

The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies

by

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Several rulings of the ECJ regarding the cross-border mobility of companies, from Daily Mail to Vale and National Grid Indus, have inspired numerous authors from throughout the European Union to discuss these judgments' justification and relevance with regard to international corporate law and its dichotomy between the "incorporation" and the "real seat" theory. This approach fails to understand that the Court deduces a principle of mutual recognition from the European fundamental freedoms which, albeit originally developed for the freedom to move goods, also applies to the freedom of establishment for companies. This principle grants the Member States autonomy in defining qualification standards in their capacity as country of origin, while at the same time obliging them to recognize as functionally equivalent other Member States' qualification standards once they become the host State for a foreign corporation. The fundamental freedoms thus allocate competences in cross-border situations by assigning the country of origin the competence to define and enforce qualification standards and the host State the authority to define and enforce framework conditions. Companies can consequently choose the country of origin within the common market whose qualification standards they wish to fulfil and can then operate throughout the common market under these laws. The article therefore demonstrates how European corporate cross-border mobility is not a question of the interaction of national laws, but part and parcel of the overall European order of fundamental freedoms and the obligations these create.

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I. Introduction

The academic analysis of European Union law and its practical application must take into consideration that this law forms an independent legal order¹ which follows own rules and notably comprises a particular method of legal application.² This method differs from the application of national law in several respects, for instance regarding the interpretational principle of the *effet utile*³. It is thus self-evident that one must not view the Union law from the perspective of national law, as 28 “different” Union legal orders would be the consequence. However, a nationally predetermined perspective of this sort is common, a phenomenon particularly distinct in the analysis of the scope and limits of the cross-border mobility of companies. In the last years, this topic has inspired representatives of both academia and legal practice to numerous contributions written from the perspective of (national) corporate law or (national) law of conflicts and that thus primarily discuss the theme in terms of how the “incorporation theory” in international corporate law has come to replace the “real seat theory”. The authors’ principal interest mostly lies in evaluating the practical leeway that companies established under their own national law enjoy by analyzing the ECJ’s particular statements in the relevant judgments. This conception however fails to comprehend that European Union law – and thus the ECJ whose responsibility it is to interpret this law – is independent of the categories, “theories” and definitions of national law; it possesses its own categories and its own terminology with which it can assess the results of the application of national law. It is the province of the European law scholarship to bring to light the

1 Fundamental ECJ ruling in case 26/62, van Gend & Loos [1963], ECR 3.

2 For a complete overview see Riesenhuber (Ed.), *Europäische Methodenlehre*, 2nd ed. (De Gruyter Studium, 2010).

3 ECJ, case 9/70, Grad [1970], ECR 825 para. 5; ECJ, case 41/74, Van Duyn [1974], ECR 1337 para. 12; Potacs, “Effet utile als Auslegungsgrundsatz”, (2009) EuR, 465–487, at 466; see Streinz, “Der ‘effet utile’ in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften” in Due/Lutter (Ed.), *Festschrift für Ulrich Everling* (Baden-Baden, 1995), 1491–1510, on the meaning of the *effet utile* in the ECJ rulings.

principle that pervades the ECJ's relevant judgments – *Daily Mail*,⁴ *Centros*,⁵ *Überseering*,⁶ *Inspire Art*,⁷ *Cartesio*⁸ and most recently *National Grid Indus*⁹ and *Vale*¹⁰ – while analyzing the cross-border mobility of companies. Only the comprehension of the principle will enable to find answers to practical questions in particular cases; the opposite is not possible.

This contribution intends to explicate that the European internal market is predominantly¹¹ built upon the foundation of the fundamental freedoms of European primary law and their uniform judicial interpretation in the sense of a principle of mutual recognition. The thought that the fundamental freedoms evidence a parallel structure is not new;¹² however, the way how the principle of mutual recognition functions has yet to be completely understood. This has led to the misinterpretation of some ECJ judgments that lay the base for the theory of fundamental freedoms, e.g. the *Keck* ruling¹³ regarding the free movement of goods¹⁴ and the *Daily Mail*, *Cartesio* and *National Grid Indus* judgments regarding the freedom of establishment for companies.¹⁵

It will become clear that the principle of mutual recognition can, in the context of a company transnationally relocating its seat without changing its previous legal form, explain the different treatment of “inbound cases” and “outbound cases” in the case law of the ECJ.

II. Principles of the Parallel Structure of Fundamental Freedoms

Originally, the fundamental freedoms were solely interpreted as prohibiting discrimination;¹⁶ they are thus specific manifestations of the general prohibi-

4 ECJ, case 81/87 [1988], ECR 5483.

5 ECJ, case C-212/97 [1999], ECR I-1459.

6 ECJ, case C-208/00 [2002], ECR I-9919.

7 ECJ, case C-167/01 [2003], ECR I-10155.

8 ECJ, case C-210/06 [2008], ECR I-9641.

9 ECJ, case C-371/10 [2011], ECR I-12273.

10 ECJ, case C-378/10 [2012], ECLI:EU:C:2012:440.

11 For the other core elements of the internal market's completion founded in primary law, to which the rules on competition (Articles 101 et seq. TFEU) belong in particular, see Müller-Graff, in Dausen, *EU-Wirtschaftsrecht*, 31st supplement (2012), para. 127 et seq.

12 See Behrens, “Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht”, (1992) *EuR*, 145–162 and Classen, “Auf dem Weg zu einer einheitlichen Dogmatik der EG-Grundfreiheiten?“, (1995) *EWS*, 97–106 on the convergence of the fundamental freedoms.

13 ECJ, case C-268/91 [1993], ECR I-6097.

14 See below III. 3 as well as the references in footnote 53.

15 See below III. 4 as well as the references in footnote 71.

16 Frenz, *Handbuch Europarecht Band I* (Springer, 2004), para. 105.

tion of discrimination established in Article 18 TFEU.¹⁷ According to the ECJ, discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations.¹⁸ This comprises both direct and indirect – i.e. open and hidden – discrimination.¹⁹

The prohibition of discrimination is inherent to all fundamental freedoms. With respect to the freedom of establishment of companies, a provision of national transformation law which allows companies to participate in a merger according to that law only if they are established under the laws of that State, therefore preventing foreign companies from participating in a merger, thus constitutes an illegal discrimination.²⁰ The same applies when other forms of transformation are restricted to companies established in a domestic legal form: while the ECJ has explicitly confirmed this for the transnational conversion of companies,²¹ the same must be true for a transnational division.

The ECJ has, in the meantime, not restricted itself to this reading of the fundamental freedoms as prohibitions of discrimination. Already in 1974 did the ECJ rule in its *Dassonville* judgment that the free movement of goods not only prohibits discrimination but also comprehensively forbids any restriction of said freedom. In this judgment, the court defined a restriction of the freedom to move goods as any trading rule “capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”.²² This interpretation of the freedom to move goods as a prohibition of restriction is paradigmatic for the other fundamental freedoms. Furthermore, all fundamental freedoms similarly share the problem that the restriction formula is very broad and thus hardly functional; it thus necessitates a limitation that the ECJ undertook – again for the free movement of goods – in its *Keck* judgment: the prohibition of restriction shall only apply to product-related provisions, not those that solely concern the selling arrangements (so-called “selling modali-

17 Teichmann, *Binnenmarktkonformes Gesellschaftsrecht* (De Gruyter, 2006), p. 111.

18 ECJ, case C-107/94, *Asscher* [1996], ECR I-3089 para. 40; ECJ, case C-80/94, *Wielockx* [1995], ECR I-2493 para. 17.

19 See Teichmann, *Binnenmarktkonformes Gesellschaftsrecht* (De Gruyter, 2006), p. 112 regarding the delimitation; see also Frenz, *Handbuch Europarecht Band I* (Springer, 2004), para. 2105 et seq., who differentiates between open, hidden and indirect discriminations.

