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Company 'Emigration' and EC Freedom of Establishment: *Daily Mail* Revisited*

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Abstract
Following the ECJ's recent case law on EC freedom of establishment (the Centros, Überseering *and* Inspire Art *cases), regulatory competition for corporate law within the European Union takes place at an early stage of the incorporation of new companies. In contrast, as regards the 'moving out' of companies from the country of incorporation, the ECJ once considered a tax law restriction against the transfer abroad of a company's administrative seat as compatible with EC freedom of establishment (the* Daily Mail *case). For years, this decision has been regarded as applicable to all restrictions imposed by countries of incorporation, even the forced liquidation of the 'emigrating' company. This paper addresses the question whether EC freedom of establishment really allows Member States to place any limit on the 'emigration' of nationally registered companies. It argues that EC freedom of establishment covers the transfer of the administrative seat as well as the transfer of the registered office and, therefore, that the country of incorporation cannot liquidate 'emigrating' companies. In addition, it addresses the question whether a new Directive is needed to allow the transfer of a company's registered office and the identity-preserving company law changes. It argues that such a Directive is necessary to avoid legal uncertainty and to protect the interests of employees, creditors and minority shareholders, among others, who could be detrimentally affected by the 'emigration' of national companies.*

Keywords: EC freedom of establishment, private international law, regulatory competition, transfer of the registered office, limits imposed by countries of incorporation.

1. INTRODUCTION

The well-known decisions of the European Court of Justice (ECJ)[1] that broadened the possible use of EC freedom of establishment by companies incorporated in an

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[1] ECJ, Case 79/85 D.H.M. *Segers* v. *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] *ECR* 2375 (hereinafter, *Segers*); ECJ, Case C-212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] *ECR* I-1459 (hereinafter, *Centros*); ECJ, Case C-208/00 *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH* [2002] *ECR* I-9919 (hereinafter, *Überseering*); ECJ, Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd* [2003] *ECR* I-10155 (hereinafter, *Inspire Art*); ECJ, Case C-411/03 *SEVIC System AG* [2005] *ECR* I-10805 (hereinafter, *Sevic*).

EU Member State in recent years only addressed the original divergence between the registered office and the administrative seat and the limits placed by the country of arrival on the 'inbound' transfer of the administrative seat of a foreign company. In contrast, in the *Daily Mail* case, the ECJ appears to allow Member States to place any limit on the transfer abroad of the administrative seat or the registered office of nationally registered companies and, as a consequence, on identity-preserving company law changes.[2] In other words, European companies can apparently freely decide where to incorporate but are not free to change company law afterwards by deciding to reincorporate elsewhere.

Regarding the question whether the country of incorporation can place limits on the transfer abroad of the administrative seat and/or registered office, Member States follow different approaches and seem to be walking along random paths. A comparative analysis reveals that three solutions are provided by Member States: (1) the company is liquidated; (2) the decision to reincorporate abroad is ineffective: the new company is regarded as incorporated in the country of arrival, but the company law of the previous country of incorporation continues to apply; (3) the identity-preserving company law change is admitted, provided that the substantive and conflict rules of both the country of departure and the country of arrival are respected.

Surprisingly, these solutions do not run along the boundaries between the 'real seat theory' and the 'incorporation theory': even countries following the latter theory are restrictive in the face of company 'emigration', as will be made clear in the following pages. The reason for the reluctance to allow nationally registered companies to reincorporate abroad is that this decision threatens to jeopardise a number of constituencies, such as creditors, workers and suppliers, who may be affected by the change of jurisdiction, although they are not part of the company and hence not involved in the decision to reincorporate abroad, which is usually in the hands of the general meeting of shareholders.[3] Indeed, a change of the applicable company law means a shift in the set of rules that should be applied to the internal organisation of the company and to its relations with the outside world. For example, if identity-preserving company law changes were allowed, an Italian *società per azioni* transferring its registered office to France would become a French *société anonyme*.[4] The company's articles of association should be eventually changed in order to comply with French mandatory rules on the

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[2] ECJ, Case 81/87 *The Queen* v. *H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1998] *ECR* 5483 (hereinafter, *Daily Mail*).

[3] See S. Rammeloo, *Corporations in Private International Law: A European Perspective* (Oxford, Oxford University Press 2003) p. 4 et seq.

[4] Indeed, a French *société anonyme* is a company 'type' that can be considered analogous to the Italian *società per azioni*. Of course, an Italian company can decide to become a different 'type' of company under the new applicable law, but national company law should require that this is made the object of an express decision.

société anonyme,[5] but the most significant consequence is that French rules and principles must be followed even if the articles of association were not formally changed. In other words, identity-preserving company law changes are similar to a conversion of the original company into a new legal form, but, in contrast to a 'national conversion', the company does not merely change its form but also the legal system that regulates its life and activities.[6]

This scenario may change in the near future, as a Hungarian court has submitted to the ECJ a request for a preliminary ruling, asking whether EC freedom of establishment also covers the transfer of the registered office and whether the country of departure can place limits on this kind of transfer.[7] It is worth recalling that a few years ago the ECJ rejected, for procedural reasons, a request for a preliminary ruling submitted by the District Court of Heidelberg concerning the transfer to Spain of both the administrative seat and the registered office of a German company.[8] The ECJ cannot avoid addressing this issue any longer.

The answer will be relevant to the issue at hand, as it will affect any possible mechanism for competition between legal systems as regards company law.

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[5] Under the new applicable company law, the question arises whether any amendment to the memorandum of associations is compatible with mandatory substantive law of the country of incorporation.

[6] The conversion of a company incorporated in a given jurisdiction into a new company regulated by a different law (hereinafter, 'international conversion') raises issues that *prima facie* are similar to the ones raised by 'national transformations'. In both cases, minority shareholders need to be protected against decisions of the majority that could fraudulently harm them, and creditors risk being damaged if the capital requirements or creditor protection under the new law are poorer than in the original jurisdiction. See P. Behrens, 'Identitätswahrende Sitzverlegung einer Kapitalgesellschaft von Luxemburg in die Bundesrepublik Deutschland', *Recht der internationalen Wirtschaft (RIW)* (1986) p. 590; P. Behrens, 'Die Umstrukturierung von Unternehmen durch Sitzverlegung oder Fusion über die Grenze im Lichte der Niederlassungsfreiheit im Europäischen Binnenmarkt (Art. 52 und 58 EWGV)', *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* (1994) p. 9 et seq.; B. Großfeld and Th. König, 'Identitätswahrende Sitzverlegung in der Europäischen Gemeinschaft', *Praxis des internationalen Privat- und Verfahrensrecht (IPrax)* (1991) p. 381 (distinguishing cases of true conversion, in which the company changes the *lex societatis*, from cases of mere adaptation of the articles of association); G.A. Frowein, *Grenzüberschreitende Sitzverlegung von Kapitalgesellschaften* (Frankfurt am Main, Lang 2001) p. 139 et seq.

Nonetheless, it seems to me that the application of the national rules for national conversions might not be sufficient to protect the aforementioned interests, as in our case the company changes its legal system and environment, not just the company 'type' within the same legal system. See M.M. Siems, 'Sevic: Der letze Mosaikstein im Internationalen Gesellschaftsrecht der EU?', 17 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2006) p. 140.

[7] ECJ, Case C-210/06 *Cartesio Oktató és Szolgáltató Betti Társaság*, Reference for a preliminary ruling from the Szegedi Ítélőtábla (Court of Appeal of Szeged), *OJ* 2006 C 165/7 (hereinafter, *Cartesio*).

[8] LG Heidelberg, 3 March 2000, *EuZW* (2000) p. 414 and ECJ, Case C-86/00 *HSB-Wohnbau GmbH* [2001] *ECR* I-5353. See P. Behrens 'Reactions of Member State Courts to the *Centros* ruling by the ECJ', 2 *EBOR* (2001) p. 169 et seq.

Among US and European scholars, it is fiercely debated whether and to what extent competition between legal systems has positive effects.[9] In this context, the following empirical observation is relevant: recent studies show that European firms have widely used the possibility opened up by the ECJ's case law to freely choose the country of incorporation while placing the company's administrative seat in another country.[10] Thus, a demand for a broader freedom of establishment has emerged among firms, and we can argue that this demand would probably extend to identity-preserving company law changes if they were allowed.

Regulatory competition has a supply side and a demand side, just like as any other market. On the supply side, national jurisdictions should compete amongst themselves to attract firms and taxpayers. In order to achieve this goal, we can assume that Member States aim to adopt the best possible company laws and to offer these laws to companies and potential shareholders. On the demand side, firms and potential shareholders seek the most suitable company law offered by national jurisdictions. The question arises whether companies or potential shareholders are allowed both to choose the most suitable company law at the moment of incorporation and to change the applicable company law afterwards without needing to liquidate the company in the original country and incorporating a new one in the country of arrival.[11] However, the outcome of this competition also depends on the rules governing the internal decision to reincorporate. If the board has the competence to decide in favour of reincorporation or the power to a veto the shareholders' decision to reincorporate abroad, the company will move to a jurisdiction that maximises the board's interests, even at the expense of the shareholders.[12] In addition, a key incentive to emigrate is obviously the opportunity to gain from switching to a more advantageous fiscal

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9 See M. Gelter 'The structure of regulatory competition in European corporate law', 5 *J. Corp. L. Stud.* (2005) p. 249 et seq.

10 M. Becht, C. Mayer and H. Wagner, *Corporate Mobility and the Costs of Regulation*, ECGI Law Working Paper No. 70 (May 2006).

11 See K.E. 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', 6 *Col. J. Eur. Law* (2000) p. 191; C. Kirchner, 'Zur Ökonomik des legislatorischen Wettbewerbs im europäischen Gesellschaftsrecht', in A. Fuchs, H.-P. Schwintowski and D. Zimmer, eds., *Festschrift Immenga* (Munich, 2004) p. 607 et seq.; L. Enriques, 'Silence is Golden: The European Company as a Catalyst for Company Law Arbitrage', *J. Corp. Law Stud.* (2004) p. 82; J.C. Dammann, 'Freedom of choice in European corporate law', 29 *Yale J. Intl. Law* (2004) p. 507 et seq.; Gelter, *supra* n. 9, at p. 265 et seq.; C. Kirchner, R.W. Painter and W.A. Kaal, 'Regulatory competition in EU corporate law after *Inspire Art*: Unbundling Delaware's product for Europe', *ECFR* (2005) p. 160 et seq.

12 See L.A. Bebchuk and A. Hamdani, 'Vigorous race or leisurely walk: reconsidering the competition over corporate charters' 112 *Yale Law Journal* (2002) p. 553 et seq.; L.A. Bebchuk, 'The case for increasing shareholders power', 188 *Harvard Law Review* (2005) p. 833 et seq.

regime, but we should also consider that tax conflict law is generally based on mandatory and objective connecting factors that are independent from the applicable company law.[13]

This paper will proceed as follows. In the next section, I will describe the legal issues arising from the application of EC freedom of establishment to companies. The third section addresses the ECJ's case law relating to EC freedom of establishment. It will show that, despite *Daily Mail*, other decisions of the ECJ do not distinguish between the 'moving out' and 'moving in' of a company.[14] The fourth section addresses the application of conflict and substantive rules to the transfer abroad of the administrative and/or registered office. I will analyse what role is played by conflict law and substantive company law in relation to a transfer of the registered office and/or administrative seat. Conflict law provides an answers to the question whether or not this transfer shifts the applicable company law. Substantive company law, on the other hand, establishes whether the decision to transfer the administrative seat and/or registered office abroad is allowed and whether these decisions produce a liquidation of the company. The fifth section addresses the question whether EC freedom of establishment covers the limits imposed by the country of incorporation on the transfer abroad of the administrative seat and/or registered office. Despite the common interpretation of *Daily Mail*, I will argue that EU companies already enjoy EC freedom of establishment *vis-à-vis* the country of incorporation, which cannot liquidate them. I will then discuss the question whether EC freedom of establishment also covers voluntary company law changes.

