



UNIVERSIDADE
CATÓLICA
PORTUGUESA

14th Directive on Company Law
– The need of a discipline for cross-border
mobility in the EU –

Master's thesis

LL.M. Law in a European and Global Context

Católica Global School of Law

Author: Filipa Correia da Silva

Supervisor: Prof. António Frada de Sousa

August 2014

To my family

Index

1. Introduction	7
2. Is the 14 th directive truly needed?	10
a) Companies' conflict of laws in the EU	10
b) ECJ's case-law: an odyssey towards the 14 th directive?	15
3. Why is the 14 th directive truly needed?.....	32
a) Regulatory competition	32
b) Indirect and direct transfer of company's seat	36
4. How should the 14 th directive be designed?.....	39
a) The long way towards the 14 th directive	39
b) The proposed model for the 14 th directive	42
5. Conclusions	46
Bibliography	49

Abbreviations

AG – Advocate General

BGB – *Bürgerliches Gesetzbuch*

CBMD – Cross-Border Mergers Directive

ECJ – European Court of Justice

EU – European Union

SE – *Societas Europaea*

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

UK – United Kingdom

1. Introduction

*“What we call the beginning is often the end
And to make an end is to make a beginning.
The end is where we start from.”*

T. S. Eliot, “Little Gidding”

The long road to corporate mobility in the EU has been a path full of ups and downs and turnarounds. Monotony has not been a characteristic of the evolution of freedom of establishment, since “even in a Single Market without borders, there may remain some hidden barriers to companies’ legal mobility”¹ that should be tackled. After the ECJ’s recognition of corporate mobility in the EU, the barriers became more subtle and procedural. EU’s national legislations could not prevent the inbound or outbound companies’ migration, but they can make it very bureaucratic and disparate, in a way they hamper those migration movements. Therefore, the need of a discipline for cross-border mobility in the EU is the ‘end from where we should start’.

Freedom of establishment is laid down in articles 49-54 TFEU, referring article 49 to the elimination of the restrictions on freedom of primary and secondary establishment (first paragraph) and to the right of pursuing activities as self-employed under the same conditions as the nationals of the Member State of establishment (second paragraph). Article 54 TFEU states that companies should be treated in the same way as natural persons, which is extremely difficult because “[g]ranting freedom of establishment to *legal* foreign persons is likely to have a heavier impact on a legal order than welcoming *natural* foreign persons”². For that reason and also due to the lack of harmonization in EU company law, companies are treated differently within the EU, which may originate discrimination and threaten their cross-border mobility.

ECJ’s striking case law has been fighting against the obstacles created by Member States to corporate mobility and developing and interpreting the Treaty, once the Treaty provisions are not self-explanatory and unequivocal. The Court has been called to the ‘battle field’ whenever a national legislation clashes with the corporate mobility

¹ PELLÉ, Philippe, “Companies crossing borders within Europe”, 2008, *Utrecht Law Review*, Vol. 4, Issue 1 (March), p. 6

² RAMMELOO, Stephan, “Corporations in Private International Law. A European Perspective”, 2001, Oxford University Press, p. 4

enshrined in the Treaty. The Court's approach has been evolving naturally in a non-linear way. To understand better the Court's route three different chronological moments can be pointed out³.

In the first moment, the Court was reluctant and uncomfortable with its position. Here, in a landmark decision in *Daily Mail* case by avoiding the posed questions, it established the immunity of the conflict rules. In the second moment, the Court changed drastically its approach and we can find a more confident ECJ that "opened the gates for regulatory competition of company law"⁴, through cases like *Centros*, *Überseering*, *Inspire Art* and *SEVIC Systems*. In the third moment, it seems that the Court finally found the courage to be coherent and in *Cartesio*, *National Grid Indus* and *VALE* cases, it recognized bluntly the companies' cross-border mobility.

Thus, the Court's case law has been a crucial tool on granting corporate mobility by forcing Member States to put their legislations in line with EU primary law. However, "[e]ven a supranational court cannot be expected to take up the legislator's tasks by providing versatile and detailed instruments in order to effectuate the total procedure of cross-border company transfers"⁵. The jurisprudential incentive has triggered several legislative solutions such as the SE Regulation and the CBMD that by allowing only indirectly the transfer of company's seat are burdensome and clearly not designed to ensure the transfer of company's seat in a 'single step'. Furthermore, "despite the many company law directives which have been adopted, considerable differences in the way the various Member States regulate companies and their activities remain"⁶. For that reason a directive on transfer of company's seat is needed to build a common framework that regulates the completely different regimes Member States may decide to adopt on this field, especially the very different levels of protection of the affected stakeholders Member States may request.

Our argument is that it is time for the EU to 'finish the job' and to guarantee the proper functioning of cross-border mobility. The 14th directive needs to be finally adopted, since "[p]roperly conducted company migrations can only be achieved on the basis of a harmonizing directive taking into account the multifold interests of many

³ PICHEL, Paulo, "O âmbito espacial do regime de coligação societária à luz do Direito da União Europeia", 2014, *Direito das Sociedades em Revista*, Ano 6, Vol. 11, p. 236-240

⁴ CAHN, Andreas & DONALD, David C., "Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA", 2011, Cambridge University Press, p. 82

⁵ RAMMELOO, Stephan, "Corporations...", p. 315

⁶ CRAIG, Paul & DE BÚRCA, Gráinne, "EU Law: Texts, Cases and Materials", 2011, 5th edition, Oxford University Press, p. 779-780

internal and external company ‘actors’ (shareholders, debenture holders and other company creditors, employees, national tax and social security law authority)”⁷. In short, each Member State will be responsible for legislating within the framework established by the 14th directive that ensures that EU primary law is respected.

As we will see in detail, we believe that the right time for the 14th directive adoption has arrived, considering that: *a*) the classical ‘struggle’ between the two opposing conflict of laws (incorporation theory and real seat theory) is currently surpassed and it is settled that exists space for both theories in the EU as long as they follow the ‘European detour’ (“*desvio europeu*”⁸) and as long as they are not against the principle of freedom of establishment; *b*) Court’s case law has evolved towards the recognition of the cross-border mobility in the EU and in the most recent case law it has also assumed the difficulties resulting from the lack of regulation on this area and suggested the need for further legislative action; *c*) the European regulatory competition requires a urgent discipline that ensures the protection of the affected ‘players’; *d*) the regulated indirect transfer of company’s seat does not substitute the need for regulating direct transfer of company’s seat; and *e*) consistent preparatory work has been done for the 14th directive.

Finally, in order to make our point easier to understand we organized our work in the following way: in chapter 2, we tried to answer the question “is the 14th directive truly needed”. With the view to frame and answer the posed question the two existing theories of conflict of laws were confronted and ECJ case law was analyzed. In chapter 3, we planned answering the question “why is the 14th directive truly needed”. The response emerged after considering the regulatory competition in the EU and also after challenging the current situation of indirect and direct transfer of company’s seat. Last but not least, in chapter 4, we attempted to answer the question “how should the 14th directive be designed”. The final question was responded through the analysis of the preparatory work that has been done so far for the 14th directive and a proposed model for the 14th directive was conceptualized.

⁷ RAMMELOO, Stephan, “Freedom of establishment: cross-border transfer of company ‘seat’ – The last piece of the puzzle?”, *Maastricht Journal of European and Comparative Law*, 2012, p. 587-588

⁸ CORDEIRO, António Menezes, “Direito das Sociedades”, 2011, Part I, 3rd edition, Almedina, p. 211

2. Is the 14th directive truly needed?

a) Companies' conflict of laws in the EU

These days, we can find in the European scenario two major theories that give us the connecting factors to determine which law is applicable to companies, *i.e.*, their *lex societatis*. They are the incorporation theory (*siège statutaire*) and the real seat theory (*siège réel*).

