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Cross-border reincorporations in the European Union: The case for comprehensive harmonization

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CROSS-BORDER REINCORPORATIONS IN THE EUROPEAN UNION:

THE CASE FOR COMPREHENSIVE HARMONISATION

Abstract. This paper compares the legal frameworks for corporate reincorporations of all EU Member States, relying on a Study prepared by the authors for the European Commission and accompanied by detailed national reports. It is shown that, despite recent decisions of the Court of Justice that liberalise inbound and outbound reincorporations, several Member States still prohibit these transactions or make them impossible or impractical. Even where reincorporations are available in principle, significant legal uncertainties often exist due to a lack of clear and interoperable rules. This situation may for instance jeopardise the interests of creditors and minority shareholders of the emigrating companies in circumstances where the involved jurisdictions do not provide for an explicit regulation of cross-border reincorporations aimed at protecting these stakeholders. Furthermore, when procedural rules are unclear or lacking, companies might be struck from the relevant register of the country of origin without being entered in the register of any other Member States. We argue that, as a consequence, harmonisation of the reincorporation process is necessary, and that it is desirable to reach a high minimum standard of creditor and minority shareholder protection and define clear rules for the cancellation of companies from the domestic register.

Keywords: reincorporations, freedom of establishment, corporate mobility, comparative company law, Court of Justice of the European Union

1. INTRODUCTION

Companies incorporated under the law of a Member State may seek to subject themselves to another Member State's law without going through the process of liquidation in their original jurisdiction. Such operations are usually labelled 'cross-border reincorporations', or just 'reincorporations'. In the European Union, companies can pursue this goal either indirectly by way of a cross-border merger, or by using the vehicle of a *Societas Europaea*. Furthermore, recent decisions of the Court of Justice indicate that companies incorporated in a Member State should be allowed, in certain circumstances that will be discussed in detail later, to change the applicable company law without being forced into liquidation. Despite these decisions, however, the issue of whether and to what extent freedom of establishment also covers cross-border reincorporations is still partially uncertain and, as a matter of fact, several Member States still effectively restrict or even outright prohibit these transactions.[1]

Even where both Member States concerned do allow reincorporations, a company can only change its applicable company law if both the country of origin and the country of destination address this type of transaction in their national laws and the company complies with the substantive laws of both countries.[2] The need to comply with rules and principles of two jurisdictions can give rise to significant practical problems. Indeed, reincorporation requirements vary widely across Member States, most of which have traditionally rendered such transactions extremely difficult. In part, the difficulties can be explained in political terms, as Member States' legislators often regard company law as a device for protecting a wide range of corporate constituencies rather than merely addressing the shareholder-director relationship. The new applicable company law may be less protective of creditors, other stakeholders or minority shareholders than the law of the country of origin – or, at least, the country of origin may consider this to be the case. Consequently, a reincorporation might be harmful for these 'weak constituencies' and companies might exploit such differences opportunistically, unless other legal mechanisms are in place to protect them. In this regard, it is also necessary to stress that the regulatory limits to reincorporations restrict the company's capacity of changing the applicable law after its formation. These rules, therefore, are key elements of regulatory competition in company law.

Cross-border reincorporations have been addressed in various scholarly studies.[3] The present work will add to previous researches a comparative analysis of all Member States of the Eu-

[1] For references and details see section 3.1., below, regarding cross-border merges and SE and section 4 and 5 regarding Member States' law.

[2] However, compliance with the rules of the country of departure is only required insofar as they do not constitute restrictions of the freedom of establishment, or else are justified; see e.g. C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, ECLI:EU:C:2011:785.

[3] Literature on EU freedom of establishment and companies' private international law is boundless and a comprehensive overview is nearly impossible. With reference to scholarly papers in English addressing exclusively cross-border reincorporations in the EU, a reference can be made to, e.g., RR Drury, 'Migrating companies' (1999) 24 *European Law Review* 362; KE Sørensen and M Neville, 'Corporate migration in the European Union: an analysis of the proposed 14th EC company law directive on the transfer of the registered office of a company from one Member State to another with a change of applicable law' (2000) 6 *Columbia Journal of European Law* 191; E. Wymeersch, 'The Transfer of the Company's Seat in European Company

ropean Union regarding rules on transfer of a company's registered office and cross-border reincorporations. The research underlying this paper was carried out as part of a 'Study on the law applicable to companies', prepared by the authors of this paper for the European Commission (DG Justice), which also comprises detailed country reports for all 28 Member States drafted by local experts based on a common template.[4] Eventually, this paper will outline how the system may develop in the future.

The paper is structured as follows: Section 2 will address the policy issues arising from decisions of changing applicable law. Section 3 depicts the current 'state of the art' regarding cross-border change of applicable company law: current possibilities to reincorporate throughout the EU and the case law of the Court of Justice. Sections 4 and 5 will compare and contrast the regimes of Member States related to 'outbound' and 'inbound' voluntary reincorporations. It will be shown that, even after the most recent case law of the Court of Justice on freedom of establishment, these national regimes still keep significant differences with regard to the possibility of domestic companies to change the applicable law without liquidation as well as regarding foreign companies who aim at converting into a domestic entity. Section 6 will then analyse a recent submission for preliminary ruling received by the Court of Justice regarding a national ban of outbound reincorporations; we also argue that judicial decisions are not sufficient to create a coherent and workable system that allows reincorporations, without neglecting the interests of other stakeholders, and that EU harmonisation is needed. The final Section 7 concludes by summarising the results of the papers and stressing that comprehensive harmonization is the best option.

2. Conceptual and policy issues raised by cross-border reincorporations

The very existence of a legal person separate from its members, and the corresponding benefit of limited liability that shareholders enjoy, stems from rules of the specific legal system according to which a company was created. [5] In the words of the Court of Justice, 'companies are creatures of the law and, in the present state of Community law, creatures of national law'.[6]

However, companies originally incorporated in a certain jurisdiction may seek to change their status and 'convert' into a company type governed by another jurisdiction. Such an operation

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Law' (2003) 40 *Common Market Law Review* 661; WG Ringe, 'No freedom of emigration for companies?' (2005) 16 *European Business Law Review* 621; T Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (WLP 2015).

[4] This study comprises an empirical, comparative and normative analysis of the conflict or laws rules applicable to companies. The question of reincorporations is one of the topics addressed in the country reports of this study, thus forming the basis of the comparative analysis of the present paper. Each national report will be published in *Private International of Companies in the European Union* (Beck, Hart, Nomos, 2018) [tbc]

[5] See e.g. P Ireland, 'Limited liability, shareholder rights and the problem of corporate irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837; MV Benedettelli, 'Five lay commandments for the EU private international law of companies' (2015/2016) 17 *Yearbook of Private International Law* 209 at 216.

[6] C-81/87, *The Queen v HM Treasury and Commissioners for Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, at [19].

can of course only be described as a 'reincorporation' where no liquidation is required in the original country of incorporation. It leads to an alteration of the (company) law to which the reincorporating company is subject, while not – at least not directly – affecting the company's operations, including the place where productive factors are situated. Reincorporations are similar to domestic conversions of a company into another company type,[7] but differ insofar as domestic conversions do not alter the State that has the power to adopt and amend the governing rules. In this respect, it is also necessary to highlight that such a shift of rule-making power only concerns issues that are characterised as 'company law' for private international law purposes (*lex societatis*), also considering that EU law places certain limits on the characterisation by Member States.[8]

In order for a reincorporation to be successful, the State of arrival should register the company into its domestic commercial register as a continuation of the formerly existing company. This shift of registration, if allowed, is normally triggered by a decision taken by the company to alter the clause in its articles of association indicating its 'registered office' or 'statutory seat'. Courts and national registers, however, should additionally inquire whether the real intention of the company was to also change the applicable company law. [9] Such an intention may be presumed when the company has approved a shift of its registered office or statutory seat. In this regard, it is worth briefly shed a light on the terms 'statutory seat' and 'registered office'. Although these terms are almost invariably used interchangeably in scholarly articles and in most EU legislative materials[10], they might refer to different concepts in different jurisdictions. In particular, the concept of 'registered office' derives from English law and refers to the place filed with Companies House[11], where documents may be served and kept for inspection.[12] The concept of 'statutory seat', by contrast, refers to a place mentioned in the articles of association, which is normally located in the same country where the company is registered.[13] Consequently, in jurisdictions that adopt the concept of 'statutory seat', compa-

[7] For instance conversion of, or re-registration by, a private limited company as public limited company.

[8] C Gerner-Beuerle and EP Schuster, 'The Costs of Separation: Conflicts in Company and Insolvency Law in Europe' (2014) 14 *Journal of Corporate Law Studies* 287, at 321; see also Bendettelli, 'Five lay commandments' (n 5), 225-232 (stressing that, when EU legislative instruments are silent regarding characterization, the risk of negative or positive conflict of law arise).

[9] MV Benedettelli, 'Sul trasferimento della sede sociale all'estero' (2010) 55 *Rivista delle Società* 1251 at 1265.

[10] See, however, Brussels 1 Regulation on jurisdiction (recast), 2012, whose art. 63 maintains that a company is domiciled, among other factors, at the place where it has its statutory seat, and that in Ireland, Cyprus and the United Kingdom, 'statutory seat' means a companies' registered office.

[11] Companies Act 2006 s. 9(2)(b). See D Prentice, 'The incorporation theory – The United Kingdom' (2003) 14 *European Business Law Review* 1.

[12] Companies Act 2006 s. 1136 and s. 1139(1).

[13] J Rickford, 'Current development in European law on restructuring of companies: An introduction' (2004) 15 *European Business Law Review* 1229; J von Hein, 'Zur Kodification des europäischen Übernahmekollisionsrechts' (2005) *Zeitschrift für Gesellschaftsrecht* 545. See First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended (now recast as Directive 2009/101/EC), which requires the presence of a 'registered office' in the Member State of registration.

nies, at least in theory, could be allowed to amend the clause of their articles of association indicating their 'statutory seat' without necessarily changing their registration and the applicable law, if they so wish.[14]

As a consequence, in this paper we define reincorporation as a transaction in which a company decides to voluntarily change the applicable company law to which it is subject and intends to do so without going through the liquidation process in the country of incorporation. Such reincorporations may or may not entail a relocation of the company's 'headquarters', or 'central administration' or any other physical elements of the company's business.

At firm level, from the perspective of shareholders, cross-border reincorporations should aim at attaining efficiency gains due to the application of a more suitable company law. A change of the applicable company law will typically result in a number of significant changes for shareholders and directors of the company. For instance, majority requirements, the balance of powers between shareholders and the board, directors' liability, the structure of the board, as well as rules limiting departures from the 'one-share-one-vote' default rule will change as a result of this operation.

All national company laws in the EU, however, go beyond just regulating the relationship between shareholders and directors: they also contain (partly harmonised) mandatory rules for the protection of creditors and other stakeholders, and often also try to address other potential negative externalities. Typical examples of company law rules that aim at protecting creditors are rules on capital formation, limits to dividends and prohibitions of disguised distributions, directors' duties in the vicinity of insolvency[15] or participation rights of employees in the company's decision-making bodies ('codetermination').[16] A decision to reincorporate from one jurisdiction to another will negatively affect creditors or other stakeholders under two conditions: (a) the rules aiming at protecting these stakeholders fall within the scope of 'company law' in the Member State of origin *and* the destination Member State; (b) the company law regime of the new jurisdiction is less protective than the original *lex societatis*. Alternatively, protection deficits may also arise if the legal mechanism protecting creditors or other stakeholders is present in the laws of both Member States, but the international scope of application of the mechanisms is determined according to different connecting factors. If, for instance, a jurisdiction relies exclusively or mostly on company law rules to protect creditors and other stakeholders, rather than addressing these issues through insolvency or tort law, moving the statutory seat, but not the real seat, to another jurisdiction that uses predominantly the latter strategies to address the same underlying problems could be detrimental.[17] Importantly, in this example, the detrimental effect may not depend on differences in the abso-

[14] See e.g. H Eidenmüller, 'Mobilität und Restrukturierung von Unternehmen im Binnenmarkt' (2004) *Juristenzeitung* 32; S Lombardo, 'Libertà di stabilimento e mobilità delle società in Europa' (2005) *Nuova giurisprudenza civile commentata* 372.

[15] See e.g. L Enriques and M Gelter, 'Regulatory Competition in European Company Law and Creditor Protection' (2006) 7 *European Business Organization Law Review* 417 at 422-435. A comparison of the English and the German regimes on capital maintenance can be found in T Bachner, *Creditor Protection in Private Companies* (Cambridge University Press 2009) 115.

[16] For an overview of workers participation regimes in EU Member States see www.worker-participation.eu/.

[17] For more details, see the discussion in Gerner-Beuerle and Schuster (n 8).

lute level of protection afforded to different corporate constituencies. Thus, the fact that significant differences exist between company laws across the EU may give rise to regulatory arbitrage and, potentially, to regulatory competition among jurisdictions, as companies seek to become subject to the legal regime least burdensome to them, given the specific situation they are in. In the absence of legal rules addressing this potential problem, reincorporations may pose a significant risk to stakeholders, as companies may act in opportunistic ways when deciding to change the law by which they – and their relationships with third parties – are governed.

