UNIVERSITY OF ESSEX **DISSERTATION**

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LLM/MA IN: International Commercial and Business Law
STUDENT'S NAME: Brian Jackson
SUPERVISORS'S NAME: Dr. Mario Koutsias
DISSERTATION TITLE **Freedom of Establishment and Cross-Border Mobility in the EU: The need for a common standard of rules at an EU level for the transfer of seats of companies within the internal market.**

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DISSERTATION

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Freedom of Establishment and Cross-Border Mobility in the EU: The need for a common standard of rules at an EU level for the transfer of seats of companies within the internal market.

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1. Introduction

European Union's main objective is to put in place a single internal market, which comes with the desire to implement the 'Four Freedoms'[1] within the EU internal market and its member states. In the field of EU Company law, the fundamental concept of freedom of establishment is interlinked with the aim to create an area without internal barriers or borders where corporate mobility is guaranteed, represent the EU's vision for their member states' companies and businesses, in order to stimulate growth, economy within the European Union.

Nowadays, a number of challenging factors still persist, complicating the operations in relation to companies' freedom of establishment and 'cross-border transfer of the company seat'[2] which affects corporate cross-border mobility within the internal market due to Member States being permitted to implement their national laws to determine the 'personal law'[3] of companies. In practice, it refers to the application of two conflicting legal theories, known as the real seat theory or 'siège réel'[4] and the incorporation theory by 28 different jurisdictions. Consequently, it creates legal uncertainty, inconsistency when it comes to the recognition of the legal status and capacity of companies within the EU. This is illustrated through the European Court of Justice's case-law and judicial decisions, which put emphasis on Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU), resulting in bringing to light the lack of consistency and the presence of ambiguity within this area of EU company law and also questioning the applicability and effectiveness of the real seat theory which is implemented and applied by various Member States of the EU.

This complex situation creates a dilemma or predicament where it might be necessary to potentially demand one of the opposing legal approach to step back and consider the process of harmonisation at a EU level in regards to the determination of the applicable law of companies and the transfer of their seats, in order for legal certainty and clarity to be present and for the EU to achieve one of its

[1] Catherine Barnard, *The substantive law of the EU: the four freedoms*, (5th Oxford University Press 2016).
[2] Hana Horak and Kosjenka Dumancic, *'Cross-Border Transfer of the Company Seat: One Step Forward, Few Steps Backward*' (2017) 14 US-China Law Review 711.
[3] Csongor Istvan Nagy, '*The Personal Law of Companies and the Freedom of Establishment under EU Law*', (2013) Hungarian Y.B. Int'l L. & Eur. L. 353.
[4] Catherine Barnard, *The substantive law of the EU: the four freedoms*, (5th Oxford University Press 2016).

greatest objectives in regard to corporate mobility between Member States and companies fully enjoying the freedom of establishment within the single internal market.

The second chapter of this paper, is to mainly have an outlook on the freedom of establishment in the EU and within the internal market which is a core concept protected and safeguarded by Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) and the 'legal distinctness'[5] within the EU emanating from the presence of 'different philosophies'[6] in relation to corporate governance within the EU. Hence, the presentation of the two core models of corporate governance that shaped and influenced Member States' national corporate governance system, known as the 'two-tier system'[7], which its basic structure emanates from German traditions and the 'one-tier system'[8] which derives from the Anglo-American tradition. And then present the two opposing theories co-existing and applied across the EU and its member states, to determine the *lex societatis*, known as the incorporation theory and the real seat theory and how their implementation affect 'intra-EU mobility for companies'[9] in the internal market.

The third chapter of this paper is to closely analyse the regime of Member States within the EU regarding cross-border corporate mobility has it is deemed to be a 'crucial element in the completion of the internal market'[10] objective. Hence, having a break-down of cross-border operations into two categories, known as inbound mobility and outbound mobility of companies between Member States and closely examine, in practice, under which conditions and the potential consequences, if any, companies transfer their administrative seat or registered office from the home member state to the host member state, and the implication of the presence of diverging national legislations and their different national approaches.

[5] Philip Wood, Law and Practice of International Finance, (Sweet & Maxwell, 2008).
[6] Ibid.
[7] F. Ghezzi, C. Malberti, *'The Two-Tier Model and the One-Tier Model of Corporate Governance in the Italian Reform of Corporate Law*' (2008) 5 ECFR 1.
[8] Ibid.
[9] Wolf-Georg Ringe, '*The European Company Statute in the context of Freedom of Establishment*', (2007) 7 Journal of Corporate Law Studies 185.
[10] European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0019+0+DOC+PDF+V0//EN>, accessed 24 July 2019.

The fourth chapter is dedicated to closely analyse the case-law of the European Court Justice, from the *Daily Mail*[11], *Centros*[12], *Uberseering*[13], *Inspire Art*[14], and the *Cartesio*[15] to the *Vale*[16] and *Polbud*[17] case and how judicial decisions and interpretation of companies' fundamental right of freedom of establishment most likely resulted to an emerging shift of balance towards the incorporation theory and at the same time questioning the seat theory's compatibility and applicability in the EU's single internal market towards cross-border corporate operations, as well as the broader concept of freedom of establishment in relation to cross-border corporate conversion.

The fifth chapter is to essentially focus on the harmonisation at EU level regarding the personal law of companies, as the next step forwards, in order to encourage and promote legal certainty, and predictability. In order to do this, it is important to closely analyse the current legal framework put in place by the EU through alternative options, such as the Societas Europea (the European Company) and cross-border mergers to address cross-border mobility within the internal market and examine the necessity of a new proposal made by the European Parliament and European Commission to implement a common rules on the transfer of company's seats across the EU in order to create a well-functioning internal market.

By examining all the above mentioned, the purpose of this paper is to mainly discuss the collision between the real seat theory and the incorporation theory with the European Court of Justice's emphasis, through its judicial decisions on freedom of establishment and 'cross-border corporate mobility'[18] within the internal market and the imperative need for the harmonisation of 'conflict of rules determining the applicable law'[19] and the 'company's seats'[20] at EU level can provide and improve

[11] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.
[12] Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen (1999).
[13] UberseeringBV v. Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR 1-9919
[14] C- 67/01, Kamer van Koophandel en Fabriekenvoor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.
[15] C-210/06, Cartesio Oktato es Szolgtiltato bt [2008] ECR 1-9641.
[16] Case C-378/10 VALE,
[17] Case C-106/16 Polbud, EU:C:2017:804.
[18] Stephan Rammeloo, '*Cross-Border Mobility of Corporations and the European Union: Two Future Landmark Cases*', (2001) 8 Maastricht Journal of European and Comparative Law 117.
[19] Timmermans C, *'Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).
[20] Stephan Rammeloo, *'Cross-border company migration in the EU: Transfer of registered office (conversion) – the last piece of the puzzle? Case C-106/16 Polbud, EU:C:2017:804*' (2018) Maastricht Journal of European and Comparative Law, Vol. 25(1) 87–107.

legal certainty, predictability and clarity in this significant and fundamental area of EU company law, for companies to fully enjoy free movement within the European Union.

2. The fundamental concept of freedom of establishment and *lex societatis* in the EU

2.1 Freedom of Establishment within the EU

In this field of company law freedom of establishment is a core element of the single internal market. This is a fundamental right protected under Article 49 and 54 of Treaty on the Functioning of the European Union(TFEU). Freedom of establishment is essential to address and suppress different national regulations that have impeding or restraining influence on the free movement of companies within the European Union.

2.1.1 Article 49 and 54 of the Treaty on the Functioning of the European Union

Article 49 of Treaty on the Functioning of the European Union stipulates,

'*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State*'[21]

And Article 54, referring to the formation of companies states that,

'*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*'[22]

[21] Article 49 Treaty on the Functioning of the European Union(TFEU).
[22] Article 54 of Treaty on the Functioning of the European Union(TFEU).

Primarily, Article 49 (TFEU), focuses on the establishment of natural persons and companies, and regarding the latter, the provision 'contemplates two forms of establishment', which is known as 'primary establishment'[23], defined as the 'right to setup and manage undertaking, specifically companies or firms'[24] and the 'secondary establishment'[25] refers to the ability to setup branches, agencies or subsidiaries. Thereby, companies, firms can enjoy and exercise their freedom of establishment through both these forms.