20 ECJ, case C-411/03, *SEVIC* [2005], ECR I-10805.

21 ECJ, case C-378/10, *Vale* [2012], ECLI:EU:C:2012:440. In *SEVIC* as well as in *Vale*, the ECJ holds that there has been a restriction of the freedom of establishment, although what actually occurs is a discrimination – see Behme, “Der grenzüberschreitende Formwechsel von Gesellschaften nach *Cartesio* und *Vale*”, (2012) *NZG*, 936–939, at 938 with further evidence.

22 ECJ, case 8/74, *Dassonville* [1974], ECR 837 para. 5.

ties”).²³ This curtailment of the broad restriction formula also extends *mutatis mutandis* beyond Keck to all fundamental freedoms, an extension that will be revisited later.

Finally, all fundamental freedoms allow for restrictions to be justified. The structure of justification is very similar as well for all freedoms: there are written grounds of justification that the ECJ regularly interprets narrowly and whose practical importance is thus comparably low. Public policy and public security in particular form part of these written grounds of justification (Articles 36, 45 para. 3, 52, 62, 65 para. 1 lit. b TFEU). Additionally, restrictions²⁴ can be justified with mandatory requirements of public interest, provided that the restriction is able and necessary to achieve a certain objective that is compatible with European Union law.²⁵ The court established this unwritten ground of justification in its Cassis de Dijon judgment²⁶ concerning the free movement of goods. Again, it applies to all fundamental freedoms in an equal fashion.

III. The Principle of Mutual Recognition in European Primary Law

The decisive question of the modern theory of fundamental freedoms relates to the freedoms' scope of application. Which provisions of national law are susceptible of being evaluated against the standard of the fundamental freedoms as far as they prohibit restrictions? And which provisions are exempt from this standard, thus granting the national legislator political leeway without the need to justify for his policy choices? In the past years, this question has primarily been discussed regarding Member States' treatment of foreign companies established under foreign laws in the light of the freedom of establishment;²⁷ it also applies with particular urgency to the freedom to move

23 ECJ, case C-268/91, Keck [1993], ECR I-6097 para. 16 et seq.

24 Open discriminations cannot be justified with mandatory requirements of public interest; see Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1608 et seq. for a critical analysis of this exception.

25 The ECJ emphasizes that the objective has to conform with European law in its case C-19/92, Kraus [1993], ECR I-1663 para. 32; a more extensive analysis can be found in Ahlfeld, *Zwingende Erfordernisse im Sinne der Cassis-Rechtsprechung des Europäischen Gerichtshofs zu Art. 30 EGV* (Nomos, 1997), p. 268; Hellwig/Behme, “Die deutsche Unternehmensmitbestimmung im Visier von Brüssel?“, (2011) AG, 740–746, at 740 et seq.

26 ECJ, case 120/78 [1979], ECR 649 para. 8; for a similar ruling concerning the freedom of services, see ECJ, case 33/74, van Binsbergen [1974], ECR 1299 para. 12.

27 For an example, see Eidenmüller, in Eidenmüller (Ed.), *Ausländische Kapitalgesellschaften im deutschen Recht* (München, 2004), § 3 para. 10 et seq.

capital.²⁸ An attempt to answer the question on the basis of the ECJ case law brings two judgments to the foreground: on the one hand, the Keck judgment with its differentiation between product- and marketing-related provisions that is terminologically tailored to the free movement of goods, and, on the other hand, the Daily Mail judgment that has in the meantime been erroneously considered out-dated, but which the ECJ has affirmed and specified in its Cartesio and in its National Grid Indus judgments. According to these latter decisions, the configuration of companies by the national law of their State of origin is a premise for their exercise of the right to free establishment. Other points of approach for a limitation of the fundamental freedoms' ambit can be found in some decisions that have found national measures to be too uncertain or indirect as to legitimately restrict the respective fundamental freedom.²⁹

The reach of the freedoms' ambit can be appreciated by clarifying how the principle of mutual recognition (state of origin principle)³⁰ that forms the basis of said freedoms' interpretation works.³¹

28 Behme, "Reichweite und Grenzen der Überprüfbarkeit von nationalem Gesellschaftsrecht am Maßstab der Grundfreiheiten", (2014) AG, 841–852, at 846 et seq.; Ringe, "Company Law and Free Movement of Capital", 69 Cambridge Law Journal (2010), 378–409, at 399 et seq.

29 See ECJ, case C-418/93, Semeraro [1996], ECR I-2975 para. 32; ECJ, case C-44/98, BASF [1999], ECR I-6269 para. 21. Eidenmüller, in Eidenmüller (Ed.), *Ausländische Kapitalgesellschaften im deutschen Recht* (München, 2004), § 3 para. 12 deduces a general *de minimis* exception from these rulings.

30 Some draw a terminological distinction between the principle of mutual recognition and the State of origin principle; according to these authors, the term "mutual recognition" is of judicial origin, while the State of origin principle derives from secondary law. See Lippert, "Die begrenzte Anerkennung – der EuGH sichert seine Kompetenz – Zugleich ein Beitrag zur Diskussion um gegenseitige Anerkennung und Herkunftslandprinzip", (2007) EuR, 631–642, at 636. The professional literature generally uses both terms synonymously; see Bitter, "Niederlassungsfreiheit für Kapitalgesellschaften in Europa: Gläubigerschutz in Gefahr?" in Tietze/McGuire/Bendel (Ed.), *Europäisches Privatrecht* (Stuttgart, 2005), 299–333, at 324; Kahl, in: Calliess/Ruffert (Ed.), 4th ed. 2011, Article 26 TFEU para. 25; Müller-Graff, in Streinz (Ed.), 2nd ed. 2012, Article 56 TFEU para. 112 et seq.; Roth, "Europäische Kollisionsrechtsvereinheitlichung", (2011) EWS, 314–328, at 324; see also Behrens, "Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht", (1992) EuR, 145–162, according to whom the State of origin principle includes the principle of mutual recognition, and Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1625, who writes that the principle of mutual recognition is an expression of the State of origin principle.

31 On the principle of mutual recognition, see seminally Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze. Ein Beitrag zum Prinzip der gegenseitigen Anerkennung im europäischen Gesellschaftsrecht* (Mohr Siebeck, 2015), p. 65 et seqq.

1. *The Prohibition of Restriction as a Duty to Recognize: Cassis de Dijon as a Specification of the Dassonville Formula*

In the field of the free movement of goods, the principle of mutual recognition takes into account that different standards³² exist throughout the Member States' legal orders with which a product must comply in order to be brought into the market. These standards can appositely be called "qualification standards",³³ as the compliance with them decides whether the product is qualified as a marketable good. These qualification standards do not pose a problem from the viewpoint of the internal market as long as they only apply to domestic products; they however hinder the cross-border marketing of a product once the Member States apply their own qualification standards to foreign products, which they are generally free to do as long as the fundamental freedoms do not provide otherwise. If e.g. one Member State demands an insulator of three millimetres of rubber for the insulation of electric cables and another a (possibly equally effective) insulator of two millimetres of Bakelite, an internal market for electric cables becomes impossible³⁴ without one of the Member States having acted in protectionist intent while setting the relevant qualification standard.