Apart from a change of the applicable company law, reincorporations may also have a number of additional effects. First of all, according to the Insolvency Regulation, reincorporations also lead to a change of the competent insolvency venue and the applicable insolvency regime, unless creditors provide evidence that the company's centre of main interests ('COMI') is still in the country of origin.[18] Furthermore, a relocation of the registered office might lead to a shift of the competent jurisdiction in civil cases to the country of arrival.[19] Therefore, although shareholders may attain efficiency gains through the application of a more suitable company law, reincorporations may also harm creditors and other stakeholders when the newly applicable rules are less protective than the original ones.

3. STATE OF THE ART IN THE EU

3.1. Current possibilities to reincorporate

Companies incorporated in a EU Member State can effectively change the applicable company law regime, without liquidation, by converting into, or otherwise forming a European Company (*Societas Europaea*, hereinafter 'SE'),[20] or by implementing a cross-border merger.[21]

The SE Regulation only provides a general regulatory framework for SEs, which are mostly governed by the regime for public companies of the Member State where their registered office is situated.[22] SEs can relocate their registered office from one Member State to any other

[18] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141/19 (hereinafter the 'Insolvency Regulation Recast'), art. 3(1).

[19] See Brussels I Regulation Recast, Regulation (EU) No 1215/2012 , art. 63. The Brussels I Regulation also grants exclusive jurisdiction to the state of a company's 'seat', but only with regard to some subject matters; the same article also maintains that '[i]n order to determine that seat, the court shall apply its rules of private international law', with the consequence that if both countries follows the idea that a company's seat is its registered office, a transfer of the latter would lead to a shift of jurisdiction; see Brussels I Regulation (recast) article 24(2). On jurisdictional issues see MV Benedettelli, 'Conflicts of jurisdiction and conflicts of law in company law matters within the EU "market for corporate models": Brussels I and Rome I after Centros' (2005) 16 *European Business Law Review* 55 at 61-3.

[20] Regulation of the Council 2157/2001/CE, October 8th 2001, on the statute of the European Company (hereinafter, the 'SE Regulation').

[21] Under the national rules implementing Directive 2005/56/EC [2005] OJ L 310/1.

[22] SE Regulation, Art. 9(1). See e.g. J Rickford, 'The European Company' in J Rickford (ed) *The European Company: Developing a Community Law of Corporations* (Antwerp: Intersentia 2003) ch 2.

country of the European Economic Area,[23] provided that their registered office is located in the same Member State where their head office is situated.[24] Therefore, the SE is not a vehicle for free (or 'pure') choice of law, for an SE must always transfer its head office together with its registered office from one jurisdiction to another. SEs, however, can only be incorporated by pre-existing public companies in specific circumstances, which are detailed in the SE Regulation and whose common denominator is the existence of a cross-border connection.[25] Meeting these formal requirements will often require additional reorganisations, thereby increasing transaction costs.

Companies incorporated in an EU Member State may also make use of cross-border mergers to achieve effects equivalent to a reincorporation.[26] Such *de facto* reincorporations are implemented by founding a new 'shell' company in another Member State (usually a wholly-owned subsidiary), and then merging into the newly formed foreign company. Cross-border mergers of this type can now be implemented under a common procedural framework,[27] which has led to a significant simplification of these transactions. This transaction, in addition, is typically tax neutral, as are national mergers in most cases.[28] However, the procedure for reincorporations using a cross-border merger can be relatively time-consuming and costly, depending on the legislation of the Member States involved and due to the absence of a 'fast-track procedure',[29] in particular when the only aim of a cross-border merger is relocating the company's registered office, without implementing a real integration between different companies.

3.2. Summary of case law of the Court of Justice

The main question of whether cross-border reincorporations, by way of relocating the registered office, are covered by freedom of establishment remains unresolved. First, the question arises of whether freedom of establishment requires Member States to allow domestic companies to reincorporate in another Member State without forcing them to liquidate. The second question is whether companies incorporated in another Member State have a right to in-

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[23] SE Regulation, Art. 8. The SE Regulation also applies to EEA countries that are not Member States of the EU (Iceland, Liechtenstein and Norway): article 77 and annex XXII EEA Agreement.

[24] SE Regulation, Art. 7. On this see e.g. Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 *Journal of Corporate Law Studies* 185, at 186 – 191.

[25] SE Regulation, article 2

[26] Reincorporations in the US are also typically implemented through cross-state mergers; see, for instance, Model Bus. Corp. Act Ann. § 11.02 (1984).

[27] Directive 2005/56/EC, of the Parliament and the Council, October 26th 2005, on cross-border mergers of limited liability companies (hereinafter, the 'Cross-Border Merger Directive'), entered into force on December 16th 2007. See M Siems, 'The European Directive on Cross-Border Mergers: An International Model?' (2004-2005) 11 *Columbia Journal of European Law* 167.

[28] See Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, as amended by Directive 2005/19/EC.

[29] See Becht-Bruun & Lexidale, *Study on the Application of the Cross-Border Merger Directive* (2013) at pp. 36 and 112; J Schmidt 'Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?', Study for the JURI committee (Legal Affairs) of the European Parliament (2016) at pp. 32-3

corporate as domestic companies, without the need to liquidate and with full continuity of their rights and duties. In both cases, the overarching questions arise of whether the involved member States can require the 'emigrating' companies to also relocate their head office or other physical elements into the country of arrival.

In recent years, the Court of Justice has gradually clarified its case law in order to favour mobility, although the present situation is still partially ambiguous. In *Daily Mail*,[30] the European Court of Justice addressed the restrictions placed by the UK on the relocation of a domestic company's administrative seat and tax domicile to the Netherlands. The ECJ held that such a restriction was not in violation of the freedom of establishment. The Court based its opinion on a general assumption regarding the relationship between a company and its state of incorporation. In particular, it was maintained that 'unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning'.[31] As a consequence, the ECJ concluded that the freedom of establishment 'cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.'[32] At a closer look, however, *Daily Mail* reveals several ambiguities. This decision only concerned the outbound relocation of a company's tax residence, not outbound reincorporations (which, as we shall see, are impossible out of the UK).[33] Additionally, the ECJ also emphasised that freedom of establishment 'prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation'.[34]

The Court of Justice partially clarified these issues in the more recent decisions *Cartesio*[35] and *VALE*. The decision rendered in the case *Cartesio* was related to a Hungarian company

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[30] *Daily Mail* (n 6)

[31] *Daily Mail* (n 6) [19].

[32] *Daily Mail* (n 6) [24]. This was confirmed in C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919 (ECLI:EU:C:2002:632) [61–72] and C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art* [2003] ECR I-1095 (ECLI:EU:C:2003:512) [102], distinguishing *Daily Mail* from the cases that were under review on the basis of the fact that the restrictions at issue concerned 'moving-in' scenarios, whereas *Daily Mail* was only related to moving-out situations: See e.g. U Forsthoff, in H Hirte and T Bücker (eds.) *Grenzüberschreitende Gesellschaften* (Carl Heymanns, Köln, 2005) 57.

[33] See S Lombardo, 'Conflict of law rules in company law after Überseering: An economic and comparative analysis of the allocation of policy competence in the European Union' (2003) 3 European Business Organization Law Review 301 at 306; FM Mucciarelli, 'Company 'emigration' and EC freedom of establishment: Daily Mail revisited' (2008) 9 European Business Organization Law Review 268 at 295.

[34] Daily Mail (n 6) [16]. Confirmed in C-264/96 *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (HM Inspector of Taxes)* [1998] ECR I-4695; C-9/02 *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409; C-446/03 *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.

[35] C- 210/06 *Cartesio Oktato es Szolgaltato bt* [2008] ECR I-9641 (ECLI:EU:C:2008:723). See J Borg-Barthet, 'Free at last? Choice of corporate law in the EU folling the judgment in Vale' (2013) 62 *International and Comparative Law Quarterly* 503; A Baert, 'Crossing Borders: Exploring the Need for a Fourteenth EU

that intended to transfer its ‘seat’ (*székhely*) to Italy, while continuing to be governed by Hungarian law as *lex societatis.* According to Hungarian substantive rules in force at the time when *Cartesio* sought to transfer its ‘seat’ abroad, a company’s headquarter could not be detached from its registered office, with the consequence that *Cartesio* was also compelled to be removed from the Hungarian register even though it did not seek to change the applicable company law.[36] The Court concluded that ‘a Member State has the power to define […] the connecting factor required’ for a company to be incorporated under its law,[37] and thus being capable of enjoying the right of establishment, and the criteria for continuing to maintain that status.[38] That included, in continuity with *Daily Mail,* the power ‘not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat’ there, ‘thereby breaking the connecting factor required under the national law of the Member State of incorporation’.[39] Importantly, however, the Court also explains[40] that this power does not include the capacity to impede a ‘conversion’ into a company governed by the law of a new Member State. Rather, freedom of establishment gives the right, as against the Member State of origin, to reincorporate a company abroad, so that any restriction to voluntary outbound reincorporations must be justified by overriding reasons in the public interest.[41] In particular, the Court views liquidation requirements for

Company Law Directive on the Transfer of the Registered Office’ (2015) 26 *European Business Law Review* 581 at 597.

[36] Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings, art. 16(1). See now, Act on Firm Information, Firm Registration and Voluntary Liquidation Proceedings, 2006, s. 7(b), in force from September 1st 2007. It is worth mentioning that Hungarian conflict of law rules for companies are based upon the incorporation theory: Statutory Rule No. 13 of 1979 on Private International Law, art. 18. See V Korom and P Metzinger, ‘Freedom of establishment for company: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06’ (2009) 6 *European Company and Financial Law Review* 144.

[37] *Cartesio* (n 35) [110]. However, despite the Court of Justice seems to consider them as connecting factors (see *Cartesio* at paragraph 108), the three criteria mentioned in article 54 TFEU (registered office, central administration and principal place of business) are rather elements that companies should have on the territory of the EU in order to enjoy freedom of establishment (under the implicit assumption that these companies have been validly formed under the law of a Member State); see Benedettelli, ‘Five lay commandments’ (n 5) 220;S Lombardo, ‘Regulatory Competition in Company Law in the European Union after Cartesio’ (2009) 10 *European Business Organization Law Review* 628; Korom and Metzinger (n 36) 149; C Teichmann, ‘Cartesio: Die Freiheit zum Formwechselden Wegzug’ (2009) *Zeitschrift für Wirstschaftsrecht* 393 at 400; D Dashwood et al., *Wyatt and Dashwood’s European Union Law* (Hart, 2011) 648; R Schütze, *European Union Law* (Cambridge University Press, 2015) 611.

[38] *Cartesio* (n 35) [110].

[39] *Cartesio* (n 35) [110]. See Korom and Metzinger (n 36) 159; J Armour and WG Ringe, ‘European company law 1999-2010: renaissance and crisis’ (2011) 48 *Common Market Law Review* 125 at 140.

[40] *Cartesio* (n 35) [111–113]. On the distinction between outbound reincorporations (included in the EU freedom of establishment) and cases in which a company relocates some relevant factors out of the state of origin without seeking a reincorporation (not included) see S Lombardo, ‘Regulatory Competition’ (n 37) 638; C Gerner-Beuerle and M Schilling, ‘The mysteries of freedom of establishment after Cartesio’ (2010) 59 *International and Comparative Law Quarterly* 303 at 311 (stressing the ambiguities of the Cartesio decision); P Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (Oxford University Press 2012) 82.

[41] *Cartesio* (n 35) [113].

companies reincorporating abroad as (generally) disproportionate restrictions. However, the Court's statement in *Cartesio* was not directly relevant to the case decided, and thus constitutes a mere *obiter dictum*.[42] The *Cartesio* ruling, therefore, does not seem to provide conclusive answers to the question of whether Member States must allow domestic companies to re-incorporate abroad or, at least, it may be debated whether this part of the *Cartesio* ruling is directly binding or not.

Furthermore, in the decision *VALE*[43], the Court of Justice addressed the case of an Italian private limited company that sought to reincorporate under Hungarian law, with the Hungarian register refusing to label the company as the 'universal successor' of the Italian entity.[44] The Court of Justice maintained that any national legislation 'which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of' the freedom of establishment.[45] A first consequence is that any restrictions to inbound reincorporations need to be justified by overriding reasons in the public interest and must be 'appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them'.[46] Consequently, a complete ban on re-incorporations goes beyond what is necessary to protect those interests.[47] Furthermore, Member States must comply with the principles of 'equivalence and effectiveness', and the recording of the designation 'predecessor in law' could not be denied to *VALE Costruzioni* if it was granted in domestic conversions.[48] Finally, we should stress that in *VALE* the Court of Justice also addressed the concept of 'establishment' for the purpose of applying articles 49 and 54 of the Treaty. In this respect, the Court has clarified that this concept 'involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period' and that 'it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there'.[49] In the *VALE* ruling, therefore, the Court of Justice refers to the concept of 'establishment' developed in the decisions *Factortame*[50] and *Cadbury Schweppes.*[51] From the point of view of the country of arrival, the consequence is that inbound cross-border reincorporations fall within the scope of the freedom of establishment only if the company decides to also relocate the place where it ac-

[42] See Opinion of AG Kokott C-106/16 *Polbud v Wykonawstwo sp. z.o.o.*, 4 May 2017 (ECLI:EU:C:2017:351) [40].

[43] C-378/10 *VALE Építési kft.* [2012] (ECLI:EU:C:2012:440).

[44] *VALE* (n 43) [45].

[45] *VALE* (n 43) [33].

[46] *VALE* (n 43) [39]. The Court of Justice only refers to the decision C‑411/03 *Sevic Systems* [2005] ECR I‑10805, but this 'test' for assessing restrictions to the freedom of establishment was originally formulated in the C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165.