Although, when it comes to the secondary establishment, in practice, it refers to a situation where a parent company from a Member State establishes a subsidiary, branch or agency in another Member State. And this illustrates the 'necessary prerequisite to identify the cross-border element'[26] in order to be able to rely on the freedom of establishment safeguarded by these provisions. And despite the fact that article 49 TFEU solely mentions the host state having been disallowed to impose restrictions, this also applies to the home state, thereby the concept of freedom of establishment covers restrictions stemming from 'inbound migration and outbound migration'[27]. But in practice, as examine at a later stage 'moving in and moving out'[28] situations illustrate a level of disparity in relation to exercising the freedom of establishment.

In *Cadbury Schweppes*[29], where the proceedings concerned the national legislation's compatibility with article 49 and 54 TFEU, which 'assign to the resident parent company the profits of its subsidiary established in a lower level taxation jurisdiction'[30]. Notwithstanding, the decision of this case, which the Court deemed the domestic legislation to be incompatible with the EU's freedom of establishment , it is important to highlight that the European Court of Justice established that in order for companies to be subject to the applicability of article 49 TFEU two

[23] Jay Gajjar, '*Your Dominion or Mine? A critical evaluation of the Case Law on Freedom of Establishment for Companies and the Restrictions*', (2013) International Company and Commercial Law Review, 24(2), 50-56.
[24] Catherine Barnard, *The substantive law of the EU: the four freedoms*, (Oxford University Press 5th ed., 2016).
[25] Jay Gajjar, '*Your Dominion or Mine? A critical evaluation of the Case Law on Freedom of Establishment for Companies and the Restrictions*', (2013) International Company and Commercial Law Review, 24(2), 50-56.
[26] Case C-186/12 Impacto Azul Lda v. BPSA 9 and Bouygues, para. 20.
[27] Baert, Crossing Borders: Exploring the Need for a Fourteenth EU Company Law Directive on the Transfer of the Registered Office (2015) European Business Law Review, Volume 26 (4).
[28] Mucciarelli, Federico M., *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited* European Business Organization Law Review, Vol. 9, pp. 267-303, 2008.
[29] Case 196/04 Cadbury Schweppes and Cadbury Schweppes Overseas.
[30] Opinion of Advocate General Leger, Case 196/04 Cadbury Schweppes and Cadbury Schweppes Overseas.

conditions must be met. These conditions are the 'actual establishment of the company in the host state and the pursuit of a genuine economic activity over there'.[31]

In addition, as a complementary provision, it is article 54 TFEU, which aims for the treatment of companies to be identical as a natural person in regards to the freedom of establishment, but 'due to the differences between natural and legal persons it is not strictly possible'[32]. In other words, it means that, despite the principle of separate corporate personality, which considers companies as legal persons and resulting to being subject to the same rights as a natural person, these legal persons, namely companies are a setup under the national legislations of distinct Member States, which have divergent domestic laws across the EU thereby different ways on regulating companies will still stand.

Moreover, in accordance with article 54 TFEU, in order to enjoy the freedom of establishment, company must be created on the basis of the national law of any Member State and have a 'connecting element within the Member State of the EU'[33] which is done through either a registered office, central administration or a principal place of business. However, it important to specify that, the last two term are making reference to the 'actual seat of administration'[34], and these three connecting factors are to be met cumulatively and not simultaneously in principle, thereby to exercise the freedom of establishment having at least one link will be sufficient.

In addition, in *Gebhard*[35] where 'the applicant, a German national authorized to practice law in Germany, resided in Italy with his wife, who was an Italian national. He decided to open his own chambers in Milan where he described himself as an "avocato" without having registered with the Milan Bar as required. Following complaints from a number of practitioners, he was suspended by the Milan Bar for failing to register'[36]. The Court was asked to consider whether the Italian legislation requiring registration with the Milan Bar was an obstacle to the freedom of

[31] Opinion of Advocate General Leger, Case 196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para.54.
[32] P. Graig, G. De Burca, EU Law: Text, Cases and Materials, (OUP 6th ed. 2015).
[33] Baert, Crossing Borders: Exploring the Need for a Fourteenth EU Company Law Directive on the Transfer of the Registered Office (2015) European Business Law Review, Volume 26 (4).
[34] Stefan Grundmann, European company law: organization, finance and capital markets (Intersentia 2nd ed. 2012)
[35] Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano
[36] Robert Schütze, European Union Law,< https://www.schutze.eu/download-file/1719/> Accessed 27 July 2019.

establishment and consequently a breach of Art. 49 TFEU. The answer would also depend on the nature of the 'applicant's practice in Italy, as the Milan Bar argued that he had not 'established' himself and so could not be protected under EU law.'[37]

Court held that,

'*following its previous case law, national measures liable to impede or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must meet four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general 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*.'[38]

To conclude, when observing the cross-border mobility of companies in Europe, it is important to identify the applicability of 'three different fields of the law'[39]. It comprises of the EU law as seen above, then the large variety of domestic laws stemming from Member States, resulting from the presence of a significant level of divergence between national legislations in relation to company law. This leads to the introduction of the third field which is the 'conflict of laws theory'[40], also referred to as private international law, which is a field of the law necessary to determine which company law applicable to corporations, also known as the lex societatis.

2.2 Corporate Governance within the EU

Primarily, the complex issue surrounding Member States adhering to distinct rules of private international law to identify the national law applicable to companies and recognising their legal personality, is stemming from a deeper 'fundamental chasm'[41] which is in relation to corporate governance.

[37] Robert Schütze, European Union Law,< https://www.schutze.eu/download-file/1719/> Accessed 27 July 2019.
[38] Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano para.2.
[39] Wolfgang Schon, '*The Mobility of Compromise in Europe the Organizational Freedom of Company Founders*', (2006) 3 European Company and Financial Law Review 122
[40] Ibid.
[41] Andrew Johnston, '*EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition'*, (2006) 6 J Corp L Stud 71.

In Cadbury report, corporate governance is defined as 'the system by which companies are directed and controlled'[42] thereby it is the area of rules and policies that control a company's conduct, operations, and it is implemented to achieve the business' objectives. And company law is intended to mitigate and solve the core issue within corporate governance which is the 'separation of ownership and control'[43]. Therefore, corporate governance is essential in identifying, the company' values, organisational structure, and the boards of directors structure, and it is an area vital for the 'stability and equity of society.'[44]This led to the emergence of the two distinct models of corporate governance adopted by EU Member States.

The 'Anglo-Saxon model'[45] also known as one-tier model has mainly been used in the US and the UK. This model of corporate governance is based on the concept of 'nexus of contract'[46], whereby the firm is simply a network of contracts between 'various inputs making up the firm'[47] such as the employees, creditors, suppliers and shareholders, which establish their rights and obligations, thereby it is essentially a 'private collection of contractual relations' Additionally, this model implements the 'shareholder primacy'[48] whereby the aim is to maximise the shareholders' profits and benefits, their interests are a priority within the company, as they are the sole members of the company and any social considerations or taking into account other stakeholders are deemed irrelevant.

This is reflected in the one-tier structure characterised in English companies, whereby there is only one body, a board of directors made up of executive and non-executive directors having a fiduciary duty towards the shareholders, thereby their conduct, actions must be in the best interests of the shareholders.

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[42] Adrian Cadbury, 'Report Of The Committee On The Financial Aspects Of Corporate Governance'(Committee and Gee and Co 1992).
[43] Klaus J. Hopt, P. C. Leyens, '*Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy. ECGI - Law Working Paper No. 18/*2004', (2004) European Company and Financial Law Review, pp. 135-168, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=487944> Accessed 29 August 2019.
[44] T. Clark, 'Theories of Corporate Governance: The philosophical foundations of corporate governance', Routlege (2004)
[45] Lucien Cernat, '*The emerging European corporate governance model: Anglo-Saxon, Continental, still the century of diversity?* (2004) Journal of European Public Policy 11:1, 147–166.
[46] Marios Koutsias, '*Shareholder Supremacy in a Nexus of Contracts: A Nexus of Problems*', (2017) Business Law Review, Vol. 38, Issue 4, pp. 136-146.
[47] Stephen M Bainbridge, '*Politics of Corporate Governance, The*', (1995) 18 Harv. J. L. & Pub. Pol'y 671.
[48] Andrew Keay, '*Stakeholder Theory in Corporate Law: Has it Got What it Takes*', (2010) 9 Rich. J. Global L. & Bus. 249.