Both, “the real seat theory and the incorporation theory consider that a company must be formed according to the law of the place where it is incorporated [...] [but the first one] requires the centre of management and control of the company to be situated in the state of incorporation”⁹. This means briefly that the real seat theory tends to limit corporate mobility, which is the freedom granted to a company to operate and move to a different jurisdiction. The *siège réel* theory brings the underlying idea that companies are States' propriety and they can only exist as such within the State where they were created, thus this theory asks for a real link between the company and the State that regulates its existence, so “reality gains over legal form”¹⁰; on the contrary the *siège statutaire* theory advocates that “besides a registered office (mainly for receipt of legal proceedings), no other connection with the country of incorporation is required: whatever activities the company may develop in other states, it will not lose its original status”¹¹.

Therefore, “the incorporation theory appears to be more business oriented, whereas the real seat theory appears to attribute more weight to other interests”¹². We should mention that these other interests have hidden objectives that are clearly protectionists, but since those objectives have been gradually declared contrary to the EU freedoms, they have been transformed and replaced by another perspicacious argumentative

⁹ SOUSA, António Frada de, “Company's Cross-border Transfer of Seat in the EU after Cartesio”, Jean Monnet Paper 07/09, p. 6

¹⁰ WYMEERSCH, Eddy, “The Transfer of Company's Seat in European Company Law”, 2003, ECGI Working Paper 08/2003, p. 9

¹¹ WYCKAERT, Marieke & JENNÉ, Filip, “Corporate Mobility”, 2010, SSRN, p. 5

¹² PASCHALIDIS, Paschalis, “Freedom of Establishment and Private International Law for Corporations” (2012) Oxford University Press, p. 29

approach that consists in a more subtle and elaborated one based in the protection of companies' stakeholders¹³.

The incorporation theory believes that companies are governed by the law of the country where the company was incorporated, even if the company has no activity in the incorporation country. According to this theory the legal order that creates the corporation should also govern it¹⁴. The state of incorporation is the one having more interest to regulate the company.

Despite the fact that the incorporation theory has been usually associated with common law jurisdictions, it has recently attracted some civil law jurisdictions such the Netherlands and Switzerland due to its well-known capacity of attracting investment and promoting economic development. However, some typically incorporation states are: the United Kingdom and Ireland. This theory is based on private autonomy (private-law conception of company law) because it allows the choice of law to govern one company, simply by incorporating in the chosen country. Moreover, the incorporation states recognize in their jurisdictions the existence of foreign companies due to the case law rule and principle resulting from vested rights doctrine that "incorporation by one state will be recognized in every other state" and also due to international comity («*comitas gentium*»)¹⁵.

As this theory accepts companies' mobility and its foreign activity, the transfer of the center of administration and control does not represent an issue because wherever the company operates, it will always be subject to the law of its domicile of origin. Also, this theory allows the company's shareholders to choose the best company regime, but "once this choice is made, it is maintained throughout the company's life, irrespective of where its actual activities take place"¹⁶. Furthermore, as we mentioned above, when a company is validly incorporated in its home state, it will be recognized all over the place.

But not everything is permitted under this theory, once the transfer of registered office is next to impossible. Doing an analogy, as natural entities cannot change their

¹³ SOUSA, António Frada de, "A Europeização do Direito Internacional Privado – os novos rumos na regulamentação das situações privadas transnacionais na UE", May 2012, Doctoral Thesis, Universidade Católica Portuguesa (Porto), nt. 279, p. 100

¹⁴ DRUCKER, Thomas C., "Companies in Private International Law", 1968, v. 17, ICLQ

¹⁵ SOUSA, António Frada de, "A Europeização...", p. 100

¹⁶ PANAYI, Christiana HJI, "Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths", 2009, QMUL, Legal Studies Research Paper No. 26/2009, p. 8

place of birth; these legal entities (companies) cannot change the country where they were born as well, which is represented by their registered office. Companies incorporated under this theory cannot transfer abroad their register offices, not even from England to Scotland. They get trapped to their State of incorporation. It is common to say that real seat theories are protectionist, but given this situation, aren't incorporation theories 'a little bit' protectionist as well?

One of the major concerns related to this theory is the so-called 'letter/mail box companies', which means the situation where a company incorporates in a State, without having any activity in that State and only incorporates there for the purpose of taking advantage of tax benefits or of a more "friendly" corporate regime. Being so, the incorporation theory may leave the door open for abuse of law. Attracting huge companies to incorporate on their jurisdiction just because their company law has laxer rules and less demanding corporate governance rules may be a negative consequence of the regulatory competition this theory enables and that may constitute abuse of law. The danger of this "race to the bottom" and 'leakage' of national companies that may be generated by the incorporation theory were direct incentives for the development of the real seat theory¹⁷.

The real seat theory believes that companies are governed by the law of the country in which the company has its head office, meaning its center of management and control or its 'brain'. This theory is intimately linked with civil law jurisdictions, having a few variations in each State's approach. Some real seat States are: France, Germany, Italy and Portugal. Apart from each country's specificities, this theory considers that each State has an absolute power over companies' lives and it can only recognize what it has created.

In France, where this theory was first received and developed, the chosen connecting factor is the "siège social" which can be determined by the following test: the siège social is "the place where the general assembly of shareholders is summoned, the board of directors has its offices, and the superior organs of management and control can be found"¹⁸ and in case of public limited company the relevant place is the location of the board of directors¹⁹.

¹⁷ SOUSA, António Frada de, "A Europeização...", p. 104-105

¹⁸ PASCHALIDIS, Paschalis, *op. cit.*, p. 8

¹⁹ *Id.*, p. 8- 9

In Germany, traditionally the country with the strictest approach of the theory, the real seat has been considered, by the case law, as the place where the company is run and managed and by ‘run and managed’, the case law means the place where the day-to-day decisions of the company are taken, insofar as the German BGB does not clearly specify a choice of law and *renvoi* is crucial on determining the applicable law²⁰.

In Italy, a curious situation takes place, since the Italian law (article 25 of Law 218 of May 31, 1995) gives space to both theories by creating in the same article two different rules: the first, which is bilateral, applies the law of the place of incorporation (*legge dello Stato nel cui territorio è stato perfezionato il procedimento di costituzione*) and the second, which is unilateral, applies the Italian law if the place of administration or of the company’s main business is located in Italy (*legge italiana se la sede dell’amministrazione è situata in Italia, ovvero se in Italia se trova l’oggetto principale*)²¹. This principle of “two rules in one” was adopted in order to apply the Italian law to companies operating in Italy and, above all, to prevent the abuse of law perpetrated by the foreign companies *Anstalten*, which are autonomous funds with legal personality from Liechtenstein, created by Italians to exclusively operate in Italy.

In Portugal, the law establishes a twofold criterion (article 3 of the Portuguese Companies Code): for internal relationships (between parties of the company) the criterion to be applied is the real seat as the place of the main and effective seat of administration (*sede principal e efectiva da administração*) and for external relationships (with “true” third parties) the chosen criterion is the statutory seat as the place referred to in the company’s statutes when this is Portugal (*a sociedade que tenha em Portugal a sede estatutária não pode, contudo, opor a terceiros a sua sujeição a lei diferente da lei portuguesa*)²².

