraisal of the Directive.

2. Directive 2004/38/EC

2.1. Purpose and Applicability

Freedom of movement of workers is granted by the Article 39 of the EC Treaty which states that "[f]reedom of movement of workers shall be secured within the Community."[3] The European Court of Justice (hereafter referred to as "ECJ") by its case law has consistently highlighted the importance of Article 39 which emphasizes the need to secure the free movement of workers, and persons in general, within the Community. Any limitations that fall outside the article must be justified exclusively on the grounds of public policy, public security or public health. There have been several Directives passed in order to govern the principle embedded in the Treaty, in particular Directive 2004/38/EC.

The Directive's main purpose is the promotion and firm implementation of the right of EU citizens and their family members to move and reside freely within the territory of the Union. As the Directive establishes it, the right of the free movement of persons is fundamental to the creation of an internal market without borders.[4]

The Directive shall cover the entire territory of the Member States and the people concerned shall have the right to take new employment as stated in Chapter V, Article 22 of the Directive. It applies to

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[2] hereafter referred to as "the Directive"
[3] Treaty Establishing the European Union, Article 39 (ex Article 48) available at www.eur-lex.europa.eu
[4] Directive 2004/38/EC, Article 2

all EU citizens and their family members, irrespective of their nationality. EU citizens shall be granted the right of residence by another Member State without having to comply with any administrative procedures like applying for visas or residence permits.[5] The basic concept of the Directive is the establishment of conditions which would allow EU citizens and their family members to move and reside freely within the Union in the same way as the nationals do within a Member State. An EU citizen staying in an EU country different from his own for more than 3 months has to comply with more stringent criteria (having a job or an income as it will be discussed below). The affected group includes workers, self-employed people, people with sufficient resources, students and their family members.

The Directive shall be transposed by the Member States and shall adopt any required measures in order to give the Directive effect. Despite the supremacy of the EU law, the Directive shall not have any effect on national legislation which provides for more favorable treatment that that indicated by the Directive. Member States are expected to revoke or amend national laws which contradict the provisions of the Directive. They are also obliged by the Directive to provide full information to nationals of the rights granted by the Directive through means of publicity as stated in Article 34. The transposition of the Directive by each Member State is guided and checked by the Commission of the EU in order to ensure that it is enforced so as to reach its.

2.2. Granted Rights

The basic right granted by the Directive 2004/38/EC is the right of free entry and exit into a Member State. EU citizens may enter a Member State and reside for a period of less than three months without having to fulfill any requirement other be in possession of a valid passport or identity card.

Family members that are non-EU citizens shall be able to travel with a valid passport, however, they may be required to obtain a visa as required by the Regulation EC 539/2001. Nonetheless, in such cases, the Member States are required to grant "every facility to obtain the necessary visas."[6]

Secondly, the Directive grants the right of entry and, eventually, residence. Chapter III of the Directive grants right to EU citizens and their family members without any conditions or formalities, except a possession of a valid passport or identity card to reside freely on a territory of a Member State for up to three months. The authorities of the host Member State may require the EU citizens and their family members to register their presence, especially in case of exceeding the 3 months limit with competent authorities. Registration certificates shall be issued immediately when the citizen or family member is requested by the Member State to register with the competent authorities. To issue the certificate, an identity card or passport, employment confirmation, insurance, proof of sufficient resources may be required. As for the family members that are EU citizens and non-EU citizens, those requirements may be valid identity

[5] Directive 2004/38/EC: Article 11

[6] Directive 2004/38/EC: Chapter 2, Article 5

card or passport, proof of existence of a relationship and registration of the citizen (family members without a job or an income would not be able to rely on their own independent right to stay). In the case *Levin v Staatssecretaris van Justitie*[7] the applicant for a residence permit was a part-time worker and was refused residence permit as a non-EU national being in relationship with a UK citizen living in the Netherlands. The Dutch authorities maintained that the applicant was not able to earn a sufficient income and would have, therefore, represented a burden for the Dutch social system. The ECJ ruled that by accepting the exclusion of part-time workers from the benefit of free circulation a large group of people would be excluded from the rights granted to EU citizens and their family members.