In contrast, the 'Continental model'[49] also called two-tier model, has mainly adopted by Germany and influenced the rest of the Continental European States. Its main feature is its 'pluralist stakeholder-orientated approach'[50]. This approach emphasises on the importance of incorporating internal and external stakeholders' interests and maintaining these relationships in order to achieve profitability. In addition, a Member State like Germany implements the 'concession model'[51], which refers to the idea that separate legal corporate personality and limited liability are two privileges granted by the State to companies. Consequently, corporations have a duty to operate for the 'benefit of the shareholders, employees and the society at large.'[52]

Moreover, the core feature is the two-tiered board structure which is usually characterised in German companies, consisting of a management board and a supervisory board and both these boards govern the corporation. And unlike the Anglo-Saxon model, the stakeholders are all represented at the corporate board. Hence, the employee's representatives or the 'personnel of the business'[53] being included in the supervisory board, which is referred to as 'labour co-determination'[54] in Germany. This results to the workforce being involved in the decision-making process and taking major management decisions, consequently 'different social and financial responsibilities are considered'[55] which is totally in opposition with the model used in the UK, USA, or other Anglo-Saxon countries.

For instance, in a restructuring situation, factories in the UK could easily and quickly be foreclosed without the need to consult with other stakeholders. On the other hand, due to a different corporate governance system in France or Germany, it will likely be harder to foreclose factories because stakeholders, specifically the employees have a voice in the board.

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[49] Lucien Cernat, '*The emerging European corporate governance model: Anglo-Saxon, Continental, still the century of diversity?* (2004) Journal of European Public Policy 11:1, 147–166.
[50] Marios Koutsias, '*Shareholder Supremacy in a Nexus of Contracts: A Nexus of Problems*', (2017) Business Law Review, Vol. 38, Issue 4, pp. 136-146.
[51] Janet Dine, Marios Koutsias, *The nature of corporate governance: the significance of national cultural identity*, (Cheltenham: Edward Elgar, 2013)
[52] Ibid.
[53] Patrick Speeckaert, *'Corporate Governance in Europe*', (1997) 2 Fordham Fin Sec Tax L F 31.
[54] Klaus J. Hopt, P. C. Leyens, '*Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy. ECGI - Law Working Paper No. 18/*2004', (2004) European Company and Financial Law Review, pp. 135-168, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=487944> Accessed 29 August 2019.
[55] Ibid.

This demonstrates the way 'different politics and different histories can result in distinct governance systems becoming dominant'[56], and the 'diversity of national culture'[57] between Member States is illustrated through their organisational preferences, and consequently these fundamental differences are also reflected when Member States implement two contrasting theories or doctrines to determine the applicable law of companies.

2.3 Two opposing conflict of law theories

In this area of company law, 'substantive requirements of incorporation of companies, including the connecting factors are covered by the national laws of the Member States'[58]. This means the conflict of laws is a non-harmonised area in EU company law, thereby it is up to the Member States and their domestic laws to determine the conflict of laws rules applicable to companies. In other words, national corporate law govern and 'regulate potential conflicts between different constituencies, such as management, shareholders, employees and creditors'[59].These national legislations are based on the real seat principle which is dominant in the continental of Europe, and the incorporation theory which is prevailing in Anglo-Saxon countries.

2.3.1 The Real Seat Theory

The Real seat theory emerged in the nineteenth century, prevailing in Continental European states such as 'France, Germany, Portugal and Italy'[60], where the rules and regulations applicable to the company, also referred as lex societatis are determined by a Member State endorsing the real seat approach through the location of the corporation's real seat. According to the German Supreme Court the term 'real seat'[61], refers to the place where 'the fundamental business decisions by the managers are being implemented effectively into the

[56] Stephen M Bainbridge, '*Politics of Corporate Governance, The*', (1995) 18 Harv. J. L. & Pub. Pol'y 671.
[57] Janice Dean, *'Ideal Type Organisations and Company Law in Europe*' (2012) European Business Law Review, Volume 23 (4).
[58] Proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, <https://eur-lex.europa.eu/resource.html?uri=cellar:063411b2-4935-11e8-be1d-01aa75ed71a1.0001.02/DOC_1&format=PDF#page80> Accessed 26 July 2019
[59] Michael Blauberger, Rike U. Krämer, '*Europeanisation with Many Unknowns: National Company Law Reforms after Centros*', (2014) West European Politics Vol. 37 Issue 4.
[60] John Lowry, '*Eliminating obstacles to Freedom of establishment: the competitive edge of UK company law*' (2004) 63 Cambridge LJ 331.
[61] Robert R. Drury, '*The regulation and recognition of foreign corporations: responses to the "Delaware syndrome"* (1998) C.L.J. 57(1), 165-194.

day-to-day business activities'.[62] Although, there is a sense of ambiguity in relation to defining the meaning of this specific term, it essentially means that companies are governed by the law of the country where the 'headquarter or central administration'[63] is located, so Member States adopting this approach, consider the connecting factor to essentially amount to the place where the company is 'effectively managed and controlled.'[64]

Besides, it is important to highlight that a company's legal capacity is obtained by being incorporated in the country where it has its central place of management and control, consequently the real seat theory makes the central administration and the registered office to be in the same country indispensable, thereby it is inconceivable to separate the central place of management from the registered office or place of incorporation.

Consequently, a corporate entity intending to solely transfer their central administration or headquarters in another Member State, can result to the home state, also referred as the 'state of origin'[65] applying this theory to require the company to go through the process of dissolution or liquidation of all their assets, as well as 'ceasing to recognise the company's legal personality'[66], which clearly restricts the corporation's ability to move their seat across the EU. In a similar way, the host state, also referred as the state of arrival might refuse to recognise the foreign company as a valid corporate entity, consequently forcing the company to go through the process of reincorporation. For example, under German law, the company will be recognised as mere 'partnership'[67], which entails the absence of being granted limited liability, which results to the shareholders being liable for the company's debts.

Therefore the real seat theory's emphasis or rationale is on the idea that the place where the main business' activities takes place is where the corporation has its 'strongest connection'[68]

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[62] Werner F Ebke, '*The real seat doctrine in the conflict of corporate laws*' (2002) 36 Int'l L 1015.
[63] Eva Micheler, *'Recognition of Companies Incorporated in Other EU Member States*' (2003) The International and Comparative Law Quarterly, Vol. 52, No. 2, pp.521-529.
[64] H. Kußmaul, L. Richter, C. Ruiner, '*Corporations on the Move, the ECJ off Track: Relocation of a Corporation's Effective Place of Management in the EU*', (2009) European Company Law Volume 6.
[65] Csongor Istvan Nagy, '*The Personal Law of Companies and the Freedom of Establishment under EU Law*', (2013) Hungarian Y.B. Int'l L. & Eur. L. 353.
[66] N. Kuehrer, *'Cross-border company establishment*' (2001) 12 European Business Law Review, Issue 5/6, pp. 110–119.
[67] Werner F. Ebke, '*The real seat doctrine in the conflict of corporate laws*' (2002) 36 Int'l L 1015.
[68] Ibid.

because it leads to the creation of a 'meaningful relationship'[69] between the Member State and the company, as the place where the business' activities are carried out. Therefore, in this situation the real seat State's national law is most suitable to govern the company, as the firm's activities have the 'most economic and political effects'[70] on the State.

For this reason, proponents of this theory, emphasise on the need to adopting the real seat approach for the 'protection of creditors and minority shareholders'[71] against the phenomenon called a 'race to the bottom'[72] among Member States, which is a situation where every legal jurisdictions compete against each other to increase their level of attractiveness towards companies by putting in place more lenient corporate laws, which consequently has an impact on the degree of protection towards stakeholders and third parties. This demonstrates, in a sense how the real seat theory derives its approach from the continental model regarding corporate governance whereby the focus is not on shareholder profit maximisation, but rather on the ability to accommodate and balance the conflicting interests surrounding different stakeholders.

In other words, it is a way to prevent an environment, where corporations choose to incorporate in a jurisdiction offering lax company laws and concurrently undertaking their business operations in a jurisdiction with a higher level of rigidity pertaining to their corporate laws. And it is argued that this is done to put a stop to 'free and separate choice of company law'.[73]Hence, the criticism towards this theory, because of the central administration being the connecting factor in determining the applicable law gives rise to issues affecting companies cross-border operations.

[69] Werner F. Ebke, '*The real seat doctrine in the conflict of corporate laws*' (2002) 36 Int'l L 1015.
[70] Ibid.
[71] Robert R. Drury, '*The regulation and recognition of foreign corporations: responses to the "Delaware syndrome"* (1998) C.L.J. 57(1), 165-194.
[72] C. David, '*Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the Race to the Bottom in the European Communities'* (1991) 32 Harv. Int'l. L. J. 423.
[73] Carsten G, Federico M. Edmund Schuster C, Mathias Siems D, '*Why do businesses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules*' (2018) International Review of Law and Economics 56 14–27.