As we mentioned above, the real seat States require the centre of management and control of a company to be located in the state of incorporation, which restricts companies’ freedom of movement. This theory in pure terms sends the message that States should control everything that happens in their territory because there are truly linked to that, and that allow us to infer that the real seat is a protectionist theory that does not accept companies operating in one country under the jurisdiction of another

²⁰ PASCHALIDIS, Paschalis, *op. cit.*, p. 10

²¹ BAREL, Bruno & ARMELLINI, Stefano, “Manuale Breve Diritto Internazionale Privato”, 6th ed., Giuffrè, Milan, 2011, p.128-129

²² ABREU, Jorge M. Coutinho de (Coord.), “Código das Sociedades Comerciais em Comentário”, Vol. I, Reprint, Almedina, Coimbra, 2010, p.74-75

(public-law conception of company law). Therefore, corporate mobility is hard to achieve under this theory, because generally if companies want to transfer their center of management and control, they have, to liquidate in the country of origin and open *ex novo* in the other country, which is not conceptualized as transfer of seat. If they do not do so and simply start operating in another Member State then the company will not be considered as a company in real seat state, but for instance as a general partnership in case of Germany, being its shareholders considered personally liable for the company's debts and not having the company the necessary legal capacity to sue²³.

These theories come from opposite assumptions and the interesting fact has been in the past years how to coordinate them with the corporate mobility envisaged by the EU law. If interpreted in strict terms both theories can originate problematic situations, especially when a company wants to move its real seat from an incorporation State to a real seat State which may lead to a double nationality situation ("bipatride" companies²⁴) or conversely from real seat State to an incorporation State which may lead to a stateless situation²⁵.

For many years the academic debate was focused on the choice of the 'best' system of conflict of laws for the EU. Nowadays we are aware that a European choice between them will probably never be made because it is not needed. The ECJ through its case law "acknowledged that the choice between the connecting factors remains also within the member state's sovereignty"²⁶ and that there is space for both theories in the EU as long as they comply with the principle of freedom of establishment. As a consequence both theories have to be mitigated in its pure terms and they have to allow corporate mobility.

In a nutshell, the incorporation theory allows the transfer of the center of management and control, but it does not allow the transfer of the registered office, so it is a restrictive theory; nevertheless the real seat theory does not allow the transfer of the center of management and control, nor the transfer of the registered office to and from another Member State, which means it is a very restrictive theory, that by nature prevents company's mobility. However, both theories have been changed by the Court's

²³ PANAYI, Christiana HJI, *op.cit.*, p. 10

²⁴ WYMEERSCH, Eddy, *op.cit.*, p. 13

²⁵ WYCKAERT, Marieke & JENNÉ, Filip, *op.cit.*, p. 7-8

²⁶ DEÁK, Daniel, "Cartesio: A Step Forward in Interpreting the EC Freedom of Emigrate", 2009, Tax Notes International, Vol, 54, Number 6, p. 499

case law being no longer considered the ‘issue’ on what concerns corporate mobility, as we will see.

b) ECJ’s case-law: an odyssey towards the 14th directive?

The ECJ case law will be analyzed first, in chronological order to allow the understanding of the cases’ context and afterwards, in connection with the cases that should be read together to enable a deeper and more systematic analysis.

The cycle began with *Daily Mail* case²⁷, a tax-law case between an UK company named Daily Mail and General Trust PLC (“Daily Mail”) that wanted to transfer its tax residence to the Netherlands in order to have a better tax regime. At the same time, it wanted to maintain its UK company status and to continue to be subject to the UK company law. The UK Treasury did not give the required permission to do so, without Daily Mail paying accumulated tax in the UK. Despite the fact this case was exclusively related with exit taxes, the Court saw knowingly a case of clash of conflict laws in company law and decided to answer to another question instead of the posed question.

The posed question was whether this UK Treasury right to refuse the transfer without paying accumulated tax in the UK was compatible with the Treaty’s freedoms. The Court did not answer to the posed question, but to a question related to the compatibility of the real seat theory with the Treaty and consequently the possibility of transferring a company’s central administration to another State, while keeping the company subject to the law of the country of origin. The fact was that the Court felt the need to announce the compatibility between the real seat theory and the Treaty and the need to declare that the non-posed question was outside the scope of application of the Treaty. Conversely it was within the exclusive scope of action of the Member States that should enter into conventions or harmonize the issue through further legislation.

This decision hides a dangerous *carte blanche* to real seat States “to ‘kill their companies at the border’ whenever those companies decided to transfer their seat abroad”²⁸. In addition, the *Daily Mail* case enacted the so-called *preliminary matter* theory, which is translated into the principle that “unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national

²⁷ ECJ Case 81/87, 27 September 1988

²⁸ SOUSA, António Frada de, “Company’s Cross-border...”, p.15

law”²⁹, and so national legislations have the power of life and of death over companies. The reasoning of the case was based on the argument “*a maiori, ad minus*”, meaning that if a Member State could kill its companies at the border whenever they want to emigrate; then a Member State could also refuse the transfer of a company’s tax residence to another Member State³⁰.

Although far from the best decision in terms of reasoning, it is only acceptable due to its own historical context. We come to the conclusion that the Court had an agenda on the *Daily Mail* decision related to the dichotomy between the two theories and, to comply with that agenda, it reframed the posed question in order to answer to what it intended. The Court could have waited and chosen another case to fulfill its agenda. As a consequence of this judgment, the ECJ left a burdensome legacy to corporate mobility.

The story goes on with the “*trilogy Centros/ Überseering/ Inspire Art*”³¹ that ensured the regulatory competition in companies to be incorporated and that drew boundaries for the real seat theory in order to reconcile it with the freedom of establishment.

Centros case³², where two Danes were denied the right of opening a branch in Denmark of a company they had created in UK to avoid the stricter Danish company law. Here, the Court cleverly invoking the right of secondary establishment conferred by the Treaty, decided that Member States could not discriminate companies incorporated outside their territory and those companies should be recognized as existing under the law of State of incorporation, even if they carry all the activity in the State of their secondary establishment. Conclusion: founding shareholders of a company can choose the most attractive company law to set up the company, which means the ECJ through this decision “sponsors” regulatory competition as a desirable route for the EU. It was raised the question whether abuse of law was implied in this case, but the Court dismissed it, considering that this situation represents a legitimate exercise of freedom of establishment.

²⁹ Paragraph 19 of *Daily Mail* case

³⁰ SOUSA, António Frada de, “A Europeização...”, p. 356

³¹ Expression used by SOUSA, António Frada de, and also, among others, by HOPT, Klaus J., WALZ, W. Rainer, VON HIPPEL, Thomas & THEN, Volker, “The European Foundation: A New Legal Approach”, 2006, Cambridge, p. 190 et seq. and MICHAELS, R., “EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory”, 2006, *Duke Law*, p. 10 et seq.

³² ECJ Case C-212/97, 9 March 1999

Followed by *Überseering* case³³, where a limited liability company incorporated in the Netherlands intended to transfer its center of administration to Germany, where the directors lived. Germany refused to recognize legal and judiciary capacity to the company and as a consequence the company could not stay in legal proceedings. The Court decided that when a company is incorporated under the laws of a Member State and exercises its freedom of establishment in another Member State, the host Member State has to recognize the company's legal capacity. This judgment announced the end of the *Sitztheorie* as it was built in Germany until then and from here on Germany began to mitigate its real seat theory.

Inspire Art case³⁴ concerns a company incorporated in the UK that only operated in the Netherlands and that wanted to open a branch there. Under Dutch law, since this company only operates in the Netherlands it had to specifically mention its foreign status in the registry and it had to comply with Dutch company law. The Court stated that Dutch rules that subjecting pseudo-foreign companies to Dutch company law were inadmissible because a foreign company should be respected as such, *i.e.* as a company subject to another State's law.

After this trilogy we can conclude that from then on Member States have to recognize the legal capacity of a foreign company operating in their jurisdiction and also that they have to recognize the foreign company as a company incorporated and subjected to another Member State's jurisdiction. Even though many scholars believe the ECJ chose, in the trilogy judgments, the incorporation theory as the most suitable theory for the EU, the fact is that for protecting and granting the freedom of establishment, the ECJ without going directly against the real seat theory and always keeping its neutrality, ended up undermining the position and utility of the real seat theory. On the one hand, the company should not change its applicable law if the Member State of incorporation allows the company to remain subject to its jurisdiction after having transferred its real seat to another Member State. On the other hand, if the Member State of incorporation does not allow the company to remain subject to its jurisdiction, the home Member State does not have to subject the company to its jurisdiction³⁵.