The right of residence for a longer period is granted to workers, self-employed persons and their family members. Those EU citizens intending to live in EU state other than the one they are a citizen of, should be able to show that they have sufficient resources in order to secure their residence and that of their family members, as well as provide proof of health insurance.

In case a worker or a self-employed person is no longer working, Article 3 foresees the retention of that right under certain conditions. It must be proved that the temporary inability to work was a consequence of an illness or accident or to embark upon vocational training. The person may also retain the status of a worker in case of unemployment (provided the person in question has been already working for more than one year and the situation of unemployment does not stem from his\her choice to resign from a previous job), after a completion of a fixed-term contract of less than a year or after becoming unemployed.

Apart from that, the Directive provides EU citizens and their family members the opportunity to obtain a permanent residence permit subject to a five year period of legal residence on the territory of a Member State. The right is also granted to family members including also non-EU national that have resided equally with the EU citizens in the Member State as granted by Article IV, Section 1, Article 16. The permanent residence application may be revoked if there has been an absence from the Member State exceeding a period of six months; this requirement ensures that the host Member State is in reality the place of constant activity of the applicant. The absence for this period may be justified by military service, pregnancy or childbirth (up to twelve months), illness, study, vocational training or other posting in another country.[8] Once granted, permanent residence may be taken away, as stated in Article 16, if the resident is absent for two consecutive.

The Directive focuses also on some exceptional cases where the right to permanent residence shall be preserved. Such an exceptional case happens when a citizen is no longer working and has reached the age foreseen by the national legislation as suitable for obtaining a pension. If the national legislation does not foresee the age, it is taken by default to be the age of 60. Another

[7] Levin v Staatssecretaris van Justitie [1982] ECR 1035, Case 53/81

[8] Directive 2004/38/EC: Article 16

category touched by the Directive is that represented by those workers residing for more than two years in another EU country, who have stopped working as a result of permanent working incapacity. The right to permanent residence is also preserved for workers or self-employed persons who work in another Member States, while residing on the territory of the host Member State and being employed there for more than three months.

Apart from those rights, the Directive prohibits discrimination on grounds of nationality.[9] It grants EU citizens working in another EU state equal treatment in comparison with local citizens. Article 24 of Chapter V states forth the requirement of Member States to treat all EU citizens equally as they treat their own nationals. This scope is extended to family members, be them EU nationals or third countries.

EU citizen cannot suffer from any restriction in their right to search and take a job in another member State. The only exception is Member States may require citizenship as a pre-requisite to work in the public sector. The ECJ in its ruling of the case *Commission v Belgium,*[10] has drawn a clear line which demonstrated that whether the work is of a public service character or not depends not on the concept of public service but in the nature of the duties that the work carries.

2.3. Restrictions and Retention of Rights

Residence up to three months does not require any additional formalities such as visas, except for the possession of an identification card or a valid passport accepted throughout the EU. The Member States are given the right to pursue adequate measures in cases of fraud and fake marriages undertaken for the purpose of enjoying the rights of free movement and residence granted by this Directive. Member States may perform checks on non-nationals on possession of a registration card or certificate if the review also applies to the resident EU-citizen. Moreover, in case of non compliance with the requirement to register with the authorities if the residence is above three months, a fine (non-discriminatory and proportionate) may be imposed on citizens and their family members.[11]

Restrictions of the rights provided by the Directive may be on the grounds of public policy, security or health.[12] In cases of expulsion, the person shall be notified in writing and shall be fully informed of the basis for the decision.[13] Persons deprived of rights established by the Directive shall have access to administrative and judicial redress.[14] If the procedure is pending, the person shall be granted access to the territory in order to be able to personally present their claims. It is possible to lift a decision of expulsion after three years.[15]