2. THE LEGAL ISSUES: A FRAMEWORK

2.1 **Possible outcomes of company 'emigrations'**

It is useful to present in clear words all possible outcomes of the transfer abroad of a company's administrative seat and/or registered office:

(a) *Identity-preserving company law change:* After the transfer of the administrative seat and/or registered office, the company law of the country of arrival applies. The company retains its legal identity and is not regarded as

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[13] M. Siems, 'Convergence, competition, Centros and conflicts of law: European company law in the 21st Century', 27 *Eur. Law. Rev.* (2002) p. 53; G. Burwitz, 'Tax Consequences of the Migration of Companies: A Practitioner's Perspective', 7 *EBOR* (2006) p. 592.

[14] ECJ, Case C-9/02 *Hughes de Lasteyrie du Saillant* v. *Ministère de l'Économie, des Finances et de l'Industrie* [2004] *ECR* I-2409 (hereinafter, *De Lasteyrie*); ECJ, Case C-446/03 *Marks & Spencer plc* v. *David Halsey (Her Majesty's Inspector of Taxes)* [2005] *ECR* I-10837 (hereinafter, *Marks & Spencer*).

having been wound up. This means that all assets, liabilities and contractual relations remain unaffected.

(b) *Continuity of the legal identity without change of the applicable company law:* After the transfer of the administrative seat and/or registered office, the company is not regarded as having been wound up, but the applicable company law does not change.

(c) *Winding-up of the company:* After the transfer of the administrative seat and/or registered office, the company is wound up, its assets are taxed as in the case of a liquidation and all contractual relations (such as those with suppliers or workers) are interrupted.

(d) *The decision to transfer the seat abroad is ineffective:* Despite the transfer abroad, the administrative seat and/or registered office are regarded as still being in the country of incorporation, and the original company law should be still applied.

2.2 National conflict and substantive law

In order to establish which of the aforementioned effects is produced by a transfer of the administrative seat and/or registered office, we should apply the conflict and substantive law of both the country of arrival and the country of departure. Regarding the different role played by conflict and substantive rules, it is useful to put in clear words the basic assumption of the present paper. We should then distinguish between two questions: (1) on the one hand, whether the company that transfers abroad its administrative seat and/or registered office is regarded as having been wound up by the country of departure; and (2) on the other hand, whether the transfer of the administrative seat and/or registered office leads to a change of the applicable company law.

The question whether and under what conditions the applicable law changes is essentially answered by conflict rules.[15] These rules are aimed at determining the applicable substantive law (i.e., *lex societatis*) according to specific connecting factors that refer to the law of a given country. Therefore, the applicable company law changes only if the company transfers the connecting factor according to the conflict rules of both the country of departure and the country of arrival. For instance, if the connecting factor applied by conflict law of both countries is the

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[15] L. Raape, *Internationales Privatrecht* (Berlin, Vahlen 1961) p. 203; Behrens (1986), *supra* n. 6, at p. 590; B. Knobbe-Keuk, 'Umzug von Gesellschaften in Europa', 154 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)* (1990) p. 338; K. Schmidt, 'Sitzverlegungsrichtlinie, Freizügigkeit und Gesellschaftsrechtspraxis', 28 *ZGR* (1999) p. 22; F.J. Garcimartìn Alférez, 'El traslado del domicilio social al extranjero. Una vision facilitadora', *Rev. Soc.* (2001) p. 112; W.-H. Roth, 'From *Centros* to *Überseering*: free movement of companies, private international law, and community law', *Int. Comp. Law Quarterly* (2003) p. 184; W.-H. Roth, 'Das Wandern ist des Müllers Lust…: Zur Auswanderungsfreiheit für Gesellschaften in Europa', in S. Lorenz, ed., *Festschrift Heldrich* (Munich, Beck 2005) p. 979.

registered office, the transfer of the latter leads to the application of the company law of the country of arrival.

In contrast, the continuity of the legal identity is determined by substantive law no matter what conflict rules are applied. Companies retain their legal identity only if the substantive laws of both the country of arrival and the country of departure agree upon this.[16] The reason is that substantive law – not conflict law – is aimed at determining the prerequisites for the existence of legal persons, that is to say, the circumstances under which a group of persons is regarded by the law as a separated and independent legal subject that can be imbued with rights and duties *vis-à-vis* the outside world.

2.3 **EC law**

From the viewpoint of EC freedom of establishment, two questions arise after the administrative seat and/or registered office is transferred abroad.

On the one hand, we should ask whether any limit imposed by the conflict or substantive laws of the Member States on the emigration of own companies is compatible with EC freedom of establishment. This question is related to the objective effects of the application of national conflict and substantive laws, irrespective of whether or not shareholders really want to change company law.

On the other hand, we should ask whether EC freedom of establishment awards companies the right *vis-à-vis* the Member State of incorporation to change the applicable company law without the need to liquidate and reincorporate in the country of arrival. This question concerns the voluntary change of company law. If the answer is positive, this would mean that Member States should provide own companies with a legal procedure aimed at changing the applicable company law without being liquidated.

3. DEVELOPMENTS IN EC LAW

3.1 **EC freedom of establishment and EC derivative law**

Regarding the question whether EC freedom of establishment also covers identity-preserving company law changes, it should be recalled that pursuant to

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[16] See the authors quoted in the previous footnote and also G. Beitzke, 'Anerkennung und Sitzverlegung von Gesellschaften und juristische Personen in EWG-Bereich', 127 *ZHR* (1965) p. 30; B. Großfeld, *Internationales Gesellschaftsrecht, J. von Staudingers Kommentar zum BGB* (Berlin, Sellier-de-Gruyter 1998) comment 606; P.St.J. Smart, 'Corporate domicile and multiple incorporation in English Private International Law', *Journal Business Law* (1990) p. 134; P. Kindler *Internationales Handels- und Gesellschaftsrecht*, in H.J. Sonnenberger, ed., *Münchener Kommentar BGB*, Vol. 11 (Munich, Beck 2006) comment 540.

Article 293 EC, Member States should enter into negotiations to secure mutual recognition of companies and 'the retention of legal personality in the event of transfer of their seat from one country to another'. As is well known, the Brussels Convention of 1968,[17] which should have allowed identity-preserving company law changes, never entered into force because the Netherlands refused to sign it. Nonetheless, pursuant to the ECJ's case law, it is nowadays accepted that Article 293 EC does not attribute to Member States any exclusive competence in these matters and, therefore, that it does not place any obstacle in the way of the direct application of EC freedom of establishment, as entry into negotiations is required only in 'so far as necessary'.[18]

However, derivative community law appears to be moving towards the acceptance of freedom to transfer abroad the registered office and to make identity-preserving company law changes.

First of all, it should be pointed out that two specific legal entities, whose existence is based upon EC regulations, are already allowed to voluntarily change the applicable law without losing their legal identity.

The first of these entities is the European Economic Interest Grouping (EEIG),[19] which is governed by the law of the country where the 'official address' is located.[20] The latter should be located in the Member State where the EEIG or one of its members has its central administration and where the activities of the EEIG are carried on.[21] The applicable law can be changed without liquidation if the EEIG transfers the official address together with the central administration.

The second of these entities is the European Company or *Societas Europaea* (SE),[22] which for our purposes is more relevant due to its similarity to national public companies. Indeed, the SE is partially regulated by the law of the public company (such as the *Aktiengesellschaft* in Germany, the *société anonyme* in France or the *società per azioni* in Italy) of the Member State where the registered office is located, provided that the administrative seat is located in the same country.[23] In addition, the SE Regulation allows identity-preserving company law

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[17] Brussels Convention, 29 February 1968, *OJ* 1972 L 299/32.

[18] *Überseering*, *supra* n. 1, recital 52 et seq. See M. Lutter, 'Überseering und die Folgen', 58 *Betriebsberater (BB)* (2003) p. 8; E. Vaccaro, 'Transfer of seat and freedom of establishment in European company law', 16 *EBLR* (2005) p. 1352; W.-G. Ringe, 'No freedom of emigration for companies?', 16 *EBLR* (2005) p. 633.

[19] Council Regulation (EC) No. 2137/1985 on the European Economic Interest Grouping.

[20] Ibid., at Art. 2.

[21] Ibid., at Art. 12.

[22] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), *OJ* 2001 L 294/1-21 (hereinafter, the SE Regulation).

[23] SE Regulation, Art. 7. This rule is a pillar in the structure of the Regulation, since the ultimate consequence of a divergence between head office and registered office is the liquidation of the company (SE Regulation, Art. 64(2)).

changes,[24] provided that the SE simultaneously transfers the registered office and the administrative seat to another country.[25]

The most significant step towards freedom of 'emigration' is the approval of the Directive on Cross-Border Mergers, which bans any obstacle imposed by the country of incorporation of a merging company and provides a framework regulation for the proceedings and timing of the merger.[26] Similarly to what happens in the United States, European limited liability companies now have a legal means whereby they can transfer their registered office and change company law without needing to be liquidated in the country of origin and reincorporated in the country of arrival, as they can incorporate a new company in a different Member State and merge with it afterwards.[27]

Despite this development, the approval of a directive on identity-preserving company law changes has faced a fierce resistance. The first attempt in 1997 to produce a directive on this topic was abandoned,[28] and the Commission has since launched a public consultation relating to a new proposal regarding the sole transfer of the registered office.[29] Meanwhile, in its report from 2002,[30] the High Level Group of Company Law Experts recommended the urgent adoption of a directive on the transfer of the registered office and on identity-preserving company law changes. The Commission responded to this suggestion with its

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[24] The SE is therefore a suitable vehicle for overcoming Member States' resistance to identity-preserving company law changes. See Enriques, *supra* n. 11, at p. 84 et seq.

[25] SE Regulation, Art. 8(1). It is worth mentioning that the wording used to indicate the 'registered office' of an SE is not identical throughout the European Union. For instance, where the English wording of the SE Regulation refers to the 'registered office', the Italian wording refers to the '*sede sociale*' (i.e., the statutory seat), the French to the '*siege sociale*' and the German, generically, to the '*Sitz*' (seat) of the SE. On this issue, see Ch. Teichmann, 'Die Einführung der Europäischen Aktiengesellschaft', 31 *ZGR* (2002) p. 455 et seq.; E. Wymeersch, 'Cross-Border Transfer of the Seat of a Company', in J. Rickford, ed., *The European Company* (Antwerp, Intersentia 2003) p. 90 et seq.

[26] Directive 2005/56/CE of the Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies *OJ* 2005 L 310/1 (hereinafter, the Directive on Cross-Border Mergers). See M.M. Siems, 'The European directive on cross-border mergers: an international model?', 11 *Col. J. Eur. Law* (2005) p. 167 et seq.