[47] *VALE* (n 43) [40].

[48] *VALE* (n 43) [57].

[49] *VALE* (n 43) [34].

[50] C-221/89, *E. v Secretary of State for transport ex p. Factortame* [1991] ECR I-3905 [20].

[51] C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Oversead Ltd v. Commissioners of Ireland Revenue* [2006] ECR I-8031. In the latter decision the Court also added that a company's establishment is revealed by 'objective factors, which are ascertainable by third parties with regard, in particular, to the extent to which the company physically exists in terms of premises, staff and equipment': Cadbury Schweppes ibid [67].

tually pursues ‘genuine economic activity’ into the country of arrival; by contrast, a mere relocation of the registered office from another Member State, without any genuine link with the country of arrival, is not protected by EU freedom of establishment.[52]

3.3. Legislative proposals

The oldest proposals for harmonising private international law for companies did not include rules on reincorporations. Neither the proposal drafted in 1965 by the Institute of International Law[53], nor the European Draft Convention of 1968[54], mention the possibility to relocate a company’s ‘registered office’ abroad or to reincorporate under the law of another jurisdiction. The Hague Convention on the recognition of the legal personality of foreign companies, associations and institutions, drafted in 1956, only provided that contracting States should recognise the continuity of a company’s legal personality after a transfer of the statutory seat (*siège statutaire*), provided that such continuity is recognised in the two States concerned.[55]

In the European Community, the first detailed proposal for a directive, which was eventually not approved, was presented in 1997.[56] The 1997 proposal did not harmonise the primary connecting factor, be it based on the ‘incorporation theory’ or the ‘real seat theory’.[57] Consequently, companies that sought to reincorporate out of a real seat country needed to relocate their real seat abroad, and companies that sought to reincorporate into a real seat country had to relocate the respective connecting factor onto their territory. According to the 1997 proposal, additionally, the reincorporation plan had to be published in the commercial register of the country of origin[58] and shareholders had to approve this proposal with qualified majority.[59]

In 2002 a panel of corporate law specialists, entrusted by the EU Commission with the task of developing reform proposals for European company law (the ‘high level group’), recommended liberalising reincorporations as a way to improve both the efficient allocation of resources and the quality of domestic laws.[60] Along this line, the Action Plan issued in 2003 by

[52] Member States, however, are free to accept that foreign companies reincorporate as domestic entities without relocating any economic activities. See KE Sørensen, ‘The fight against letterbox companies in the internal market’ (2015) 52 *Common Market Law Review* 85 at 88; Biermeyer (n 3) 67-68; Biermeyer ‘Shaping the right of cross-border conversions in the EU. Between right and autonomy: *Vale’* (2013) *Common Market Law Review* 571 at 588; W Schön, ‘Das System der gesellschaftsrechtlichen Niederlassungsfreiheiten nach VALE’ (2013) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 333 at 351.

[53] Companies in private international law, 1965: www.justitiaetpace.org/idiE/resolutionsE/1965_var_02_en.pdf

[54] Draft Convention on the Mutual Recognition of Companies and Bodies Corporate, 1968, OJ 2-196: http://aei.pitt.edu/5610/1/5610.pdf

[55] Hague Convention concerning the recognition of the legal personality of foreign companies, associations and institutions, available 1956, https://www.hcch.net/en/instruments/conventions/full-text/?cid=36.

[56] Document XV/D2/6002/97-EN REV.2 (hereinafter the ‘1997 Proposal’). See RR Drury, ‘Migrating companies’ (1999) *European Law Review* 362.

[57] Article 3, 1997 Proposal of a 14th Directive.

[58] Article 4, 1997 Proposal of a 14th Directive.

[59] Article 6, 1997 Proposal of a 14th Directive

[60] High Level Group, ‘A modern regulatory framework for company law in Europe’, available at http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf, p. 101.

the Commission, which was aimed at modernising company law, maintained that issuing a directive on cross-border reincorporations (which would be the 14th directive on company law) was a priority for the EU.[61] In the following years, various resolutions and reports of the European Parliament have requested the European Commission to present new proposal for a directive on the cross border transfer of companies' registered offices,[62] specifying that Member States should adopt provisions for the protection of dissenting shareholders, including a withdrawal right from the 'emigrating' company, and creditors should be protected by a security deposit.

A full-fledged policy analysis conducted in 2007, however, has revealed a more complex situation. This assessment concluded that harmonisation could be too onerous and not proportionate, 'considering that the practical effect of the existing legislation on cross-border mobility (i.e. the Cross-Border Merger Directive) is not yet known and that the Community approach to the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future', with the consequence that 'it might be advisable to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined.'[63] Therefore, the project of harmonising Member States' regimes on cross-border transfers of the registered office was eventually put on hold.

Finally, a public consultation launched in 2012 on the future of European company law confirmed the interest of the respondents in a legislative initiative aimed at clarifying that European companies can transfer their registered office throughout the EU and reincorporate in another Member State without having to liquidate in the country of origin, and at regulating such cross-border reincorporations.[64] The 2012 Action Plan on company law and corporate governance[65] acknowledged that the issue of cross-border reincorporations was relevant and that 'any future initiative in this matter needs to be underpinned by robust economic data and a thorough assessment of a practical and genuine need for and use made of European rules on transfer of seat.' Following this acknowledgement, in 2013, the European Commission launched a new public consultation on the transfer of a company's seat, which confirmed that in most Member States the rules on cross-border transfers of statutory seat (or registered of-

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[61] Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, at 22 (COM(2003) 284 final). See also the consultation launched in 2004: http://ec.europa.eu/yourvoice/results/transfer/index_en.htm.

[62] See Resolution of the European Parliament of 25 October 2007 [P6_TA(2007)0491]; Resolution of the European Parliament of 10 March 2009 [P6_TA(2009)0086]; Resolution of the European Parliament of 2 February 2012 [P7_TA(2012)0019].

[63] See Commission of the European Community, Impact assessment on the Directive on the cross-border transfer of registered office, Brussels, 12.12.2007 SEC(2007) 1707. See GJ Vossestein, 'Transfer of the registered office: The European Commission's decision not to submit a proposal for a Directive' (2008) 4 *Utrecht Law Review* 53.

[64] See http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf

[65] Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies (Text with EEA relevance) Strasbourg, 12.12.2012 COM(2012) 740 final.

fice) were still unclear and that the Court of Justice's decisions rendered in the cases *Cartesio* and *VALE* were not sufficient to clarify all regulatory issues.[66] Finally, we should mention that the Commission' Work Programme 2017 does not mention initiatives for cross-border transfer of registered offices or reincorporations[67] and the plan put forward by the Estonian Presidency is still uncertain as to whether initiative in this field are necessary or not[68]; at the same time, a new consultation was just launched, which includes conflict-of-law rules for companies and cross-border 'conversions'.[69]

4. Voluntary outbound reincorporations in the EU

4.1. Policy and legal issues

Whether a company can reincorporate in another (EU) jurisdiction will depend, first, on the company law of the current State of incorporation. In particular, the question will turn on whether the State of origin permits, as a matter of practice, a process whereby a domestic company is struck from its register and thus loses its status under that law without going through a formal liquidation procedure. Even where this is the case, the practical possibility for companies to reincorporate abroad will also depend on the interoperability of the applicable substantive and procedural rules for such a reincorporation in both the country of origin and the destination country. Whether reincorporations are in fact possible can thus only be precisely answered for specific *pairs* of countries.

From a policy perspective, a Member State's desire to allow or prohibit outbound reincorporations will depend on a number of different factors. Perhaps most importantly, it will depend on the way in which a given jurisdiction views – and uses – company law rules: Member States that view company law primarily as way to facilitate structures that minimise agency problems arising between shareholders and directors will naturally see the continued applicability of their company law rules as less important than jurisdictions with a broader, especially social view of the tasks and aims of company law. In several Member States, company law rules, besides regulating companies' internal affairs, that is to say the agency problem arising between shareholders and directors and the relation among shareholders, also address agency problems arising between companies and their creditors. For instance, a widespread strategy for protecting creditors is based on rules on capital formation and capital maintenance, and minimum capital requirements in public (and possibly private) companies, yet the intensity of creditor protection varies from Member State to Member State.[70] Additionally, in several jurisdictions the level of creditor protection is higher in public companies than in private com-

[66] See European Commission (DG Market), Feedback statement, Summary of responses to the public consultation on Cross-border transfers if registered offices of companies, September 2013.

[67] Se: Commission Work Programme 2017 at https://ec.europa.eu/info/sites/info/files/cwp_2017_en.pdf

[68] See the programme for a '21st European Company Law and Corporate Governance Conference: Crossing Borders, Digitally' at http://www.just.ee/en/conferences-during-estonian-presidency

[69] See: https://ec.europa.eu/eusurvey/runner/CompanyLawPackageSurvey2017.

[70] See e.g. E Ferran, 'The place for creditor protection on the agenda for modernisation of company law in the European Union' (2006) 3 *European Company and Financial Law Review* 178 at 214-217.

panies.[71] Furthermore, certain Member States include in the *lex societatis* rules on debentures and the powers of debenture holders, while in most jurisdictions these issues are governed by the *lex contractus.*[72] Finally, it is worth noting that in some Member States employees have the right to appoint a certain number of directors or members of the supervisory board ('codetermination').[73]

In these circumstances, a reincorporation under the law of another jurisdiction could be seen as harming creditors or employees if the new jurisdiction is less protective than the country of origin,[74] unless that country regards these rules as overriding mandatory provisions also applicable to (pseudo-)foreign companies (to the extent that such outreach-application is compatible with the Treaty). The impact of reincorporations on creditors and other stakeholders also depends on the scope of company law in the country of origin. If rules protecting creditors and other stakeholders are included in the scope of company law, reincorporations might harm these stakeholders, if the country of arrival is not as 'protective' as the country of origin. By contrast, if the country of origin protects creditors and other stakeholders through 'non-company law' rules, such as insolvency law or tort law, a reincorporation is likely to be less harmful to pre-existing stakeholders, who can continue to rely on the application of insolvency or tort law of the country of origin (unless all relevant connecting factors, including a company's COMI, are moved together with the registered office).[75]

Regarding creditor protection, things are further complicated by the significant differences between the regulation of private and public companies that exist in several countries. Rules on creditor protection of public companies are partially harmonised at EU level, while virtually no such harmonisation has taken place in relation to private companies.[76] Furthermore, in recent years a trend has emerged throughout the European Union to reduce or abolish minimum capital requirements, at least as far as private limited companies are concerned.[77] Consequently, in some Member States significant differences have emerged in the level of protection afforded to creditors of private and public companies, respectively. The effects of a reincorporation may thus depend not only on each country's regime, but also on national company types involved. Moreover, powers of minority shareholders and strategies aimed at

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[71] See L Enriques and M Gelter, 'Regulatory competition in European company law and creditor protection' (2006) 7 *European Business Organization Law Review* 417.

[72] According to the country reports accompanying the Study on the Law Applicable to Companies, in most Member States, the validity, content and underlying rights of bonds fall within the scope of the Rome I Regulation; in some jurisdictions, however (Bulgaria, Italy and Portugal), bonds issued by domestic companies are, at least in part, governed by domestic rules.

[73] A comprehensive overview of jurisdictions adopting fors of workers' participation at board level is to be found at www.worker-participation.eu/About-WP/European-Participation-Index-EPI.

[74] This is the case for example when the law of country of arrival does not provide for codetermination mechanisms or when capital maintenance rules are weaker than those of the country of origin.

[75] Lombardo, 'Regulatory competition' (n 37) 647; FM Mucciarelli, 'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU' (2012) 20 *Tulane Journal of International and Comparative Law* 421 at 458-461.

[76] Directive 77/91/EEC of the Council (Second Company Law Directive).

[77] See GH Roth and P Kindler, *The Spirit of Corporate Law – Core Principles of Corporate Law in Continental Europe* (C.H. Beck: 2013) 60.

protecting them vary from Member State to Member State.[78] Where the law of the country of arrival is less protective of minority shareholders than the country of origin, a cross-border reincorporation could therefore also harm this group of stakeholders.

These are the main policy reasons why in several Member States reincorporations are restricted or not allowed by national law. In particular, a complete ban of outbound reincorporations, although it is unlikely to be compatible with the Treaty, would be an effective strategy to protect the acquired interests and expectations of pre-existing creditors or other stakeholders, who rely on the application of company law rules of the country of incorporation. Alternatively, when reincorporations are allowed, the State of incorporation may provide for specific legal mechanisms and procedural safeguards to protect minority shareholders, creditors and other stakeholders, such as: (a) supermajority requirements for the approval of these decisions; (b) further safeguards aimed at protecting dissenting minority shareholders, such as the right to withdraw from the company; (c) special safeguards aimed at protecting creditors, such as the right to object to the reincorporation or to request a guarantee.[79]

Finally, it is important to also assess the procedural and technical aspects of reincorporations in the State of origin. Such technicalities and procedures have significant practical and theoretical implications. Companies typically do not exist unless registered in an official commercial or company register. Companies, in other words, cannot exist independently from a jurisdiction of incorporation and, consequently, reincorporations require continuity of registrations across jurisdictions. Once a company – in accordance with the private international law rules of both jurisdictions involved – starts being governed by the law of the new jurisdiction, its articles of association need to comply with the provisions of that jurisdiction.[80] Furthermore, it is the State of origin that governs the point in time when the domestic commercial register strikes off that company. In this context, the question arises of whether the 'emigrating company' should be cancelled only after it has been registered in the companies register of the destination country as a domestically incorporated company. If a company was cancelled from the company register of the State of origin before being registered in the State of arrival, there would be a period of time during which that company would not be registered anywhere, and thus not exist. All these issues, as we shall see in the subsequent comparative analysis, are still uncertain in most Member States of the EU.