The restriction of rights or expulsion due to economic or other reasons are not acceptable. The grounds shall be examined and it shall be concluded whether in reality, the individual represents “a genuine, present and sufficiently serious threat affecting one of the fundamental

[9] IBID
[10] *Commission v Belgium II*. [1982] ECR 1845, Case 149/79
[11] Directive 2004/38/EC, Article 31
[12] IBID, Chapter IV
[13] IBID, Article 30
[14] Directive 2004/38/EC,Article 31
[15] IBID, Article 32

interests of the society."[16] In case of a person representing a threat to public health, the disease shall have characteristics of an epidemic and shall be defined as such by the World Health Organization. However, it is not applicable to cases where the disease occurs after three months of residency as stated in Article 29.

2.4. Overall Assessment

The Directive 2004/38/EC does bring forward some new points and emphasizes the legal provisions provided by other secondary legislation, thus embracing an entire legal sphere which is directed towards the creation of one community where the freedom of movement shall ensure European integrity. An important point is that the Directive not only facilitates the free movement of workers and their family members but also extends these rights to self-employed persons. On the other hand, the Directive contains shortcomings which echo in the practical application of the rules stated in it.

First of all, we must emphasize the fact that EU legislation lacks a clear concept of freedom of movement. Its concept is developed and supported by all the secondary legislation available, which however do not totally fill in the gaps that arise. As a result, there are many conflicting implications that arise while being applied in real world. If taking into consideration particularly this given Directive, we can clearly see that it also reflects some loopholes. The Directive provides clear definitions as to whom the provisions apply. It applies to all EU citizens, meaning any person who has a nationality of an EU Member State. Family members include spouse, contracted or registered partners (if the host Member State recognizes registered partnerships), direct descendants under the age of twenty-one or dependent direct ascendants. The host Member State is the EU state which the citizen moves to.[17] Still there are shortcomings. For example, the Directive does not explain explicitly what the term "worker" means. A more clear concept was provided in the case *Lawrie-Blum*,[18] where the court states that the definition of what a worker is shall consist in "[t]he essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."[24]

This demonstrates that the ECJ case-law brings in some solution and fills in the gaps that the Directive has. However, it is worth emphasizing that the lack of clear definitions of key terms essential for the effect of the Directive creates additional challenges that have to be solved in practice.

Another problematic issue of the Directive may be the requirement of proof of sufficient resources, without providing clear guidelines for quantification.

3. Conclusion

The former Vice-president Jaques Barrot[19] stated that "[f]ree movement of persons constitutes one of the fundamental freedoms of the internal market, to the benefit of EU citizens, of the Member States and of the competitiveness of European

[16] IBID, Article 27

[17] Directive 2004/38/EC, Chapter 1, Article 2

[18] Lawrie-Blum v Land Baden-Wuerttemberg [1986] ECR 2121, Case 66/85

[19] Vice-president, Commissioner in charge for Justice, Freedom and Security

economy."[20] The analysis of the legislation has reflected that the Directive intends to transform this principle into practice and provides rights and freedoms. However, the Directive present also some gaps, some of them have in many cases been filled by European Court of Justice which better reflects the dynamic changes in the concepts relating to this particular area. Nonetheless, a Directive is not supposed to offer a complete set of principles and rules, as its nature is just to provide objectives the member States may attain through further legislative output. Hence, it is standard for the studied Directive to leave some space for States to fill in some details with their own legal elaboration.