2.3.2 The Incorporation Theory

On the other hand, the incorporation theory founded in England in the eighteenth century has been dominant in 'Anglo-Saxon countries, including Switzerland and Scandinavian countries'[74]. This conflict of law theory refers to the idea that companies are governed by the 'laws of the state of incorporation.'[75], which signifies that the corporation's existence and dissolution are regulated by this law. Therefore, the 'connecting criteria'[76] applied by Member States adopting this approach, is the place where the company has been founded, also referred as the registered office, meaning that the 'company's official address in the State where it was incorporated is registered in the Member State's registry'.[77]

For example, UK courts will deem a company British and govern by UK company law, due to the fact, that the company's registered office is situated in London. Consequently, the location of the company's registered office is the 'relevant link between a company and a legal order'[78] that determines the applicable law in a conflict of law scenario.

Additionally, Member State adhering to this theory, simultaneously use the connecting factor in the 'determination of the question of the recognition of a foreign company'[79], which means a corporation validly incorporated under the incorporation Member State, entails the company to have 'rights and privileges of a corporate existence'.[80]Therefore, in practice, the recognition grants companies to enter into a contract, to undertake court proceeding and most importantly

[74] Carsten Frost, *'Transfer of Company's Seat - An Unfolding Story in Europe*' (2005) 36Victoria U Wellington L Rev 359.
[75] Federico M Mucciarelli, *'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*' (2012) 20 Tul J Int'l & Comp L 421.
[76] Communication from the Commission to the Council and European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM (2003) 284 final, <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0284/COM_COM%282003%290284_EN.pdf> Accessed 29 July 2019
[77] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), <https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_final_report_05022018_clean_1.pdf> Accessed 1 August.
[78] European Commission, Commission Staff Working Document Impact Assessment, SWD(2018) 141 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0141&from=EN > Accessed 1 August 2019.
[79] Robert R. Drury, *'Migrating companies*' (1999) E.L. Rev. 24(4), 354-372.
[80] Ibid.

its limited liability, whereby in a situation of insolvency, the shareholders are protected by solely being liable to repay the amount they invested in the company.

Furthermore, It is argued that this approach provide legal certainty in commercial transaction, due to the place of incorporation being easily discernible and recognisable and it encourages cross-border corporate mobility, which enables 'companies to take their operations on a cross-border dimension and undertake their activities internationally.'[81] Hence, the rationale behind this theory being the freedom of 'incorporators'[82] to determine, choose the lex societatis regardless of taking into account the location on the corporation's central place of management or headquarters. This approach is derived from the Anglo-Saxon's corporate of governance model, which emphasise on the shareholder primacy principle, referring to the interests of the incorporators being the priority.

3. Cross-border corporate transfer of seats within the EU

The emergence of globalisation created international business whereby 'corporations operate far beyond the borders of the country that presided over their birth'[83], due to the elimination of trade barriers. This phenomenon stimulates cross-border corporate activities, which means companies have the freedom to choose a specific legal framework. This choice of corporate law will be mostly based on the degree of laxity within the Member states' national legislations in relation to the 'cost of incorporating a company, minimum capital requirements'[84] and tax legislations, as well as to 'adjust their corporate governance, capital structure and financial disclosure requirements'.[85]

As a State of origin, every Member States possesses the autonomy pertaining to the 'definition and enforcement of qualification standards'[86] that a company have to meet in order to be

[81] M. Siems, '*Convergence, Competition, Centro and Conflicts of Law: European Company Law in the 21st Century'* (2002) (with postscript 2008) 27(1) European Law Review 47-59.
[82] John Lowry, '*Eliminating obstacles to Freedom of establishment: the competitive edge of UK company law'* (2004) 63 Cambridge LJ 331.
[83] S. Rammeloo, Corporations in Private International Law: A European Perspective, (Oxford University Press, 2001)
[84] Wymeersch. Eddy, '*Is a Directive on Corporate Mobility Needed?'* (2007) European Business Organization Law Review Vol. 8.
[85] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), <https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_final_report_05022018_clean_1.pdf> Accessed 1 August 2019.
[86] B. Caspar, '*The Principle of Mutual Recognition in the European Internal Market with Special Regard to the Cross-Border Mobility of Companies*' (2016) European Company and Financial Law Review, Volume 13 (1).

established and given legal capacity in accordance with the Member State national legislations. The requirement concerning the location of the companies' administrative seat or registered office also falls within these qualification standards. Moreover, prior the European Court of Justice's jurisprudence, the differences between a Member State following the real seat theory and a Member State adhering to the incorporation theory becomes more apparent when corporate mobility takes place, in practice. Hence, the notion of 'company's emigration'[87] comes into play as it refers to the procedure of transferring the company's seats. And in turn this procedure consists of companies transferring their administrative seat or the registered office, as well as transferring both seats concurrently to another Member State. So, the presence of distinct legal regime amount to an 'unlevel playing field'[88] between companies wanting to transfer their seat.

3.1. Outbound Mobility

This refers to a situation of a company' emigration from the perspective of the home state, which is the 'state where until now the transferred seat has been located'[89]. In other words, it refers to the 'situation of the home Member State when a company moves its seat outside the jurisdiction of that Member State.'[90]And the question on the possibility of such transfer will be dependent on the home state's conflict of laws rules and substantive law.

3.2 Inbound Mobility

In contrast, this term describes the situation a 'company's immigration'[91] from the perspective of the country of destination, which is from the Member State where the company's seat is located after the transfer is done. So, it is regarding the 'situation of the host Member State when a

[87] M. Szydlo, '*Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the Cartesio Case*' (2008) European Review of Private Law, Volume 16 (6).
[88] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[89] M. Szydlo, '*Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the Cartesio Case*' (2008) European Review of Private Law, Volume 16 (6).
[90] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[91] M. Szydlo, '*Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the Cartesio Case'* (2008) European Review of Private Law, Volume 16 (6).

company moves its seat from another Member State into the jurisdiction of the host Member State'[92], and whether the host state accept such transfer will also depend on its conflict of law and substantive law.

3.1.1. Transfer of the company's real seat or central administration

The legal consequences stemming from the transfer of the company's real seat or central administration are determined by the conflict of law rules which is used to ascertain the main connecting factor and the national substantive company law of the home state and the host state, namely the State of origin and the State of arrival, which gives Member States 'ample leeway to define the legal forms upon which they confer legal capacity'[93]thereby it determines whether the transfer of the central administration will affect the company's legal identity. So, in a situation where a company transfers its central administration seat from a Member State following the incorporation principle to the host State adopting the same principle of incorporation, which means here that the key focus, in regards to this principle is the registered office, therefore, this will result to the transfer of the company's administrative seat to be allowed, without the change of the applicable law and the requirement to go through the process of dissolution or liquidation.

In contrast, in an event where the company move its central administration or head office from the home Member State adopting the incorporation theory to the host State applying the real seat theory as its conflict of law rules, then, from the perspective of the host Member State, a change of the applicable law governing the company will take place.

Moreover, the company will be subject to the substantive company law of the host Member State, thereby when a host State applies the real seat principle, like Germany, and finds that the company must comply with German law due to its administrative seat being transferred there, it will require that company to also have its registered office in Germany in other to be recognised

[92] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[93] Wolfgang Schön, *'The Mobility of Compromise in Europe and the Organizational Freedom of Company Founders*' (2006) 3 ECFR 122.

as company. Consequently, the company would be recognised as a 'partnership'[94] or at least any other entity other than a company with limited liability status or the company needs to be 'reincorporated in accordance with the law of the host Member State'[95], and entailing the 'loss of legal and business continuity.'[96]

Furthermore, if a company in a Member State following the incorporation theory transfers its head office (real seat) to a host Member State applying the real seat principle, and the registered office remains in the home Member State of incorporation, this might result to the 'company being subject to both the law of the home Member State and to the law of the host Member State'[97]. For example, 'Austria applies the real seat principle, which means that a company can only be subject to Austrian jurisdiction if it has its real seat in Austria. If the company moves its real seat out of Austria to the UK, it is no longer recognised as an Austrian company; however, it is not recognised in the UK either (unless it incorporates in the UK), as the UK applies the incorporation doctrine'[98]

In addition, when a home State adopts the real seat principle, the transfer of the central administration may in principle not be possible, thereby the company would have to go through the procedure of dissolution or winding-up in the home Member State and reincorporation in the host Member State or might be restricted by certain requirements imposed by the home Member State, this means 'substantive company law rules may impose different types of residence requirements'[99]. For instance, the requirements might be the need of the 'a unanimous

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[94] M. Szydlo, '*Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the Cartesio Case*' (2008) European Review of Private Law, Volume 16 (6).
[95] Commission Staff Working Document: Impact Assessment on the Directive on the cross-border transfer of registered office, SEC (2007) 1707, <https://ec.europa.eu/transparency/regdoc/rep/2/2007/EN/SEC-2007-1707-1-EN-MAIN-PART-1.PDF> Accessed 9 August 2019.
[96] R. Panizza, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Briefing on Cross-border transfer of company seats PE 583.143. <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf> Accessed 3 August 2019.
[97] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[98] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[99] Carsten Gerner-Beuerle, Federico M. Mucciarelli, Edmund-Philipp Schuster, Mathias M. Siems, Study on the Law Applicable to Companies (2016), <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1> Accessed 6 August 2019.

shareholders' approval and the administrative seat is accordance with the rules of both the home State and host State'[100].