While *Sevic* is based on the freedom of establishment stemming from the EC Treaty and should therefore be applied to all companies, the Directive on Cross-Border Mergers addresses only limited liability companies.

[27] See Gelter, *supra* n. 9, at p. 267; Siems, *supra* n. 26, at p. 179.

[28] This first draft of a Fourteenth Directive on company law harmonisation is available at: <http://www.uv.es/cde/TEXTOS/14thCLDd.pdf>. On the first draft, see R. Drury, 'Migrating Companies', 24 *Eur. Law Rev.* (1999) p. 362 et seq.

[29] See: <http://ec.europa.eu/internal_market/company/seat-transfer/index_en.htm>.

[30] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, p. 101 et seq., available at: <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>.

Action Plan of 2003,[31] which regards this issue as one of the priorities in EC company law. The future of this project is still uncertain, and the ECJ once again has the opportunity to move forward faster than the EC representative organs when it decides on the submission of the *Cartesio* case.[32] But even if the ECJ were to state that EC freedom of establishment covers identity-preserving company law changes, the question nonetheless arises whether there is a need for a directive regulating this issue.

3.2 Decisions of the ECJ relating to 'moving in' cases

Although the development in the ECJ's judgments on companies' freedom of establishment has been widely celebrated as the beginning of a widespread competition between the Member States' legal systems to attract the incorporation of firms and companies, the reality is far from being so clear.

The ECJ has only addressed limits imposed by the country of arrival on companies transferring their administrative seat into its territory without changing the applicable company law. In fact, these 'liberal' ECJ decisions concern only two issues: (1) the original divergence between the administrative seat and the registered office, as in *Centros* and *Inspire Art*, and (2) the transfer of the administrative seat to another Member State after incorporation without changing company law, as in *Überseering*.

Thus, European citizens can incorporate a new company in any Member State, even if the company does not operate in the country of incorporation at all, provided that the latter accepts an original divergence between the registered office and the administrative seat. After incorporation, the administrative seat can be transferred to another Member State, which cannot impose unjustified obstacles on this transfer.

The ECJ then extended EC freedom of establishment to cross-border mergers.[33] In *Sevic*, it debated whether German case law, which prohibits cross-border mergers,[34] was compatible with EC law. A Luxembourg company (SVC) had

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[31] Commission Communication to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM (2003) 284 final.

[32] See n. 7 above.

[33] *Sevic*, *supra* n. 1.

[34] This was the dominant opinion according to German legal scholars and courts, based on § 1(1) of the *Umwandlungsgesetz* [Act on Transformations of Legal Entities] (hereinafter, *UmwG*), which includes both the conversion of companies into another form and company mergers, pursuant to which, the rules set forth by the *UmwG* should be applied to entities having their 'seat' in Germany. See H. Schaumburg, 'Grenzüberschreitende Umwandlungen', 87 *GmbH Rundschau (GmbHR)* (1996) p. 502; Großfeld, *supra* n. 16, comment 699; Kindler, *supra* n. 16, comment 872 et seq. Other scholars, nonetheless, hold that § 1(1) *UmwG* does not place an obstacle on cross-border mergers. See H. Kronke, 'Deutsches Gesellschaftsrecht und grenzüberschreitende Strunkturänderungen', *ZGR* (1994) p. 35; H. Kallmeyer, 'Grenzüber-

decided to merge with a German company (Sevic), but the German registrar refused to inscribe the merger in the register, arguing that German substantive law did not permit cross-border mergers even if the resultant company was a German one.[35] The ECJ declared that the German regime was incompatible with EC freedom of establishment, at least as regards 'inbound' mergers, that is to say, when the merger is prohibited by the Member State where the resulting company should be registered. It is not clear whether *Sevic* can also be applied to limits imposed by the original country of the merging companies,[36] but this should no longer be an issue for limited liability companies since the approval of the Directive on Cross-Border Mergers.

These 'liberal' ECJ decisions thus did not concern the limits imposed on the transfer abroad of the administrative seat and/or registered office by the country of departure. IN summary, we can state that EC freedom of establishment requires Member States of arrival to accept that the administrative seat can diverge from the place of incorporation. On the supply side, Member States can therefore compete to attract companies at an early stage of the decision-making process on where to incorporate a new company. At this stage, shareholders can choose the country that provides the most suitable company law.[37] After incorporation, shareholders can change company law only if this is allowed by the conflict law of both the country of arrival and the country of departure.[38]

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schreitende Verschmelzungen und Spaltungen', 17 *Zeitschrift für Wirtschaftsrecht (ZIP)* (1996) p. 535; T. Kuntz, 'Zur Möglichkeit grenzüberschreitender Fusionen', 16 *EuZW* (2005) p. 526.

[35] See LG Koblenz, 16 September 2003, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* (2003) p. 1124 et seq.

[36] The first comments on *Sevic* hold that the rationale of the decision should also be extended to 'outbound' cross-border mergers. See V. Geyrhalter and T. Weber, 'Transnationale Verschmelzungen – im Spannungsfeld zwischen SEVIC Systems und der Verschmelzungsrichtlinie', 44 *Deutsches Steuerrecht (DStR)* (2006) p. 150; W. Meilicke and D.E. Rabback, 'Die EuGH-Entscheidung in der Rechtssache Sevic und die Folgen für das deutsche Umwandlungsrecht nach Handels- und Steuerrecht', 97 *GmbHR* (2006) p. 125 et seq.; E.-M. Kieninger, 'Grenzüberschreitende Verschmelzungen in der EU – das SEVIC-Urteil des EuGH', *EWS* (2006) p. 51; G.-J. Vossestein, 'Companies' Freedom of Establishment after Sevic', *ECR* (2006) p. 177 et seq.; P. Behrens, 'Comment to Sevic', *CMLR* (2006) p. 1686; M.M. Siems, '*SEVIC*: Beyond Cross-Border Mergers', 8 *EBOR* (2007) p. 307 et seq.; M. Doralt, 'Cross-border mergers: A glimpse into the future', *ECFR* (2007) p. 25; N. Krause and N. Kulpa, 'Grenzüberschreitende Verschmelzungen', 171 *ZHR* (2007) p. 45.

[37] See E.-M. Kieninger, 'Internationales Gesellschaftsrecht nach 'Centros', 'Überseering' und 'Inspire Art': Antworten, Zweifel und offene Fragen', 12 *Zeitschrift für europäisches Privatrecht (ZEuP)* (2004) p. 692; M. Andenas, 'Freedom of establishment', *Law Quart. Rev.* (2003) p. 221 et seq.; A. Looijestijn-Clearie, 'Have the Dikes Collapsed? *Inspire Art:* A Further Breakthrough in the Freedom of Establishment of Companies?', 5 *EBOR* (2004) p. 404; U. Klinke, 'European Company Law and the ECJ: The Court's Judgments in the Years 2001 to 2004', *ECFR* (2004) p. 270 et seq.

[38] A. Johnston, 'EC freedom of establishment, employee participation in corporate governance and the limits of regulatory competition', *J. Corp. L. Stud.* (2006) p. 875 et seq.

3.3 Decisions of the ECJ relating to 'moving out' cases

In the well-known *Daily Mail* case, the ECJ addressed the question whether limits placed by the country of departure on the 'emigration' of own companies are compatible with EC freedom of establishment. In this case, an English company decided to transfer abroad its administrative seat and tax domicile (its 'residence' according to the English legal wording). In order to do this, according to English tax law, companies need authorisation from the Treasury, which refused to grant authorisation in this case. It was therefore an issue of tax law rather than company or conflict law. Nonetheless, the ECJ expressed its opinion by means of a very broad statement that is also applicable to conflict law and other limits imposed by the country of departure.

The ECJ indeed stated 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.'[39] As regards national conflict rules, the ECJ stated that

> the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.[40]

Therefore,

> Articles 52 [now 43] and 58 [now 48] of the Treaty 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.[41]

According to widespread opinion, *Daily Mail* should be regarded as being 'good law', even following the ECJ's recent decisions on the transfer of the administrative seat, as the ECJ distinguished the matter at issue in *Überseering* and *Inspire Art* from the issues debated in *Daily Mail*, which was therefore not overruled.[42] We should conclude that: (1) the conflict law and company law of

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[39] *Daily Mail*, *supra* n. 2, recital 19.

[40] Ibid., at recital 23.

[41] Ibid., at recital 24.

[42] See Kieninger, *supra* n. 37, at p. 694; C. Kersting and C.P. Schindler, 'The ECJ's Inspire Art Decision of 30 September 2003 and Its Effects on Practice', 4 *German Law Journ.* (2003)

Member States can place limits on the transfer abroad of the administrative seat and/or registered office of domestic companies; and (2) EC freedom of establishment does not grant companies a right *vis-à-vis* their own country to change company law voluntarily, irrespective of the conflict rules applied by the Member State of incorporation.

However, *Daily Mail* is not as unambiguous as it might appear at a first glance. Indeed, in *Daily Mail* the ECJ also stated:

> Even though those provisions [i.e., Articles 43 and 48 TEC] are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit 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 which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Articles 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State.[43]

This statement was probably only an *obiter dictum* in *Daily Mail*, nonetheless it was used by the ECJ as a *ratio decidendi* in a decision issued ten years later. In this case, a tax relief based on the law of the country of incorporation of a holding company, which was applicable only if the main activities of the controlling entities were national, was declared as incompatible with EC freedom of establishment.[44] The same argument was applied by the ECJ in the recent *Marks & Spencer* case, where it held that

> Even though, according to their wording, the provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit 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.[45]

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p. 1282; P. Lagarde, *Überseering*, case note, 92 *RCDIP* (2003) p. 529; G. Rehm, 'Völker- und europarechtliche Vorgaben für die Bestimmung des Personalstatuts', in H. Eidenmüller, ed., *Ausländische Kapitalgesellschaften im deutschen Recht* (Munich, Beck 2004) comment 65.

[43] *Daily Mail*, *supra* n. 2, recital 16.

[44] ECJ, Case C-264/96 *Imperial Chemical Industries plc (ICI)* v. *Kenneth Hall Colmer (HM Inspector of Taxes)* [1998] *ECR* I-4695, recital 16 (hereinafter, *ICI*).

[45] *Marks & Spencer*, *supra* n. 14, recital 31. See G.-J. Vossestein, 'Exit Restrictions on Freedom of Establishment after *Marks & Spencer*', 7 *EBOR* (2006) p. 863 et seq.; D. Dürrschmidt and M. Schiller, 'Die Rechtssache Marks & Spencer und ihre Folgen', *Europarecht* (2007) p. 277; P. Rodas, 'La libertad de establecimiento en la UE tras la Sentencia del TJCE *Marks & Spencer*', *Cuadernos Der. Com.* (2007) n. 47.

It is also worth mentioning the case *de Lasteyrie*, in which a French citizen who owned a shareholding in a French company transferred his domicile to Belgium. According to French tax law, if a French citizen transfers his or her domicile abroad, unrealised capital gains on his or her shareholdings should be taxed in order to tackle tax avoidance. The ECJ declared these provisions as incompatible with EC freedom of establishment, because 'the transfer of a physical person's tax residence outside the territory of a Member State does not, in itself, imply tax avoidance.'[46] This decision was related to the transfer of a natural person, hence it is debatable whether it should be regarded as relevant to company 'emigration'.[47]

We can conclude, therefore, that within the ECJ's case law the distinction between 'moving in' and 'moving out' cases is not as evident and established as it appears to be according to widespread opinion among legal scholars concerning *Daily Mail*.[48]

4. NATIONAL CONFLICT AND SUBSTANTIVE RULES

It is worth paying attention to how Member States' laws address the transfer of a company's administrative seat and/or registered office. In order to clarify this issue, the application of conflict law and substantive law will be discussed separately.