[20] Press release: Free movement and residence rights of EU citizens and their families: the Commission assesses application by Member States, available at www.europa.eu

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Legal Status of the Muslims in the Czech Republic

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The article studies the historical development of the legal status of Muslim communities in Bohemia, Moravia, and Silesia since the nineteen century until today. It mentions the historical circumstances that led to legal recognition of Islam in the Austro-Hungarian Empire. It surveys the journey undertaken by the adherents of Islam in Bohemia and Moravia towards legal recognition of their communities starting with the foundation of Czechoslovakia in 1918 until the present day. It presents and comments on the Fundamental Document that was prepared and submitted by Muslims in the Czech Republic as part of the motion for legal registration in 2004. It eventually formulates some possible challenges that stem from respecting the constitutional right of religious freedom in connection with the legal recognition of Muslim associations according to Czech law.

In accordance with state law Muslim communities gained legal status as a religious community in the Austrian part of the Habsburg Empire, which included the Czech lands, only in 1912 by virtue of the Imperial Code Act No. 159/1912 (so referred to as the *Islamgesetz* – Muslim Law) as a result of particular historical developments and changes. Bosnia and Herzegovina were occupied and administered by the Austro-Hungarian army in accordance with the decision of the Berlin Congress of 1878 and were eventually annexed by the Austro-Hungarian Empire in 1908. These territories had been part of the Ottoman Empire since the fifteen century and a significant number of the population joined Islam during that period. Thus, about a half a million of Muslims mostly of Hanafi rite became subjects of the Habsburg monarchy through the annexation. Due to a number of specifics, e.g., polygamous marriages, the Islamic religion was not recognized by an administrative decision pursuant to the Recognition Act (*Anerkennungsgesetz*) No. 68/1874 as other new religions were but by a special law in 1912.

The adherents of the Hanafi rite of Islam were recognized as a religious association by Act No. 159/1912 of the Imperial Code, approved and signed by Emperor Franz Joseph I in Bad Ischl on July 15, 1912. The Act No. 159/1912 comprised of Article One, consisting of eight paragraphs, and a short Article Two is based on *Saatsgrundgesetz* (Constitutional Act on the Fundamental Rights of Citizens) No. 142/1867, article 15. The Act of 1912 guaranteed the Hanafi rite Muslims the right to formally establish religious communities according to the principle of self-determination and self-governance, the right to organize worship and appoint religious ministers under the supervision of the State, and the right to legal protection of rights in a similar way as other churches and religious societies enjoyed. However, the right to assist at weddings and administer Marriage Registry was denied to Muslim religious associations. The administration of Muslim marriages remained under the administration of the state authorities pursuant to Act No. 51/1870 of the Imperial Code, in

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essence like that of persons without a religious persuasion. The Act No. 159/1912 was promulgated for the 15 crown lands of the Empire of Austria (*Cisleithania*) including Bohemia, Moravia and Silesia. The Muslims living in the Kingdom of Hungary (incl. Slovakia) (*Transleithania*) were recognized as religious society by legal article XVII/1916 four years later.

As a matter of fact, no Muslim community was established in Bohemia, Moravia, and Silesia since the promulgation of the Muslim Law in 1912 until the break-up of Austro-Hungarian Empire in 1918. However Act No. 159/1912 of the Imperial Code was accepted as law in the newly established Czechoslovakia in 1918 in pursuant to Act No. 11/1918 Sb.,[2] on the foundation of Czechoslovakia. There were perhaps very few Muslims, mostly members of diplomatic corps, businessmen or travelers living in the territory of newly established Czechoslovakia. A first attempt to organize a Muslim community emerged in Czechoslovakia in the 1930-s. A group of both foreign and Czech adherents to Islam agreed upon creating the Muslim Religious Association in Czechoslovakia with a Seat in Prague and, in December of 1934, officially applied for registration as religious society that would give the newly established Muslim Association all the rights of the registered religious associations including the right to assist at Muslim weddings. The negotiations between the Ministry of Education and National Promotion and the Board of the Muslim Religious Association were prolonged due to alleged discrepancies in the required documents including the issues of Muslim marriage. The Muslim Religious Association eventually obtained recognition from the Protectorate Government of Bohemia and Moravia on December 18, 1941. However, all of the legal acts of the Protectorate Government, including this one, were declared null and void by the decrees of President Beneš in 1945 after World War II. Nothing new happened in this matter during the years immediately following the War.[3]