This problem can, as a matter of principle, be solved in two different ways: on the one hand through the – politically not always enforceable – harmonization of the respective qualification standards by the European legislator and on the other hand through mutual recognition by the Member States. The ECJ has paved the way for an obligation of mutual recognition founded in primary law in the *Cassis de Dijon* decision, according to whose findings French spirits can be marketed in Germany merely because they were lawfully (i.e. in conformity with the relevant French qualification standards) produced and marketed in France; the German legislator must accept their qualification as a marketable good by its French counterpart.³⁵ Not accepting this qualification, however, will constitute an infringement of the free movement of goods and thus of European primary law.

32 See Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1388 with regard to this term.

33 Behrens, "Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht", (1992) *EuR*, 145–162, at 146 uses the similarly accurate term of "quality and qualification norms" ("*Qualitäts- und Qualifikationsnormen*").

34 See Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1626 for this example.

35 Thus the ECJ, case 120/78, *Cassis de Dijon* [1979], ECR 649 para 14. "There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules."

The principle of mutual recognition is based upon the assumption that the qualification standards of the Member States are functionally equivalent.³⁶ The foundation of such an assumption of equivalence lies in the mutual confidence that the Member States have in the quality of their national regulations.³⁷ This means that it suffices if a product complies with the qualification standards of its State of origin in order to be qualified as a marketable good in the other Member States. If this is the case, the non-recognition of a product by the host State constitutes a restriction of the free movement of goods that will have to be justified; in other words, a restriction necessitating a justification occurs when a Member State acting as a host State fails to recognize and applies its own qualification standards to a product that conforms to the qualification standards of its State of origin. The principle of mutual recognition thus delimits the broad *Dassonville* formula according to which any trade regulation constitutes a restriction capable of hindering intra-Community trade directly or indirectly, actually or potentially.³⁸ It already follows from this formula that the application of any national provision of the host State on foreign products can be a restriction of the free movement of goods solely because it has a different (albeit not necessarily stricter) content than a comparable regulation of the State of origin. Recognizing the qualification standard of the State of origin prevents such a restriction induced by the mere difference between the national qualification standards. In this respect, the observation that the principle of mutual recognition can be traced not only to the *Cassis de Dijon*, but already to the *Dassonville* judgment is accurate.³⁹

36 Basedow, “Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis”, 59 *RebelsZ* (1995), 1–55, at 4; Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1626; Lippert, “Die begrenzte Anerkennung – der EuGH sichert seine Kompetenz – Zugleich ein Beitrag zur Diskussion um gegenseitige Anerkennung und Herkunftslandprinzip”, (2007) *EuR*, 631–642, at 637; von Borries/Petschke, “Gleichwertigkeitsklauseln als Instrument zur Gewährleistung des freien Warenverkehrs in der Europäischen Gemeinschaft”, (1996) *DVB*, 1343–1350, at 1349; see also Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council* (Milan, 28–29 June 1985) COM (85) 310 para. 65; see Götz, “Der Grundsatz der gegenseitigen Anerkennung im europäischen Binnenmarkt” in Götz/Selmer/Wolfrum (Ed.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin/Heidelberg/New York, 1998), 763–791, at 772 for a critical view.

37 Körber, *Grundfreiheiten und Privatrecht*, Jus Priv 93 (Tübingen, 2004), p. 134; Mansel, “Anerkennung als Grundprinzip des Europäischen Rechtsraums – Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?“, 70 *RebelsZ* (2006), 651–731, at 668; Müller-Graff, “Gegenseitige Anerkennung im Europäischen Unionsrecht – Rapport de Synthèse”, 111 *ZVglRWiss* (2012), 72–86, at 73.

38 ECJ, case 8/74, *Dassonville* [1974], ECR 837 para. 5.

39 Müller-Graff, “Gegenseitige Anerkennung im Europäischen Unionsrecht – Rapport de Synthèse”, 111 *ZVglRWiss* (2012), 72–86, at 80, albeit without further substantiation.

2. *Qualification Standards as the Point of Reference of the Recognition Obligation*

The development of the principle of mutual recognition in the field of the free movement of goods is paradigmatic for the appreciation of the other fundamental freedoms,⁴⁰ the principle being inherent to all of them.⁴¹ Regardless of the relevant fundamental freedom, the reference point of the host State's recognition obligation can be found in the respective qualification standards of the State of origin. As far as the free movement of goods is concerned, these qualification standards refer to the qualification of a product as a marketable good; they are primarily made up of technical requirements for the product's properties. In the field of the comparably structured⁴² freedom of services (Article 56 TFEU), of establishment (Article 49 TFEU) and of movement for workers (Article 45 TFEU), the recognition of professional qualifications comes to the fore. All three freedoms can be interpreted in a way that obliges the Member States to take into serious consideration the professional qualifications earned in a different Member State when granting professional licences.⁴³

In the field of the freedom of establishment for companies, the host State's obligation of recognition refers to the qualification of a personal association as a company. If a company complies with the qualification standards set by its State of origin in order for a company to be established and to exist under its national laws, the other Member States must recognize it as such, i.e. in the respective legal form configured by the national law of its State of origin.⁴⁴ In

40 See Müller-Graff, in von der Groeben/Schwarze (Ed.), 6th ed. 2003, preliminary remarks to Articles 28 to 31 EC, para. 10 on the pioneering nature of the free movement of goods.

41 ECJ, case C-238/98, Hoesman [2000], ECR I-6623 para. 24; ECJ, case C-31/00, Dreesen [2002], ECR I-663 para. 25; see also Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums – Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?", 70 *RabelsZ* (2006), 651–731, at 651; Ruffert, "Recognition of Foreign Legislative and Administrative Acts" in Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, 2008, online edition ([www.mpepil.com], last visited 26 Jan. 2015), para. 12; S. Schmidt, "Mutual recognition as a new mode of governance", (2007) *Journal of European Public Policy*, 667–681.

42 Hellwig, "Gemeinschaftsrechtliche Fragen des Code of Conduct des CCBE" in Grundmann/Haar/Merkt/Mülbert/Wellenhofer (Ed.), *Festschrift für Klaus Hopt zum 70. Geburtstag am 24. August 2010* (Berlin/New York, 2010), 2791–2824, at 2807.

43 ECJ, case C-340/89, Vlassopolou [1991], ECR I-2357 para. 16; ECJ, case C-104/91, Aguirre Borell [1992], ECR-3003 para. 11; ECJ, case C-375/92, Commission v. Spain [1994], ECR I-923 para. 12; ECJ, case C-238/98, Hoesman [2000], ECR I-6623 para. 21; ECJ, case C-31/00, Dreesen [2002], ECR I-663 para. 24.