3.1.2. Transfer of the registered office

Then, when it comes to transfer of the registered office, for the home Member State adopting the incorporation doctrine, it would entail that the doctrine's key connecting factor has been moved, which would result to a change of the law governing the company. However, the Home Member States can as well impose additional requirement, like 'the transfer being in accordance with both the laws of the home Member State and host State.'[101] Additionally, in a situation where the home Member State endorsing the real seat theory and the corporation wish to transfer the registered office to another State. In order to comply with the new substantial company law, the transfer must include the registered office, at the same time, the company intend to move its administrative seat, because Member State applying the real seat approach will only recognised the company's legal identity, and consider it validly reincorporated, if the registered office and firm's real seat are situated within that State. The State demand 'coincidence of administrative and registered office for companies to be validly formed and remain in existence'[102] and consequently this will require the dissolution of the company in the home Member State and reincorporation or the registered office deemed ineffective. Conversely, if the host Member adopts the incorporation theory, it is clear that the connecting factor is the registered office, however the in principle this is not possible and will require the winding up of a company in the home Member State and reincorporation in the host Member State.

Accordingly, it is fair to conclude that carrying out a cross-border transfer is complicated and complex process, in practice, which is done through the application of the conflict and substantive law of both the country of arrival and the country of departure, but it 'usually entails the liquidation of the company in home Member State and the establishment of new legal entity in the host

[100] Panayi, Christiana, '*Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths*', (2009) Yearbook of European Law, Volume 28.
[101] Ibid.
[102] Panayi, Christiana, '*Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths*', (2009) Yearbook of European Law, Volume 28.

Member State.'[103] In other words, observing from an inbound perspective, the non-recognition of companies in the host Member State is a possibility, which entails the loss of the 'protection of the limited liability status'[104]or going through the process of reincorporation. And from the outbound perspective, companies might not be permitted to transfer the registered office without having to go through the process of wind up or dissolution.

The situation is even got worse due to the fact, that in recent years a number of Member States have 'adopted legislation to facilitate cross-border transfers of corporate seats'[105], which results to a number of disparities and incompatibilities in the domestic legislation pertaining to cross-border transfers, for instance some Member States like, 'Poland, Sweden, Hungary'[106] inbound transfers are allowed but outbound transfers are not permitted. This are the drivers for the need for a common procedure at EU level of the transfer of company seat.

4. The impact of the European Court of Justice's jurisprudence

The substantial degree of complexity regarding the transfer of company seats has led to a couple of landmark law cases which through their development and the European Court's broad interpretation of the concept of the freedom of establishment protected under Article 49 and 54(TFEU). Consequently, led to 'some liberalisation regarding to freedom of choosing the applicable law'[107]. In other words, the ECJ has been providing clarity to some extent on the question of 'company seat expatriation without a change of applicable law'[108], as well as the recognition of a company's legal personality by other Member States and including on companies intending to carry out cross-border conversion. At the same time, these rulings led to an emerging

[103] Hana Horak, Kosjenka Dumancic, *'Cross-Border Transfer of the Company Seat: OneStep Forward, Few Steps Backward'* (2017) 14 US-CHINA L REV 711
[104] Panayi, Christiana, '*Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths*', (2009) Yearbook of European Law, Volume 28.
[105] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019
[106] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), <https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_final_report_05022018_clean_1.pdf> Accessed 1 August 2019.
[107] C. Gerner-Beuerle, Mucciarelli, Federico M., E. Schuster, M. Siems, '*Why do businesses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules*' (2018) International Review of Law and Economics, Elsevier, vol. 56(C), pages 14-27.
[108] Julie Benedetti, Arnaud Van Waeyenberge, '*Structural consequences of cross-border company seat transfers within the EU in the latest Court of Justice case law: Polbud*' (2019) E.L. Rev. 44(3), 416-430.

shift of balance towards the incorporation approach, which comes after a history of debate on which type of conflict of law theories correspond best to the needs of companies operating across borders within the single internal market.

4.1 DailyMail

One of the first case relating to freedom of establishment was the *DailyMail*[109]. This case focused on newspaper company resident in the UK, who intended to transfer its residence from the UK to the Netherlands. The company intended to avoid regular tax payments expected in the UK when selling part of its assets and buying its own shares. Distinct legislations existed between the two Member States. In the Netherlands no consent was needed, but the UK's national legislations required the Treasury's consent to permit the company to move into another Member State. A couple of days before Daily Mail decided to liquidate and sell a large part of its assets, Daily Mail had to pay tax to the UK, but intended to move to the Netherland before the sale of its asset, for the purpose to pay lower taxes, therefore Daily Mail's transfer to another Member State was very much to avoid paying its taxes.

The European Court of Justice addressed the restriction placed by a Member State to the transfer abroad of a national company's administrative seat and 'fiscal seat'[110]. The European Court of Justice held that,

> '*Articles 52 and 58 of the Treaty, properly construed, 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.*'[111]

Therefore, such restriction was deemed to not violate the freedom of establishment under the Treaty. However, the European Court of Justice came to this conclusion, based on its 'opinion

[109] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.
[110] Timmermans C, '*Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).
[111] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, para. 25.

on a general assumption regarding the relation between a company and its State of incorporation'[112], which seems to go deeper than tax law. And according to the ECJ, companies are defined as being,

'*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.*'[113]

Consequently, the European Court of Justice stated that, regarding the concept of freedom of establishment,

'*Under those circumstances, Articles 52 and 58 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.*'[114]

Moreover, in the light of this case, Member States were able to impose any limitations in the way of any 'moving out'[115] of a domestic company. Although, *DailyMail*, also demonstrated a couple of ambiguities, through its judicial decision by addressing 'international company law to a question regarding international tax law related matter'[116], as there was no issue arising from the conflict of law rules because *DailyMail* which is a company governed by UK, which is a Member State applying the incorporation theory meaning that the administrative seat is irrelevant as it is not considered a connecting factor in relation to this theory.

Hence, the newspaper company had the ability to under UK company law to move its central management and control to the Netherlands without the loss of its status as a UK company.

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[112] Carsten Gerner-Beuerle, Federico M. Mucciarelli, Edmund-Philipp Schuster, Mathias M. Siems, Study on the Law Applicable to Companies (2016), <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1> Accessed 6 August 2019.
[113] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, para. 19.
[114] Ibid. para 24.
[115] Federico M. Mucciarelli, '*Company Emigration' and EC Freedom of Establishment: Daily Mail Revisited'* (2008) European Business Organization Law Review, Vol. 9, pp. 267-303.
[116] Timmermans C, '*Impact of EU Law on International Company Law'* (2010) European Review of Private Law, Volume 18 (3).

However, in its decision, the European Court of Justice also stated that the freedom of establishment 'also prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation'.[117] The European Court of Justice confirmed this statement in other decisions, maintaining, and safeguarding the rights to freedom of establishment. Additionally, the Court was of the opinion that this was not an 'issue to be solved under the Community law rules on freedom of establishment but had to be dealt with by future legislation or conventions.[118]Moreover, this decision, only concerned 'the outbound relocation of company's tax residence and not outbound reincorporation.'[119] However, In Daily Mail, the European Court of Justice concluded that a Member State had the ability, in the case of a company incorporated under its law, to 'make the company's right to retain its legal status'[120] under the law of that State subject to restrictions on the transfer of the company's actual center of administ

4.2 Centros

This is a ground-breaking case that made some important changes which involved a 'host Member State restriction'[121]. Centros, is a private limited company founded in the UK, and then intended to apply to register a branch in Denmark. Centros' application was revoked and considered by the Danish authorities to circumvent Danish's expensive and complex incorporation rules and avoid payments on higher minimum share capital than in the UK. Additionally, the Danish authorities argued that the company did not carry out any activity in the Member State of formation.