4.2. Comparative analysis

Despite the most recent decisions of the Court of Justice, Member States still follow a variety of strategies with regard to cross-border reincorporations of domestic companies, ranging from complete prohibition to explicit and detailed regulations of these transactions. In this respect, we have classified Member States in three groups, considering the 'law in action', not

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[78] See PH Conac, L Enriques and M Gelter, 'Constraining dominant shareholders' self dealing' (2007) 4 *European Company and Financial Law Review* 490.

[79] For details see the subsequent section 4.2.

[80] See T Luchsinger, Die Niederlassungsfreiheit der Kapitalgesellschaften in der EG, den USA und der Schweiz (Universitätverlag Freiburg, 1992) 21.

just the ‘law on the books’. This classification is based on whether, and to what extent, reincorporations are accepted and feasible in a given legal system. In jurisdictions where reincorporations are not regulated, this analysis also sheds a light on how legal scholars and courts react to the developments of EU law and adapt the interpretation of domestic law accordingly. The first category of countries includes jurisdictions that explicitly allow domestic companies to change the applicable company law without liquidation and that regulate, either partially or comprehensively, this operation. The second class of countries comprehends jurisdictions from which outbound reincorporations are, as a matter of fact, impossible or not allowed despite the most recent decisions of the Court of Justice. The last group includes jurisdictions that do not regulate reincorporations, but where scholars and courts are increasingly of the opinion that domestic companies should have the possibility to reincorporate abroad despite the lack of rules.

(a) Jurisdictions that explicitly allow voluntary outbound reincorporations

One group of jurisdictions, namely Belgium, France, Greece, Luxembourg and Portugal, statutorily allow domestic companies to ‘reincorporate’ abroad, or to change their ‘nationality’, although domestic legislation does not fully regulate the procedural details of this transaction. Interestingly, all of these countries retain certain elements of the ‘real seat theory’, and the applicability of these elements to EU-incorporated companies is often not entirely clear. The consequence of relying on the real seat as relevant connecting factor for reincorporations within the EU would be that companies should transfer both their administrative seat and their statutory seat in order to reincorporate abroad. All of the above regimes except Belgium regulate the internal decision procedure and the mechanisms for protecting shareholders, while no special creditor protection rules are foreseen. According to the Portuguese Companies Act, the general meeting of shareholders has to approve the transfer of the real seat abroad with a supermajority of 75% of the share capital and dissenting or absent shareholders can withdraw from the company; however, there is no provision to protect creditors.[81] French[82] companies, by contrast, can change their ‘nationality’ (that is to say, they can reincorporate in another jurisdiction without liquidation) only by unanimous decision, which makes these transactions almost impossible in the case of widely held companies. This was also the case for Luxembourgish companies until a recent amendment of the general company law.[83] Greek public limited companies can reincorporate abroad by deciding with qualified majority;[84] additionally, dissenting shareholders are protected through the right of withdrawal from the company.[85] In Greek private companies, on the other hand, a unanimous de-

[81] *Código das Sociedades Comerciais* (Commercial Companies Act) Decree-Law No. 76-A/2006, as amended, article 3 (5).

[82] For French private companies see *Code de Commerce* article L 223-30, while for French public companies see *Code de Commerce* article L 225-97 (unless abilateral treaty exists with the country of destination);

[83] See Luxembourg Commercial Companies Act 1915: article 119 for private companies and article 67-1 for public companies, as amended by the act n. 167/2016, 10.08.2016, article 45 and article 98 (in public companies the required majority is 2/3 of the votes cast, while in private companies the majority os ¾ of the votes cast).

[84] Act 2190/1920, articles 29-31.

[85] Act 2190/1920, article 49(a).

cision is required.[86] Despite statutory rules in these jurisdictions explicitly allowing domestic companies to change the *lex societatis* without liquidation, the procedure to implement outbound reincorporations is not regulated or only partially regulated. Therefore, the risk arises that companies are cancelled from the register of the jurisdiction of origin before they are registered in the commercial register of the new jurisdiction. Finally, as we have mentioned above, the Belgian regime allows domestic companies to re-incorporate abroad,[87] but the procedure for the implementation of this decision is not regulated at all.

Other jurisdictions clearly regulate reincorporations through detailed rules on the internal decision-making process and the registration procedures. These countries are: Cyprus, the Czech Republic, Denmark, Malta and Spain. These jurisdictions show how legislation on cross-border reincorporations can be drafted in order to take into account the interests of all stakeholders and to address all procedural issues. In all of these countries, reincorporations require a supermajority decision of the shareholders to transfer the registered office or statutory seat abroad. One reason for an explicit legal instrument regulating reincorporations is the need to protect minority shareholders from risks related to a change of the *lex societatis*. As we have already seen, the most common strategies to protect minorities are supermajority or high quorum requirements and withdrawal rights of dissenting shareholders. In all Member States with comprehensive legislation on reincorporations,[88] the decision to reincorporate has to be taken by the general meeting of shareholders by supermajority.[89]

Some of the Member States with a comprehensive regulation of cross-border reincorporations grant a right to withdraw from the company to dissenting shareholders.[90] In this respect, it is worth noting that a withdrawal right is also granted to dissenting shareholders by the legislation of some of the Member States that allow reincorporations without comprehensively regulating this operation (Greece for public companies and Portugal) and by the Italian re-

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[86] Act 3190/1955, article 38(3)(a).

[87] Article 112 Belgian Private international law act (Loi portant le Code de droit international privé, 16 July 2004).

[88] Curiously, Czech companies can decide to transfer their statutory seat abroad without triggering a change of company law; these companies are cancelled from the Czech company register, despite their keeping the Czech *lex societatis*, with the consequence that such a transfer is only feasible if the country of arrival accepts that a domestically registered company is governed by a foreign law: Act 125/2008 (Transformation Act).

[89] Cyprus: ¾ of attending shareholders (Companies Act article 354L, as amended by the act 24(I)/2006, and article 135); Czech Republic: this decision should be approved by 3/4 of attending shareholders (Sections 17 and 21 Transformations Act). Denmark: 2/3 of attending shareholders (Companies Act, s. 106). Malta: unless more stringent requirements are provided in the articles of association (a) for public companies 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51% per cent in nominal value of all the shares entitled to vote at the meeting; (b) for private companies 51% in the nominal value of the shares conferring that right (Subsidiary Legislation 386.05, Continuation of Companies Regulation 26th November, 2002, at 13 and Companies Act 1996, art. 135). Spain: (a) for private companies the majority required is 2/3 of their capital; (b) for Public companies the majority depends on the number of shareholders attending the meeting (½ of voting shares if 50% or more of voting capital attended the meeting, or 2/3 of voting shares if between 25% and 50% of shares with voting capital attended the meeting (*Ley 3/2009, sobre modificaciones estructurales de las sociedades mercantiles*, No 3/2009, hereinafter ‘Structural Modification of Companies Act’, art. 97).

[90] Denmark: companies act 2009, as amended, s. 16a; Spain: Structural Modification of Companies Act, art. 99.

gime, which we will analyse in the third group of countries. By contrast, other jurisdictions that allow reincorporations (Greece for private companies, France and Luxembourg) require that this decision is to be taken unanimously, which can be considered as a functional equivalent of shareholders' withdrawal right.

Most of the regimes that comprehensively regulate reincorporations explicitly govern the procedure for cancelling a domestic company from the local register, thus avoiding that the company is cancelled before it is registered in the new jurisdiction. Finally, Member States having detailed regulations on cross-border conversions in place also provide for adequate creditor protection mechanisms, mostly based on a right of creditors whose claims occurred before the initial plan to reincorporate was made public to object to the reincorporation[91] or request a security.[92] The Danish regime is based on the creditors' right to file their claim or require a security, unless an independent expert officially declares that creditors are sufficiently protected.[93] Interestingly, the Cyprus and Maltese regimes require that the directors of emigrating companies issue a solvency statement in which they declare that 'they are not aware of any circumstances that could negatively influence the solvency of the company within a period of three years.'[94]

(b) Jurisdictions in which voluntary outbound reincorporations are either not allowed or are practically impossible

If we look at national regimes as they operate in practice, we can see that, despite the most recent decisions of the Court of Justice in *Cartesio* and *VALE*, several jurisdictions still prohibit or make impossible outbound reincorporations. These countries are: Croatia, Hungary, Ireland, Lithuania, Poland, Romania and the United Kingdom. As a matter of fact, companies incorporated in these countries cannot relocate their statutory seat or registered office abroad and cannot reincorporate under the law of a different Member State without prior liquidation.

It is worth considering the position of the UK,[95] which is to be contrasted with other common law jurisdictions, such as Cyprus and Malta. The leading case is *Gasque v Inland Revenue Commissioners*, where Macnaughten J stated clearly that companies cannot have a domicile of choice, by stressing that '*[t]he domicile of origin, or the domicile of birth, using with re-*

[91] Cyprus: Companies Act article 354M; Malta: Continuation of Companies Regulation at 15(2); Spain: Structural Modification of Companies Act, art. 100.

[92] Czech Republic: Transformation Act, s. 35 and s. 59u.

[93] Danish Companies Act, Chapter 16a.

[94] For Cyprus see The Companies Law Cap. 113, s 354K. The language used by the Maltese Companies Act (art. 13(b)(i)) is almost identical: 'a declaration […] confirming the solvency of the company and confirming that the directors are not aware of any circumstances which could negatively affect in a material manner the solvency position of the company within a period of twelve months'.

[95] This paper has been drafted without considering the effects of the referendum on the withdrawal of the United Kingdom from the European Union, which was held on 23 June 2016 and in which the majority of voters decided to leave the EU. At present, the outcome of negotiations between the UK government and the governments of the other 27 Member States is still unpredictable. At this stage, it cannot be excluded that the UK will completely retreat from the single market, in which case the freedom of establishment would no longer be applicable to their companies and to EU-based companies that aim at moving into the UK.

spect to a company a familiar metaphor, clings to it throughout its existence'.[96] Therefore, even when an English company decides to reincorporate in another jurisdiction, it cannot simply be struck off the register for this reason and, if the country of arrival accepts its registration according to domestic law, under the viewpoint of English law a new company exists, which is entirely separate from the original English entity.[97] Additionally, even if courts were to accept the position that, in the aftermath of *Cartesio*, English law cannot unilaterally prohibit domestic companies from converting into entities governed by the law of another Member State,[98] it would remain uncertain how reincorporations would be implemented in practice.

In Ireland, whose approach regarding the *lex societatis* is identical to the approach adopted in England and Wales,[99] the impact of the *Cartesio* ruling has been debated in light of possible amendments to Irish company law. In particular, the government entrusted a group of experts, the Company Law Review Group, with assessing the impact of ECJ case law on Irish regime prohibiting reincorporations.[100] The Company Law Review Group maintained that the *Cartesio* decision is binding regarding voluntary outbound reincorporations, so that barriers against this decision posed by the country of origin violate freedom of establishment under the Treaty unless they serve overriding requirements in the public interest. Therefore, the Company Law Review Group recommended to introduce provisions that allow cross-border conversion in the new companies act. However, such changes were not implemented when the new statute was eventually adopted in 2014.

The Polish regime is also interesting. On the one hand, art. 19(1) of the Polish Private International Law Act maintains that transfers of seat within the EEA do not result in the loss of legal personality; on the other hand, a shareholders' resolution on relocation of the statutory seat is treated akin to a liquidation decision (arts. 270(2) and 459(2) Commercial Company Act). As a consequence, Polish companies that seek to reincorporate abroad must pay all their debts and liquidate all assets and the entire business, but this does not lead to a loss of their legal personality, which continues after their re-registration in the country of arrival. It goes without saying that this is akin to making reincorporations impossible in practice.[101]

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[96] Ga*sque v Inland revenue commissioners* [1940] 2 KB 80 at 84. See also National Trust Company v. Ebro Irrigation & Power Ltd. [1954] DLR 326; International Credit and Investment Co v. Adham [1994] 1 BCLC 66.

[97] *Re Irrigation Company of France Ltd* (1871) LR 6 Ch App 176; A Farnsworth, *The residence and domicile of corporations* (Butterworth: 1939) 222; PS Smart, 'Corporate Domicile and Multiple Incorporation in English Private International Law' (1990) *Journal of Business Law* 126; *Dicey, Morris and Collins on the Conflict of Law* (Sweet and Maxwell: 2012) at para. 30-003. This policy choice was renewed recently, when the company law reform of 2006 did not implement the proposal made by the Company law steering group to allow identity preserving company law changes. See *Company law steering group, completing the structure*, 2000, URN 00/1335, 11, 54 and *Final Report*, 2001, chapter 14

[98] See E Ferran, 'Corporate Mobility and Company Law' (2016) 79 *Modern Law Review* 813 at 830.

[99] See *Kutchera v Buckingham International Holdings Ltd* [1988] 1 IR 61, 68

[100] CLRG Sixth Report 2010-2011, par. 6.2.1. available at www.clrg.org/publications/clrg-sixth-report-2010-2011.pdf

[101] As we shall see in the final section of this paper, the compatibility of the Polish regime with the Treaty will be addressed by the Court of Justice when it will decide on the case C-106/16, *Polbud v Wykonawstwo sp. z.o.o.*, which concerns a Polish company seeking to reincorporate in another Member State.