44 In the field of corporate law, the recognition always has a dimension related to the conflict of laws: as the national law of the host State does not know the legal form of the immigrated company as originally determined by the law of the company's State of

terms of corporate law, qualification standards thus consist of the requirements for the establishment and continued existence of a company in a particular legal form of its State of origin.⁴⁵ These corporate qualification standards comprise all relevant characteristics that define a legal form, that regulate its “incorporation and functioning”⁴⁶ and give distinction to its “corporate identity”⁴⁷. This notably includes provisions that define the necessary territorial link of a company to its State of origin and thus determine whether the statutory seat, the center of administration (real seat) or both seats of a company must lie in the State of origin or can be moved to a different Member State at will. But the requirements pertaining to the formation and preservation of capital, the organizational statutes and the rules on the liability of shareholders and executives also belong to the corporate qualification standards. If for instance a company must form a certain minimum capital according to the law of its State of origin, the host State may not subsequently amplify this requirement or apply its own minimum capital requirements on the foreign company in the desire to enforce its own conception of how a company’s creditors should be adequately protected.⁴⁸ It is likewise precluded from applying its own rules on employee codetermination on a company which must not or only to a certain extent guarantee such codetermination pursuant to the laws of its State of origin; to the contrary, it must accept the State of origin’s decision for or against employee codetermination or a particular level of such codetermination.⁴⁹ Applying own corporate qualification standards to foreign

origin, recognition can only occur by referring to the State of origin’s substantive corporate law in the host State’s provisions on the conflict of laws. Whether the freedom of establishment includes a “hidden” provision concerning the conflict of laws by way of a so-called theory of incorporation is a different question whose answer does not follow from the above and which shall not be dealt with here. See Basedow, “Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis”, 59 *RebelsZ* (1995), 1–55, at 12; Körber, *Grundfreiheiten und Privatrecht*, *Jus Priv* 93 (Tübingen, 2004), p. 432; Wendehorst, “Kollisionsnormen im primären Europarecht?” in Lorenz/Trunk/Eidenmüller/Wendehorst/Adolff (Ed.), *Festschrift für Andreas Heldrich zum 70. Geburtstag* (München, 2005), 1071–1088, at 1085 for the opposite distinction between these questions.

45 Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze. Ein Beitrag zum Prinzip der gegenseitigen Anerkennung im europäischen Gesellschaftsrecht* (Mohr Siebeck, 2015), p. 89 et seqq.

46 ECJ, case C-378/10, Vale [2012], ECLI:EU:C:2012:440 para. 30.

47 See Armour/Ringe, “European Company Law 1999–2010: Renaissance and Crisis”, 48 *CML Rev.* (2011), 125–174, at 138 and passim; Eidenmüller, “Die Reichweite des Gesellschaftsstatuts” in Sonnenberger (Ed.), *Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts* (Tübingen, 2007), 469–496, at 473.

48 ECJ, case C-167/01, Inspire Art [2003], ECR I-10155 para. 100 et seq.

49 Behme, “Die Mitbestimmung der Arbeitnehmer bei der britischen Limited mit Verwal-

companies constitutes a restriction of the right to free establishment which will but rarely fulfil Union law justification grounds: the ECJ employs very strict standards in its proportionality test.

Since what matters to Union law is only the result of national corporate law's application in cross-border contexts and not its general theory, it is irrelevant to the application of a corporate qualification standard of the host State to foreign companies how the host State's rules on the conflict of laws evaluate this qualification standard. What determines that a certain provision restricts the right to free establishment is only that this provision is a corporate qualification standard whose application contradicts the recognition of foreign legal forms. This is undoubtedly the case of the shareholders' liability for destruction of the corporation's economic basis (*Existenzvernichtungshaftung*) under German law; its application to foreign corporations thus violates the obligation to recognize foreign liability regimes regarding the respective legal forms and restricts the freedom of establishment. The Federal Court's recent ruling⁵⁰ according to which this liability traces its theoretical foundation to sect. 826 of the German Civil Code (*BGB*) and thus possibly forms part of tort, not of corporate law,⁵¹ is irrelevant in this context.⁵² The same applies to the question whether the German rules on the subordination and voidabili-

tungssitz in Deutschland", (2008) ZIP, 351–357, at 356; Eidenmüller, "Wettbewerb der Gesellschaftsrechte in Europa", (2002) ZIP, 2233–2245, at 2242; Paefgen, "Auslandsgesellschaften und Durchsetzung deutscher Schutzinteressen nach 'Überseering', (2003) DB, 487–492, at 492; Schanze/Jüttner, "Die Entscheidung für Pluralität: Kollisionsrecht und Gesellschaftsrecht nach der EuGH-Entscheidung 'Inspire Art'", (2003) AG, 661–671, at 668 arrive at the same conclusion; see Weiss/Seifert, "Der europarechtliche Rahmen für ein 'Mitbestimmungserstreckungsgesetz'", (2009) ZGR, 542–580, at 567 for the opposite opinion.

50 BGH ZIP 2007, 1557 ("Trihotel").

51 See Gloger/Goette/van Huet, "Die neue Rechtsprechung zur Existenzvernichtungshaftung mit Ausblick in das englische Recht (Teil II)", (2008) DStR, 1194–1197, at 1195 et seq.; Weller, "Die Neuausrichtung der Existenzvernichtungshaftung durch den BGH und ihre Implikationen für die Praxis", (2007) ZIP, 1681–1689. Eidenmüller, "Private Equity, Leverage und die Effizienz des Gläubigerschutzrechts", 171 ZHR (2007), 644–683, at 661 and Gehrlein, "Die Existenzvernichtungshaftung im Wandel der Rechtsprechung", (2008) WM, 761–769, at 769 continue to favour a corporate law qualification despite the Trihotel ruling.

52 An opinion shared by Bitter, "Niederlassungsfreiheit für Kapitalgesellschaften in Europa: Gläubigerschutz in Gefahr?" in Tietze/McGuire/Bendel (Ed.), *Europäisches Privatrecht* (Stuttgart, 2005), 299–333, at 310; Grundmann, *Europäisches Gesellschaftsrecht*, 2nd ed. (C.F. Müller, 2011), para. 785; K. Schmidt, "Verlust der Mitte durch 'Inspire Art'? – Verwerfungen im Unternehmensrecht durch Schreckreaktionen der Literatur", 168 ZHR (2004), 493–502, at 499; and Teichmann, *Binnenmarktkonformes Gesellschaftsrecht* (De Gruyter, 2006), p. 465.

ty of shareholder loans (sect. 39 para. 1 no. 5 and sect. 135 of the German Insolvency Code [*InsO*]) regulate foreign companies with an administrative seat in Germany: it is irrelevant whether the German rules on the conflict of laws regard these provisions as belonging to bankruptcy or rather to corporate law. What matters from a European law point of view is that the provisions constitute corporate qualification standards, which means that their application to foreign companies limits these companies' freedom of establishment regardless of the provisions' nature as bankruptcy law regulations. Characterizing a certain national provision as pertaining to corporate law according to the rules on the conflict of laws and labeling the same regulation a corporate law qualification standard may thus present a considerable overlap; but the criteria are not synonymous.

3. *The Treatment of Framework Conditions as a Limitation of the Recognition Obligation*

Some voices in academia believe that the ECJ's Keck ruling softened the obligation of mutual recognition.⁵³ In this decision, the ECJ limited the broad prohibition of restriction set out in the Dassonville ruling by excluding national provisions that restrict or prohibit certain selling arrangements from the ambit of the free movement of goods.⁵⁴ This does not however mean that the principle of mutual recognition was watered down. Keck did not limit the principle according to which the host State must generally accept the qualification standards of the State of origin as functionally equivalent, but rather clarified that the obligation of recognition is confined to these qualification standards and does not go beyond them.⁵⁵ That is the reason why selling arrangements must not be evaluated against the standard of the right to free establishment; for these arrangements precisely do not constitute product-related qualification standards, but mere marketing-related location or framework conditions that are not even susceptible of recognition by the host State.⁵⁶ For instance, a prohibition of

53 See S. Schmidt, "Gefangen im "lock in"? Zur Pfadabhängigkeit der Rechtsprechung des Europäischen Gerichtshofs", (2010) *Der moderne Staat*, 455–473, at 458 (Keck as a "break with the past" [*"Pfadbruch"*]); see also Büchele, "Diskriminierung, Beschränkung und Keck-Mithouard – die Warenverkehrsfreiheit" in Roth/Hilpold (Ed.), *Der EuGH und die Souveränität der Mitgliedstaaten* (Stuttgart, 2008), 335–394, at 356: "the great trend reversal".