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[46] *De Lasteyrie*, *supra* n. 14, recital 51.

[47] See the different opinions held, on the one hand, by Rehm, *supra* n. 42, comment 68; H. Eidenmüller and G.M. Rehm, 'Niederlassungsfreiheit versus Schutz des inländischen Rechtsverkehrs: Konturen des Europäischen internationalen Gesellschaftsrechts', 33 *ZGR* (2004) p. 178, n. 78; and Ringe, *supra* n. 18, at p. 640 (*De Lasteyrie* is irrelevant and does not overrule *Daily Mail*) and, on the other hand, P. Mankowski, 'Entwicklungen im IPR und IZVR 2003/2004', *RIW* (2004) p. 484; L. Enriques and M. Gelter, 'Regulatory Competition in European Company Law and Creditor Protection', 7 *EBOR* (2006) p. 431; and Gelter, *supra* n. 9, at p. 268 (the decision should also be applied to outbound transfers of the administrative seat and/or registered office).

[48] See also the Opinion of Advocate General Tizzano in *Sevic*, recital 45: 'it is evident from this case law that Article 43 EC does not merely prohibit a Member State from impeding or restricting the establishment of foreign operators in its territory, it also precludes it from hindering the establishment of national operators in another Member State. In other words, restrictions 'on entering' or 'on leaving' national territory are prohibited.' In *Sevic*, the ECJ upheld the conclusions of the Advocate General but unfortunately neither quoted this sentence of the Advocate General nor explicitly admitted that 'moving out' cases should be treated like 'moving in' cases.

4.1 **Conflict law**

4.1.1 *Conflict law families: 'incorporation theories' v. 'real seat theory'*

Legal scholars distinguish two kinds of conflict rules: those based on 'real seat theory' and those based on 'incorporation theory'.

I would like to point out that this is only a rough distinction and that legal systems that are classified as belonging to the same 'theory' might employ different practical solutions, as will be made clear in the following pages.[49] The distinction between two opposite 'theories' is deeply rooted in a legal tradition that depicts conflict law as formed only by multilateral conflict rules.[50] Following this assumption, company conflict rules refer to a single law, the 'personal statute' of the company, which aims to regulate all questions falling within 'company law'.[51] The same connecting factor, therefore, should establish both whether national law is to be applied and under what circumstances a foreign company should be recognised.

Real legal systems are rather different from this simplified model. National conflict laws, for instance, may apply different unilateral conflict rules to own companies and foreign companies or may provide for a more complex bundling of conflict and substantive rules. Moreover, the outcome also depends on whether conflict rules call for the application only of substantive law or also of conflict rules (i.e., *renvoi* doctrine).[52] If the conflict law of the country of departure does not follow the *renvoi* doctrine and a company transfers the connecting factor to another country, then it should only apply the substantive company law of the country of arrival but not its conflict law. Therefore, from the viewpoint of the country of departure, the applicable company law changes independently of the conflict rules of the country of arrival. In contrast, if the conflict law of the country of departure follows the *renvoi* doctrine, the outcome of the transfer of the connecting factor is different, since we should pay attention to the conflict law

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[49] See J. Wouters, 'Private International Law and Companies' Freedom of Establishment', 2 *EBOR* (2001) p. 103 et seq.

[50] On multilateral conflict rules, see L. Collins, et al., eds., *Dicey, Morris and Collins on the Conflict of Laws*, 14th rev. edn., Vol. 1 (London, Sweet & Maxwell 2006) p. 21.

[51] See H. Halbhuber, 'National doctrinal structures and European company law', 38 *CMLR* (2001) p. 1392.

[52] On the *renvoi* doctrine, see P. North and J.J. Fawcett, *Cheshire and North's Private International Law* (London, Oxford University Press 2005) p. 51 et seq.; Dicey, Morris and Collins, *supra* n. 50, at p. 65 et seq. (arguing both that the *renvoi* doctrine should be rejected under English conflict law and that only substantive law should be applied); T. Ballarino, *Diritto internazionale privato* (Padova, Cedam 1999) p. 255 et seq.; J. Kropholler, *Internationales Privatrecht* (Tübingen, Mohr Siebeck 2004) p. 161 et seq.; H.J. Sonnenberger, 'IPR. Einleitung', in H.J. Sonnenberger, ed., *Münchener Kommentar zum BGB*, 4th edn., Vol. 10 (Munich, Beck 2006) comment 403 et seq.

of the country of arrival, as this could clash with the conflict law of the country of departure and refer to the law of another country or even refer 'back' to the law of the country of departure.[53]

Nonetheless, the distinction between 'real seat theory' and 'incorporation theory' is helpful to understanding the functioning of conflict law, but only if we make clear that such theories are 'ideal' analytical tools rather than a picture of the real world.[54] Therefore, it is more meaningful to depict the two 'theories' as two different 'families' of conflict laws rather than two identical multilateral conflict rules.

Bearing this in mind, we can say that, according to the 'real seat theory', the law of the country where they have their administrative (i.e., 'real') seat should be applied to companies. The connecting factor, therefore, is objective and mandatory, and party autonomy is excluded.[55] Many EU Member States belong to this family, including Spain, France and Belgium, but its purest version, at least before the aforementioned ECJ decisions on EC freedom of establishment, was applied in German and Austrian law.

In contrast, according to 'incorporation theory', the law of the country where they are incorporated should be applied to companies. Therefore, the founders of a company can freely choose the country where they wish to incorporate and the applicable law, notwithstanding that the firms operates in another country. In contrast to the common but oversimplified view, there could be different kinds of incorporation theories, rather than just one, based on the relevant connecting factor.[56] For our purposes, the most significant distinction is between conflict rules referring to the country of the *original* incorporation and conflict rules referring to the country of any subsequent reincorporation or simply to the country where the registered office is located. Many other Member States of the

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[53] Kindler, *supra* n. 16, comment 500 et seq.

[54] According to Max Weber's definition of the '*empyrischer Idealtypus*', see M. Weber, *Wirtschaft und Gesellschaft* (Tübingen, Mohr 1922).

[55] See Roth (2003), *supra* n. 15, at p. 181; W.F. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: *Überseering*, *Inspire Art* and Beyond', *EBLR* (2005) p. 13.

[56] Legal scholars have distinguished between the following connecting factors: (i) the country in whose territory the legal formalities for the incorporation were completed; (ii) the country according to whose law the company is regulated by shareholders (which could be different from the case *sub* (i) if the company is a mere partnership that does not need any formality in order to come into existence); and (iii) the place where the registered office is located (which could be different from the country of the *original* incorporation if the country of arrival allows companies to reincorporate in its territory). See J. Hoffmann, 'Das Anknüpfungsmoment der Gründungstheorie', 101 *Zeitschrift für die vergleichende Rechtswissenschaft (ZvglRW)* (2002) p. 293; H. Eidenmüller, 'Theorien zur Bestimmung des Gesellschaftsstatuts und Wettbewerb der Gesellschaftsrechte', in *Ausländische Kapitalgesellschaften*, *supra* n. 42, comment 3; M.V. 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*', *EBLR* (2005) p. 56, n. 2.

European Union and the EEA belong to the family of incorporation theories, such as England, Ireland, Italy, the Netherlands, Denmark and Switzerland.

4.1.2 *Conflict law of the country of departure*

4.1.2.1 The country of departure follows real seat theory

Theoretically, under real seat theory, the transfer abroad of the administrative seat should lead to a change of the applicable company law, provided that the country of arrival does not refer back to the country of origin because it follows the *renvoi* doctrine.[57] In contrast, the transfer abroad of only the registered office or the statutory seat should not be relevant, as this is not a connecting factor,[58] but this cannot be the case, as the transfer of the registered office abroad makes national law unenforceable. In addition, we should also consider that, according to the First Company Law Directive,[59] the articles of association of limited liability companies need to be inscribed on a public register, which plays a crucial role in the incorporation and should therefore be located in the country according to whose law the company is incorporated.[60] This is the reason behind the general

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[57] More specifically, if the conflict law of the country of incorporation follows the *renvoi* doctrine, the applicable company law changes only if the country of arrival follows 'real seat theory' as well. In contrast, if the country of arrival follows incorporation theory, its conflict law refers back to the country of departure (where the company was originally incorporated) and company law should not change, unless the company has also transferred the registered office (in the latter case, as will be made clear in the following pages, the outcome depends on whether the country of arrival refers to the country of the original incorporation or to the country of any subsequent r-incorporation, and whether the substantive law allows company reincorporation).

[58] T. Ballarino, 'La società per azioni nella disciplina internazionalprivatistica', in G.E. Colombo and G.B. Portale, eds., *Trattato delle società per azioni*, Vol. 9/1 (Torino, Utet 1994) p. 108; Großfeld, *supra* n. 16, comment 650; W.-H. Roth, 'Die Wegzugsfreiheit für Gesellschaften', in M. Lutter, ed., *Europäische Auslandsgesellschaften in Deutschland* (Cologne, O. Schmidt 2005) p. 382; Garcimartìn Alférez, *supra* n. 15, at p. 110; Kindler, *supra* n. 16, comment 510.

[59] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination 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.

[60] See Roth (2005), *supra* n. 15, at p. 982; S. Lombardo, 'Libertà di stabilimento e mobilità delle società in Europa', 21 *Nuova giurisprudenza civile commentata* (2005) p. 372. For instance, as regards the incorporation of a new company, according to Italian law concerning joint stock companies (incorporation doctrine), the competent register is the one of the place where the company has its registered office (Art. 2330 *Codice Civile* [Civil Code]). According to German law (real seat theory), the competent register for the *GmbH* is the one of the place where the company has its registered office (§ 7 *GmbHG* [the law on private limited companies]).

rule followed by German courts, according to which under real seat theory the administrative seat should coincide with the statutory seat and the public register on which the company is inscribed.[61] This means that companies cannot decide to transfer abroad their administrative seat without transferring the registered office as well, provided that substantive law allows this transfer without liquidation.[62]

4.1.2.2 The country of departure follows incorporation theory

As I pointed out above, there are many incorporation theories, depending on the relevant connecting factor. For our purposes, it is relevant to distinguish between conflict rules referring to the country of the original incorporation and conflict rules referring to the country of any subsequent reincorporation. Following a transfer of the registered office abroad, the applicable company law changes only if the conflict law of the country of departure does not refer to the country of the *original* incorporation but to the country where the company is incorporated and registered, even if the registered office is transferred there afterwards. As will be made clear in the following pages, the applicable company law cannot be changed without the intervention of substantive law, which should allow company reincorporation.

Common law countries, such as England and Ireland, are restrictive *vis-à-vis* the reincorporation of own companies abroad. The basic principle in common law is that companies are regulated by the law of their 'domicile', which is the country of the original incorporation, where companies should locate their registered office.[63] Hence, the transfer abroad of the registered office does not shift the connecting factor and the applicable law does not change.[64] English and

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[61] Kindler, *supra* n. 16, comment 400; Garcimartìn Alférez, *supra* n. 15, at p. 110; Roth, *supra* n. 58, at p. 381.