With regard to the Hungarian regime, it is interesting to note that Hungarian companies still cannot, as a practical matter, reincorporate abroad, with little discussion of the direct applicability of the Court of Justice's interpretation of the Treaty in *Cartesio*. Regarding Romania, in 2014 a decision of the Court of Appeal of Brasov rejected a request for reincorporation to the UK on the basis of two arguments: first, that case law of the Court of Justice (*Cartesio* in particular) did not provide any clear guideline regarding the procedure for reincorporations and no specific rules had been adopted in Romania; second, that the specific company that sought to reincorporate in the UK did not provide evidence that all formalities had actually been fulfilled in the country of arrival.[102]

(c) Jurisdictions that do not explicitly regulate voluntary outbound reincorporations

In several Member States, neither statutory law, nor judge-made law address outbound reincorporations. In most of these jurisdictions (Bulgaria, Estonia, Finland, Latvia, Slovenia and Sweden) it is still not clear whether domestically incorporated companies can actually reincorporate abroad by way of a transfer of statutory seat, but in some of them an increasing awareness of the impact of EU law on freedom of reincorporation is emerging.[103] Among legal systems without an explicit regulation, we should analyse two groups of countries in which this issue has been largely debated, although with partially diverging solutions: on the one hand, Austria, Germany and the Netherland, and, on the other hand, Italy.

In the former group of jurisdictions, outbound reincorporations by way of transfer of a company's statutory seat abroad were traditionally prohibited. In Germany, for instance, which until *Centros* represented the most significant case of a consistent application of the 'real seat' theory, a decision to transfer the statutory seat of domestic companies abroad would be seen as void,[104] while older case law even interpreted it as a decision to liquidate the company.[105] Nevertheless, Austrian, German and Dutch commentators accept, in light of the decisions *Cartesio* and *VALE* of the Court of Justice, that voluntary outbound reincorporations into other EU Member States must be allowed as a matter of EU law, although a considerable degree of uncertainty exists regarding their procedural requirements, as well as creditor and

[102] Court of Appeal Brasov, No. 910/2014, 6528/62/2013, at: http://legeaz.net/spete-drept-comercial-curtea-de-apel-brasov-2014/plangere-impotriva-rezolutiei-directorului-orc-23-09-2014-g90 .

[103] It is worth mentioning the position of Estonia, where reincorporations are not regulated at all and it still unclear whether this transaction is feasible; as a matter of fact, however, Estonian companies are cancelled from the local register when they relocate their registered office abroad. In Slovenia, additionally, despite the absence of statutory rules in this respect, some academic scholars submit that such transactions should be made possible as a consequence of the *Cartesio* and *VALE* rulings; see Prostor, 'Razdružitev statutarnega in dejanskega sedeža slovenske družbe' (2014*) Pravnik* 1-2.

[104] See L Fastrich, in Baumbach & Hueck's GmbHG (Munich: Beck 20th ed., 2013) s 4a, 9; ibid. See e.g. BayObLG 11 February 2004, in AG, 2004, 266; OLG München 4 October 2007, in ZIP, 2007, 2124.

[105] See B Grossfeld, *Internationales Gesellschaftrecht,* in *Staudinger's Kommentar BGB* (DeGruyter: 1998) 605; M-P Weller, 'Zur identitätswahrender Wegzug deutscher Gesellschaften' (2004) *Deutsches Steuerrecht* 1218; L Fastrich, in Baumbach & Hueck's GmbHG (Munich: Beck 20th ed., 2013) s 4a, 9; a complete analysis of case law can be read in A Frank, *Formwechsel im Binnenmarkt* (Tübingen: Mohr Siebeck, 2016) 40 (with further references). See among others BGH, 21 March 1986, BGHZ 97, 334 and BayObLG 7 May 1992, BayOBLGZ, 1992, 113.

employee protection.[106] In Austria and in the Netherland, the idea that domestically incorporated companies can voluntarily reincorporate abroad without liquidation in spite of the lack of statutory regulation does not seem to have been tested in court. A German court, by contrast, has recently maintained that cross-border outbound reincorporations from Germany have to be allowed despite the lack of any regulations, in the wake of the Vale decision of the European Court of Justice.[107] Regarding Germany, it is worth remembering that, before the *Cartesio* and *VALE* decisions, legal practitioners had developed another procedure for the transfer of the seat of a German company abroad: the German company converts into a partnership – a GmbH & Co KG with a newly formed foreign corporation as one of the partners – followed by a withdrawal of all German partners from the partnership with the result that all assets of the partnership accrue to the foreign shareholder.[108] However, it does not seem to be the case that this happens frequently in practice, presumably, due to the complex tax implications of such a conversion of a company to a partnership.[109] In the Netherlands, on the other hand, although companies seem to prefer entering into cross-border mergers, reincorporations abroad are not infrequent and practitioners have developed a standardised procedure based upon the application, by way of analogy, of the rules on cross-border mergers and domestic conversions.[110] Furthermore, a draft bill is being discussed by the Dutch Parliament and is likely to be approved soon.[111]

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[106] For Austria see e.g. N Adensamer and G Eckert, 'Umzug von Gesellschaften in Europa, insbesondere Wegzug österreichischer Gesellschaften ins Ausland' (2004) Gesellschaftsrecht 52; G Eckert, *Internationales Gesellschaftsrecht* (Vienna: Manz 2010) 564. For Germany, see e.g. W Bayer and J Schmidt, 'Grenzüberschreitende Sitzverlegung und grenzberschreitende Restrukturierungen nach MoMiG, Cartesio und Trabrennbahn' (2009) 173 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 735; J Hushahn, 'Grenzüberschreitende Formwechsel im EU/EWR-Raum – die identitätswahrende statutenwechselnde Verlegung des Satzungssitzes in der notariellen Praxis' (2014) *Rheinische Notar-Zeitschrift* 137 at 142-9; G Janisch, *Die grenzüberschreitende Sitzverlegung von Kapitalgesellschaften in der Europäischen Union* (Baden-Baden: Nomos, 2015) 293; Frank (n 105) 174 – 257 (suggesting application of most rules on national conversions by way of analogy, provided that companies also relocate a genuine link to the host state). For the Netherlands see M Zilinsky, 'Cartesio: zetelverplaatsing en de vrijheid van vestiging' (2009) *WPNR* 6787, 153-4; A Stroeve, 'Het VALE-arrest en de 'inbound' grensoverschrijdende omzetting in Nederland' (2013) *Tijdschrift voor de Ondernemingsrechtspraktijk* 72.

[107] OLG Frankfurt a.M., 03.01.2017 - 20 W 88/15 (conversion of a German *GmBH* into an Italian *srl*). See C Teichmann 'Grenzüberschreitender Formwechsel kraft vorauseilender Eintragung in Aufmahmestaat? (2017) *ZIP*, forthcoming (criticizing both the registration of the company in the Italian register, without all pre-requisites, and the acceptance of such registration by the German court). Another case of reincorporation (from Germany to Austria) is reported by K Jennewein, 'Grenzüberschreitende Sitzverlegung einer deutschen GmBH nach Österreich' *Der Gesellschafter* (2016) 277.

[108] R Ege and S Klett, 'Praxisfragen der grenzüberschreitenden Mobilität von Gesellschaften' (2012) *Deutsches Steuerrecht* 2442 at 2446; C Teichmann, 'Die Auslandsgesellschaft & Co.' (2014) 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 220 at 223; Frank (n 105) 58. See *Hans Brochier Holding Ltd v. Exner* [2006] EWHC 2594.

[109] Based on *Umwandlungssteuergesetz* (UmwStG), s 14.

[110] The procedure is regularly applied and the intention for conversion is disclosed in the Staatscourant; see https://zoek.officielebekendmakingen.nl/zoeken/staatscourant.

[111] Draft bill 12 January 2012, available at www.rijksoverheid.nl/documenten/kamerstukken/2012/01/12/wetsvoorstel-grensoverschrijdende-omzetting-van-kapitaalvennootschappen.

Finally, Italian law represents a fairly distinct position. Italian companies are explicitly allowed to transfer their 'statutory seat' (*sede legale*) abroad by way of a supermajority decision of the general meeting amending the articles of association,[112] and dissenting or absent shareholders have the right to withdraw from their company.[113] Furthermore, the Italian Private International Law Act stipulates that any transfer of the statutory seat is effective only if both conflict and substantive rules of all States involved are respected.[114] Therefore, the Italian regime seems to be more in line with countries that allow reincorporations without clarifying, or without fully clarifying, the details of this procedure, such as France or Belgium (which we have classified under the second group of countries). According to Italian private international law regime, however, companies are governed by the law of the State in which the formation procedure was fulfilled.[115] Consequently, several judicial decisions and local offices of the commercial register maintain that Italian companies cannot change their *lex societatis* and that a transfer abroad of a company's statutory seat is only effective if it does not trigger a change of applicable company regime.[116] The practical application of these rules, however, is not univocal and other local offices of the commercial register simply strike off domestically incorporated companies after a decision to relocate their statutory seat, without inquiring whether the company has actually been re-registered in the commercial register of the country of arrival.[117] It is worth mentioning, however, that an increasing number of scholars,[118] judicial decisions[119] and local offices of the company's registrar[120] maintain that,

[112] Public companies (*societa' per azioni*): at first call, quorum and majority are ½ of the legal capital; at second call, the quorum is 1/3 of the legal capital, while the majorityis 2/3 of represented capital; at third call, the quorum is 1/5 of the legal capital and the majority is 2/3 of represented capital; however, in 'closed' public companies (ie, not listed nor widely held), the majority of votes in favour to the reincorporation should also correspond to at least 1/3 of the whole capital (*Codice civile*, article 2369). Private companies (*società a responsabilità limitata*): quorum and majorities ½ of the legal capital (*Codice civile* art. 2379-bis(3))

[113] *Codice civile*, article 2347, for public companies, and article 2473 for private companies. See M Ventoruzzo, 'Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law' (2007) 6 *European Company and Financial Law Review* 47.

[114] Act No. 218/1995, Italian Private International Law Act, article 25(3)

[115] Act No. 218/1995, Italian Private International Law Act, article 25(1).

[116] See Corte d'Appello Trieste 9.10.1999, (2000) 54 *Rivista del notariato* 167; Corte di Cassazione 23.1.2004, n. 1244 (on which see F Mucciarelli, 'The Transfer of Registered Office and Forum Shopping in International Insolvency Cases: an Important Decision from Italy' (2005) 4 *European Company and Financial Law Review* 512). Among legal scholars see D Damascelli, *I conflitti di legge in materia societaria* (Bari: Cacucci 2004) 131. This is probably one of the reasons why Fiat Chrisler Automotive reincorporated as a Dutch entity by way of a cross-border merger. See F Pernazza, 'La mobilità delle società in Europa, da *Daily Mail* a *Fiat Chrysler Automotive*' (2015) 29 *Diritto del commercio internazionale* 439.

[117] This risk is not trivial, as the cases *Interedil* and *VALE,* both related to the 'emigration' of Italian companies, clearly show. The Interedil case will be addressed thoroughly in section 6.1.

[118] T Ballarino, *Diritto internazionale privato* (Padova: Cedam 3d ed. 1999) 360; MV Benedettelli 'Sul trasferimento della sede sociale all'estero' (2010) 55 *Rivista delle società* 1264; FM Mucciarelli, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi* (Milan: Giuffrè 2010) 174-8.

[119] Tribunale Monza 5.4.2002, (2003) 30 Giurisprudenza commerciale, II/558; Tribunale Torino 10.1.2007, (2007) 159 Giurisprudenza Italiana, 1679.

[120] The most significant example is the Milan branch of the Commercial Register: www.mi.camcom.it/web/guest/trasferimenti-di-sede-all-estero-e-dall-estero. Interestingly, this commercial register accepts that local companies relocate their statutory seat to another EU Member State and decide to

in the wake of *Cartesio* and *Vale*, Italian companies should be allowed to change the applicable law without liquidation, by transferring their statutory seat abroad, provided that the country of arrival accepts this change and that its rules are respected. The situation is, therefore, still uncertain, but scholars and practitioners seem to be increasingly aware of the impact on domestic law of most recent decisions of the Court of Justice.

5. VOLUNTARY INBOUND REINCORPORATIONS IN THE EU

5.1. Policy and legal issues

Cross-border reincorporations should also be analysed from the viewpoint of the country whose law the company seeks to adopt. The legal and policy issues that arise from that Member State's perspective often mirror those addressed by the State of original incorporation. Thus, most Member States that allow outbound reincorporations also allow the inbound conversion of foreign companies into domestic ones. A few exceptions do however exist.

The preliminary question is whether private international law and substantive rules of the country of arrival allow foreign companies to convert into domestic companies without liquidating in the State of origin and by ensuring continuity of their legal personality. One approach is, of course, simply to prohibit inbound reincorporations. In this case, when a foreign company decides to transfer its statutory seat or registered office and re-register in the domestic company register as a local company, this decision would – at most – be regarded as the decision to register a new company, which is neither the 'same legal person' as the original company, nor its legal successor.[121] Therefore, from the standpoint of the incoming country, no debts and credits, and no contracts – including employment contracts – of the former company are transferred to the newly registered company. Furthermore, shareholders would need to make contributions to the company's capital according to domestic substantive company law. Alternatively, the commercial registers of Member States that do not accept 'inbound reincorporations' may simply register a domestic branch or an establishment of a foreign company, even though that company sought to re-register under the new law. In both cases, if the emigrating company was cancelled from the register of the original State of incorporation, while the State of arrival did not accept inbound reincorporations, the company would 'disappear' from any company register in the EU without being officially liquidated, as already mentioned above. From a EU law standpoint, however, a complete prohibition of inbound reincorporations violates freedom of establishment as interpreted by the Court of Justice in the *VALE* ruling.