54 ECJ, case C-268/91, Keck [1993], ECR I-6097 para. 16 et seq.

55 Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze. Ein Beitrag zum Prinzip der gegenseitigen Anerkennung im europäischen Gesellschaftsrecht* (Mohr Siebeck, 2015), p. 72 et seq.

56 Michaels, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland* (Duncker & Humblot, 2004), p. 230.

selling on a Sunday in the host State⁵⁷ has nothing to do with the principle of recognizing foreign products. “Recognizing” the possibility in the State of origin of selling the product on a Sunday would entail the host State’s permission of Sunday sales – at least regarding foreign products – and therefore, in the end, a complete abolition of its own prohibition. This means that Keck does not include an exception to, but merely an important terminological specification of the principle of mutual recognition.⁵⁸

This does not only make sense from a theoretical standpoint, but is also justified on teleological grounds: simple selling arrangements do not infringe, as the ECJ has correctly emphasized,⁵⁹ the market access of foreign products; they are unobjectionable from an internal market point of view.⁶⁰

A precondition for the exclusion of selling arrangements from the ambit of the free movement of goods and the recognition obligation is however that these arrangements apply to all concerned business participants who pursue their activities in the host State and that they affect the marketing of domestic products in the same way both legally and actually. The free movement of goods thus does not become irrelevant for selling arrangements but rather limits itself to a prohibition of discrimination.

The term “selling arrangements” is tailored to the free movement of goods and not apposite for the other fundamental freedoms; however, the objective of the Keck ruling can be translated to the freedom of services, of establishment and of movement for workers: only those qualification standards of the State of origin must be recognized that regulate the access to a particular profession. The fundamental freedoms therefore enable an integration of service providers and workers who acquired their professional qualification in a different Member State into the labour market of the host State. If however the national law of the host State defines certain modalities for the provision of services and work – for instance, maximum working time regulations or bans on advertis-

57 In its *Torfaen* ruling (case 145/88 [1989], ECR 3851), the ECJ had still considered a British Sunday sale prohibition a restrictive measure, while Advocate-General van Gerven already proposed limiting the scope of application of the free movement of goods (opinion of June 29, 1989, para. 23).

58 Michaels, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland* (Duncker & Humblot, 2004), p. 230 already argued similarly (“a confirmation of the term mutual recognition from the ECJ’s *Cassis de Dijon* ruling”).

59 ECJ, case C-268/91, *Keck* [1993], ECR I-6097 para. 17.

60 Regarding market access as the deciding criterion, see *Bücheler*, in Roth/Hilpold (ed.), *Der EuGH und die Souveränität der Mitgliedstaaten*, 2008, S. 335 (380 ff.); Nohlen, *Binnenmarktkonformer Minderbeitenschutz bei der grenzüberschreitenden Verschmelzung von Aktiengesellschaften* (Nomos, 2012), p. 131.

ing⁶¹ –, these modalities must not be evaluated against the standard of the fundamental freedoms. “Framework conditions” is a term tailored to all fundamental freedoms which adequately describes this category of regulations that do not pertain to the field of qualification standards which in turn create an obligation of recognition.⁶²

Regarding the freedom of establishment for companies, obligations that pertain e.g. to disclosures or certifications should be considered framework conditions of establishment; the same holds true for mandatory participation in an industry or commerce chamber for foreign corporations with a domestic centre of administration.⁶³ These obligations are not susceptible of mutual recognition, as they are not linked to a foreign legal form; they are not objectionable from an internal market point of view because they do not infringe the market access of foreign companies. Again, it is not up to national rules on the conflict of laws to decide whether or not a provision is a framework condition; rules pertaining to a Member State’s international corporate law can thus constitute framework conditions and be applied to foreign companies without restricting these companies’ freedom of establishment. However, the standard set to evaluate whether a provision is a mere framework condition is strict; the ECJ’s *Daily Mail* and *Cartesio* rulings equate “modalities” of seat transfer to qualification standards whose non-recognition constitutes a restriction of the

61 This only means that a ban on advertising in the host State (e.g. for members of free professions [*Freiberufler*]) does not infringe the freedom of services or of establishment; see Hellwig, “Perspektiven der deutschen Anwaltschaft ex Europa”, (2005) NJW, 1217–1226, at 1219 for a differing opinion. The ban does however violate Article 24 para. 1 of the services directive 2006/123/EC of December 12, 2006 pursuant to which the Member States shall remove all total prohibitions on commercial communications by the regulated professions; see Hellwig, “Anmerkung zu EuGH: Werbung für Freiberufler ist frei”, (2011) AnwBl., 493–494, at 494 for an accurate analysis of the advertising ban for lawyers. The directive thus goes beyond the fundamental freedoms guarantee.

62 See Poiars Maduro, *We The Court – The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), p.83 for a similar term; the author distinguishes between “characteristics” and “circumstances” with regard to the free movement of goods; see also Müller-Graff, in von der Groeben/Schwarze (Ed.), 6th ed. 2003, preliminary remarks to Articles 28 EC, para. 254, who labels the provisions called framework conditions above “marketing impediments” that follow from general provisions of order without regard to cross-border trade or specific products.

63 That is why the Administrative Court of Darmstadt’s ruling (VG Darmstadt, MittBay-Not 2007, 149) and Kluth’s (“IHK-Pflichtmitgliedschaft weiterhin mit dem Grundgesetz vereinbar”, [2002] NVwZ, 298–301, at 301) opinion are accurate; however, the ECJ took a different course with regard to the freedom of services: ECJ, case C-58/98, Corsten [2000], ECR I-7919 para. 34; case C-215/01, Schnitzer [2003], ECR I-14847 para. 34 et seq.

freedom of establishment.⁶⁴ Regulations tied to the actual process of establishment can thus not be considered framework conditions.

4. The Autonomy of the State of Origin in Defining the Qualification Standards

The above elaborations pertain to the fundamental freedoms' demands on the regulation of cross-border activities by the Member States in their role as host State. The freedoms however not only address the Member States in that capacity, but also lay down obligations for them as countries of origin. For instance, the free movement of goods not only precludes quantitative restrictions on imports and all measures having equivalent effect (Article 34 TFEU), but also quantitative export restrictions and all measures having equivalent effect in the State of origin (Article 35 TFEU); from the perspective of market participants, it thus not only pertains to imports, but also to exports. The other fundamental freedoms do not comprise separate provisions for restrictions in the host State and the State of origin; but within their ambit, their formulation includes both Member States concerned by a cross-border movement (cf. Articles 45 para. 1, 59 para. 1, 56 para. 1, 63 para. 1 TFEU). From the viewpoint of market participants, the freedoms therefore protect both moving abroad vis-à-vis their State of origin as well as establishing themselves abroad vis-à-vis the host State. This seems appropriate in light of the internal market, as appreciating an activity as an import or export or as moving in or away is merely a question of perspective. Both are reciprocally conditional distinctions of a uniform process, namely the cross-border movement of goods or the pursuit of cross-border mobility.⁶⁵

The question, however, to which extent national law must stand the test of the fundamental freedoms on the one hand and how much political leeway remains on the other hand not only arises for the host State, but also for the State of origin. The answer to this question lies in clarifying that the principle of mutual recognition essential for interpreting the fundamental freedoms has a twofold function: it not only assures the marketability of goods and the mobility of natural persons and companies in the internal market,⁶⁶ but goes beyond that to solve a conflict of competence that impedes said marketability of goods and mobility of natural persons and corporations. This conflict of competence results from two Member States potentially claiming to define the relevant qualification standards

64 ECJ, case 81/87, *Daily Mail* [1988], ECR 5483 para. 23; ECJ, case C-210/06, *Cartesio* [2008], ECR I-9641 para. 107.

65 See Kämmerer, "Inländer im Europarecht – Obsoleszenz oder Renaissance eines Rechtsbegriffs?", (2008) EuR, 45–56, at 48.