[62] See S. Lombardo, 'Conflict of Law Rules in Company Law after *Überseering*', 4 *EBOR* (2003) p. 309.

[63] *Baelz* v. *PT* [1926] 1 Ch. 683; *Gasque* v. *Inland Revenue Commissioners* [1940] 2 KB 80 (hereinafter, *Gasque*); *National Trust Company* v. *Ebro Irrigation & Power Ltd.* [1954] DLR 326; *International Credit and Investment Co* v. *Adham* [1994] 1 BCLC 66. Among legal scholars, see A. Farnsworth, *The Residence and Domicile of Corporations* (London, Butterworths 1939) p. 71; D.D. Prentice, 'The incorporation theory – The UK', 14 *EBLR* (2003) p. 633; Dicey, Morris and Collins, *supra* n. 50, Vol. 2, at p. 1336.

The incorporation doctrine is also applied also in the United States. See *Vantage Point Venture Partners 1996* v. *Examen Inc.*, 871 A.2d 1108 (2005) (Del. Supr. Ct); S.C. Symeonides, 'Choice of law in the American courts in 2005: 19th annual survey', 53 *Am J. Comp. L.* (2006) p. 649 et seq.

[64] Farnsworth, *supra* n. 63, at p. 222 (arguing that, since the applicable law cannot change, the company cannot have a domicile of choice); North and Fawcett, *supra* n. 52, at p. 175; Dicey, Morris and Collins, *supra* n. 50, at p. 1337.

Dutch and Danish law is similar to English law, as both also follow the incorporation doctrine: the company's emigration is not allowed and the decision to transfer the registered office

Irish substantive law also does not allow the transfer abroad of the registered office, based on the consideration that the 'old' company is still existent and the new company is grounded in the country of arrival.[65] Indeed, a seminal decision of an English court, stressing the parallel between natural and legal persons, states that '[t]he domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence'.[66]

Other examples of incorporation theory can be found in Italian and Swiss conflict law. According to Italian conflict law, companies are regulated by the law of the country where the incorporation proceedings were carried out.[67] In addition, companies can transfer their registered office abroad, but only if this is done in accordance with the law of all 'involved' countries, that is to say, the country of departure and the country of arrival.[68] Symmetrically, Italian company law explicitly allows companies to transfer their registered office abroad.[69] It follows from these rules that a transfer made according to Italian company law is hindered only if the law of the country of arrival does not consent to it or if the transfer itself is not realised in accordance with such law.[70] Nonetheless, the transfer should not lead to a change of the applicable law, at least not from the viewpoint of Italian conflict rules. Italian case law on this point is not homogenous, but it is worth mentioning that, a few years ago, the Italian *Corte di Cassazione* decided to liquidate a company exactly because the transfer of its registered office changed the applicable company law.[71] However, this is an isolated decision in Italian case

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abroad is ineffective (but the company is not liquidated). See L. Timmerman, 'Sitzverlegung nach niederländischem Recht', 28 *ZGR* (1999) p. 153; Drury, *supra* n. 28, at p. 358; E. Wymeersch, 'The transfer of the company's seat in European company law', 40 *CMLR* (2003) p. 666; Rammeloo, *supra* n. 3, at p. 124 et seq.

65 P. Nygh, 'The refugee corporation', *West. Australian L.R.* (1976) p. 468; Smart, *supra* n. 16, at p. 126 et seq.; Dicey, Morris and Collins, *supra* n. 50, at p. 1337.

66 *Gasque*, *supra* n. 63, at p. 84.

67 Art. 25(1) of the Reform of Private International Law Act No. 218, 31 May 1995 (hereinafter, 'Italian Act on Private International Law'). See M.V. Benedettelli, 'La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato', 42 *Rivista delle società* (1997) p. 39 et seq.

68 Art. 25(3) Italian Act on Private International Law. See Benedettelli, *supra* n. 67, at p. 96; and M.V. Benedettelli, 'Libertà comunitarie di circolazione e diritto internazionale private delle società', *Rivista italiana diritto internazionale privato* (2001) p. 620 (who argues that this is not a conflict norm but a private international substantive norm that places some limits on the effectiveness of company 'emigrations').

69 Art. 2437 *Codice Civile* [Civil Code], providing a withdrawal right for dissenting shareholders. See M. Ventoruzzo, 'Cross-border mergers, change of the applicable corporate laws and protection of dissenting shareholders: withdrawal rights under Italian law', *ECFR* (2007) p. 62.

70 R. Luzzato and C. Azzolini, 'Società (nazionalità e legge regolatrice)', *Digesto disc. priv. sez. commerciale*, Vol. 14 (Torino 1997) p. 153; A. Santa Maria, 'Società. Diritto internazionale privato', in *Enciclopedia giuridica Treccani* (Roma 1998) p. 4; Ballarino, *supra* n. 52, at p. 371.

71 Corte di Cassazione Civile, S.U. 23 January 2004, n. 1244, *Rivista italiana di diritto internazionale privato e processuale* (2005) 1381.

law. In my view, is not consistent with Italian substantive law, which explicitly admits the transfer abroad of the registered office.[72]

In contrast, Swiss international company law follows a more liberal path. Pursuant to Swiss private international law, companies are regulated by the law of the State under whose law they are organised, which is a wider connecting factor than the country of the original incorporation.[73] Therefore, Swiss companies can change jurisdiction without being wound up if they comply with Swiss substantive and conflict rules and if the country of arrival permits such identity-preserving inbound reincorporation.[74]

4.1.3 *Conflict law of the country of arrival*

4.1.3.1 The country of arrival follows real seat theory

From the viewpoint of a country of arrival following real seat theory, any inbound transfer of the administrative seat of a foreign company leads to a change of the applicable company law, irrespective of the conflict rules applied by the country of departure.[75] As I have pointed out above, the registered office should generally be located in the country of the applicable law. Hence, the country of arrival should require the company also to transfer the registered office and to reincorporate

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[72] Italian case law appears to be incoherent, and all possible solutions are represented: (a) the 'emigrating' company is liquidated (App. Torino, 17 June 1958, *Rivista di diritto industriale* (1958) II, p. 373 et seq.; App. Trieste, 9 October 1999, *Rivista del notariato* (2000) p. 167 et seq.); (b) Italian company law continues to be applied, despite the transfer abroad of the registered office (App. Milano, 7 May 1974, *Giurisprudenza commerciale* (1975) II, p. 832 et seq.; Trib. Verona, 5 December 1996, *Società* (1997) p. 574 et seq.); (c) the decision of the general meeting to convert the Italian company into a foreign one and transfer the registered office abroad is void (Trib. Alessandria, 19 August 1995, and App. Torino, 1 December 1995, *Nuova giur. civ. commentata* (1996) p. 855 et seq.); and (d) identity-preserving company law changes are permitted if the law of the country of arrival allows them (Trib. Torino, 10 January 2007, *Giurisprudenza italiana* (2007) p. 1679 et seq.). On this topic, see F.M. Mucciarelli, 'The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: An Important Decision from Italy', 2 *ECFR* (2005) p. 512 et seq.

[73] Art. 154 of the Swiss Code on Private International Law of 18 December 1987. If a company incorporated abroad is managed from Switzerland, the managers are deemed liable (Art. 159 of the Swiss Code on Private International Law). Although Switzerland is not a member of the European Union, EC freedom of establishment should also be applied to Swiss companies, in accordance with the general agreement between Switzerland and the European Community of 23 June 1999. Hence, Art. 159 is probably at odds with *Inspire Art*. See F. Vischer in *Zürcher Kommentar zum IPRG* (Zürich, Schulthess 2005) p. 1786.

[74] Art. 163 of the Swiss Code on Private International Law.

[75] The country of departure and the country of arrival could follow different conflict rules and disagree on the applicable law. See Ballarino, *supra* n. 58, at p. 106; Großfeld, *supra* n. 16, comment 629; T. Ballarino, 'Sulla mobilità delle società nella Comunità Europea', 48 *Riv. Soc.* (2003) p. 690; Kindler, *supra* n. 16, comment 499; Garcimartìn Alférez, *supra* n. 15, at p. 110; Roth, *supra* n. 58, at p. 382 and Roth 2005, *supra* n. 15, at p. 978.

according to its own law.[76] This raises the question whether the substantive law of the country of arrival allows this kind of 'inbound' reincorporation.[77] 'Real seat' countries do not follow identical solutions regarding this issue.

For example, according to German case law, German company law should be applied to companies transferring their administrative seat to Germany. After the 'inbound' transfer of the administrative seat, the immigrating company should therefore be regarded either (i) as non-existent, since it was not incorporated in accordance with the 'right' law,[78] or (ii) as a mere partnership.[79] Following the aforementioned ECJ decisions on EC freedom of establishment, German case law has abandoned the real seat theory towards companies incorporated in EU and EEA Member States, stressing that EU companies transferring their administrative seat to another Member State should be recognised if they still have their registered office in the country of incorporation.[80] Real seat theory should be still applied to non-EU and German companies.[81]

In contrast, France, which is commonly also classified among the 'real seat' countries,[82] although this classification is nowadays debated among legal scholars,[83] accepts company immigration. The immigrating company should transfer its

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[76] Kindler, *supra* n. 16, comment 513.

[77] Ibid., at comment 499.

[78] See BGH, 21 March 1986, *BGHZ* 97, 269 et seq.; for other case law references, see also Großfeld, *supra* n. 16, comment 85; Kindler, *supra* n. 16, comment 400.

[79] OLG Frankfurt M., 4 December 2001, *NJW/RR* (2002) p. 605 et seq.; BGH, 1 July 2002, *ZIP* (2002) p. 1763.

[80] See BGH, 3 March 2003, *BGHZ* 154, 185; BGH, 5 July 2004, *RIW* (2004) p. 1618 (concerning a Delaware company); BGH, 14 March 2005, *RIW* (2005) p. 542; BGH, 19 September 2005, *DStR* (2005) p. 1870 (concerning a company incorporated in Liechtenstein); BGH, 7 May 2007, *ZIP* (2007) p. 1306.

[81] M.-P. Weller, 'Das Internationale Gesellschaftsrecht in der neuesten BGH-Rechtssprechung', 23 *IPrax* (2003) p. 327; Kindler, *supra* n. 16, comment 407; OLG Hamburg, 30 March 2007, *GmbHR* (2007) p. 763 et seq.

In Austria, although §§ 10 and 12 *IPR Gesetz* [Austrian Act on Private International Law] of 1978 apparently follow the real seat doctrine, the case law has abandoned this doctrine in relation to EU and EEA Member States. See ÖOGH, 15 July 1999, *JZ* (2000) p. 199 (in *Centros*, the ECJ followed incorporation theory and the Austrian rule on choice of law could no longer be applied to companies incorporated in the European Union).

Similarly, the recent project to reform German conflict law, which has not yet been approved by the German Parliament, aims at adopting incorporation theory. See *RIW* (2006) annex 1.

[82] According to Art. 1837 *Code civil* [French Civil Code] and Art. L 210-3 *Code de commerce* [French Commercial Code], French law must be applied if the '*siege social*' of a company, which generally refers to the administrative seat, is located in France. Y. Loussouarn, P. Bourel and P. de Vareilles-Sommières, *Droit international privé* (Paris, Dalloz 2004) comment 707.

