

KEY POINTS FOR PANEL DEBATE

Dr Jesper Lau Hansen
Panel on corporate mobility, 17 May 2011

1. Short presentation of the Reflection Group (short time, no comprehensive proposals)
2. The issue of corporate mobility for national companies
3. Where are we now (case law) – important to understand how little the next step is
4. No agreement among founding MS on connective element between company and Home State (Art 58 EEC drafted as a compromise).
5. Left for later legislation: transfer of seat while retaining legal personality (Art 220 EEC)
6. No legislation has been made (a convention was drawn up in 1968, but never ratified, and the Commission has toyed with the idea of a 14th Company Law Directive, though abandoned in 2007)
7. Case law on connection: The company has the nationality of the MS according to which laws it was formed (French double taxation case 1986) – the connecting element is left to national law (Daily Mail case 1988)
8. Case law: The Centros-line: MS must recognise companies formed in another MS (Home State) irrespectively of connections such as real seat, carrying out business, etc., because that is decided by the Home State.
9. The Cross Border Mergers Directive: Provides right for companies to Cross Border mergers, which effectively provides right to transfer nationality and seat.
10. Important: This right was ALREADY a right of companies according to the Treaty, cf. SEVIC Systems case 2005. BUT a directive ensures that this is a clear right and prevents MS from arguing that restrictions are justified.
11. Turning to the question of transfer of seat, that is, to change nationality but retain personality.
12. Important: Again, a right to change nationality is in fact accepted by the Court in the *Cartesio* case 2008. BUT this is dependant on the new Home State acceptance of the transfer and is not a clear right of the company and furthermore, both the old and the new Home Member States can argue that restrictions are justified.
13. A directive would provide a clear right for companies.

14. Harmonisation would not require substantial harmonisation of international private law (real seat problem should be looked at) and the provisions on afflicted stakeholders in the Cross Border Mergers Directive could be used *mutatis mutandis*. This only in overview.
15. Also, it would be nice, but not necessary, to have more transparency, harmonised rules on disqualifications and remove tax obstructions.