66 Jayme/Kohler, "Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?", (2001) IPRax, 501–514, at 501.

for a product, a profession or the configuration of a corporation in a cross-border situation: the State of origin does so because a certain product is produced on its territory and marketed there for the first time, because a natural person acquires its professional qualification on its territory, because a corporation was initially established under its national law; the host State does so because a product is marketed on its territory after crossing the border, because a natural person pursues his or her professional activities there, because a corporation commences business there. The principle of mutual recognition resolves this conflict by exclusively assigning the jurisdiction for defining and enforcing the qualification standards to the State of origin.⁶⁷ In cross-border situations, it causes the host State's general authority to define the qualification standards required on its territory to step back behind the equivalent but preceding authority of the State of origin; the definition and enforcement of the qualification standards by the State of origin continues to take effect in the host State. This horizontal allocation of competence to the State of origin means that this Member State can autonomously define the qualification standards without them falling under the ambit of the fundamental freedoms. The definitional autonomy of the State of origin is inherent to the principle of mutual recognition. Recognition can only be *mutual* between the Member States if each Member State can claim autonomy within its own jurisdiction; no Member State would be willing to recognize other Member States' qualification standards if it couldn't be sure of the other States' recognition of its own qualification standards. The autonomy of the Member States to define qualification standards in their capacity as State of origin is thus the unwritten premise of the recognition of other Member States' qualification standards; there exists an intrinsic reciprocity between the recognition obligation of the host State and the definitional autonomy of the State of origin.

Regarding the freedom of establishment for companies, the ECJ already came to delineate the State of origin's autonomy in defining qualification standards in its corporate law in the *Daily Mail* ruling of 1988; according to this judgment and the state of contemporary (and since unchanged) Union law, corporations are creatures of national law which are established under a national legal order and do not have a reality beyond the respective legal order that determines their incorporation and functioning.⁶⁸ In the *Cartesio* and *Nation-*

67 Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze. Ein Beitrag zum Prinzip der gegenseitigen Anerkennung im europäischen Gesellschaftsrecht* (Mohr Siebeck, 2015), p.65 et seq.; see furthermore Roth, "Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht", 55 *RabelsZ* (1991), 623–673, at 666 for an early proponent of this argument. However, the author is not quite precise as he talks of a competence shift, although the State of origin's jurisdiction for the definition and enforcement of qualification standards is original, not derivative, and merely continues to exist in the case of a cross-border movement.

68 ECJ, case 81/87, *Daily Mail* [1988], ECR 5483 para. 19.

al Grid Indus rulings,⁶⁹ the court has, against numerous predictions voiced in legal literature, confirmed this insight that German academia – always focused on formulating “theories” – strikingly calls the “theory of creation” (*Geschöpfungstheorie*)⁷⁰. In its capacity as State of origin, each Member State thus enjoys the autonomy to define the qualification standards that a corporation must fulfil in order to be established and continue to exist under its national law. If a corporation fails to meet the conditions set by the State of origin for the establishment of corporations in a specific legal form, the State of origin may already refuse the creation according to its national law; if one of the conditions cease to be fulfilled, it can withdraw the previously accorded legal form from the corporation, e.g. by mandating the company’s dissolution. As the requirements pertaining to the location of the corporation’s seat also belong to the qualification standards of corporate law, the State of origin can refuse the creation of a corporation whose seat has always been abroad and can sanction subsequently moving the seat abroad with the withdrawal of the corporation’s legal form. The State of origin’s autonomy that emanates from the principle of mutual recognition thus explains why relocating a company’s seat while maintaining the previous legal form is not protected by the freedom of establishment when the company relocates abroad – and hence encounters legal obstacles set up by the country of origin – while taking up residence domestically – and hence encountering legal obstacles set up by the host State – is protected by said freedom. Voices in academia that have often criticized the different treatment of relocating abroad (“outbound cases”) and taking up residence domestically (“inbound cases”)⁷¹ are thus unfounded.

69 ECJ, case C-210/06, *Cartesio* [2008], ECR I-9641 para. 104; ECJ, case C-371/10 [2011], ECR I-12273 para. 26.

70 See Bayer/Schmidt, “Das Vale-Urteil des EuGH: Die endgültige Bestätigung der Niederlassungsfreiheit als ‘Formwechselfreiheit’”, (2012) ZIP, 1481–1492, at 1481; Kindler, “Ende der Diskussion über die so genannte Wegzugsfreiheit”, (2009) NZG, 130–132, at 131; *Rehm* in: Eidenmüller (Ed.), *Ausländische Kapitalgesellschaften im deutschen Recht*, 2004, § 2 para. 61 et seq.

71 See e.g. Armour/Ringe, “European Company Law 1999–2010: Renaissance and Crisis”, CML Rev. 48 (2011), 125 (139 et seq.); Borg-Barthet, “European Private International Law of Companies after *Cartesio*”, ICLQ 58 (2009), 1020 (1025 et seq.); Mörsdorf, “Beschränkung der Mobilität von EU-Gesellschaften im Binnenmarkt – eine Zwischenbilanz”, EuZW 2009, 97 (98 et seq.); Zimmer/Naendrup, “Das *Cartesio*-Urteil des EuGH: Rück- oder Fortschritt für das internationale Gesellschaftsrecht?”, NJW 2009, 545 (546).

5. *The Treatment of Framework Conditions as a Restriction of the Definitional Autonomy*

The State of origin has the authority to autonomously define the qualification standards that a good must fulfil in order to be marketable. It cannot, however, prohibit the export of a good that meets these standards: Article 35 TFEU expressly forbids quantitative restrictions on exports and measures having equivalent effect. Speaking in the words of the Keck ruling, the autonomy the State of origin enjoys is limited to establishing product-related regulations; selling arrangements (“selling modalities”) must fulfil the standard of the free movement of goods, provided that they have a cross-border impact. Likewise, the State of origin cannot, with regard to a natural person’s cross-border pursuit of a profession, prohibit the exercise abroad of qualifications acquired domestically or set conditions for activities abroad that render these activities less attractive. Both cases would constitute a restriction of the respective fundamental freedom—either the freedom of services, of establishment or of movement for workers.