[83] See M. Menjucq, *La mobilité des sociétés dans l'espace européen* (Paris, L.G.D.J. 1997) p. 132 et seq.; P. Mayer and V. Heuzé, *Droit international privé*, 8th edn. (Paris, Montchrestien 2004) comment 1037. These scholars hold that according to French case law the connecting factor is the registered office not the real seat.

administrative seat together with the registered office and follow the regular national incorporation proceedings in order to become a French company.[84]

4.1.3.2 The country of arrival follows incorporation theory

If the country of arrival follows incorporation theory and a company only transfers its administrative seat, leaving its registered office in the original country, the conflict law of the country of arrival refers back to the law of the country of departure. If the latter accepts this *renvoi*, then the company will be still regulated by the law of the original country, despite the transfer of the administrative seat.[85] It is worth noting that, if this happens, the coincidence of the registered office and the applicable law is not violated.[86]

If a company transfers its registered office to a country that follows incorporation theory, we should pay attention to the real connecting factor adopted by the country of arrival. For instance, under English conflict law, foreign companies cannot change the applicable law and reincorporate under English company law, since the connecting factor is the domicile of origin.[87] In contrast, other countries following incorporation theory, allow 'inbound' reincorporation without liquidation. For instance, Swiss law explicitly allows foreign companies to submit themselves to Swiss company law without being liquidated and reincorporated, provided that the original jurisdiction allows this.[88] Italian conflict law also does not place obstacles in front of the inbound transfer of the administrative seat or the registered office, provided that the country of origin, whose law must be applied in accordance with Italian conflict rules, refers back to Italian substantive law. In addition, Italian law provides a typical norm against pseudo-foreign corporations, according to which Italian substantive law applies to companies incorporated abroad that have either their administrative seat or the main centre of their activities in Italy.[89]

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[84] Loussouarn, Bourel and Vareilles-Sommières, *supra* n. 82, comment 709.

[85] This is true only if the conflict rules of the home country refer to both conflict and substantive law (*renvoi*). If the conflict law only calls for the application of substantive law, the company should be governed by the law of the country of arrival, notwithstanding that the conflict law of the latter refers to another law. This should lead to a disagreement between the country of departure and the country of arrival as regards the applicable law.

[86] Knobbe-Keuk, *supra* n. 15, at p. 350; Kieninger, *supra* n. 37, at p. 694; Menjucq, *supra* n. 83, at p. 142; Garcimartìn Alférez, *supra* n. 15, at p. 110; Roth, *supra* n. 58, at p. 382 and Roth (2005), *supra* n. 15, at p. 979; Kindler, *supra* n. 16, comment 501. But see also Großfeld, *supra* n. 16, comment 629 (who holds that German law should consider the company as having been wound up even when the applicable company law does not change).

[87] Smart, *supra* n. 16, at p. 356; Dicey, Morris and Collins, *supra* n. 50, at p. 1337.

[88] Art. 161(1) of the Swiss Code on Private International Law.

[89] It is unclear to what extent Italian substantive law should be followed by pseudo-foreign companies, but this rule cannot be applied to companies incorporated in a Member State, according to EC freedom of establishment as interpreted by the ECJ. See Ballarino, *supra* n. 52,

4.2 **Substantive law**

4.2.1 *Company law of the country of departure*

As we have seen in the previous section, the question whether company law changes is determined by conflict law, and the change of the applicable substantive law thus depends on whether the company transfers the connecting factor, according to both the country of departure and the country of arrival.

In contrast, substantive company law determines whether the transfer of the administrative seat and/or registered office is allowed.[90] As I have pointed out above, some countries, such as Germany, regard the transfer abroad of the administrative seat and/or registered office as a reason for the liquidation of the company. Other countries, such as England, regard the transfer of the domicile as simply ineffective. In both cases, a company cannot effectively transfer the administrative seat or the registered office without being dissolved in the original jurisdiction and reincorporated in the new one. These solutions are independent from the connecting factors chosen by conflict law: even jurisdictions following incorporation theory could hinder company 'emigration' and jurisdictions following real seat theory could allow identity-preserving company law changes. This will be clarified by means of some examples:

(a) Among countries following incorporation theory, we could take the example of English company law and Italian company law, which do not share the same view regarding the outbound transfer of the registered office.[91] English companies cannot transfer their registered office to Scotland or any other EU Member State.[92] If this happens, as we have already seen, a new company is regarded as having been incorporated in the country of arrival and the 'old' English company is regarded as still existent.[93] Italian law is more liberal, because it permits limited liability companies to transfer their registered office abroad based on a decision of the general meeting, allowing dissenting shareholders to withdraw from the company,[94] although this transfer should not have consequences for the applicable law.

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at p. 127; F.M. Mucciarelli, 'Libertà di stabilimento comunitaria e concorrenza tra ordinamenti societari', 27 *Giurisprudenza commerciale* (2000) II, p. 574; Benedettelli, *supra* n. 68, at p. 620; L. Enriques, 'Delle Società costituite all'estero', in *Commentario del codice civile Scialoja-Branca* (Bologna, Zanichelli 2007) p. 4.

[90] Knobbe-Keuk, *supra* n. 15, at p. 351.

[91] Both English and Italian law do not place any obstacles on the transfer abroad of the administrative seat of national companies, as this is not relevant under conflict law.

[92] P.L. Davies, *Gower and Davies' Principles of Modern Company Law* (London, Sweet & Maxwell 2003) p. 117.

[93] Smart, *supra* n. 16, at p. 357.

[94] Art. 2437(1) *Codice Civile* [Civil Code] (as regarding the *società per azioni*) and Art. 2473(1) *Codice Civile* (as regarding the *società a responsabilità limitata*). But see the decision of the *Corte di Cassazione* cited *supra* at n. 71.

(b) Among countries following real seat theory, we can mention German, French and Belgium company law. According to German case law, a company that transfers its actual administrative seat abroad should be regarded as having been wound up,[95] and a decision of the general meeting to transfer the administrative seat and/or registered office abroad is also regarded as a winding-up decision.[96] According to other scholars, these decisions are simply void and the company should not be liquidated.[97] Therefore, a German company can transfer abroad neither its administrative seat, nor its registered office, nor both together. French company law, in contrast, explicitly allows limited liability companies and *sociétés en commandite simple* to transfer their registered office abroad and change company law, but only if the shareholders decide unanimously in favour of such a move.[98]

4.2.2 *Company law of the country of arrival*

If the conflict law of the country of departure refers to the company law of the country of arrival and the conflict rules of the latter accept this, the transfer produces a change in the applicable company law.[99] Nonetheless, the company law of the country of arrival could hinder the 'immigration' regardless of the conflict rules that are in force, for instance by requiring the company to reincorporate

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[95] See Großfeld, *supra* n. 16, comment 605 et seq.; Kindler, *supra* n. 16, comment 507 (but only if the company seeks to transfer the administrative seat to a country applying the real seat doctrine).

[96] BayObLG, 7 May 1992, *BayOBLGZ* (1992) 113 et seq.; Großfeld, *supra* n. 16, comment 631 et seq. See also BayObLG, 11 February 2004, *AG* (2004) p. 266 et seq.: a decision of the general meeting to transfer the registered office from Germany to Portugal cannot be registered. See M.-P. Weller, 'Zur identitätswahrender Wegzug deutscher Gesellschaften', 42 *DStR* (2004) p. 1218.

[97] M. Lutter and W. Bayer, in M. Lutter and P. Hommelhoff, eds., *GmbHG* (Cologne, Otto Schmidt 2004) § 4, comment 22; U. Hüffer, *AktG*, 7th edn. (Munich, Beck 2006) § 5, comment 12; P. Kindler, 'GmbH Reform und internationales Gesellschaftsrecht', 52 *Aktiengesellschaft (AG)* (2007) p. 723.

[98] Art. L. 225-97 *Code de commerce* [French Commercial Code]. See H. Le Nabasque, 'L'incidence des normes européennes sur le droit français applicable aux fusions et au transfert de siège social', *Rev. Société* (2005) p. 81 et seq.

Another example may be provided by Belgian law, which also follows real seat theory. The transfer of the administrative seat is permitted, and the company is not liquidated, if both the country of departure and the country of arrival agree on this. See Art. 112 of the Code of Private International Law; and F. Rigaux and M. Fallon, *Droit international privé* (Brussels, Larcier 2005) p. 989.

[99] It is always worth paying attention to the substantive law of the country of arrival, because if the latter places obstacles in the way of a transfer, the company is *in practice* hindered in the transfer of the administrative seat or the registered office. See Knobbe-Keuk, *supra* n. 15, at p. 353.

in the country without preserving its legal personality. In that case, the original jurisdiction should also regard the company as having been liquidated.

4.3 Conclusions

We can sum up the previous sections by stating that identity-preserving company law changes depend on the combined application of the conflict and substantive rules of both the country of incorporation and the country of arrival.

From the viewpoint of the country of incorporation, we should distinguish between countries belonging to the 'real seat' family and countries belonging to the 'incorporation' family:

(a) If the country of departure follows real seat theory, the applicable company law changes without liquidation if: (1) substantive company law allows companies to transfer the administrative seat (together with the registered office) and to reincorporate voluntarily in another country without being liquidated; (2) the company follows the relevant procedures and secures the necessary majorities; and (3) the country of arrival accepts the 'inbound' transformation.

(b) If the country of departure follows incorporation theory, the applicable company law changes without liquidation if: (1) substantive company law allows companies to transfer the registered office and to reincorporate voluntarily in the country of arrival; (2) the company follows the relevant procedures and secures the necessary majorities; (3) the relevant conflict law does not only refer to the country of the original incorporation but also to the country where the company was reincorporated afterwards; and (4) the country of arrival accepts the 'inbound' transformation.

5. EC FREEDOM OF ESTABLISHMENT AND 'MOVING OUT' CASES

5.1 Ambiguities of Articles 43 and 48 EC

I will now once again address EC law, asking whether EC freedom of establishment also covers 'moving out' cases. To answer this question, it is useful to briefly summarise the legal basis of EC freedom of establishment as provided by the Treaty and the ECJ's decisions.

The difficulties faced by legal scholars and the ECJ in allowing the transfer of a company's administrative seat or registered office throughout the European Union are due to the ambiguities of Articles 43 and 48 EC, which are not perspicuous with regard to legal entities.

In this regard, it is worth recalling that Article 43 EC provides for two kinds of freedoms.[100] The 'primary' freedom bans every restriction erected by a Member State on the establishment of its nationals in another Member State. Therefore, every citizen of a Member State can move his or her domicile or residence to another Member State, working and living there without being discriminated. The 'secondary freedom' prohibits all restrictions on the establishment of branches or agencies in another Member State. Every citizen of an EU Member State can establish a secondary centre of interest for his or her activities in another Member State.

The same freedoms are granted to firms and companies, as stated in Articles 43(1) and 48 EC. Indeed, according to the latter article,

> [c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this chapter, be treated in the same way as natural persons who are nationals of Member States.