The State of origin, where the company is incorporated at the moment when the decision is taken, is also normally competent to determine the relevant substantive and procedural requirements (such as majorities for approving the reincorporation decision). Nevertheless, we cannot exclude that the State of arrival also seeks to regulate substantive law issues. In any

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keep the Italian *lex societatis*; these companies, therefore, continue to be registered in the Milan office of the register, which 'fictively' considers the original 'statutory seat' as the actual seat for registration purposes.

[121] See PS Smart (n 97) 126.

case, the State of arrival is certainly competent to regulate the registration procedure. In other words, the question arises of which procedural steps immigrating companies should follow to register in the company register as the continuation of an already existing company instead of a newly founded one.

5.2. Comparative analysis

Our findings indicate that, in practice, Member States still follow different solutions regarding inbound reincorporations, despite the decisions of the Court of Justice in *VALE*. In most cases, rules on inbound reincorporations reflect those on outbound transactions, but we shall see that exceptions exist. Member States can be classified along the same dimensions that were adopted for outbound reincorporations, according to whether (a) inbound conversions are statutorily allowed and regulated, (b) inbound conversions are not allowed or practically impossible, or (c) inbound reincorporations are not explicitly regulated, the consequences of the lack of regulation are still unclear, yet scholars and court are increasingly of the opinion that companies incorporated in another EEA country should be allowed to reincorporate as domestic companies, despite the lack of rules. The classification of Member States in these classes largely, although not entirely, mirrors the classification related to voluntary outbound reincorporations

(a) Jurisdictions that allow and regulate inbound reincorporations

While some countries allow inbound reincorporations without regulating the procedural and substantive rules of this transaction (Belgium and Portugal), other jurisdictions have explicitly allowed and regulated inbound reincorporations in the same legislative instrument that governs outbound reincorporations (Cyprus, Czech Republic, Denmark, Malta and Spain). In particular, inbound reincorporations are feasible only if the country of origin allows domestic companies to reincorporate abroad and if the immigrating company has complied with both substantive requirements and private international law provisions of that country. Therefore, commercial registers will enter an incoming company only if it has complied with the relevant laws of both the country of origin and the country of arrival. In some jurisdictions, a notary statement (Czech Republic) [122], a statement of the competent authority (Denmark)[123] or a specific declaration of the immigrating companies (Cyprus)[124] must be attached to the filing with the local register attesting that the relocation complies with the law of the country of origin. Additionally, under Spanish legislation, in order to protect creditors of the incoming company, an independent expert should state that the net value of assets is at least equal to

[122] The notary attests to the satisfaction of the requirements of Czech law for registration in the commercial register and to having seen the instrument issued by the competent authority of the country of origin, proving compliance with the requirements of that law for the cross-border conversion of the legal form. See Czech Transformation Act, s. 59z and s. 384d

[123] Danish Companies Act s. 318n.

[124] The Companies Law Cap. 113, art. 354C.

the Spanish minimum capital requirements (this provision is applicable to both EEA and non-EEA countries).[125]

Another issue that needs to be addressed in proceedings for inbound reincorporations is the cancellation from the commercial register of the country of origin. As we have seen above regarding outbound reincorporations[126], according to both the SE Regulation and the Cross-Border Merger Regulation, the 'emigrating' company can be cancelled from the original register only after its registration in the country of arrival. After registration and before cancellation, therefore, the company is registered in two registers at the same time. From the viewpoint of the state of arrival, the question arises as to whether a domestic authority should send a statement of registration to the commercial register of the country of departure and whether it should check that the company is cancelled from the register of the original country. Cypriot, Maltese and Danish regimes deal with these issues. In Cyprus and Malta, an 'immigrating company' is registered only temporarily, and is required to submit evidence of its removal from the companies register of origin within 6 months; only after this submission can the (final) certificate of continuation be issued.[127] In Denmark, the local register (DBA) should send a statement to the authority of the State of origin, attesting that the company was registered as a Danish company.[128]

(b) Jurisdictions in which inbound reincorporations are either not allowed or are practically impossible

Other Member States have not adopted legislation on inbound reincorporations and, as a matter of practice, inbound reincorporations remain either impossible or excessively difficult (Bulgaria, Croatia, Estonia, Ireland, Latvia, Lithuania and the UK). These countries, additionally, do not distinguish EEA from non-EEA companies. This policy option normally mirrors the ban on 'outbound reincorporations' in the same country and is either based on general private international law criteria (Ireland and the UK) or lack of regulation (Bulgaria and Romania). For instance, Romanian legislation does not mention inbound reincorporations, and a court of appeal decision from 2008, concerning the attempt of an Italian company to reincorporate as a Romanian entity, held that these transactions were not allowed.[129] However, this issue is controversial and legal scholars argue that EEA companies should be allowed to reincorporate under Romanian law without liquidating and that domestic law should be reformed in order to comply with the VALE decision.[130] Given that these countries provide for the possibility of a domestic company to convert into another type of business organisation, the restrictive approach of the countries in this group is in breach of the freedom of estab-

[125] Structural Modification of Companies Act 3/2009, art. 94.
[126] See section 3.1, above.
[127] For Cyprus: The Companies Law Cap. 113, art. 354G. For Malta: Continuation of Companies Regulation 2002, s. 6.
[128] Danish Companies Act s. 318n.
[129] Court of Appeal Bucarest No 1060/2008.
[130] M Şandru, 'Libertatea de stabilire a societăţilor comerciale. Posibile efecte ale cauzei VALE, C-378/10, pendinte, asupra practicii instanţelor române' (2012) *Revista Rômana de Drept European* 124.

lishment, as interpreted in *VALE*, if it continues to be applied to foreign companies incorporated in the EEA.[131]

(c) Jurisdictions that do not explicitly regulate voluntary inbound reincorporations

In several other Member States where inbound reincorporations are not regulated, the interpretation of domestic law might be uncertain, ranging from countries that accept inbound reincorporations by applying case law of the Court of Justice to countries in which this issue is unclear or has not yet been addressed. In all of these countries, however, scholars and courts show, albeit to different degrees, an increasing awareness of the impact Court of Justice's decisions on inbound reincorporations.

In Austria and Germany, case law has recently started accepting that inbound reincorporations should be allowed despite the lack of legislation. In Austria, the Supreme Court has recently clarified that inbound reincorporations from other Member States are possible and that rules on domestic conversions should be applied.[132] Additionally, in light of Austrian private international law, the 'immigrating' company must also relocate its headquarters onto the Austrian territory. In Germany, a recent judicial decision has maintained that inbound reincorporations are to be allowed and that rules on national conversions should be applied by way of analogy.[133] This approach followed by Austrian and German courts is largely driven by the decisions of the Court of Justice in *VALE,* but some uncertainty still remains regarding which procedure is to be followed for reincorporating a foreign company domestically. Finally, in Luxemburg and Slovenia, no judicial decision has been issued so far, but legal scholars argue that inbound reincorporations should be allowed as a consequence of *Cartesio* and *VALE*.[134]

The situation is more uncertain in other jurisdictions, although scholars often submit that inbound reincorporations are to be made possible by virtue of an application of *VALE*. In France, the lack of statutory regulation still raises uncertainty as to the procedure that foreign companies have to fulfil in order to re-incorporate as French entities. In Hungary, where 'outbound reincorporations' are still impossible, inbound reincorporations are considered feasible by applying the *ratio decidendi* of the *VALE* decision (which was related to a company that sought to reincorporate in Hungary).[135] In Italy, although it is accepted that foreign companies can relocate their 'statutory seat' onto the domestic territory, provided that both Italian substantive rules and the rules of the country of origin are respected,[136] it is uncertain wheth-

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[131] P Davies and S. Worthington, *Gower Principles of Modern Company Law* (Sweet and Maxwell, 10th ed. 2016) 142.

[132] See OGH, judgment of 1 August 2014, 6 Ob 224/13d.

[133] OLG Nürnberg (2014) *Deutsches Steuerrecht* 812: a Luxembourgish private company (*Sarl*) sought to transfer its statutory seat, together with its headquarters, to Germany in order to become a German private company (a *GmbH*). See Frank (n 105) with further references to previous cases deciding in the negative.

[134] For Luxembourg see A Steichen, *Précis de droit des sociétés* (Saint-Paul: 2014) 4th ed., n° 82. For Slovenia see J Prostor, 'Razdružitev statutarnega in dejanskega sedeža slovenske družbe' (2014) *Pravnik* 1-2.

[135] However, it is worth mentioning that the Hungarian Supreme Court, in its task of applying the *VALE* decision, refused registration of the Italian company as a Hungarian entity for lack of compliance with Hungarian law: EH 2013.02.G3.

[136] Italian Private International Law Act, Article 25(3).

er such a relocation leads to a change of company law.[137] In this respect, Italian notaries seem to accept inbound reincorporations, mostly so in the aftermath of the *VALE* decision, provided that the incoming company has respected Italian substantial and procedural rules.[138] Finally, the Polish regime is similar to the Hungarian regime, since legal scholars hold that inbound reincorporations should be made possible after the *VALE* decision, whereas, as we have seen above, legal scholars are divided regarding outbound reincorporations, which are likely not to be feasible and, in any event, require full liquidation of a company's assets. It is interesting to note, therefore, that both in Hungary and Poland the *VALE* decision is held directly applicable, whereas the position in relation to the statement in *Cartesio*, according to which outbound reincorporations must also be allowed, is far less clear, probably reflecting the uncertain binding force of this part of the *Cartesio* ruling.

6. Restrictions to reincorporations: discussion of the current state of affairs and a glimpse into the future

6.1. Discussion of the comparative analysis

As a consequence of the analysis conducted hitherto, the question arises of whether obstacles placed by national regimes to reincorporations are compatible with the EU freedom of establishment, as interpreted by the Court of Justice in the cases *Cartesio* and *VALE*. With regard to outbound voluntary reincorporations of domestic companies, the answer largely depends on whether the obiter dictum in *Cartesio*, according to which obstacles to outbound reincorporations are to be treated as restrictions to the freedom of establishment, is viewed as the correct interpretation of the Treaty. Our findings indicate that several Member States have not brought their domestic law in line with the interpretation of the Treaty in *Cartesio* and still prohibit voluntary outbound reincorporations. By contrast, as we have seen above,[139] in three countries (Austria, Germany and the Netherlands) that formerly prohibited outbound reincorporations, the prevailing view among legal scholars is that – even without explicit legislative reform – such transactions should now be regarded as being available to domestic companies by virtue of the relevant Treaty provisions as interpreted by the Court in *Cartesio*. Even so, many technical and procedural questions still remain unclear, as *Cartesio* does little more than declaring that outbound reincorporations constitute an exercise of the freedom of establishment.

With regard to 'inbound' voluntary reincorporations, by contrast, the *VALE* decision clarified that (a) the absence of rules laid down in secondary European Union law is not a precondition

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[137] See, e.g., R Luzzatto and C Azzolini, 'Società (nazionalità e legge regolatrice)' in *Digesto delle discipline privatistiche sezione commerciale* (Torino: UTET 1997), 136, 153; Damascelli (n 116) 135-136 (relocation in Italy is possible without change of company law); Ballarino (n 118) 372 (a relocation of statutory seat may lead to a reincorporation as an Italian company); Benedettelli, 'La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato' (1997) *Rivista delle società* 39 at 98-103 (stressing the necessity to check what companies aim at attaining and what is being allowed by the regime of the country of origin).

[138] See www.consiglionotarilemilano.it/documenti-comuni/prassi-registro-imprese/prassi_09.aspx.

[139] See section 4.2 (c), above.

for the application of the freedom of establishment,[140] (b) where equivalent domestic restructurings are permitted, more onerous rules for 'inbound' reincorporations require full justification, that is to say they should be appropriate for attaining overriding reasons in the public interest and must not go beyond what is necessary to attain them,[141] and (c) domestic rules of the host states should comply with the general principles of equivalence and effectiveness.[142] It is clear that Member States cannot completely prohibit inbound reincorporations or render them practically impossible. Nevertheless, as we have seen, several Member States still impede, or severely restrict, the possibility of foreign companies to convert into domestic entities.

Even where reincorporations are generally allowed, their practical availability crucially depends on the applicable procedural rules. In several Member States the procedure is regulated insufficiently or is not regulated at all. From a practical perspective, a particularly relevant question concerns the process by which the domestic register of the country of origin deregisters the emigrating company. In Member States where this issue is not regulated, there is a significant risk that a company is struck off the register of the country of origin without being registered yet in any other commercial register and having acquired its status under the law of the destination country. As registration is typically a prerequisite for a company possessing legal capacity, uncertainty regarding this process – which will require a certain level of cooperation between judicial or administrative authorities across Member State borders – poses a significant risk for businesses wishing to reincorporate. The decision rendered in the case *Interedil* is a telling example of this problem:[143] an Italian company decided to transfer its statutory seat to London and the local register cancelled the company without checking whether the company was registered in the English register as a domestic company. Interedil, however, was only registered by the UK's Companies House as an 'overseas' company having a 'place of business' in England, not least since inbound reincorporations are not currently possible under English law – notwithstanding the jurisprudence of the Court of Justice discussed above. As a consequence, after its cancellation from the Italian register, Interedil was not registered anywhere as a domestic company: the Italian register believed that this company had become a UK entity, while its record with the Companies House suggested it was still an entity existing under Italian company law. Interedil thus shared the fate of VALE Építési kft.