With respect to the cross-border mobility of companies, the ECJ also recently ruled that provisions of the State of origin that merely lay down framework conditions for the status-maintaining relocation of the company’s centre of administration into a different Member State and do not withdraw the corporation’s legal form as a result of the relocation, thus not revisiting the corporation’s status as such, must be evaluated against the freedom of establishment. The *National Grid Indus* case dealt with the question whether a provision of the Dutch tax law was compatible with the right to free establishment. This provision stipulated that all hidden reserves of a corporation that relocates its centre of administration into another Member State be immediately subjected to taxation in the Netherlands. Yet the relocation of the seat had no effect on the corporation’s status as a corporation under Dutch law. The court thus consequently held that a cross-border seat relocation has no effect under Dutch law on the corporation’s possibility to claim the freedom of establishment. It then concluded in relatively short words that there had been a restriction and refused to affirm mandatory requirements of public interest as grounds of justification.⁷²

This argumentation evidences that the ECJ would assess the *Daily Mail* case differently today. For just as in the *National Grid Indus* case, what impeded a relocation of the *Daily Mail*’s management to the Netherlands was not a corporate qualification standard, but rather a provision of British tax law pursuant to which a relocation of the centre of administration necessitated a permit by the British treasury; paying taxes on the hidden reserves could fulfil

⁷² ECJ, case C-371/10, *National Grid Indus* [2011], ECR I-12273 para. 26; for an identical argumentation see ECJ, case C-38/10, *Commission v. Portugal* [2012], ZIP 2012, 1801 with comments by Behme, (2012) EWiR, 681–682.

the permit's conditions. Like the contentious provision in the National Grid Indus case, requiring a permit is to be seen as a framework condition of establishment that would be considered a restriction of the freedom of establishment under the freedom's current theoretical understanding⁷³ and would hardly fulfil Union law grounds of justification.

6. Deduction: the Fundamental Freedoms as Provisions of Competence Allocation for the Definition of Qualification Standards and Framework Conditions

The State of origin's autonomy is thus inverse to the host State's obligation of recognition ("opposite Keck case"): while the application of the host State's product-related qualification standards on goods, services or corporations constitutes a restriction, its framework conditions that apply to domestic and foreign market participants alike are not subject to evaluation against the prohibition of restriction; the host State thus enjoys a definitional autonomy solely delimited by the prohibition of discrimination. Just as competences are horizontally assigned to the State of origin regarding product-related qualification standards, the host State can be regarded as the beneficiary of a horizontal competence allocation in the field of framework conditions.

The fundamental freedoms can therefore be interpreted as provisions allocating competences: in cross-border situations, they assign the State of origin the competence to define and enforce qualification standards (thus instituting the State of origin principle) and the host State the competence to define and enforce framework conditions (thus instituting the State of destination principle). If the Member States apply regulations of their own national law to cases in which the fundamental freedoms allocate the competence to another State, this application constitutes a restriction of the relevant fundamental freedom that necessitates a justification founded in Union law. If however the Member States act within the jurisdiction described above, they must only heed the principle of national treatment (prohibition of discrimination), as set out clearly in the ECJ's Keck ruling.

73 Grundmann, *Europäisches Gesellschaftsrecht*, 2nd ed. (C.F. Müller, 2011), para. 799; Hellwig, "Von Daily Mail zu Cartesio" in von Westphalen (Ed.), *Deutsches Recht im Wettbewerb* (Wiesbaden, 2009), 154–159, at 157; and Wilhelmi, "Anwendung der Niederlassungsfreiheit auf Gesellschaften bei Sitzverlegung", (2009) JZ, 411–413, at 412 share this opinion; see Barthel, "Die Niederlassungsfreiheit der Gesellschaften nach EuGH 'Cartesio' – die Suche nach dem Gleichgewicht zwischen Wettbewerb im Binnenmarkt und nationalstaatlicher Regelungsautonomie", (2010) EWS, 316–330, at 328 et seq. and Bratton/McCahery/Vermeulen, "How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis", 57 Am. J. Comp. L. (2009), 347–385, at 350 for a differing opinion.

IV. On the Relationship Between the Recognition Obligation of Primary Law and European Secondary Law

This contribution's penultimate part will touch upon the relationship between the Member States' primary law obligation to mutually recognize qualification standards and adjoining measures of secondary law. Secondary law can have two different functions regarding the establishment and enforcement of qualification standards: on the one hand, it can harmonize these standards and abolish the necessity of mutual recognition by the Member States to the extent of the harmonization; but on the other hand, it can also abstain from a harmonization and limit itself to delineating the obligation of mutual recognition already founded in primary law.

Harmonization can either lead to a complete assimilation of Member States' qualification standards (full harmonization) or can create a core of common rules within which the national legislators retain a certain leeway (minimum harmonization). In the latter case, the standards set in exercise of this leeway bring about the other Member States' obligation to recognize them. It follows therefrom that mutual recognition and harmonization of qualification standards are not exclusive, but rather parallel elements of a strategy to achieve the internal market.⁷⁴ From the internal market's perspective, a harmonization of qualification standards becomes necessary when the host State can justify its non-recognition of qualification standards with mandatory requirements of public interest. Such justification of a fundamental freedom's restriction leaves the restriction-induced market fragmentation intact, thus triggering a harmonization competence under Articles 114 and 115 TFEU⁷⁵.⁷⁶ Yet not only qualification standards, but also framework conditions are susceptible of harmonization if they distort competition and thus compromise the functioning of the internal market. That these framework conditions are exempt from evaluation against the fundamental freedoms as a result of the principle of recognition's *modus operandi* as terminologically specified in Keck does not change the fact that they can impede competition and can thus be harmonized pur-

74 See Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985) COM (85) 310 para. 61 et seq. for an early example of this perspective.

75 See Tietje, in Grabitz/Hilf/Nettesheim, Article 115 TFEU para. 7 et seq. (March 2011) regarding the convergence of both provisions' interpretation.

76 See Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1591 et seq.; and Weiler, "Epilogue: Towards a Common Law of International Trade" in idem. (Ed.), *The EU, the WTO, and the NAFTA* (Oxford/New York, 2000), 201–232, at 227 for an elaborate analysis; see also Jayme/Kohler, "Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?", (2001) IPRax, 501–514, at 501 ("indication for further need of harmonization").

suant to Articles 114 and 115 TFEU.⁷⁷ Weiler's and Haltern's opinion that the ECJ limited the scope of application not only of the fundamental freedoms but also of Articles 114 and 115 TFEU in *Keck*⁷⁸ is thus not convincing.⁷⁹

Delimiting primary law's recognition obligation through secondary law can make sense in order to promote legal security. That is why the European legislator already created a secondary law framework for the recognition of college diplomas awarded on completion of a minimum three-year studying period in its 1988 directive on the recognition of higher-education diplomas⁸⁰. Specific directives for particular groups of professions ensued. The majority of these directives was abolished when the 2005 directive on the recognition of professional qualifications⁸¹ which, similar to the services directive⁸², follows a cross-sectoral approach⁸³, entered into force.⁸⁴ The content of the directive on

77 Tietje, in Grabitz/Hilf/Nettesheim, Article 114 TFEU para. 98 (March 2011); see also Leible/Schröder, in Streinz (Ed.), 2nd ed. 2012, Article 114 TFEU para. 44; Koenig/Kühling, "Der Streit um die neue Tabakprodukttrichtlinie – Ist der Gemeinschaftsgesetzgeber bei seinem Kampf gegen den Tabakkonsum einmal mehr im Konflikt mit Gemeinschaftsgrundrechten und Kompetenzbestimmungen?", (2002) EWS, 12–20, at 17.

78 Haltern, *Europarecht*, 2nd ed. (Mohr Siebeck, 2007), para. 1683; Weiler, "Epilogue: Towards a Common Law of International Trade" in Weiler (Ed.), *The EU, the WTO, and the NAFTA* (Oxford/New York, 2000), 201–232, at 227.