It is not clear what this equal treatment of legal entities and human beings means in terms of EC freedom of establishment. This issue is highly debated because Article 43(1) EC is apparently written only for natural persons, who have the right to establish themselves in another Member State. Therefore, Member States cannot place limits on the immigration and establishment of citizens from other Member States nor on the emigration of their own citizens.[101] For instance, a French citizen can live and work permanently in Italy without losing French nationality. EC freedom of establishment prohibits French law from obstructing the emigration of French citizens and requires Italian law not to discriminate against French citizens *vis-à-vis* Italian ones or to raise other obstacles to immigration, unless they are aimed at achieving a public goal and are proportionate to this aim. It should be noted that EC freedom of establishment does not require

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[100] See U. Forsthoff, 'Mobilität von Gesellschaften im Binnenmarkt', in H. Hirte and T. Bücker, eds., *Grenzüberschreitende Gesellschaften* (Cologne, Heymanns 2006) comment 11 et seq.; D. Wyatt and A. Dashwood, *Wyatt and Dashwood's European Union Law* (London, Sweet & Maxwell 2006) p. 841 et seq.

[101] It is widely recognised by legal scholars that Member State citizens enjoy EC freedom of establishment not only *vis-à-vis* countries of arrival but also *vis-à-vis* the country of emigration. See ECJ, Case C-251/98 *Baars* v. *Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem* [2000] *ECR* I-2787, 28: 'Even though Article 52 of the Treaty, like the other provisions concerning freedom of establishment, is, according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, it also prohibits the Member State of origin from hindering the establishment in another Member State of one of its own nationals.' Among legal scholars, see Forsthoff, *supra* n. 100, comment 20; Ringe, *supra* n. 18, at p. 639.

Member States to grant a right to change an 'old' nationality into the one of the country of establishment, since citizenship rules are still within the competence of the Member States.

The application of EC freedom of establishment to companies is not clear, because legal entities do not exist and live *per se*, as human beings do, but only according to the law of a specific jurisdiction, which grants them legal personality and regulates their internal organisation and their relations with the outside world. This point was stressed by the ECJ in *Daily Mail*, where it stated that 'companies are creatures of the law and, in the present state of Community law, creatures of national law'.[102] Far from being a mere theoretical remark, this assumption was used by the ECJ to allow Member States to place limits on the emigration of domestic companies.[103] This is confirmed in *Überseering*, where the ECJ stated that 'Articles 43 EC and 48 EC require Member State[s] to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation'.

The question therefore arises whether Article 48 EC provides a hidden conflict rule referring to the country of incorporation. Indeed, after the decisions in *Centros*, *Überseering* and *Inspire Art*, the debate among legal scholars focused mostly on conflict rules, rather than substantive rules, and particularly on whether real seat theory is still compatible with EC freedom of establishment. In the previous pages, I have stressed that not only conflict rules but also substantive rules can raise obstacles to company mobility. Thus, it would be too restrictive an approach to hold that EC freedom of establishment simply provides for a hidden norm on the choice of law that refers to the country of incorporation,[104] as in this way we would address only some of the obstacles to company mobility but not all of them. Moreover, we should also consider that EC law is not placed at the same level as national jurisdictions and that it does not need to fit into legal categories and distinctions stemming from national laws and legal thinking. Therefore, we should argue that EC freedom of establishment prohibits whatever rule may obstruct company mobility in an unreasonable way.[105]

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[102] *Daily Mail*, *supra* n. 2, recital 19.

[103] Ibid., at recital 25.

[104] S. Leible and J. Hoffmann, '"Überseering" und das (vermeintliche) Ende der Sitztheorie', 48 *RIW* (2002) p. 928; P. Behrens, 'Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art', 23 *IPrax* (2003) p. 204; C.C. Wendehorst, 'Kollisionsnormen im Primären Europarecht', in *Festschrift Heldrich*, *supra* n. 15, at p. 1083 et seq.

[105] See W.-H. Roth, 'Der Einfluβ des europäischen Gemeinschaftsrechts auf das internationale Privatrecht', 55 *RabelsZ* (1991) p. 631; Benedettelli, *supra* n. 68, at p. 576 et seq.; Wouters, *supra* n. 49, at p. 116; Eidenmüller and Rehm, *supra* n. 47, at p. 165; Rehm, *supra* n. 42, comment 71; S. Leible, 'Niederlassungsfreiheit und Sitzverlegungsrichtlinie', 33 *ZGR* (2004) p. 534; Kindler, *supra* n. 16, comment 116.

This conclusion allows us to tackle the question whether EC freedom of establishment covers identity-preserving company law changes. As I have pointed out in the previous sections, we should distinguish between two questions: (a) whether the company can transfer the administrative seat and/or registered office abroad without losing its legal identity; and (b) whether a transfer of the administrative seat and/or registered office changes the applicable company law. First, we will ask whether EC freedom of establishment requires Member States to allow national companies to transfer abroad their registered office and/or administrative seat without liquidation. As we have already seen, this question is answered by substantive company law at national level. Second, we will ask whether EC law requires Member States to allow national companies to change the applicable substantive law voluntarily. Whether and under what circumstances the applicable company law changes is a question answered at the national level by conflict rules, while substantive rules are meant to establish the procedure to approve such a decision.

5.2 Company 'migrations' throughout the European Union

5.2.1 *Ambiguities of* Daily Mail

The first question was explicitly addressed by the ECJ only in relation to countries of arrival, which cannot place obstacles in the way of 'inbound' transfers of the administrative seat and/or registered office.[106]

In contrast, in *Daily Mail*, the ECJ judged the obstacles imposed by the country of departure as compatible with EC law, stating that Articles 43 and 48 EC

> confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State, while retaining the status of companies incorporated under the legislation of the first Member State.[107]

This was not explicitly overruled, as the ECJ distinguished *Überseering* and *Inspire Art* from *Daily Mail*,[108] stressing that

> unlike the case before the national court in this instance, Daily Mail and General Trust did not concern the way in which one Member State treats a company which is validly incorporated in another Member State and which is exercising its freedom of establishment in the first Member State.[109]

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106 *Überseering*, *supra* n. 1.
107 *Daily Mail*, *supra* n. 2, recital 24.
108 *Überseering*, *supra* n. 1, recital 61 et seq.; *Inspire Art*, *supra* n. 1, recital 102 et seq.
109 *Überseering*, *supra* n. 1, recital 66.

Therefore, we should consider *Daily Mail* as being still good law.

I have stressed above that *Daily Mail* does not address a case of winding up decided by the country of incorporation but the Treasury's authorisation to the transfer abroad of the tax domicile. Therefore, most of what the ECJ declared in this decision should be regarded as *obiter dictum.*[110] Moreover, *Daily Mail* is inherently contradictory, because in another place it also stresses that Articles 43 and 48 EC 'prohibit 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 which comes within the definition contained in Article 58'.[111] Thus, the ECJ stated that restrictions on company 'emigrations' imposed by the country of incorporation are covered by EC freedom of establishment.

As I have remarked above,[112] this was not an isolated statement. On the contrary, it has been used as precedent in at least two other cases that I have already mentioned above, *ICI* (1998)[113] and *Marks & Spencer* (2006),[114] in which the ECJ stated that EC freedom of establishment also covers limits imposed by the country of incorporation.

We can conclude, therefore, that the ECJ's case law is far from being uncontroversial as regards the distinction between the 'moving in' and 'moving out' of companies and that the question whether the country of incorporation can place limits on company 'emigrations' still needs to be answered.

5.2.2 *Lack of rationale for any distinction between 'moving in' and 'moving out' cases*

In this section, I will argue that to distinguish between 'moving out' and 'moving in' cases is not consistent with EC freedom of establishment.

We should proceed from the basic norm of Article 48 EC, which extends to legal entities the right to establish themselves in another Member State that Article 43 EC assigns to natural persons. Article 48 raises the question whether Member States can wind up companies that transfer their registered office and/or administrative seat abroad, 'killing' them at the frontier.[115]

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[110] Behrens, *supra* n. 104, at p. 201; Rehm, *supra* n. 42, comment 57.

[111] *Daily Mail*, *supra* n. 2, recital 16; see W.-H. Roth, 'Internationales Gesellschaftsrecht nach *Überseering*', 23 *IPrax* (2003) p. 122; Roth (2003), *supra* n. 15, at p. 193; Roth (2005), *supra* n. 15, at p. 983.

[112] See *supra* para. 3.3.

[113] *ICI*, *supra* n. 44.

[114] *Marks & Spencer*, *supra* n. 14.

[115] If we do not consider legal persons as inherently identical to natural persons, we could refer EC freedom of establishment to the shareholders by putting the question in a different way: does freedom of establishment grant shareholders the right to transfer the administrative seat and/or registered office of their company to another Member State without needing to liquidate the company in the original country and incorporate a new company in a different

The inherent diversity between natural and legal persons emerges if we consider that Member States can neither kill their citizens at the frontiers (which is obvious, at least in democratic countries) nor take away their legal capacity if they try to emigrate. In addition, Member States cannot take away the citizenship of somebody who is establishing him or herself in another Member State, this being an unacceptable restriction of EC freedom of establishment.

Taking Article 48 EC seriously, we should argue that Member States cannot do to companies what they are not allowed to do to individuals[116] and that they therefore cannot liquidate an emigrating company.

One could nonetheless agree with *Daily Mail*, stressing that, in contrast to human beings, legal persons are a mere creation of the law. If we continue from this premise, we might argue that it is within Member States' competence to determine under what conditions a legal person can be created and continues to exist[117] and even to establish whether to offer natural persons the opportunity to form a company instead of carrying on business as individuals.[118] If we admit this, we might also conclude that Member States are free to liquidate national companies that transfer their administrative seat and/or registered office abroad.[119]

This argument, after a deeper scrutiny, cannot be praised, as it is merely product of positivistic conceptions of the legal personality and their consequences are squarely in contrast with EC freedom of establishment.

Indeed, if the country of incorporation liquidates companies that transfer their administrative seat and/or registered office abroad, such companies would have only two alternatives: (a) give up their aim to 'emigrate'; or (b) accept being wound up in the original country and reincorporated in the Member State of arrival. After liquidation, the 'emigrating' company no longer exists as a legal entity. We should then ask ourselves who is reincorporating in the country of arrival. The answer is easy: the former shareholders *as individuals* are incorporating a *new* company, not the *'old'* company, which does not exist anymore. In other words, following the theory that countries of incorporation are free to liquidate emigrating companies, we would then implicitly assume that the *shareholders as individuals – not the company –* enjoy EC freedom of establishment,

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Member State? See W. Schön, 'The mobility of companies in Europe and the organizational freedom of company founders', *ECFR* (2006) p. 138.

116 Knobbe-Keuk, *supra* n. 15, at p. 354; H. Eidenmüller, 'Mobilität und Restrukturierung von Unternehmen im Binnenmarkt', 59 *Juristenzeitung (JZ)* (2004) p. 29; Eidenmüller and Rehm, *supra* n. 47, at p. 177; Rehm, *supra* n. 42, comment 63; Leible, *supra* n. 105, at p. 536; Wymeersch, *supra* n. 64, at p. 677; Ringe, *supra* n. 18, at p. 632.

117 See Farnsworth, *supra* n. 63, at p. 230: 'According to the common law both of England and America, the personality of a corporation – and this has been seen to be its status – depends solely on the law of the country of its incorporation which alone can bring it into existence or cause it to cease to exist.'

118 See Ringe, *supra* n. 18, at p. 631 (who then criticises this argument).

119 See Kindler, *supra* n. 16, comment 98.

which is to say that Article 48 EC is meaningless.[120] This outcome is a complete negation of EC freedom of establishment of legal persons, not a simple limitation of this freedom,[121] and this conclusion is therefore not compatible with the EC Treaty.