Some Member States (Cyprus, Czech Republic, Denmark, Malta and Spain), by contrast, have decided to explicitly allow reincorporations and to precisely regulate these transactions. In these countries, the proceedings and substantial requirements for reincorporating abroad are often similar to those foreseen in cross-border mergers. In particular, companies can be cancelled from the domestic register only after they prove being registered under a foreign commercial register.

[140] *VALE* (n 43) [38], quoting Sevic [26].
[141] *VALE* (n 43) [36] and [39], quoting Sevic [28, 29].
[142] *VALE* (n 43) [48].
[143] C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-9915. See FM Mucciarelli, 'The Hidden Voyage of a Dying Italian Company, from the Mediterranean Sea to Albion' (2012) 9 *European Company and Financial Law Review* 571.

6.2. A new submission for a preliminary ruling from a Polish court

This paper has shown that several Member States restrict or even prohibit cross-border reincorporations. This issue is much more relevant regarding voluntary outbound reincorporations of domestic companies, due to the need of protecting minority shareholders and creditors from the risk that the new company law rules are less protective of their interests. In this respect, the Court of Justice held in *Cartesio* that any restrictions on outbound reincorporations should be justified by overriding reasons in the public interest. However, as we have seen above, the scope of this holding is still partially unclear. The question of whether freedom of establishment includes a right to change the applicable company law without liquidation will be addressed by the Court of Justice when it will deliver its judgement on the request for a preliminary ruling submitted by the Polish Supreme Court (*Sąd Najwyższy*) in February 2016.[144] It is worth, therefore, briefly to summarise the content of the questions submitted to the Court of Justice and the related problems.

The starting point is a decision of a Polish company, Polbud, to relocate its statutory seat to Luxembourg and to convert into a Luxemburgish company, under the new name Consoil Geotechnik S.à.r.l.. The Polish Private International Law Act (art. 19(1)) stipulates that transfers of companies' 'seats' within the EEA area do not result in the loss of legal personality; the concept of 'seat' is commonly interpreted as a company's registered office or statutory seat. The Polish Commercial Company Act, however, treats a shareholder resolution on relocation of the statutory seat akin to a liquidation decision.[145] In other words, after a decision to relocate its seat abroad, a company would keep its legal personality, but its assets are to be liquidated and creditors are to be satisfied. As a consequence, Polbud, after its decision to transfer its statutory seat to Luxembourg, formally entered into a liquidation procedure, which was considered a precondition for a cross-border reincorporation.

Two years later, the company was entered in the Luxembourgish register under its new name and filed an application to be cancelled from the Polish register. The Polish registry court, however, refused to cancel Polbud, claiming that it did not provide sufficient evidence of having completed the liquidation process.[146] Polbud challenged this decision and the case eventually reached the Polish Supreme Court, which referred three preliminary questions to the Court of Justice. In the first place, the Court is asked to clarify whether the freedom of establishment precludes a Member State from requiring liquidation of a reincorporating company before it is removed from the relevant national register. Secondly, if the first question is answered in the negative, the Polish court asks whether such a liquidation requirement could be seen as a justified restriction in relation to the aim of safeguarding 'creditors, minority shareholders, and employees of the migrant company'. Finally, the Court is required to clarify the concept of establishment for the purpose of article 49 of the Treaty; the reason is that Polbud had declared that its commercial activities would remain in Poland, which raises the

[144] Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 22 February 2016, C-106/16, *Polbud v Wykonawstwo sp. z.o.o.*

[145] Art. 270(2) and 459(2) Commercial Company Act.

[146] See the whole description in Opinion AG Kokott (nt. 55) [13]-[19].

question as to whether a company's decision to reincorporate without relocating its establishment would fall within the scope of article 49 TFEU.

The first two questions are crucial, since the Polish regime does not regulate the procedure of cross-border reincorporations, so that creditors may be left unprotected. In this respect, the main policy problem seems to be that, while a conversion of a Polish company into another Polish entity would require this company to comply with a large number of information and protection requirements, companies migrating abroad would be exempted entirely from the application of any requirements if the liquidation procedure was not applicable, considering that Polish courts refuse to apply the protection mechanisms of domestic conversions to the cross-border context by way of analogy.

Finally, the Court is asked to address the concept of 'establishment' for the purpose of applying article 49 and 54 of the Treaty. The decisions *VALE* and *Cadbury Schweppes* maintained that the concept of establishment 'involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period', with the consequence that the country of arrival can examine whether the incoming company 'is seeking to establish a lasting economic link' with its territory.[147] It is however uncertain whether the same logic also applies to the country of emigration. Therefore, the Polish court has submitted to the Court of Justice the question of whether 'a situation in which […] a company transfers its registered office to another Member State without changing its place of principal establishment, which remains in the State of initial incorporation' falls within the scope of the EU freedom of establishment.[148] The Polish court seems to envisage the possibility that the country of origin is given the same authority as the country of arrival. It is clear that the Member State of immigration can refuse the incorporation of a company if it does not pursue any business activity in its own territory (provided the same requirement applies to domestic companies). This authority of the state of incorporation was acknowledged as early as *Daily Mail*, and it is in line with the definition of establishment as espoused in *VALE* and other cases, since the mere act of registration of a company arguably does not amount to 'the pursuit of genuine economic activity'.[149] The referring Polish court now seems to argue that even if the state of immigration allows the registration of the migrating company without any economic activity and the company keeps its 'actual' or 'fixed' establishment in the state of origin, the process of reincorporation may fall outside the scope of the right of establishment as no 'fixed establishment' is relocated, provided the state of origin, were it the immigration state, would refuse to register a company that did not pursue any economic activity in that country.[150]

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[147] C‑196/*04 Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I‑7995, paragraph 54; *VALE* (n 43) [34].
[148] *Polbud* question n. 3.
[149] *VALE* (n 43) [34].
[150] This seems to be the case under national Polish company law, see A Szajkowski in S Sołtysiński, A Szajkowski, A Szumański, J Szwaja (eds), *Kodeks spółek handlowych t. II, Spółka z ograniczoną odpowiedzialnością, Komentarz do artykułów 151-300* (3rd edn, C.H. Beck 2014) 83; A Kidyba, *Kodeks spółek handlowych t. I, Komentarz do artykułów 1-300* (9th edn, Wolters Kluwer 2013) 648.

In May 2017, Advocate General Kokott issued her opinion in *Polbud*.[151] Rephrasing the questions and addressing the third question first, she pointed out that it had to be assessed whether Polbud's decision to reincorporate in Luxembourg fell within the scope of the right of establishment, before it could be asked whether Polish law unnecessarily restricted that freedom .[152] Whether Polbud actually aimed not to relocate any 'establishment' to Luxembourg was a merely factual question, which was to be decided by the local courts. Regarding the interpretation of EU law, the Advocate General concluded that a cross-border reincorporation without any 'genuine economic activity' in the country of arrival did not fall within the scope of freedom of establishment, with the consequence that the country of origin could block such a decision.[153] This interpretation was not seen to be in conflict with *Cartesio* or *Centros*. The Advocate General argued that the former decision could not 'be taken to mean that the Court regarded cross-border conversions as falling within the scope of freedom of establishment irrespective of any actual act of establishment'.[154] The present case was distinguished from *Centros* because the latter did not involve 'the *consecutive* application of two national laws'.[155] The Advocate General, therefore, seems to suggest that in a static case, such as *Centros*, a genuine establishment in *any* Member State is sufficient to invoke the protections of the right of establishment in that state (Denmark in *Centros*), whereas in a dynamic case involving a change in the applicable law, the establishment must follow the applicable national law.[156]

The Opinion then addressed the first two questions, stating that (a) the need to liquidate a company in order to reincorporate abroad was a restriction of the freedom of establishment,[157] and (b) such a restriction was neither necessary nor proportionate to protect creditors and minority shareholders.[158] Interestingly, the Opinion implicitly suggests that national legislators or, failing an explicit statutory regulation, national courts by way of analogy may apply less restrictive mechanisms to attain the goal of protecting such stakeholders. In this regard, the Opinion explicitly mentioned that creditors might be given the right to request specific safeguards, similarly to domestic mergers,[159] and that minority shareholders could be protected by way of granting them the right to withdraw their participation from the company.[160]

For the purpose of this paper, it is to be stressed that, even in the wake of a final decision of the Court clarifying that freedom of establishment also protects voluntary outbound reincorporations, the 'law in action' of Member States would not, as such, necessarily change, and certain jurisdictions might continue not to provide any specific procedure for implementing cross-border reincorporations in a detailed and interoperable way, with the consequence that

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[151] Opinion AG Kokott (nt. 55).
[152] Opinion AG Kokott (nt. 55) [25].
[153] Opinion AG Kokott (nt. 55) [38]. In a similar vein see: Frank (n 105) 65 – 72 and 146 – 149.
[154] Opinion AG Kokott (nt. 55) [40].
[155] Opinion AG Kokott (nt. 55) [42].
[156] This, of course, would constitute a qualification of *Centros*, since in that case there was no congruence between applicable law (English) and genuine establishment (in Denmark).
[157] Opinion AG Kokott (nt. 55) [48].
[158] Opinion AG Kokott (nt. 55) [66].
[159] Opinion AG Kokott (nt. 55) [60].
[160] Opinion AG Kokott (nt. 55) [62].

these operations may well remain impracticable in many Member States. A possible solution could be for national courts to apply by analogy – guided by principles stated in the European case law – the harmonised procedural and substantive rules for cross-border mergers or transfers of registered offices of SEs. Yet, no one can be certain that such interpretation is going to be widely accepted by national courts and authorities, which may well face constraints on their ability to create *ad hoc* a procedural framework for reincorporations, based only on the fact that these operations fall within the scope of the freedom of establishment. This is a situation that several Member States already experience regarding inbound reincorporations, as we have seen in the former sections, and we can expect the same will happen regarding outbound reincorporations, for which political problems are even more pronounced. In these countries, therefore, two different issues would emerge. On the one hand, there is a problem of legal certainty as companies would still not be aware of how the procedure for reincorporations would work in practice. On the other hand, outbound reincorporations may create risks for creditors and other stakeholders and a lack of regulation would simply jeopardise their interests. The consequence is that, in order to make the right to reincorporate effective from the perspective of both the country of origin and the country of arrival, a legislative instrument should be in place that clarifies the procedure for cancelling a company from the original register and re-registering it in the new register and the mechanisms for protecting minorities and creditors.

6.3. The essential elements of a future directive

Reincorporations from one jurisdiction to another can only be implemented when procedural and substantive rules are in place in both jurisdictions that make this operation possible. Since Member States should implement these rules in a way that accommodates the structure and substance of their domestic company laws and national commercial registers, the instrument of a directive seems more appropriate for the aim of harmonising rules on reincorporations.[161] Additionally, Member States retain the power to require domestically incorporated companies to keep some kind of 'physical' connection to their territory, such as their headquarters, their activities or administrative offices. Indeed, according the Court of Justice, these requirements for domestically incorporated companies fall into what can be labelled a

[161] Other academic proposals have addressed cross-border reincorporations, and yet none of them has analytically touched upon substantive and procedural issues: (a) Geman commission for private international law (*Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts. Vorgelegt im Auftrag der zweiten Kommission des Deutschen Rates für Internationales Privatrecht, Spezialkommission Internationales Gesellschaftsrecht*) edited by HJ Sonnenberger, 2007, art. 2 – 7; (b) The 'Reflection Group on the future of EU company law' is a group of academics from different Member States, which was established in December 2010 by the European Commission; see Report of the Reflection Group on the Future of Company Law in Europe, Brussels, 5 April 2011 (http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf) at 18; (c) *Groupe européen de droit international privé* (GEDIP) Proposal 2015, www.gedip-egpil.eu/present_eng.html: See: F Garcimartín-Alférez, 'The law applicable to companies in the European Union. A proposal othe European Group for Private International Law' (2016) available at https://ssrn.com/abstract=2857077.

‘reserved area’ for Member States’ legislation.[162] A directive on cross-border reincorporation will set a minimum standard for protecting minority shareholders, creditors and employees from opportunistic midstream changes of company law.[163] To attain these goals, it is suggested that such a directive should have the following essential features in order to make cross-border conversions feasible and to take into account the interests of all stakeholders.

First, in order to reincorporate abroad, companies need to be struck off the initial public register and entered in the public register of the destination Member State. Thus, companies should first decide to ‘relocate’ their statutory seat (or their registered office) to the new jurisdiction. This explains why most legislative proposals for a 14th directive and recent resolutions of the European Parliament refer to the transfer of a company’s ‘registered office’ or to the need to harmonise and clarify rules on the transfer of a company’s ‘seat’.[164] Yet, a decision to amend the articles of association and to ‘relocate’ the registered office does not trigger *per se* a reincorporation abroad. In order to achieve this effect, a company must also show the intention to change the *lex societatis* and, consequently, must file for cancellation from the original register and for registration in the public register of the new country. It seems thus more appropriate and clear that a new directive will address any situation in which a company decides, by own volition, to change applicable company regime, rather than just the transfer of companies’ registered office or statutory seat (which is just an element of this transaction). However, it is also worth stressing that most EU legislative instruments are implicitly based on the assumption that registered office (or statutory seat) and applicable law always coincide.[165] Thus, it is advisable that a reform avoids diverging interpretations at the national level and any ambiguities as to the consequences of a decision to relocate a company’s statutory seat on the applicable law.