79 See Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze. Ein Beitrag zum Prinzip der gegenseitigen Anerkennung im europäischen Gesellschaftsrecht* (Mohr Siebeck, 2015), p. 270 et seqq.

80 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

81 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

82 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

83 Kluth/Rieger, "Die neue EU-Berufsanerkennungsrichtlinie – Regelungsgehalt und Auswirkungen für Berufsangehörige und Berufsorganisationen", (2005) EuZW, 486–492, at 486 et seq. Some specific directives for certain professions remain; for instance, the lawyer-specific services directive (Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services) and the lawyer-specific establishment directive (Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained) apply to that profession. See Hellwig, "Gemeinschaftsrechtliche Fragen des Code of Conduct des CCBE" in Grundmann/Haar/Merkt/Mülbert/Wellenhofer (Ed.), *Festschrift für Klaus Hopt zum 70. Geburtstag am 24. August 2010* (Berlin/New York, 2010), 2791–2824, at 2815 et seq. on the relationship between the lawyer-specific and the general services directive.

84 See the enumeration in number 9 of the directive's recitals.

the recognition of professional qualifications proves to be a reflection of the fundamental freedoms' theoretical understanding because it distinguishes between the pursuit of an activity in the host State (i.e. the market access) on the one hand and the modalities of the profession's pursuit (i.e. the framework conditions) on the other; it does this without however watering down the fundamental freedoms' importance in the field of recognition of natural persons' professional qualifications. That means that also when the directives on the mutual recognition of diplomas do not apply in the specific case, the obligation to mutual consideration or recognition of professional qualifications deduced from the fundamental freedoms applies nevertheless on the level of primary law;⁸⁵ for as the ECJ held in the *Dreessen* case with regard to the free establishment of natural persons, these directives solely have the function of facilitating the mutual recognition by setting common rules and criteria. They do and may not however aim to hinder mutual recognition in situations to which they do not apply.⁸⁶

As regards the freedom of establishment for companies, the ECJ ruled in almost identical fashion that the obligation to recognize foreign corporations flows immediately from the right to free establishment and is not subject to a convention among the Member States on the mutual recognition of corporations according to Article 293 of the old TEC.⁸⁷ Nevertheless, European legal measures that harmonize Member States' standards pertaining to a company's seat or – at least – Member States' rules on the conflict of laws remain highly desirable. The same applies to the further harmonization of the legal framework for transnational transformations;⁸⁸ for the mere assertion that these

85 ECJ, case C-238/98, *Hocsman* [2000], ECR I-6623 para. 31 et seq.; ECJ, case C-31/00, *Dreessen* [2002] ECR I-663 para. 25 et seq. The court had already ruled likewise for cases in which relevant directives did not yet exist: see case 71/76, *Thieffry* [1977], ECR 765 para. 17.

86 ECJ, case C-31/00, *Dreessen* [2002] ECR I-663 para. 26.

87 ECJ, case C-208/00, *Überseering* [2002], ECR I-9919, para. 55 and 60. Of the five judges who had taken part in the *Dreessen* ruling, four also participated in the *Überseering* decision, namely the judges Edward, La Pergola, Jann and von Bahr. See also ECJ, case C-411/03, *SEVIC* [2005], ECR I-10805, para. 67 and Müller-Graff, in Streinz (Ed.), 2nd ed. 2012, Article 54 TFEU para. 14.

88 Regarding the project of a directive on the transfer of a company's statutory seat, see Bayer/Schmidt, "Grenzüberschreitende Sitzverlegung und grenzüberschreitende Restrukturierungen nach MoMiG, Cartesio und Trabrennbahn", 173 ZHR (2009), 735-774, at 770; Behme, "Der grenzüberschreitende Formwechsel von Gesellschaften nach Cartesio und Vale", (2012) NZG, 936-939, at 939; Borg-Barthet, "European Private International Law of Companies after Cartesio", 58 ICLQ (2009), 1020-1028, at 1028; Kieninger, "The Law Applicable to Corporations in the EC", 73 *RabelsZ* (2009), 607-628; Schön, "Das System der gesellschaftsrechtlichen Niederlassungsfreiheit nach VALE", (2013) ZGR, 333-365, at 364 et seq.; Wisniewski/Opalski, "Compa-

transformations are protected by the freedom of establishment does little to help legal practice, as the latter depends upon a binding legal framework. The use of analogies with existing provisions (e.g. the transnational merger of corporations or seat relocations for SE)⁸⁹ increases the cost of transactions and proves to be an obstacle for the transnational restructuring of companies.

V. Conclusion and Outlook

The often misinterpreted rulings of the ECJ on the freedom of establishment for companies conform to the general theory of the fundamental freedoms and embody these freedoms' interpretation as setting a principle of mutual recognition. The ECJ developed this principle primarily for the free movement of goods in the Dassonville, Cassis de Dijon and Keck decisions; the principle however also applies to the other fundamental freedoms. In the last years, it has been increasingly discussed in the light of the right to free establishment and free services: while not one of the 25 most commented upon ECJ rulings as of January 1, 2000 pertains to the free movement of goods, ten relate to the freedom of establishment or of services.⁹⁰ Apparently, these freedoms have replaced the free movement of goods as paradigmatic freedoms.

The principle of mutual recognition leads to a broad freedom of choice of law within the European internal market: market participants can volunteer being subjected to the qualification standards of a different Member State and can thus operate throughout Europe under the laws of their State of origin, provided they fulfil these standards. Due to this freedom of choice of law to which mandatory requirements of public interest and the prohibition of abusive arrangements only set boundaries in exceptional cases, the principle of mutual recognition creates a much bigger social explosive force in the field of the freedom of services and of establishment than in that of the free movement of goods. Contrary to the obligation to recognize foreign spirits regardless of their alcohol content (Cassis de Dijon), the import of other Member States' social standards or the immigration of corporations that make use of an overly permissive foreign legal form can indeed become a political issue. Since the principle of mutual recognition relies on the Member States' mutual confi-

nies' Freedom of Establishment after the ECJ Cartesio Judgement", 10 EBOR (2009), 595-625, at 620 et seq.

89 Examples for provisions susceptible of an analogy can be found in Bayer/Schmidt, "Grenzüberschreitende Sitzverlegung und grenzüberschreitende Restrukturierungen nach MoMiG, Cartesio und Trabrennbahn", 173 ZHR (2009), 735-774, at 757 et seq.; Teichmann, "Cartesio: Die Freiheit zum formwechselnden Wegzug", (2009) ZIP, 393-404, at 403.

90 Author's inquiry at the EU publications office (January 2012).

dence in the quality of their national legislation, the current debt crisis thus poses a danger that is not to be underestimated. For if this crisis develops into a crisis of confidence that transcends fiscal policies – as, for instance, Joachim Gauck concludes in his speech on the prospects for the European idea⁹¹ – the willingness to recognize products, service providers and corporations that do not comply with own but rather qualification standards of a different Member State will decrease sooner or later; this particularly applies to cases in which the public no longer views the other Member State as an equal partner, but rather as a bail-out candidate and thus as a financial burden. The debt crisis therefore not only endangers the common currency project, but also the project of a common internal market.

91 Accessible online at <http://www.bundespraesident.de/SharedDocs/Reden/EN/JoachimGauck/Reden/2013/130222-Europe.html> (last visited 22 Feb. 2013).