³³ ECJ Case C-208/00, 5 November 2002

³⁴ ECJ Case C-167/01, 30 September 2003

³⁵ SOUSA, António Frada de, "A Europeização...", p. 630

As a consequence of these three last decisions, although being compatible with the Treaty, the real seat theory started dying from the inside for not being a good player on the regulatory competition match. Given that regulatory competition is a reality in the EU, as we will see, the real seat theory by not allowing the companies incorporated in their jurisdiction to play in another Member States while remaining subject to the home State law are limiting their national companies' field of action. At this stage, the choice of a conflict rule or of the nuances to give to the chosen conflict rule is a question of strategy and of knowing how to play the game.

In the trilogy decisions, the line followed by the Court was inspired by the “juridical pragmatism”, which is a consequentialist approach that focuses on the practical results the Court wants to achieve, that is ensuring the freedom of establishment and an efficient EU company law based on regulatory competition³⁶. Due to this “result-oriented” methodology followed by the ECJ, the concept of abuse of law appears with a minimized and almost ‘rhetorical’ importance, as mentioned by Sorensen, and as a vague idea of something that could be done by the States to avoid the abuse of law. It is difficult to precise the concrete measures that Member States could take to prevent the abuse of law and after *Cadbury Schweppes* case it became even more difficult, because by addressing the abuse of law on a different approach, those cases get hard to reconcile, as we will see.

The *SEVIC Systems Case*³⁷ refers to a merger between a German company and a Luxembourg company that was prevented because the German legislation only allowed mergers between German companies. The Court decided that this legislation was against the freedom of establishment, once cross-border operations “constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market”³⁸. Then, the ECJ admitted also that there was no justification for that German law because “such a rule goes beyond what is necessary to protect those interests”³⁹, meaning the interests of creditors, minority shareholders and employees and protect fiscal supervisions and commercial transactions. In this decision, the Court rejected the “preliminary matter” approach of *Daily Mail*, brought by the German argument related to the extinction of the incorporated company during the

³⁶ SOUSA, António Frada de, “A Europeização...”, p. 635-646

³⁷ ECJ Case C-411/03, 13 December 2005

³⁸ Paragraph 19 of *SEVIC Systems Case*

³⁹ Paragraph 30 of *SEVIC Systems Case*

process of the merger and consequent transfer of the former company's assets to the incorporating company, becoming factually impossible to take advantage of the freedom of establishment. The ECJ dismissed the formalistic German reasoning, considered as "an inverted logic" by AG Tizzano, and adopted a literal and broad interpretation of the scope of freedom of establishment, that gives the same treatment to persons and companies in terms of freedom of establishment (as a result of the case *De Lasteyrie du Saillant*)⁴⁰. Plus, the adopted interpretation was the opposite that was decided on *Daily Mail* and *Cartesio*, being the *SEVIC*'s interpretation the most updated that has been used in the last decades. Beyond that, this *SEVIC*'s broad interpretation represents the thorn in *Cartesio*'s side.

One year later, in 2006, it was the time for *Cadbury Schweppes* case⁴¹, another tax law case. Cadbury Schweppes, a UK company created two subsidiaries in Ireland to benefit from a better tax regime and to avoid the UK legislation on 'controlled foreign companies' (CFCs). ECJ said that neither companies nor people should take advantage of the EU law. But the fact that a company has established subsidiaries in another Member State in order to benefit from a better tax regime it is not enough to be considered abuse. Moreover, it has concluded that the CFCs legislation wanted to prevent the exercise of freedom of establishment and it can only be justified in situations such as a 'letterbox' or 'front' subsidiary and cannot go beyond what is necessary to avoid the circumvention of a national legislation. One of the most important aspects in this judgment is the interpretation given to "abuse of law" by the Court that goes against its previous interpretation argued in *Centros* and *Inspire Art*. In *Cadbury Schweppes* the Court readjusts its understanding of fraud/abuse of law by developing a test that whenever passed will allow Member States to adopt general measures (not case by case measures as established in previous decisions)⁴² to prevent abuse of law. The test consists in analyzing whether we are in the presence of "an artificial arrangement which has no real economic link with the host Member State" and does not "carry on genuine economic activities in the host Member State"⁴³. If there is an effective participation in the host Member State that is objectively verifiable, then the Member State is not allowed to react against this company.

⁴⁰ SOUSA, António Frada de, "A Europeização...", p. 362

⁴¹ ECJ Case C-196/04, 12 September 2006

⁴² SOUSA, António Frada de, "A Europeização...", p. 648-649

⁴³ Paragraph 61 and 66 of *Cadbury Schweppes* case

This more comprehensive interpretation of abusive practices should nowadays be applied to all legal areas, thus being considered as a general principle of EU Law. However as we have said above, the Court is imbued by the result-oriented perspective of juridical pragmatism and that is what makes possible to reconcile *Centros/ Inspire Art* with *Cadbury Schweppes*. The ECJ does not consider regulatory competition as a desirable route for tax law due to its characteristics based on redistributive purposes and it has a more demanding notion of abusive practices through *Cadbury Schweppes* to allow Member States to fight against the ‘artificial arrangements’. Differently, the Court considers regulatory competition desirable for company law and based on that belief developed the laxer standard present in *Centros* and *Inspire Art* jurisprudence that represents a *conditio sine qua non* together with the mutual recognition principle to enable regulatory arbitrage for companies in the EU⁴⁴. This double standard approach of abusive practices is justifiable within the juridical pragmatism methodology followed by the Court: for different consequences, different standards and solutions.

In 2008, *Cartesio* case⁴⁵ was decided and the decision was awaited with great enthusiasm for the revolution it could represent. *Cartesio* case occurred 20 years after *Daily Mail* and it emerged for testing the validity of *Daily Mail* in the current days. Those cases should be read together, since they refer to the same object (company’s emigration) and they follow the same approach (a divergent approach from the remaining case-law).

Cartesio Oktató és Szolgáltató bt (“*Cartesio*”) is a Hungarian company that wanted to transfer its seat from Hungary to Italy and at the same time continue to be considered as a Hungarian company. The problem was that Hungarian law did not allow these situations of transferring companies’ seat abroad, while continuing to exist as a Hungarian company (in reality, continuing to exist as a company). The Court was asked whether Hungarian law was incompatible with EU law. The way the Court answered the posed questions (that were reframed) is by addressing the *preliminary matter* and consequently repeating the idea affirmed in *Daily Mail* that the transfer of a company’s registered office or head office from one Member State to another Member State is not related with freedom of establishment and Treaty provisions, but it should be regulated by national laws and conventions. So, Member States are free to prevent companies

⁴⁴ SOUSA, António Frada de, “A Europeização...”, p. 657-659

⁴⁵ ECJ Case C-210/06, 16 December 2008

governed by their national law to transfer their seat abroad. This decision is in line with *Daily Mail*, because the Court was not able or did not want to see the differences between the cases, even if two decades have passed since the first decision and the case-law has evolved.

However, *Cartesio* made some progress from *Daily Mail* in the sense of improving the ‘preliminary matter theory’ through an *obiter dictum*, where the Court granted to companies the possibility of direct reincorporation, which means the transfer of companies’ registered offices to another Member State, without losing their legal personality and changing their applicable law. The *obiter dictum* was the upgrade brought by *Cartesio* that made finally possible for the companies to avoid being “killed at the border” whenever they want to reincorporate in another Member State. The ECJ ensured that Member States do neither have “immunity”, nor total freedom to forbid a cross-border transfer of a company⁴⁶, but they should create the necessary measures to allow direct reincorporation to occur. Since *Cartesio*, the lack of an appropriate legislative instrument does not allow Member States to hinder direct reincorporations, even though they may be difficult to put into action⁴⁷.