It also follows from this conclusion that Article 48 EC, which states that legal persons 'should be treated the same way as a natural person', implicitly interferes with national substantive rules, since it prohibits Member States from liquidating a company that transfers abroad its administrative seat and/or registered office. Member States are free to establish the legal conditions for incorporating a new company under their law, but once the company has been created it is free to exercise EC freedom of establishment throughout the European Union just as individuals do. This outcome should not come as a surprise: the creation of a single market throughout the European Union means precisely that firms based in a Member State should have the opportunity, if they regard it as economically reasonable, to transfer their activities and their administrative seat to another Member State.

5.2.3 *Transfer of the registered office*

The issue is more complex when it comes to the transfer of the registered office if the company does not simply amend the articles of association but also removes itself from the public register of the country of incorporation and files for registration on the public register of the country of arrival. Such a transfer of the registered office has two possible outcomes: (a) the applicable company law changes to the law of the country of the new registered office and the 'emigrating' company reincorporates in the country of arrival; or (b) if the substantive law does not change despite the transfer, the applicable law becomes unenforceable precisely because the law of the country where the public register is located does not coincide with the applicable law.[122]

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[120] Art. 48 EC would only have the role of giving legal entities the right to become shareholders of newly incorporated legal entities. Under a traditional systematic analysis, it is worth mentioning that this argument is consistent with whatever theory of legal personality we select. Even if we think that legal personality only has a fictive nature, being a verbal means to understand a set of rules to be applied to shareholders, we should still reach the conclusion that EC freedom of establishment cannot admit Member States to liquidate emigrating companies, otherwise Art. 48 EC would be meaningless. See Schön, *supra* n. 115, at p. 138.

[121] See W.F. Ebke, 'Überseering: "Die wahre Liberalität is Anerkennung"', 58 *JZ* (2003) p. 932; Ebke, *supra* n. 55, at p. 23; J. Rickford, 'Current development in European law on restructuring of companies: An introduction', *EBLR* (2004) p. 1246.

[122] See P. Behrens, 'International Company Law in view of the *Centros* Decision of the ECJ', 1 *EBOR* (2000) p. 143. This is exactly the solution stemming from Italian conflict law and followed by part of the Italian case law (see *supra* n. 67 et seq.).

Nonetheless, there is no real reason, from the viewpoint of EC freedom of establishment, to distinguish between the transfer abroad of the administrative seat and the registered office. Even if we hold that EC freedom of establishment does not cover identity-preserving company law changes, it is not possible to infer from this premise that the transfer of the registered office falls outside of the area covered by EC freedom of establishment. We should consider, indeed, that the change of the applicable company law stems from the application of national conflict rules, which diverge in terms of the relevant connecting factor. There is no reason for a different treatment under EC law of the administrative seat and the registered office, since both might well be connecting factors for company law at national level.

This does not mean that Member States are not allowed to place limits on the transfer abroad of the registered office – on the contrary, they can – but, since this transfer is also covered by EC freedom of establishment, any limit eventually imposed by Member States should be justified and proportionate to the need to achieve a public goal. In the wording used by the ECJ in *Inspire Art*,

> according to the Court's case law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.[123]

The question arises whether and to what extent the winding-up of the emigrating company is necessary or proportionate to achieving a legitimate public goal. The same issue is raised, among others, by English and Irish law, which does not liquidate the emigrating company but regards the transfer abroad of the original domicile as ineffective.[124] Both rules provide limits on EC freedom of establishment that need to be justified under the proportionality review. The answer to the question whether restrictions are justified under the proportionality review should be provided on a case-by-case basis.

However, Member States cannot justify a winding-up of the emigrating company based on the aim of preserving the coincidence of the registered office and the applicable law, since in the country of departure has at its disposal a less

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[123] See *Inspire Art*, *supra* n. 1, recital 133; see also ECJ, Case C-19/92 *Kraus* [1993] *ECR* I-1663, recital 32; ECJ, Case C-55/94 *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] *ECR* I-4165, recital 37; *Centros*, *supra* n. 1, recital 34; ECJ, Case C-436/00 *X and Y* v. *Risskatteverket* [2002] *ECR* I-10829, recital 43.

[124] Roth (2003), *supra* n. 15, at p. 197; see also M. Garcia-Riestra, 'The transfer of seat of the European Company v. free establishment case law', 15 *EBLR* (2004) p. 1318; Wymeersch, *supra* n. 64, at p. 692.

restrictive measure than liquidating the emigrating company order to achieve this goal: it can indeed allow the emigrating company to change company law while preserving its legal identity, since in this way the registered office and the applicable law would continue to coincide.[125]

Restrictions on identity-preserving company law changes need a different justification, such as the need to protect minority shareholders or company creditors in specific circumstances. But this aim is also not always able to justify the liquidation of the company. As I pointed out above, identity-preserving company law changes, from the viewpoint of the interests affected by such decisions, are similar to the conversion of the original company into another type of company regulated by the law of the country of arrival. The country of incorporation could therefore take into account the interests of minority shareholders or creditors simply by extending to identity-preserving company law changes the national rules on company conversions, unless there are specific reasons that lead to the conclusion that these interests are not adequately protected by applying national rules on conversion. Once again, this should be established on a case-by-case basis.

The issue of employee protection is more complex, especially when the country of incorporation confers rights or powers on employees that are not based on labour law but on company law, as in the case of German codetermination.[126] In that case, identity-preserving company law changes would negatively affect employee interests in such countries. Hence, the SE Regulation and the Directive on Cross-Border Mergers deal with this issue and contain rules aimed at preventing firms from trying to evade the codetermination regime.[127] But again, this is not a good reason to exclude the 'outbound' transfer of the registered office from the area covered by EC freedom of establishment. Instead, it could be a reason to accept procedural or substantive limitations imposed by the country of incorporation, similar to the provision of the SE Regulation and the Directive on Cross-Border Mergers, aimed at allowing company 'emigrations' only if the country of arrival provides for the same level of employee participation as the country of the original incorporation.[128]

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[125] Roth, *supra* n. 58, at p. 395. This is fully compatible with the wording used by the ECJ in *Daily Mail*. According to *Daily Mail*, if a company wants to preserve its legal identity, it should either leave the administrative seat in the original country or transfer it together with the registered office. See Frowein, *supra* n. 6, at p. 130 et seq.; Roth, *supra* n. 111, at p. 122; Behrens, *supra* n. 104, at p. 205.

[126] Gelter, *supra* n. 9, at p. 277; Johnston, *supra* n. 38, at p. 92 et seq.

[127] Johnston, *supra* n. 38, at p. 106 et seq.

[128] See Art. 16 of the Directive on Cross-Border Mergers.

6. CONCLUSIONS: IDENTITY-PRESERVING COMPANY LAW CHANGES IN THE EUROPEAN UNION?

In the previous pages, I have tackled the issues related to the transfer abroad of a company's administrative seat and/or registered office and identity-preserving company law changes, under both national and EC law. In this regard, it is useful to distinguish between the different 'families' of conflict rules.

(a) *The country of incorporation follows real seat theory.* From a conflict law viewpoint, the real seat theory leads to a change of the applicable company law if the company transfers its administrative seat to another country. As a consequence of this rule on the applicable law, real seat countries generally require that the registered office should coincide with the administrative seat. Therefore, at least theoretically, companies transferring both their registered office and their administrative seat abroad should change the applicable company law. Nonetheless, the substantive law of some jurisdictions, such as Germany, does not allow a change of company law, even if the company transfers both its registered office and its administrative seat.

(b) *The country of incorporation follows incorporation theory.* I have distinguished between two kinds of incorporation theories, according to the connecting factor followed by the conflict rules. If conflict law refers to the country of the original incorporation (or 'domicile'), the transfer abroad of the registered office is ineffective and a new company is regarded as having been incorporated in the country of arrival. Other countries call for the application of the law of any subsequent reincorporation, thus permitting identity-preserving company law changes.

As regards EC law, I have argued that EC freedom of establishment, despite the common interpretation of *Daily Mail*, allows 'outbound' transfers of the administrative seat and/or registered office. This means that: (1) the theory according to which the country of incorporation is free to liquidate a company that transfers abroad the administrative seat and/or registered office is not compatible with EC freedom of establishment; and (2) Member States can place restrictions on the transfer abroad of the administrative seat and/or registered office, provided that these restrictions are aimed at achieving a legitimate public goal and are proportionate to this goal according to the criteria established by the ECJ's case law.

This outcome leaves open the question whether EC freedom of establishment also covers voluntary company law changes. In other words, the question arises whether Member States have a duty to provide their companies with a legal means to change company law voluntarily without needing to liquidate and reincorporate in the new country. The answer to this question should be in the negative, stressing the parallel between natural and legal persons drawn by Article

48 EC, which aims to extend to legal entities the same freedom of establishment that is granted to natural persons by Article 43 EC. Indeed, EC freedom of establishment does not grant natural persons who establish themselves in another country a right *vis-à-vis* the original country to change nationality. If we place the nationality of a natural person on the same footing as the *lex societatis* of a legal person, we should conclude that, pursuant to EC law, Member States do not have a duty to allow national companies to voluntarily change the applicable company law while preserving their legal identity.[129]

Despite this conclusion, I have argued in the previous pages that EC freedom of establishment also covers the transfer abroad of the registered office. Therefore, the country of incorporation can neither liquidate the company that transfers the registered office abroad nor treat this transfer as ineffective, unless doing so is proportionate to achieving a legitimate public goal, which should be established on a case-by-case basis. The same rule applies even if the transfer abroad of the registered office leads to a company law change.

This conclusion paves the way to a high degree of legal uncertainty regarding the question whether restrictions to company 'emigrations' are justified under EC law.[130] Companies risk not having knowledge in advance of the possible outcome of the transfer abroad of their administrative seat and/or registered office, unless the company and conflict laws of both the country of departure and the country of arrival explicitly admit identity-preserving company law changes.[131] In order to do so, the conflict laws of both the country of departure and the country of arrival should adopt the same connecting factor and agree upon the change of the applicable company law; otherwise the company in question would be regarded as an 'own' company by both countries and would risk becoming a sort of 'hybrid' company or a 'chimera' governed by two jurisdictions.[132] Moreover, even if both countries allow identity-preserving company law changes and their connecting factors coincide, many technical problems arise if the regulations are not harmonised as regards the procedures and the timing of the transfer.[133] This lack of harmonisation could be viewed as a sort of hidden obstacle in the path of outbound transfers, despite the fact that they are formally covered by EC freedom of establishment.

If identity-preserving company law changes are regarded as a relevant step on the path to efficient regulatory competition, it is necessary to clarify this issue through a directive, which, following the examples provided by the SE Regulation

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[129] See Lombardo, *supra* n. 60, at p. 374.

[130] See E. Wymeersch, 'Is a Directive on Corporate Mobility Needed?', 8 *EBOR* (2007) p. 168.

[131] Legal uncertainty as such can be regarded as a relevant obstacle on the path to freedom of establishment.

[132] S. Rammeloo, 'The Long and Winding Road Towards Freedom of Establishment for Legal Persons in Europe', 10 *Maastricht J. Europ. Comp. Law* (2004) p. 195.

[133] Behrens, *supra* n. 122.

and the Directive on Cross-Border Mergers, should take into account all interests affected by company mobility and harmonise the timing and procedures of the transfer of the registered office.