Moreover, the European Court of Justice had to deliberate whether the refusal of registration of a branch of a company registered in another Member State and wanting to expand its

[117] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, para. 16.
[118] Ibid. para 23.
[119] Carsten Gerner-Beuerle, Federico M. Mucciarelli, Edmund Schuster & Mathias Siems (2018) Cross-border reincorporations in the European Union: the case for comprehensive harmonisation, Journal of Corporate Law Studies, 18:1, 1-42, DOI: 10.1080/14735970.2017.1349428
[120] Timmermans C, *'Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).
[121] Csongor Istvan Nagy, '*The Personal Law of Companies and the Freedom of Establishment under EU* Law' (2013) Hungarian Y.B. Int'l L. & Eur. L. 353.

operations in the new Member State, considering that the aim of this registration is to avoid domestic legislation and that the company did not carry out any activity in the Member State of first incorporation, it is compatible with the concept of freedom of establishment. Hence, the European Court of Justice stated that,

'*it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud*'[122]

Therefore, the outcome in this case, was that the host Member State restriction by refusing the subsidiary to be registered in their place, the European Court of Justice considered such action to be incompatible with the concept of freedom of establishment. In other words, the refusal to 'register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business'.[123]

This ruling opened the floor for the emergence of a phenomenon known as 'Pseudo-Foreign company'[124], which describe companies incorporated in a Member State but undertaking all their business activities in another Member State and absolutely no business in the State on incorporation. Its appeal emanates from being incorporated under a foreign law which offers expeditious company setup procedure and its less expensive. However, it is questioned whether this type of company can 'invoke the right of establishment'[125]

[122] Case c-212/97 Centros Ltd v Erhvervs- og selskabsstyrelsen, para.39
[123] Werner F. Ebke, *'Centros - Some Realities and Some Mysteries'* (2000) The American Journal of Comparative Law, Vol. 48, No. 4, pp. 623- 660.
[124] Timmermans C, *'Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).
[125] Ibid.

4.3 Überseering

The case involved a company incorporated under Dutch law, a Member State of the European Union, and the company was actively carrying out its business activities in Germany and entered into a contractual relationship. Then, there was an issue from the contract and the company sort to take legal formal actions against the supplier in a German court. Additionally, the national court held that the company is non-existent, thereby the legal personality status did not exist as the company was not on the German's register, and consequently it rendered the contract invalid, void, due to the company not even having the legal capacity to enter into a contractual agreement. This means, the ability to enjoy rights and to be subject to obligations did not exist. However, the company argued that they were a legal entity as they were incorporated pursuant to Dutch law, and Netherland being a Member State of the EU. The European Court of Justice held,

'where a company validly incorporated under the law of one Member State ('A') is found, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC, read together, preclude the conflict rules applying in Member State B from providing that the company's legal capacity, and its capacity to be a party to legal proceedings, are to be determined by reference to the law of Member State B. That would be so where, under the law of Member State B, the company is denied all possibility of enforcing before the national courts rights under a contract with a company established in Member State B'[126].

The Court applied again the rules on freedom of establishment to state that German law refusing to recognise a Dutch company, that move its centre of administration into Germany. Moreover, the real seat theory seems to create a bigger gap between its approach and the concept of free movement across Europe. Additionally, *DailyMail* was still considered a good law. Moreover, it is argued that Uberseering 'fundamentally changed the conflicts of corporate laws within the EU'[127], especially in Member States such as Austria, Belgium, France,

[126] UberseeringBV v. Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR 1-9919.Para. 36
[127] Timmermans C, *'Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).

Germany, Greece, Luxembourg, Portugal and Spain, that traditionally applied the real seat theory to create a level playing field for all corporations having a substantial nexus with the particular country. This means, since Uberseering, the real seat principle can no longer be applied by a court of any EU Member State to determine the existence and the legal status of a corporation incorporated in another Member State. Rather, the 'legal personality of a Sister State corporation'[128] is to be determined by way of the law of the state of incorporation. Hence, the level playing field by the real seat doctrine has been replaced by the European Court of Justice in Uberseering, with a jurisdictional competition among the Member State.

4.4 Inspire Art

This case referred to special rules in the Netherlands that applied only for foreign companies but undertaking their business operations in the Netherlands. The law includes 'extensive publishing requirements and penalties, such as unlimited jointly and severally liability of the managing directors.

And the European Court ruled that,

'*The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.*'[129]

Therefore in Inspire Art, the European Court of Justice put an 'end to attempts by the legislature of the Netherlands to impose certain legal obligations on corporations'[130] that were incorporated in an- other Member State but carry on their business activities exclusively, or almost exclusively, in the Netherlands, which are known as pseudo-foreign companies.

[128] Timmermans C, *'Impact of EU Law on International Company Law*', (2010) European Review of Private Law, Volume 18 (3).
[129] C- 67/01, Kamer van Koophandel en Fabriekenvoor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.
[130] Werner F. Ebke, '*The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond'*, (2003) The International Lawyer, Vol. 38, No. 3, International Legal Developments in Review: pp. 813-853

In other words, the Court held that it is contrary to Articles 43 and 48 of the EC Treaty for domestic legislations to impose on the 'exercise of freedom of secondary establishment'[131] in that Member State by a company formed pursuant to the law of another Member State certain conditions provided for in domestic company law in relation to company formation relating to 'minimum capital and directors' liability'[132]. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not 'deprive the company of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established, on a case-by-case basis'[133].

In addition, *Centros*, *Überseering* and *Inspire Art* favoured a 'more liberal approach'[134] regarding the Cross-Border mobility of companies' head offices or central place of administration from Member States following the incorporation principle to Member States adhering to the real seat theory. Hence the host Member States, regardless of whether it follows a stringent version of the real seat theory, must come to acceptance that companies incorporated in another Member State carrying out all its business' activities in the host Member State, are at the same time still being subject to the applicable law of the home Member State. Furthermore, based on these judicial decisions, the European Court of Justice has to have minimum of questioning pertaining to the compatibility of the real seat theory with EU law. Although, the ECJ do not explicitly put across this viewpoint, the rulings does imply that companies formed in accordance with the law of a Member State which has its registered office, central administration or principal place of business within the Community, must be recognised in all other Member States, notwithstanding the place of its administrative seat.

[131] Blanca Ballester, Micaela del Monte, European Added Value Assessment Directive on the cross-border transfer of a company's registered office (14th Company Law Directive) EAVA 3/2012, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf> Accessed 6 August 2019.
[132] Ibid.
[133] Ibid.
[134] Patrice Muller, Shaan Devnani, Rohit Ladher and Paula Ramada, European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive), EAVA 3/2012<http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN02)_EN.pdf> Accessed 6 August 2019

4.5 Cartesio

The European Court of Justice's ruling in *Cartesio* is considered a landmark judgment for companies' freedom of establishment, as the Court gave two significant decisions regarding the mobility of companies. Cartesio is a Hungarian limited partnership whose application for registration of the transfer of its seat to Italy was revoked by the Hungarian Court of Registration. Cartesio wished only to transfer its central administration or head office to Italy, while continuing to operate under Hungarian company law. Because of the refusal to enter transferral of the head office or administrative seat in the Hungarian Company Register the question was referred to the ECJ, to determine whether Articles 49 and 54 of the Treaty 'preclude a Member State from imposing an outright ban on a company'[135] incorporated under its legislation moving its central administration to another member state without having to be wound up in Hungary first, and to have the seat transfer entered in the Hungarian Company Register.

It should be highlighted that the Cartesio case is to a considerably to some extent similar to the European Court of Justice's *DailyMail* case, since it also raises the question of the transfer abroad of the head office. The decision of the Court did not overrule its '*DailyMail*' decision, which allows member states to restrict the transfer of the central administration of a company abroad. On the contrary, the European Court of Justice reaffirmed the *Dailymail's ruling*. The European Court of Justice stated that,

> *'As Community law now stands, Articles 49EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.'*[136]

Moreover, the European Court of Justice admitted that, as it currently look, articles 49 and 54 of the of the Treaty on the Functioning of the European Union are powerless to resolve

[135] Patrice Muller, Shaan Devnani, Rohit Ladher and Paula Ramada, European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive), EAVA 3/2012<http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN02)_EN.pdf> Accessed 6 August 2019

[136] C-210/06, Cartesio Oktato es Szolgtiltato bt [2008] ECR 1-9641, Para 124.

certain disputes, the ruling in Cartesio leaves much in the hands of national legislation and thus may lead to different treatment between emigrating and immigrating companies and between companies emigrating from 'real seat' countries and 'incorporation' countries.