Nevertheless, in the overall *Cartesio* was one step back on the walk to limit Member States complete freedom to “kill” their companies, whenever they want to move abroad. The decision had not met the expectations, especially after the Opinion of the AG Poiares Maduro that gave a much better reasoning to achieve the same outcome: general public interest invoked in the justifications level. The Court, after having clarified in previous judgments that inbound and outbound situations may be treated differently and that the model for outbound situations was *Daily Mail*, remained attached to the heavy and implicit burden of having to follow its previous case-law. Lack of courage to directly overrule or tremendous respect for the precedent, the fact is that the Court did not want to solve the case following *SEVIC*’s broad interpretation of the right of establishment. Conversely, it decided to circumvent and avoid *SEVIC* like it were a stranger and to return the previous formalistic and conservative approach.

However, this judgment sends a clear message to real seat States: they have to “allow their companies, at least to be capable of transferring their seat abroad with a change of

⁴⁶ See paragraphs 109, 110 and 112 of *Cartesio* Case

⁴⁷ SOUSA, António Frada de, “A Europeização...”, p. 619 - 621

lex societatis, without being wound up or liquidated, namely through a cross-border conversion”⁴⁸.

The trilogy “*Centros/ Überseering/ Inspire Art*” granted companies’ freedom of entering into another State, meaning that the Court had gradually affirmed the freedom of immigration for companies and Member States are obliged to accept and recognize foreign companies operating in their territory. Regarding companies freedom to emigrate, things don’t work the same way. *Cartesio* missed the chance of granting a real and complete freedom of establishment in the EU and it perpetuated the different treatment given to the immigration and emigration of companies, making the outbound situation less protected than inbound situations. Nevertheless, after *Cartesio* it became clear that cross border transfer of company’s seat within the EU has to be regulated through a directive that harmonizes its procedures. Some authors pointed out that “[i]n light of the current ECJ case law, only a legislative approach would seem suitable to guarantee non-discrimination in the ongoing regulatory competition between Member States”⁴⁹.

We should now focus on the most recent case law post-*Cartesio* to explore what has been changing in the Court’s approach. The *National Grid Indus* case⁵⁰ is a tax law case that is the inverse of *Daily Mail*. Ten Member States have intervened on this case and the decision was much awaited by corporate and tax lawyers and scholars.

National Grid Indus BV (“National Grid Indus”) was a Dutch company that was integrated in a group of companies (National Grid Transco Group), whose parent company was located in the UK. The parent company made group loan to National Grid Indus and that loan was never used for the purpose that has been granted (electricity project in Pakistan), being considered as a result that the Dutch company made unrealized currency profits regarding the abovementioned loan⁵¹. National Grid Indus decided then to transfer its center of effective management to the UK. After the transfer, National Grid Indus became resident in the UK due to the Netherlands-UK tax convention for the avoidance of double taxation and the prevention of fiscal evasion

⁴⁸ SOUSA, António Frada de, “Company’s Cross-border...”, p. 75

⁴⁹ PETROVIC, Siniša, and JAKSIC, Tomislav, “The ECJ Ruling in *Cartesio* and Its Consequences on the Right of Establishment and Corporate Mobility in the European Union”, *European Journal of Law Reform* (2010)

⁵⁰ ECJ Case C-371/10, 29 November 2011

⁵¹ PANTAZATOU, Katerina, “National Grid Indus: The First Case on Companies’ Exit Taxation”, *European Business Law Review*, 2012, p.946

(“Convention”) and as a consequence of that, all the tax rights over the company were due to the UK. In this context, the Netherlands asked for a “final settlement tax” at the time of the company’s transfer: the liquidation of the company’s tax liabilities (unrealized capital gains).

Three questions were then referred to the Court; the first question: if National Grid Indus could rely on article of 49 of TFEU against the Netherlands to challenge the imposed exit tax at the time of the company’s transfer of effective management to another Member State; the second question: if article 49 of the Treaty were considered applicable, then should the imposed “final settlement tax” be considered contrary to the Treaty or not, and finally, the third question: if the answer to the previous questions depends on fact that the “final settlement tax” relates to a (currency) profit gathered under the Dutch jurisdiction when that profit cannot be reflected in the UK under its tax system.

A unique opportunity was given to the Court to reconsider its reasoning and main findings on *Daily Mail* and *Cartesio* cases. The Court could now prove to what extent it has developed the scope of companies’ freedom of establishment and its first proof of “maturity” was the decision that National Grid Indus may rely on article 49 of the Treaty to challenge the exit tax imposed by the Member State of origin.

As it is common on ECJ’s case law to mention previous cases, this decision referred *Cartesio* and *Überseering*⁵² cases to make a point: national legislations have to comply with the Treaty rules on freedom of establishment. Following its reasoning the Court assumed that there is a difference of treatment between a Dutch company wanting to transfer its seat abroad and a Dutch company retaining its seat in the Netherlands and that this “the difference of treatment relating to the taxation of capital gains is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State”⁵³. Next, the ECJ concluded this difference of treatment constitutes a restriction on the freedom of establishment that in principle is against the Treaty. The next logical step after admitting that this Dutch tax measure is a restriction is to look for a justification that allows this restriction of freedom of establishment to exist. Furthermore, the restrictive measure, if justifiable, may only exist to the necessary extent to preserve the interest it protects. The ECJ decided that

⁵² Paragraph 27 and 30 of *National Grid Indus Case*

⁵³ Paragraph 37 of *National Grid Indus Case*

there was a valid justification for this restriction: the protection of the allocation of powers of taxation between the Member States, which means that unrealized capital gains should be taxed in the country where they arose⁵⁴.

Then, the Court analyzed whether the definitive establishment of the amount of tax should be done at the time when the company transfers its seat of management abroad and concluded that the Treaty does not prevent legislation of a Member State to fix definitively the amount of tax on unrealized capital gains relating to company's assets at the time the company ceases to obtain taxable profits on that Member State due to a transfer of its seat to another Member State. The ECJ examined if the Dutch legislation went beyond what was needed to reach its valid objective (proportionality analysis), taking into account two factors: the establishment of the amount of tax, described above and the recovery of that tax. On this analysis the decision was that "only the determination of the amount of tax at the time of the transfer [...], and not the immediate recovery of the tax, should be regarded as not going beyond what is necessary for achieving that objective"⁵⁵, therefore the Dutch legislation was disproportionate. One thing is to determine the due amount at the time the transfer takes place; we can understand this situation, once it is proportionate that a Member State acts before its power of taxation regarding the company cease to exist⁵⁶; another different thing to ask for that amount to be paid at the exact same time of its determination. As mentioned by the AG Kokott in her Opinion, the economic situation of a company transferring its seat abroad may be so complex that forcing that company to pay the due tax amount on the moment it crosses the border might be a too heavy burden to be endured by this company⁵⁷.

In sum, the Court, in this decision considered for some authors as a "Solomon's verdict"⁵⁸, concluded that article 49 of the TFEU must be interpreted as not precluding national exit tax rules that fix the amount of tax definitively, without taking into account decreases or increases in value that may occur after the date of transfer of the place of effective management. Furthermore, the Court held that article 49 of the TFEU precludes national exit tax rules that ask for the immediate recovery of tax on unrealized gains of a company when it transfers its place of effective management to another

⁵⁴ Paragraph 48 of *National Grid Indus* Case

⁵⁵ Paragraph 81 of *National Grid Indus* Case

⁵⁶ Paragraph 52 of *National Grid Indus* Case

⁵⁷ Paragraph 70 of *National Grid Indus* Case

⁵⁸ VAN ARENDONK, Henk, "National Grid Indus and Its Aftermath", 2013, EC Tax Review, Issue 4, p. 170

Member State. This decision has merit for having been able to decide without focusing on the “quarrel” of the connecting factors, but on the role of the exit taxes within the freedom of establishment, contrary to what happen in *Daily Mail*.