Regarding the internal decision-making process to implement voluntary outbound reincorporations, we have seen that in all jurisdictions that allow these operations the ultimate decision is for the general meeting of the company’s shareholders.[166] A decision to ‘reincorporate’ abroad is a fundamental decision, which is reasonable being adopted with at least the same quorum and majority needed for amending the articles of association, or for converting a company into another type of domestic company. Such quorums and majorities are legal safeguards for protecting minority shareholders from opportunistic midstream changes of

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[162] The Court in *Cartesio* explains that ‘the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article [49 TFEU], can arise only if it has been established, in the light of the conditions laid down in Article [54 TFEU], that the company actually has a right to that freedom’: *Cartesio* (n 35) [109].

[163] See LA Bebchuk, ‘Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law’ (1992) 105 *Harvard Law Review* 1437 at 1485-91.

[164] See section 3.3, above.

[165] See e.g. First Council Directive 68/151/EEC of 9 March 1968, Directive 2007/37/CE on shareholders’ rights, or Directive 2004/25/EC on takeover-bids.

[166] This is also the solution adopted for cross-border mergers (Cross-Border Merger Directive, Art. 9), the SE (SE Regulation, Art. 8(4)) and the European Cooperative Company (Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE) art. 7.

company regime.[167] To attain this goal, it is desirable that the new directive establishes a minimum majority requirement based on votes cast, similarly to the SE Regulation.[168] Quorums and majorities, however, cannot be more stringent than those applicable to similar domestic transactions. Finally, it seems advisable that a mandatory protection of classes of shares is included in the new directive. Quorums and supermajorities, however, risk not being sufficient for protecting minority shareholders when shares' ownership is concentrated and the emigrating company does not face pressures from the capital market.[169] In order to address this risk, all Member States that statutorily allow outbound reincorporations, with the sole exception of the Czech Republic, grant to dissenting shareholders either a right to withdraw their participation or a veto power through unanimous vote.[170] While unanimous vote would make reincorporations impossible and is to be excluded, the question arises of whether the new directive should codify a withdrawal right. On the one hand, withdrawal or appraisal rights are elements of company law regimes, and each Member State is likely to be in the best position to assess whether minority shareholders of domestically incorporated companies need this type of protection.[171] On the other hand, one of the policy goals of EU legislation should be avoiding opportunistic regulatory arbitrages at the expenses of local weak constituencies, in order to create the environment for a sound regulatory competition among national company law regimes; therefore, it seems desirable that a directive on reincorporations also increases the protection for dissenting shareholders, by including dissenting shareholders' withdrawal right, which is, as we have seen, the common denominator of almost all Member States that statutorily allow reincorporations. However, in order to allow Member States to adjust protection of dissenting shareholders to domestic necessities and policy purposes, it seems appropriate to allow Member States to opt-out from such a mechanism.

Protecting pre-existing creditors of the company, as well as other stakeholders, is one of the main problems of outbound reincorporations and the main reason why several jurisdictions are restrictive towards reincorporations.[172] Member States that have detailed regulations on

[167] Se J Armour, 'Who should make Corporate Law? EC Legislation versus Regulatory Competition' (2005) 58 *Current Legal Problems* 369 at 400.

[168] SE Regulation, art. 8(6) and art. 59: relocations of a SE's registered office should be approved by at least 2/3 of votes cast. The Cross-Border Merger Directive, by contrast, only provides that Member States may adopt provisions 'designed to ensure appropriate protection for minority members who have opposed the cross-border merger'. Cross-Border Merger Directive, Art. 4(2).

[169] TH Tröger, 'Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance' (2005) 6 *European Business Organisation Law Review* 3 at 40.

[170] In economic terms, such protection indicates that the country of incorporation aims at protecting each shareholder individually through a right to 'exit' from the 'nexus of contracts' that binds all stakeholders Lombardo, 'Regulatory competition' (n 37) 647.

[171] See Impact Assessment 2007 (n 78) 48 (discouraging harmonisation of shareholders' protections) In this regard, see M Siems, 'The Case Against Harmonisation of Shareholder Rights' (2005) 6 *European Business Organization Law Review* 539.

[172] According to the SE Regulation, the Member State of original incorporation should provide for adequate protection, while the Cross-Border Merger Directive implicitly refers to the Third Directive on domestic mergers, according to which Member States should provide 'adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards'. Additionally, the SE Regulation and the SCE Regulation do not allow relocations of a company's

cross-border conversions in place also provide for adequate creditor protection mechanisms, mostly based on the right to object to the reincorporation. As a first option, the new directive may replicate the solution of the SE Regulation[173] by stating that Member States should provide for 'adequate protection' of creditors, without any further specification. This solution is likely to increase the level of creditor protection in Member States that do not provide for any mechanisms aimed at attaining this goal, but it risks being quite vague and uncertain. It is, therefore, advisable increasing the level of creditor protection mechanisms by requiring Member States to grant pre-existing unsecured creditors at least a right to object to the reincorporation, or, alternatively, to obtain adequate security or payment, and that a court should assess whether the reincorporation is detrimental to creditors. Creditors, indeed, are the class of stakeholders that risk being jeopardised the most by a cross-border reincorporation, without having any powers to influence such decision (with the sole exception of 'adjusting' creditors, such as banks and other big lenders). Additionally, in order to avoid opportunistic reincorporations decided after a company's insolvency or in the vicinity of insolvency, a new directive should prohibit reincorporations of companies against which proceedings for liquidation, insolvency or suspension of payments have been brought.

Furthermore, it matters that in some Member States, employees can appoint a certain number of members of the supervisory board or of the board of directors ('codetermination').[174] Therefore, reincorporations out of these countries risk disenfranchising the employees if the new state of incorporation does not have similar mechanisms. To address this risk, the Directive on employee involvement accompanying the European Company (SE) Statute and the Cross-Border Mergers Directive[175] establish mandatory legal frameworks aimed at protecting existing employee participation arrangements. A new directive, therefore, should consider applying those mechanisms to reincorporations as well.

Finally, a new directive should address procedural requirements for companies wishing to reincorporate, which are often uncertain under the national laws of the Member States involved. The main procedural problem arising for reincorporations is the coordination of actions taken by the relevant companies registers, as legal personality is typically tied to registration. The risk exists that the company register of the country of origin strikes off a company before it 'reappears' in the destination country. In this respect, the SE Regulation, the SCE Regulation and the Cross-Border Merger Directive stipulate that (a) Member States should designate a court, notary or other authority, which shall scrutinise the legality of the transaction and issue a certificate attesting the completion of acts and formalities to be accomplished in the country or origin; (b) this certificate should be submitted to (i) the commercial register of the new registered office of an SE or SCE, or (ii) the court, notary or authority designated by the Member State of the company resulting from a cross-border merger; (c) the new registration,

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registered office abroad if proceedings for 'winding-up, liquidation, insolvency or suspension of payments or other similar proceedings' have been brought. SE Regulation Art. 8(15) and SCE Regulation Art. 7(15).

[173] SE Regulation, art. 8(7).

[174] For an overview of employee participation regimes see www.worker-participation.eu.

[175] Council Directive 2001/86/EC of 8 October 2001, supplementing the SE Regulation, Art. 4(4). The same mechanism is to be applied to cross-border mergers, although with some adaptations: Recital 13 and Art. 16 Cross-Border Merger Directive.

or the registration of the company resulting from a cross-border merger, may not be affected until this certificate has been submitted; (d) when the new registration has been affected, the registry shall notify the commercial register of the jurisdiction of origin, or of the jurisdiction where the companies entering into a cross-border merger are registered; (e) a company can be deleted from the commercial register of the original country only after its name is entered in the commercial register of the new Member State, or the company resulting from a cross-border merger is registered in the Member State where its registered office is situated.[176] It is suggested that a solution for regulating cross-border reincorporations should replicate these rules.

7. Conclusion

In this paper, we have analysed one of the most relevant and unresolved issues related to the EU's freedom of establishment, namely whether companies formed under the law of a Member State can decide to reincorporate under a different jurisdiction without liquidation. In this respect, we clarified that the common term 'corporate mobility' risks being misleading, since productive factors or a company's headquarter might continue being located in the country of origin. A cross-border reincorporation only aims at changing the State having law-making power over 'company law' issues, namely primarily, though not exclusively, a company's internal affairs. It goes without saying that if the country of the original incorporation protects creditors and other stakeholders through 'company law' rules, a decision of reincorporating abroad is politically very contentious. This explains why several Member States prohibit or severely restrict voluntary reincorporations of domestic companies into entities governed by the law of other states.

In this scenario, the question arises as to whether the freedom of establishment also covers a right to reincorporate across Member States and, consequently, whether Member States should grant domestically incorporated companies the possibility of reincorporating under the law of a different jurisdiction and foreign companies the possibility of converting into domestic entities without liquidation. The answer is still unclear, despite recent decisions of the Court of Justice. In particular, as we have seen, the *Cartesio* ruling of 2008 indicates that Member States cannot prohibit cross-border reincorporations when internal conversions are allowed instead. Strictly speaking, however, this statement was just *obiter dictum*, which probably explains why many Member State have ignored it.

Regarding restrictions to inbound reincorporations, the *VALE* decision maintained that any restriction placed by the country of arrival should be proportionate and reasonable. The Court, however, also added that the concept of 'establishment' refers to the '*actual pursuit of an economic activity through a fixed establishment*', with the consequence that midstream changes of company law are protected by the freedom of establishment only when the company also transfers some physical premise into the Member State of arrival and establishes a '*genuine economic activity*' there. Consequently, the *VALE* decision indicates that EU law

[176] See section 3.2, above.

does not protect 'free choice' of company law, while Member States are of course free to allow companies to reincorporate even though no activity is transferred across the borders.

Furthermore, this paper has engaged in a comparative analysis of all Member States regimes regarding outbound and inbound reincorporations. We have described whether and under which conditions domestic companies can, in practice, reincorporate abroad and whether foreign companies can convert into domestic entities without being previously liquidated. Our analysis has shown that, while some Member States have thoroughly regulated cross-border reincorporations, most Member States either have not regulated this issue at all, or only provide for partial and incomplete rules.

In those Member States without any explicit rules on reincorporations, or with partial and incomplete rules, the 'law on the books' needs to be supplemented by scholarly interpretations, judicial decisions or notary authorities. In comparative terms, this is an intriguing natural experiment for assessing the impact of national legal cultures and mind-sets on the construction of domestic legal regimes. For instance, both Austrian and German lawyers argue that EU law, after the *Cartesio* and *VALE* decisions, mandates Member States to allow cross-border reincorporations and that, as a consequence, domestic law should be interpreted and applied accordingly, even though no explicit provision exists for implementing midstream changes of company law. By contrast, in other Member States that likewise have no explicit rules on reincorporations, scholars and practitioners either argue that a domestic legislation is necessary to make reincorporations possible, or simply ignore this issue.

As a consequence, from the standpoint of several Member States, outbound and inbound reincorporations are, as a matter of fact, not feasible, despite the *Cartesio* and *VALE* rulings. This situation will probably not change even if the Court of Justice should explicitly decide that voluntary outbound reincorporations are covered by the freedom of establishment. This confused situation could give rise to opportunistic reincorporations at the expenses of creditors or other stakeholders. As we have seen above analysing the *Interedil* case,[177] when the involved Member States do not provide for any reincorporation proceeding, or when their rules are confused, companies might be cancelled from the commercial register of the country of origin without being entered in any register of other Member States.

Based on this comparative analysis, we have argued in favour of EU harmonisation of rules and proceedings on reincorporations. At the same time, this directive should not harmonise private international law criterions and should leave Member States free to require domestically incorporated companies to keep some kind of 'physical' connection to their territory. Thus, a new directive should concern the procedural requirements that domestic companies should meet when they decide to reincorporate under a different jurisdiction or when foreign companies aim at converting into a domestic entity. Additionally, since outbound reincorporations might jeopardise creditors, minority shareholders and other stakeholders (such as workers when the country of origin follows some form of codetermination), the new directive should provide for a minimum harmonisation of mechanisms aimed at protecting these categories of company's stakeholders. In this respect, although it is reasonable that such harmoni-

[177] See section 6.1, above.

sation effort would only set minimum requirements, we also argued that Member States should not be entirely free to decide on the content of these protection mechanisms.

A common set of substantive and procedural rules on cross-border reincorporations has become a necessity in the EU. On the one hand, several Member States ban reincorporations or make them impossible, regardless of case law of the Court of Justice, thus highlighting a severe mismatch between national regimes and EU law. On the other hand, other Member States allow domestically incorporated companies to change the applicable company law without liquidation, but only few of these jurisdictions provide for clear rules for protecting stakeholders and avoiding the risk that ‘emigrating’ companies disappear from any commercial register of the EU. In this confused situation, creditors and other stakeholders suffer widespread risks of being damaged through opportunistic reincorporations or through relocations of registered office without a real intention of reincorporating abroad. In this scenario, without clear and common rules, which take into account the interests of all constituencies and address all procedural issues raised by decisions of reincorporating abroad, Member States will have good reasons for increasingly closing their borders and rejecting companies’ mobility.