'*It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether — and, if so, how — the registered office (siège statutaire) or real seat (siège réel) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions*'[137]

4.6 VALE

Vale was a limited liability company governed by Italian law and registered in the Italian commercial register, wanting to wind up in Italy and reincorporate under the Hungarian law with the name of Vale Építési. And 'in order to have all its rights and obligations transferred to the new Member State, it wished to name its Italian predecessor (Vale Costruzioni) as its legal predecessor'[138]. After denial of the application from the commercial court of first instance, then confirmed by the Regional Court of Appeal of Budapest, the company lodged an appeal before the Supreme Court with reference to Articles 49 and 54 of the TFEU. The Supreme Court asked the ECJ for a preliminary ruling.

In this case, the issue was whether Articles 49 and 54 of the TFEU be interpreted as precluding legislation of one Member State to 'prohibit a company established in another

[137] C-210/06, Cartesio Oktato es Szolgtiltato bt [2008] ECR 1-9641, Para 108.
[138] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), <https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_public_annexes_final_report_05022018.pdf > Accessed 1 August 2019.

Member State to transfer its seat into another, so could a Member State refuse to register the predecessor of that company which originates in another Member State?'[139]

The Court's judicial decision was in favour of Vale stating that, 'if nationally incorporated companies in Hungary may convert and transfer all rights and obligations to the new company'[140], any restrictions on foreign companies employing this mechanism come within the reach of Article 49 TFEU (former Article 43 EC Treaty) and therefore contravene EU law.

4.7 Polbud

In September 2011, the shareholders of Polbud, a limited liability company established under Polish law, decided to transfer the company's registered office from Poland to Luxembourg. The 'resolution made no reference to a simultaneous transfer of either the real head office or the place of real economic activity'[141].

Based on that resolution, the registry court in Poland recorded the opening of the liquidation procedure. In May 2013, following a resolution adopted by a shareholder meeting in Luxembourg, the registered office of Polbud was transferred to Luxembourg. Polbud was renamed and its legal form was changed to the 'Société à responsabilité limitée (S. à r. l.),'[142] the Luxembourgish private limited liability company. Subsequently, Polbud gave an application with the Polish registry court for its removal from the commercial register. This application was refused to be registered because, as the registry court stated, and Polbud failed to provide evidence of the successful execution of a liquidation procedure. Then, Polbud appealed against this decision, arguing that no liquidation was needed because the company continued to exist as a legal person incorporated under Luxembourgish law.

[139] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), < https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_public_annexes_final_report_05022018.pdf> Accessed 1 August 2019.
[140] Ibid.
[141] Case C-106/16 Polbud — Wykonawstwo sp. z o.o., in liquidation.
[142] Case C-106/16 Polbud — Wykonawstwo sp. z o.o., in liquidation.

In its recent judgement Polbud, the European Court of Justice 'confirmed the right of companies to carry out cross-border conversions'[143] on the basis of the freedom of establishment. The ECJ held that the freedom of establishment is applicable solely with the registered office alone, without the real central place of management, is transferred from one Member State to another if the Member State of new incorporation accepts the registration of a company even without the exercise of an economic activity there. Thereby, article 49 TFEU does not require an economic activity as a precondition for its applicability.

The European Court of Justice also remembered that, in the absence of harmonisation, Member States have full authority in determining the connecting factor of a company to its national order and thus apply their own incorporation requirements to incoming companies. In addition, the ECJ further 'recalled its previous jurisprudence whereby the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse. In Polbud, it was ruled that a national rule which imposes the winding-up prerequisite of cross-border transfer of a company is an unjustified and disproportionate restriction and thus unlawful.

The Polbud judgement clarified the context for cross-border conversions. But the ECJ, being a 'judiciary organ, may not create any procedure for making such conversions possible or set out the related substantive conditions.'[144] In the absence of EU harmonisation on cross-border conversions, national legislation may still set out rules for the procedure to be followed and for the protection of minority shareholders, creditors or workers or for the fight against tax related or other abuses in case of cross-border company conversion. However, it is necessary to 'assess case-by-case'[145] whether such rules comply with EU law and with the

[143] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions 2018/0114(COD) <https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=COM:2018:241:FIN&from=EN> Accessed 11 August 2019

[144] Conflict of laws, Freedom of establishment after Polbud: Free transfer of the registered office, <http://conflictoflaws.net/2017/freedom-of-establishment-after-polbud-free-transfer-of-the>-registered-office/> Accessed 11 August 2019.

[145] Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union The Polbud judgment and the freedom of establishment for companies in the European Union: problems and perspectives - PE 608.833 <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608833/IPOL_STU(2018)608833_EN.pdf> Accessed 10 August 2019

right of establishment. This leads to an unsatisfactory situation in terms of legal certainty, which negatively affects companies, stakeholders and Member States

Currently, companies wishing to move their registered offices cross-border need to rely on Member States' laws. Such laws, where they exist, are often incompatible or difficult to combine with each other. Moreover, more than half of the Member States do not provide any specific rules allowing for cross-border conversions. SMEs are in particular negatively impacted since often they lack resources to perform cross-border procedures through costly and complicated alternative methods.

The *Polbud* judgement may therefore be considered a 'further step in promoting regulatory competition across the EU, because it allows modifying the lex societatis by adopting a new law different from that of the Member State where the economic activity'[146] is performed in parallel with other European Union Court of Justice's decisions confirming the possibility of preserving the original lex societatis while modifying the place of real business.

5. The need of harmonisation within EU company law

The European Commission presented in the 2003 Action Plan[147], the intention to introduce a 14th Company Law Directive in relation to the transfer of seat. And still to this day, the current panorama regarding the transfer of the registered office is still rendered impossible or impeded by distinct national company laws and procedures, if available, within Member States. This initial proposal was to give the ability to companies to transfer their registered office across the EU without the necessity to go through the dissolution or liquidation in the home member state and then have to go through reincorporation in the host member, consequently leading to the 'loss of

[146] Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union The Polbud judgment and the freedom of establishment for companies in the European Union: problems and perspectives - PE 608.833 <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608833/IPOL_STU(2018)608833_EN.pdf> Accessed 10 August 2019

[147] Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM (2003) 284 final, <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0284/COM_COM%282003%290284_EN.pdf > Accessed 3 August 2019.

legal and business continuity'[148] which gives rise to legal difficulties and substantial social and tax costs that companies are subject to. However, according to McGreevy (former Commissioner for Internal Market and Services), the reasons for abandoning the Fourteenth Company Law Directive were that,

'*The economic analysis of the possible added value of a directive were inconclusive. Companies already have legal means to effectuate cross-border transfer. Several companies have already transferred their registered office, using the possibilities offered by the European Company Statute. Soon the Cross-Border Merger Directive, which will enter into force in December, will give all limited liability companies, including SMEs, the option to transfer registered office*.'[149]

In other words, due to alternative mechanisms available and the lack of an 'economic case'[150], the Directive was not going to proceed, and at that time the Commission was also awaiting the final ruling on the then ongoing Cartesio case. However, it was argued that the Commission's economic justification should be 'dismissed'[151], as these 'alternative legal means to effectuate cross-border transfers' come with important disadvantages, in comparison with a Directive offering economic benefits.

Although, the introduction of two 'alternative options' came into play, namely the EU legislation on the European Company (SE)[152] and Cross-Border Mergers[153] which were mechanisms to address the issue of companies losing their legal personality when carrying out cross-border operations, by transferring their seats, specifically their registered office, named as a conversion. Nevertheless, it is apparent that, in addition to these alternative procedures and the ECJ setting out some important guidelines through its jurisprudence the need to for a specific legal framework

[148] R. Panizza, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Briefing on Cross-border transfer of company seats PE 583.143. <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf> Accessed 3 August 2019.
[149] SPEECH/07/592 of 3 October 2007 (Speech by Commissioner McCreevy at the European Parliament's Legal Affairs Committee, Brussels).
[150] SPEECH/07/441 of 28 June 2007 (Company law and corporate governance today. 5th European Corporate Governance and Company Law).
[151] Gert-Jan Vossestein, '*The European Commission's decision not to submit a proposal for a Directive*' (2008) Utrecht Law Review, Volume 4, Issue 1.
[152] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
[153] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies

for cross-border transfer of seat is still required to close the gap within corporate mobility. Hence, the European Commission introduced the Company Law Package[154] initiative to present a common procedure on cross-border conversion, also known as cross-border transfer of seat.