At this point, the million dollar question is what about *Daily Mail* after this judgment and how to reconcile this case with *National Grid Indus*. Both cases are very similar, but their outcomes are very different. For *Daily Mail*, the concept of freedom of establishment did not include *per se*, the right for 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”⁵⁹; while, for *National Grid Indus*, the transfer of a company’s central management and control falls within the scope of freedom of establishment and it does not affect the company’s status on the incorporation country, nor affects the company’s possibility of relying on the Treaty⁶⁰.

Besides, the Achilles heel of *National Grid Indus* is the fiscal discrimination it creates between incorporation systems and real seat systems. In the end, this “quarrel” is back to ECJ stage, but in a more sophisticated and blurred way that in *Daily Mail*. The issue that was pointed out by several intervening Member States and was ignored by the Court is that if a real seat State has the power to ask an emigrating company to be liquidated and as a consequence to pay all its fiscal obligations, then it should mean that an Incorporation State should have the power to impose fiscal requirements (paragraph 29 of *National Grid Indus*). “Prohibiting incorporation system states to apply exit taxation would fiscally punish these states for not trying to kill companies which attempt to make use of their free movement rights, as real seat states do”⁶¹. The Netherlands could have affected the company’s status as a Dutch company after the emigration, once it has not done so; the consequence is to “lose” the right to impose exit taxation over the company, once it is protected by the Treaty. It seems that on *Daily Mail* the approach was rather different, that the emigrating company could not rely on the Treaty for the transfer of its central management and control. Thus, we can “infer that either *Daily Mail* has become obsolete, or it has never contained the answer to the question the referring UK court had asked”⁶².

⁵⁹ Paragraph 25 of *Daily Mail Case*

⁶⁰ Paragraph 32 of *National Grid Indus Case*

⁶¹ TERRA, Ben & WATTEL, Peter, “European Tax Law”, 6th edition, 2012, p. 517

⁶² TERRA, Ben & WATTEL, Peter, *op.cit.*, p. 517

National Grid Indus closed the circle and created a distinction⁶³ where “corporate exit taxes applied in those Member States that adhere to the internal market-friendly incorporation theory can be scrutinized under the freedom of establishment whereas corporate exit taxes applied in those Member States that adhere to the internal market-unsympathetic real seat cannot”⁶⁴. We believe that the same regime should be applied to the real seat States; otherwise the incorporation States have an incentive to become less market-friendly and to adopt some typical real seat measures. It seems that when it comes to exit taxation cases, the ECJ feels the need to protect and comfort the real seat theory; unlike it does on cases regarding company law. This probably means that the ECJ agenda is pro-real seat theory on tax law issues and pro-incorporation theory on company law issues.

In conclusion, “the Netherlands incorporation regime, according to which a company’s real seat can be transferred to another country while retaining its legal personality under Netherlands law, prevents *Daily Mail* from being used successfully according to the ECJ in *National Grid Indus*”⁶⁵.

Moreover, in terms of approach, the exit taxation of emigrating companies has been addressed by two perspectives of case law: the first, the previous case law on companies’ emigration, where the Court was questioned about the conditions of the freedom to emigrate and the second, the case law on exit taxation imposed on individuals⁶⁶. Regarding the first perspective, we can realize there is a different approach to corporate law cases and tax law cases, being “the freedom of establishment even in tax cases, still, partly dependen[t] on the adoption of the company law connecting factor by each Member State”⁶⁷. In relation to the second perspective, case law on exit taxation imposed on individuals has determined that “immediate exit taxes were incompatible with the EU law”⁶⁸; however the approach given for individuals exit taxation cannot be transposed to corporate exit taxation due to the different level of complexity in question.

⁶³ Paragraph 33 of *National Grid Indus* Case

⁶⁴ SMIT, Daniël, “The National Grid Indus Case: A Pyrrhic Victory?”, *European Tax Studies*, 1/2012, p. 20

⁶⁵ VAN DEN HURK, Hans, VAN DEN BROEK, Harm & KORVING, Jasper, “Final Settlement Taxes for Companies: Transfer of Seats, Interest Charges, Guarantees and Step-Ups in Value”, *Bulletin for International Taxation*, April/May 2013, p.259

⁶⁶ PANTAZATOU, Katerina, *op. cit.*, p. 948 - 949

⁶⁷ *Id.*, p. 966

⁶⁸ *Id.*, p. 953

After *National Grid Indus* decision, the Netherlands had to change its exit taxes regime and put it in accordance with the Court's decision. The UK was asked by the Commission to amend its exit tax regime and others countries adapted their legislations like for instance Italy.

This judgment represents one step forward in the development of the real concept of freedom of establishment, once it had reinforced the scope of the Treaty provisions and clarified some unclear aspects such as exit taxes in the EU. Beyond that, this decision stressed a crucial idea: despite the fact the Treaty ensures cross-border transfer of place of management, it does not ensure that it “will be neutral as regards taxation”⁶⁹, since freedom of establishment does not ask for the Member States to make their national tax law depend on tax rules from other Member States, so as to remove any burden arisen from different tax rules.

Finally, the *National Grid Indus* decision has influenced other decisions since it had created a framework to deal with other exit taxes cases, such as “in *Commission v. Portugal*, the ECJ extended its conclusions to a transfer of assets of a permanent establishment, thus broadening the scope of application of *National Grid Indus*”⁷⁰.

The latest judgment regarding corporate mobility is *VALE* Case⁷¹ that represents a milestone in the EU freedom of establishment of companies, once it covers for the first time a cross-border conversion. This case should be read together with *Cartesio*, once *VALE* and *Cartesio* are two sides of the same coin.

Cartesio ruled that a Member State may prevent their companies to transfer their real seat without changing the applicable law, *a contrario sensu*, if a company wants to transfer its real seat and jointly change its applicable law by converting into a host Member State's company, then, in principle, the Member States could not prevent that to happen. This is the case of *VALE*.

Regarding the facts, *VALE Costruzioni Srl* (“*VALE Costruzioni*”) was an Italian company that wanted to be converted into a Hungarian company named *VALE Építési kft* (“*VALE Építési*”). The Italian law allows cross-border conversions, but the Hungarian law only accepts domestic companies' conversion. When registering the

⁶⁹ Paragraph 62 of *National Grid Indus* Case

⁷⁰ Opinion Statement of the CFE on the Decision of the European Court of Justice of 29 November 2011 in Case C-371/10, *National Grid Indus BV and Business Exit Taxes within the European Union*, *European Taxation*, 2013, V. 53, n.º 6, p. 277

⁷¹ ECJ Case C-378/10, 12 July 2012

company in Hungary, it was mentioned that VALE Costruzioni was VALE Építési's "predecessor in law", which did not permit the registration. The rejection of the application for registration was then addressed to the Hungarian courts that asked the ECJ to answer several questions, such as: whether this situation fall within the scope of article 49 and 54 of the Treaty; if it does so, in which sense must the Treaty be interpreted; the compatibility of the justifications presented with the Treaty; and if a distinction should be made between international and domestic conversions.

The Court demonstrated a very strategic reasoning and started by mentioning that "company transformation operations are, in principle, amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment"⁷² and that since national law only allows national companies to convert it falls within the scope of articles 49 and 54 of the Treaty.