The Recognition Act No. 68/1874 and the Act No. 159/1912 were abolished by the derogative paragraph No. 14 of Act No. 218/1949 Sb. Thus, since November 1949 until 1991, there was no law in Czechoslovakia under which a new church and religious association could have registered or been recognized. Yet, a few of the new religious associations were acknowledged by an administrative decision of the Government during this period.[4] Adherents to the Muslim religion made one more unsuccessful attempt to obtain the official recognition during the Prague Spring of 1968. Altogether Muslim believers were limited to private meetings to express their faith in Czechoslovakia during the communist era of oppression.[5]

In the beginning of 90-s, the Parliament of the Czech and Slovak Federal Republic passed the Charter of Fundamental Rights and Liberties that confirmed the key principles of state and church relationship based on the right of religious freedom and the principle of non-identification of the State

[2] Sb. = Collection of Laws of Czechoslovakia or the Czech Republic.

[3] Luboš Kropáček, "Islám v českých zemích," in *Islám v českých zemích* (Praha: Center for Migration Studies, KTF UK, 2009) 22-23.
[4] Cf. Jiří Tretera, *Stát a církve v České republice* (Kostelní Vydří: Karmelitánské nakladatelství, 2002) 34.
[5] Zdeněk Vojtíšek, *Encyklopedie náboženských směrů v České republice* (Praha: Portál, 2004) 306.

and religion. In accord with these constitutional principles, the government of Czechoslovakia prepared new legislation covering churches and religious societies and eventually passed Act No. 308/1991 Sb., on freedom of religion and the status of churches and religious societies and Act No. 161/1992 Sb., on the registration of churches and religious societies. These two acts together with Act No. 218/1949 Sb. constituted the framework for the legal status of churches and religious societies and the conditions of the registration of new churches and religious communities.

The Muslim Religious Associations were not included on the list of the registered churches and religious associations as part of the addendum to Act No. 308/1991 Sb., in pursuant to § 22 of the Act. The Main Office of Muslim Associations petitioned the Ministry of Culture for registration. However, the registration proceedings were suspended because the petition did not include a list of 10000 signatures as required by Act No. 161/1992 Sb.

A new law on churches and religious associations was promulgated as Act No. 3/2002 Sb. Once again Muslim Religious Associations were not included once again in the list of the registered churches and religious communities in spite of its efforts and negotiations with the governmental offices. However, the new law significantly lowered the minimum number of the adherents. As part of the motion for registration the present law requires signature from only 300 Czech citizens or alien residents who are members of the religious society. Thus, the Muslim Religious Associations prepared all the formalities, gathered the required number of signatures and submitted the motion for registration. The Associations were eventually registered as Ústředí muslimských obcí – the Main Office of Muslim Associations on September 17, 2004.[6]

The Main Office of Muslim Associations petitioned the Ministry of Culture in 2006 to make an exception and grant authorization for special rights according to § 7 and § 11 of Act No. 3/2002 Sb., that include among others the rights to assist at religious weddings, to teach religion at public schools, and to appoint clergy as army and prison chaplains. However, such authorization was not granted at that time. The next possibility to submit the motion for authorization for special rights according to § 11 Act No. 3/2002 Sb., will come in 2014.[7]

The Fundamental Document of the Main Office of Muslim Associations as a required component of the motion for registration was submitted in 2004;[8] it introduces basic information on Muslim communities in the Czech Republic.[9] The content and form of the Fundamental Document follow § 10 of Act No. 3/2002 Sb. It states the official name of the religious society which is "Ústředí muslimských obcí (ÚMO)" - the Main Office of Muslim