5.1 Alternative options

5.1.1 European Company (SE)

The first alternative option to consider is the registration of the company as Societas Europaea (SE), statute which provides for the creation of a truly pan-European company and which enables companies to move their registered office across the EU by simple notification of the company registers in the home and host Member States. This means, a cross-border move of the company's registered office under the European Company does eliminate the process of going through a wind up or dissolution of the company in its original home country. Although, there are a couple limitations and drawbacks coming from this approach one is only public companies can become a Societas Europaea.

The European company established the European Companies and allows companies to transfer their 'registered office and to adapt their organisational structure throughout the European Union'[155] and the European Economic Area, without important legal obstacles. In addition, European Companies can be created through a way of merger, conversion, by the establishment of a European holding company and by the establishing of a European subsidiary. While the first two options are addressed to public limited liability companies, all limited liability companies can form a SE by establishing a European holding company and all companies can be formed by the establishment of a European subsidiary.

[154] Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions COM/2018/241 final - 2018/0114 (COD). < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241&from=EN> Accessed 5 August.

[155] Ernst & Young, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available), <https://ec.europa.eu/info/sites/info/files/dg_just_transfers_divisions_public_annexes_final_report_05022018.pd> Accessed 1 August 2019.

The European Company Statute effectively follows the incorporation doctrine from a private international law perspective, since European Companies are governed by rules on public companies of the Member State where their registered office is situated. Although at the same time, the substantive requirement of locating the head office in the same jurisdiction as the registered office creates a result similar to the real seat doctrine which is stipulated in Article 7 of the SE Regulation. Even Member States following the real seat doctrine may permit companies formed under their laws to move their headquarters or central administration abroad without this affecting the continued application of that Member States' company law. But this alternative legal instrument is not consistent with the current European Court of Justice case law as it has been ruling in favour of the concept of freedom of establishment and companies can have their seats in two different Member State territory. Additionally, there is quite a consensus of among scholars that believe it is the end of real seat theory due to its incompatibility with the modern globalised world and the EU's single internal market objective regarding cross-border mobility.

5.1.2 Cross-Border Mergers

Similarly with the Cross-Border Directive companies intending to move cross-border its registered office of having the possibility to merge with a company in the host state, which can either be 'an established subsidiary or a new company created for the explicit purpose of the cross-border move'.[156] The directive, provides for all limited companies, including Small and medium-sized enterprises (SMEs), the possibility to transfer their registered office to another Member State. However, it is an indirect instrument just like the European company, whereby it is expensive and time-consuming, hence the need for common rule on transfer of company's seats.

[156] P. Muller, S. Devnani, R. Ladher, P.Ramada, European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive) PE 494.460 - EAVA 3/2012. <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN02)_EN.pdf> Accessed 6 August 2019.

5.2 Proposal for a Directive on cross-border transfer of seats

The clash between private international law rules and EU's freedom of establishment rights, resulted to companies intending to move cross-border to be subject to overwhelming challenges since the first landmark case, namely Daily Mail case, which are still very present for at least 3 decades. Although, the European Union might have potentially found a solution to bring the problem to an end. In April 2018 the European Commission introduced through a proposal with new rules on cross-border mobility, and through the enactment of the Proposal of the Directive on cross-border conversions, mergers and divisions, the European Commission introduced important changes to the cross-border mobility with an aim to facilitate procedures, provide legal certainty and create an environment which will enable companies to operate easily in the single internal market.

5.2.1 Company Law package

The proposal introduces some little changes in the existing regulation of cross-border mergers, among others, such as 'new report for the information of employees and gives non-conforming shareholders the right to exit the company'[157]. However, the real innovative element is the introduction of common procedures for cross border divisions and conversions also known as 'cross border transfers of seat and divisions.

Cross-border conversions had been expressly admitted by the Court of Justice of the EU. But, the lack of a harmonized legal framework in all member states created uncertainties, although the proposal creates a uniform procedure to facilitate these transactions while at the same time protecting the rights of minority shareholders, creditors and employees. The process for both cross-border conversions and divisions follows closely the one for cross-border mergers. In summary, the steps would be the 'drawing up of the draft terms and the administrator´s and expert´s reports, disclosure of these documents, shareholder

[157] European Law Blog, Segismundo Alvarez, The Commission's Company Law Package: Overview and Critical View of The Proposal for Cross-Border Transactions, <https://europeanlawblog.eu/2018/06/07/the-commissions-company-law-package-overview-and-critical-view-of-the-proposal-for-cross-border-transactions/> Accessed 13 August 2019.

approval'[158], examination by the competent authority of the home member state and registration in the host member state.

Conclusion

The freedom of establishment under Article 49 and 54 TFEU granting free movement rights to companies and the liberal approach of the transfer of the company's seats stemming from European Court of Justice's judicial decisions are two components that are substantial regarding cross-border mobility, but not enough to fill the gap created by the absence of harmonisation within the company law at a EU dimension. This was clearly highlighted by the European Court of Justice, as from their perspective, 'it must be dealt with by future legislation or conventions'[159].

As the jurisprudence only had the capacity to cover a few scenarios from the above-mentioned cases, but the remainder retains its unsettled and uncertainty status causing challenging obstacles for cross-border corporate mobility, such as the absence of a 'set out operational details of cross-border conversions'[160] and the 'disparity of requirements imposed by the procedures to be followed in the home and in the host Member States'[161], regarding the transfer of the company's seats.

Hence, it must be acknowledged that under a specific directive these issues can be solved, as well as offsetting the drawbacks emanating from the two alternative options use to effectuate indirect free movement of seat, namely the European Company (SE) and Cross-Border Mergers, as unlike these options the directive is less time-consuming and offers a 'much more cost-effective transfer procedure'1. However, the introduction of the Company Law Package, aims to enable companies to transfer their seats cross-border without having to wind-up or leading to the interruption and loss of their legal personality. It has been argued that 'political feasibility'[162] can be an hindrance whereby the

[158] European Law Blog, Segismundo Alvarez, The Commission's Company Law Package: Overview and Critical View of The Proposal for Cross-Border Transactions, <https://europeanlawblog.eu/2018/06/07/the-commissions-company-law-package-overview-and-critical-view-of-the-proposal-for-cross-border-transactions/> Accessed 13 August 2019.
[159] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, para. 23.
[160] Roberta PANIZZA, Briefing on Cross-border transfer of company seats - PE 583.143 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf> Accessed 2 April 2019
[161] Ibid.
[162] Gert-Jan Vossestein, '*The European Commission's decision not to submit a proposal for a Directive*' (2008) Utrecht Law Review, Volume 4, Issue 1.

fact Member State have exercise 'law-making autonomy in the field of company law'[163] for a long time, it will be difficult to give up on domestic legal traditions that each Member States are attached to.

This rigid dichotomy between the real seat theory and the incorporation theory, emanates from Member States not having a 'common understanding of the structure of company law'[164] because of the presence of different views regarding whose interests are to be protected and prioritise by corporate law. Hence, the Anglo-American countries view company law as an area which concerns 'relationship between shareholders and their directors'[165], but in contrast Continental European countries consider corporate law to include stakeholders, such as creditors and employees. Although, this division should not 'outweigh European integration'[166]as well as the EU's objectives in relation to the single internal market, thereby the need for a common rules, on transfer of the company's seat and private international law at a EU level is clearly necessary to provide legal certainty and predictability, and based on the developments of the European Court of Justice's rulings, it is best for the real seat theory to be put aside due to it is incompatibility with the concept of freedom of establishment within the EU's internal market and the 'realities of modern business'[167]operations.

[163] Joseph A McCahery, Erik P M Vermeulen, *'Does the European Company Prevent the Delaware Effect'* (2005) 11 Eur LJ 785.
[164] J. Borg-Barthet, '*Free at Last? Choice of Corporate Law in the EU following the judgment in VALE*'(2013) 62 International and Comparative Law Quarterly 503.
[165] Ibid.
[166] J. Borg-Barthet, '*Free at Last? Choice of Corporate Law in the EU following the judgment in VALE*'(2013) 62 International and Comparative Law Quarterly 503..
[167] Nadja Kubat Erk, '*Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine*' (2010) European Business Law Review, Vol. 21, Issue 3.

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