Then, the Court decided that the Hungarian legislation in this matter was restrictive to freedom of establishment, once "that legislation treats companies differently according to whether the conversion is domestic or of cross-border nature"⁷³. This restriction can only be justified on the basis of overriding reasons in the public interest (interests of creditors, minority shareholders and employees, effective fiscal supervision and fair commercial transactions). Besides, the inexistence of EU law on this matter is not a justification for the different treatment given to international conversions. The fact is that Hungarian law "simply prohibite[s] cross-border conversions"⁷⁴ always, without taking into consideration if the public interest is being threatened or not, so the Court declared that once there is no justification for this reality, the Hungarian law is contrary to the Treaty.

When dealing with international conversions two national legislations are applicable, so these two legislations should be in line with the Treaty provisions. Therefore, Member States that allow national conversions must also grant the same right to international conversions.

The Court draws the attention to the fact that when there is no EU law to regulate a specific matter, procedural rules having the shape of principles were developed to ensure that the Treaty is protected. Those principles are the principle of equivalence,

⁷² Paragraph 24 of VALE Case

⁷³ Paragraph 36 of VALE Case

⁷⁴ GERNER-BEUERLE, Carsten, "Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in VALE", 2013, Gore-Browne on Companies, Special Release, p. 3

which means that national procedural rules created to ensure the protection of rights acquired under EU law should be governed by each Member State domestic law, provided that they are not less favorable than those governing similar domestic situations and principle of effectiveness, which means that such procedural rules should not “render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order”⁷⁵.

In the end, the ECJ concluded that it is up for the host Member State to determine the applicable national law to cross-border conversions, but the abovementioned principles “preclude the host Member State from refusing, in relation to cross-border conversions, to record the company which has applied to convert as the ‘predecessor in law’, if such a record is made of the predecessor company in the commercial register for domestic conversions, and refusing to take due account, when examining a company’s application for registration, of documents obtained from the authorities of the Member State of origin”⁷⁶.

Despite the fact that the Court has already used these principles to solve other matters such as the right to recover undue payments⁷⁷, their introduction in this reasoning about cross-border conversion was innovative because it allowed to finally clarify what Member States should do and on what they should rely (host Member State legislation), additionally the Court “went further and offered its guidance on the procedural matters applicable to a cross-border conversion”⁷⁸.

However, criticisms have been pointed out as the “principles of equivalence and effectiveness, for lack of supporting secondary legislation, are extremely vague. One might even ask whether they solve the question how cross-border conversion can take place or create further issues and uncertainties in this area”⁷⁹. This fear of uncertainty is caused by situations where companies have to comply with both national laws and they are hard or impossible to reconcile or even, situations where a company no longer exists in the home Member State and still does not exist in the host Member State⁸⁰.

⁷⁵ Paragraph 48 of *VALE* Case

⁷⁶ Paragraph 62 of *VALE* Case

⁷⁷ See ECJ Joined Cases C-10/97 to C-22/97, *IN. CO. GE.’90 and Others*, 1998

⁷⁸ HANSEN, Jesper Lau, “The Vale Decision and the Court’s Case Law on the Nationality of Companies”, *ECFR*, 2013, p. 10

⁷⁹ PISTONE, Pasquale, SZABÓ, Daniel Gergely & SØRENSEN, Karsten Enssig, “Mobility of Companies in the European Union: A Jigsaw of Company Law and Tax Law, Case Law and Secondary Law falls into place?”, “Movement of Persons and Tax Mobility in the EU: Changing Winds”, *IBFD*, 2014, p. 150

⁸⁰ *Id.*, p. 151

The reason why the Court brought these principles to the decision was that, on the one hand it ruled the right to cross-border conversion under article 49 of TFEU and on the other hand it was aware that due to the absence of secondary EU law on this matter, companies will have to rely exclusively on Member States national law, which is risky; so, these principles appear to be a solution for controlling Member States national laws and ensuring they comply with the Treaty. This approach sends a clear message to Member States: even though no EU secondary legislation exists and the specific shapes of national legislations regarding freedom of establishment are not regulated, Member States national laws have to comply with EU law in the way it is interpreted⁸¹.

We believe the ‘principles solution’ was a ‘last resort solution’ developed by the Court to calm the chaos resulting of twenty-seven national legislative standards, while the 14th directive does not progress.

On *VALE* case it is ruled that “the concept of establishment within the meaning of the Treaty provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period”⁸², where is inferred that companies can only have freedom of establishment if they pursue economic activity on the host Member State. This idea *per se* does not mean that the seat of management has be transferred together with the registered office, because the Court did not specify the “level of economic activity required”⁸³, so if transferring the center of administration together with the registered office to a Member State would mean economic activity is being pursued in that country, the fact is that economic activity can be pursued even without the center of administration located in the same Member State. In addition, Member States may allow the transfer of the registered office alone; it is within their legislative freedom.

VALE case will affect national legislations within the EU, once almost all European legislations do not allow cross-border conversions. As happened after *SEVIC Systems* case, when rules regarding cross-border mergers were introduced in national legislations like in Germany where a separate subsection was introduced in the German Code to cover cross-border mergers, the same thing is expected to happen regarding cross-border conversions.

⁸¹ BIERMEYER, Thomas, “Shaping the space of cross-border conversion in the EU. Between right and autonomy: *VALE*”, *Common Market Law Review* (2013), p. 581-582

⁸² Paragraph 34 of *VALE* Case

⁸³ BIERMEYER, Thomas, *op. cit.*, p. 587

A curious fact about *SEVIC Systems* case is that short time after this judgment has been released, the CBMD was adopted. We believe *VALE* case has brought the required impetus for the 14th Directive to be adopted.

The *VALE* case may or may not be the end of a saga in the companies' freedom of establishment, but one thing is certain this case brought to light the challenge that still remain to be fulfilled on corporate mobility and also, it has demonstrated that a consensus has been reached on the need for a directive. Since long time scholars have drawn the attention for the need of a directive, but in *VALE* the Court has agreed with the need of EU legislation on this issue⁸⁴.

If we read behind Court's words in *VALE*, we note that it stresses that the needed directive must cover the sensitive aspects that could justify restrictions to freedom of establishment such as "protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions"⁸⁵ in order to regulate national legislations.

Further, the *VALE* case has not brought all the needed answers, in particular it "does not define the repercussions of a relocation of exclusively the company's registration office (company headquarters remaining in the state of origin). Nor does it rule on a transfer of the company's registered office and headquarters to different EU Member States, or on seat transfers operations involving non-EU/EEA territory [...] [and] does not cover 'crossover' transfers simultaneously involving a change in the applicable law and a change in business form"⁸⁶.

In conclusion, after *Cartesio* and *VALE*, a Member State may not prevent a national company to move its registered office to another Member State (*Cartesio*) and may not prevent a foreign company to transfer its registered office to its territory by converting into a national company, if national conversions are allowed (*VALE*). What it may do is to set the terms of that transfer/conversion to its territory. Without a directive, each Member State is free to determine the procedure it considers necessary to allow conversions, which makes conversions more burdensome and complex. The 14th directive is needed to regulate this freedom Member States have and to establish a common general framework that, at the same time, facilitate reincorporations and protect the stakeholders involved.

⁸⁴ See paragraph 38 of *VALE* Case

⁸⁵ Paragraph 39 of *VALE* Case

⁸⁶ RAMMELOO, Stephan, "Freedom of establishment...", p. 588

3. Why is the 14th directive truly needed?

a) Regulatory competition

Firstly, in order to understand why is the 14th directive truly needed it is important to highlight our conclusions so far. Since the dream of harmonizing substantial company law through a choice of conflict law for the EU has vanished and harmonization has proved not to be the right and the most desirable solution for EU company law, regulatory competition started to be seen as a valid choice for the EU. Plus, as we have seen above in the case-law analysis, the Court has declared and enabled the existence of companies' mobility in the EU by fighting against the restrictions imposed by Member States to the exercise of the freedom of establishment. Even though Member States are ashamed of admitting, they have been adapting their domestic law to this new reality, maybe not directly to attract companies to their jurisdictions, but certainly to keep their legislation updated and to prevent the escape of their companies to other more interesting corporate regimes. Hereupon we have to admit that a “defensive” and ‘low profile’ regulatory competition already exists in the EU⁸⁷.