[6] Basic data: name of the religious society: the Main Office of Muslim Associations; the seat: Blatská 1491, 198 00 Praha 14 – Kyje; IČ 73633259. Cf. official webpage of the Ministry of Culture at http://www3.mkcr.cz/cns_internet/ (Oct 25, 2011).
[7] Cf. Ústředí muslimských obcí – historie a současnost at http://www.umocr.cz/historiecz.pdf (Nov 18, 2011).
[8] Text of the Fundamental Document (Základní dokument) is a document available at the official website of the Ministry of Culture at http://www3.mkcr.cz/cns_internet/ (Nov 18, 2011).
[9] Cf. also the Statute of the Main Office of Muslim Associations at http://www.umocr.cz/ (Nov 18, 2011).

Associations. It further includes a short description of the mission of the Muslim Associations; the basic articles of faith; the data about the seat of the Main Office; the statutory authority of the Main Offices, including the personal data of the officeholders, the organizational structure of the Muslim Associations; the procedures of appointing and removing clergy; the procedure of approving the Fundamental Document; the incorporation of the Muslim Associations into religious societies outside the Czech Republic; principles of financing the Muslim Associations, and the rights and duties of the adherents.

The mission of the Muslim Associations embraces social, educational, charitable, and administrative aims. According to the Document, the Main Office of Muslim Associations is to help with establishing and building mosques, houses of prayer, schools, health and charitable institutions; providing a Muslim diet; defending Muslim communities against all kinds of racism and discrimination; assisting at Muslim funerals in accordance with Islamic law as well as promoting Islam in public. Among the other components of the mission are enumerated efforts to disseminate objective information about Islam and more concretely to intensify good relations between the Czech Republic and the Muslim countries, between the Muslims in the Czech Republic and the Muslims in other countries, and between the Muslim Associations and other religious societies. The Main Office of Muslim Associations also assists the Muslim religious communities with keeping evidence of the members for its own purposes.

The main articles of Muslim faith according to the Document include the faith in one God – Allah, the faith in the Scriptures, especially Tora, the Gospels and Koran that is intended for all humanity, the faith in all the prophets of Allah starting with Adam, through Noah, Abraham, Moses, Jesus to Mohammad, and the faith in the Judgment Day. The Document names the Five Pillars of Islam, i.e., the testimony of faith, daily prayer, the support of the needy, fasting during the month of Ramadan, and the pilgrimage to Mecca once in a lifetime for those who are able to do it.

The Document includes organizational regulations of the Muslim Associations. The regulations in general are based on the principle of voluntary membership, the principle of the separation of competences of various statutory organs and the principle of participation of members in the decision making process through voting. The members who are at least sixteen year old enjoy the active right to participate in elections and the members who are at least eighteen year old enjoy the passive right of election to various offices according to the respective statutes. The highest executive authority of the Main Office of Muslim Associations is exercised by the Executive Counsel of UMO. The Document describes the proceedings of the elections of five members of the Counsel and the competences and duties of the Counsel. Local Muslim Associations create a basic structure of the Muslim Associations. The local Associations are separate and self-governing subjects that can be registered as religious legal subjects according to

Act No. 3/2002 Sb.[10] Islamic Foundations are other legal subjects that could obtain registration according to Act No. 3/2002 Sb. Islamic Foundations are involved especially in organizing common Friday prayer service, festive prayer services, and various cultural programs.[11] The Counsel of the Founders is a board to oversee the general operation of the Main Office and the local Muslim Associations. Clerics, called mufti or imam, are chosen and appointed by the Executive Counsel of the ÚMO, or the board of the local Muslim Association. The Fundamental Document includes the statement that UMO and its local organizations are not incorporated into any structure beyond the Czech Republic. The Document also states general principles of financing the Muslim Associations.

The Document closes with a short list of the rights and duties of the adherents of Islam. It guarantees first of all a voluntary membership in the Muslim Associations which means that one cannot force another to join the Muslim association or prevent one from leaving the Muslim association.[12] It states the right to participate in the decision making processes, the right to participate in all activities of the UMO, and the right to petition the various boards of the Main Office of Muslim Associations. It further states the obligation of all the members to respect the principles of Muslim faith, the obligation to act in harmony with the mission and goals of UMO and act upon the decisions of all the boards of UMO. It details the obligation of the members of the Muslim Associations to comply with law and the Constitution of the Czech Republic.

The registration of the Muslim Associations in accordance with Act No. 3/2002 Sb., as well as the prospective authorization to special rights implies specific challenges. One of them is a rather intricate compatibility of Islamic legal tradition and European continental law tradition. The legal and religious structures of Muslim communities and the Muslim way of life are not easily grasped in terms of current Czech law on church-state relations. Although Islam might seem to be a monolithic and definite religion it is in fact a multiform religious society. Furthermore, the sense of belonging of the Muslims in the Czech Republic is complex and it depends, among other things, on affiliation with the various schools of the Muslim Rite and specific ethnic, linguistic and territorial origins of each individual Muslim.

Another challenge consists in an uneasy compatibility between the *constitutional* right to religious freedom and freedom to change religion as it is recognized in the Czech Republic where Muslims are minority[13] and the defense of the *human right* to religious freedom and freedom to change religion in the countries of origin of many Muslim adherents living now in the Czech

[10] Four local Muslim Associations have been already registered according to law as part of the ÚMO: Muslim Association in Brno was registered in 2007, Praha in 2007, Teplice in 2009, and Hradec Králové in 2010. Cf. http://www3.mkcr.cz/cns_internet/ (Nov. 18, 2011).

[11] Cf. Islamic Foundation in Brno - Brno Mosque and Islamic Foundation in Prague - Prague Mosque at http://www.islamweb.cz/ (Nov 18, 2011).

[12] Cf. Act No. 2/1993 Sb., the Charter of Fundamental Rights and Liberties, art. 15 (1): "Freedom of thought, conscience and religion is guaranteed. Everyone enjoys the right to change his or her religion or faith or to stay with no religious faith." Compare a subtle difference in wording of both of the texts: The Fundamental Document states the freedom to join and to leave the Muslim associations in the Czech Republic, the Charter guarantees the freedom to profess or to change religion or to stay with no religion.

[13] A territory where Muslims are minority is considered a territory of unbelievers or territory of war – *dar al-harb* according to Sharia.

Republic.[14] What is at stake, furthermore, is the integrity of individual Muslim believers who appeal (of course rightly) for the right of religious freedom in a country where Muslims are minority but do not appreciate and defend the same right in the same way while living in countries with Muslim majority. The difference in understanding the right of freedom of conscience and religious freedom according to European legal tradition and Islamic law is a true problem.

These challenges in the area of human rights and religious freedom should not be omitted with naïve credulity. They are not just academic questions but practical problems in life of the people. They deserve serious attention by experts and politicians as well as individual citizens.[15] Legal and other experts should study the principles and defenses of the right of freedom of conscience and religious freedom in various countries and cultures as it is expressed in European legal traditions and in Sharia. Community leaders should aim for practical solutions in their countries to allow the adherents of various religious views to respect each other. All should aim for considered and differentiated views and relations with others and at willingness to accept otherness in their neighbor. The basis of such a dialog lie in a deep belief of the legitimacy of an open society in which every human being can live according to his or her faith. Then, the mutual dialogue does not aim at one common faith rather at respecting and appreciating the otherness in the neighbor.[16]

[14] A territory where Muslims are majority is called the dwelling of Islam – *dar al-Islam* according to Sharia.
[15] Cf. Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (ISI Books, 2002).
[16] Cf. Albert-Peter Rethmann, "Setkání s islámem," in *Islám v českých zemích* (Praha: Centre for Migration Studies, KTF UK, 2009) 11-19.