To recognize if regulatory competition is a reality or not in the EU we must understand what it means. The concept implies the idea of competition between States' legislations to maintain or to attract more companies and so being to attract more investment. States compete to have their legislation with more “clients”, because if consumers of that legislation can choose to “buy” or not that legislation, they may all decide to “buy” another State's jurisdiction. So each State has to stay attentive to what other States are doing in legislative terms in order to control the “attractiveness” of its own legislative system.

This abovementioned idea of States as producers of law and nationals and companies as consumers of that law is the basis of regulatory competition that has been primarily developed by Charles Tiebout, that believed that if citizens were truly mobile, they would move to the municipality that best meets their needs and each municipality would provide a more efficient public good provision (“If consumer-voters are fully mobile,

⁸⁷ SOUSA, António Frada de, “A Europeização...”, p. 674

the appropriate local governments, whose revenue-expenditure patterns are set, are adopted by the consumer-voters”⁸⁸).

By way of framing it, the term “regulatory competition” was originally used by the US scholarship, in the beginning of the twentieth century, when Delaware began to dominate the market by attracting more and more companies to incorporate there; occupying the position that used to belong to the state of New Jersey and that is why regulatory competition is also alternatively known as the “Delaware effect”⁸⁹.

Delaware effect may ring the bell of abuse of law, once companies may only incorporate there in order to take advantage of the more friendly company law existing in this State. Some may argue the fact that Delaware is the state for excellence for incorporating a company may be due to the effort put on implementing laxer laws in order to attract big companies, which may be called the “law beauty competition”⁹⁰. However, states have been getting aware of the real danger of the abuse of law and “anti-abuse rules” have been enacted.

When the Treaty foresaw mobility within the internal market, the Treaty was asking directly Member States to work together and to look at the neighbor’s yard to improve their own yard, in order to create a balanced European market. This means that, since the establishment of the internal market and the EU project, the old concept of a State “living alone” with its total sovereignty makes no sense, since the birth of the EU, Member States have to realized that they do not “live alone” anymore, they live in a “family home” and that implies several compromises in favor of the “EU family”. Those concessions include strategies and principles that need to be pursued by the all the Member States until a reasonable limit, that could justify restrictions.

In the beginning Member States, in the inexperience and goodwill of the EU’s youth, believed that the best way to build this “family home” was by harmonizing company law. Altogether, giving up of their beloved national law in favor of a transnational law equal for all, that would bring attached a small part of each Member State. What a naïf dream, one may say today, as if it were that easy (and desirable) to achieve. Back then, regulatory competition was not considered a reasonable alternative to harmonization and, mostly, it was not conceived as a desired model to be adopted in EU.

⁸⁸ TIEBOUT, Charles, “A Pure Theory of Local Expenditures”, 1956, *The Journal of Political Economy*, p. 424

⁸⁹ PASCHALIDIS, Paschalis, *op. cit.*, p. 125-126

⁹⁰ DRURY, Robert, “The regulation and recognition of foreign corporations: Responses to the «Delaware syndrome»”, 1998, *The Cambridge Law Journal*, Volume 57, Issue 01, p. 15

However, the winds changed due to the difficulties found on the implementation of the process of substantive harmonization and regulatory competition started to be considered as a valid alternative for Europe that would be more respectful of the principles of subsidiary and proportionality (article 5 (3) and (4) of TEU), based on the principle of mutual recognition and that could lead to an *ex post* harmonization by the market⁹¹. In fact, many scholars considered that “the future of European company law-making would better be left with Member States than take the form of European legislation, except for areas in which a uniform consensus has emerged regarding the appropriate regulatory choice”⁹² and currently it is considered that “company law harmonization is, to put it mildly, uneasy”⁹³.

A new conception of company law as business law that requires flexibility and diversity enabling business to occur has reinforced the idea of regulatory competition as the right path for EU company law. The previous idea of harmonization of EU law as the best solution to the EU project, started to be realized as a strategy developed by EU institutions with a hidden agenda to build a European identity and to consolidate a political unity in the single market⁹⁴.

In sum, regulatory competition seems to be the appropriate solution to guarantee and respect the European idiosyncrasies that are part of the EU DNA at the same time that allows the market to work on a more democratic basis. However, it is well-known that the market has several failures and if we allow company law to freely self-regulate, then stakeholders will suffer and be harmed by the shareholders’ choices of the best law applicable for the their companies. One may ask whether the harmonization is not the best option to protect stakeholders from shareholders unlimited power to choose their company law and consequently from their opportunism. Protecting stakeholders from the risks of regulatory competition through a mitigation and elimination of legislative diversity on company law is easiest way to “nip it in the bud”, but this does not mean that the easiest solution is the best one. On the contrary, regulatory competition is the best solution but requires a clear discipline to surpass its shortcomings and to guarantee the true corporate mobility in Europe.

⁹¹ SOUSA, António Frada de, “A Europeização...”, p. 548

⁹² ARMOUR, John, “Who Should Make Corporate Law? EC Legislation versus Regulatory Competition”, June 2005, ECGI Working paper no. 54/2005, p. 52

⁹³ ENRIQUES, Luca, “Company Law Harmonization Reconsidered: What role for the EC?”, November 2005, ECGI Working paper no. 53/2005, p. 21

⁹⁴ SOUSA, António Frada de, “A Europeização...”, p. 566

Furthermore, attached to the abovementioned idea of regulatory competition is the idea of regulatory arbitrage that synthetically means that individuals and companies will choose the most favorable law to their specific situation and consequently they will take advantages of the different legislations offered by each Member State. In other words “legal arbitrage demonstrates a demand for legal rules that differ from existing law”⁹⁵, which stimulates a more efficient legislation turned to the real needs of individuals and companies. In addition, for regulatory arbitrage to exist it requires that: first, mobility and mutual recognition are granted; second, different legislations are offered to individuals and companies that are aware of the different regimes; and finally it is necessary that the costs of the more attractive legislation are borne by the citizens of that Member State⁹⁶.

The EU legislator has proven to be more and more in favor of the regulatory arbitrage rather than in favor of substantial harmonization, especially when adopted, first the SE Regulation, in 2004, that consequently originated different legal regimes in Member States to regulate this corporate entity, so leaving room for some regulatory competition and after, the CBMD, in 2005, which is closer to regulatory competition model than to substantial harmonization.

Beyond the EU legislator, the Court also has shown some affection for regulatory competition in company law. Apart from guaranteeing the mobility enshrined in the Treaty, it has also helped changing the EU company law paradigm especially through cases like *Centros*, *Cartesio* and *VALE*, where “in terms of regulatory competition, *Centros* created a market for incorporations and *Cartesio* offered the prospect of a market for reincorporations”⁹⁷, which after *VALE* became a market for conversions. Thus, the Court has made possible the cross-border mobility for companies in the EU, but it has not (and it could not) provide a full discipline to regulate that freedom. Currently, there is a lack of regulation in what concerns the freedom guaranteed by the Court.

Before *Cartesio* case, corporate mobility has been made possible through mechanisms created for other realities, originating a disparity in the treatment of two

⁹⁵ EIDENMÜLLER, Horst, ENGERT, Andreas & HORNUF, Lars, “Incorporating under European Law: The *Societas Europaea* as a Vehicle for Legal Arbitrage”, 2009, *European Business Organization Law Review* 10, p. 32

⁹⁶ SOUSA, António Frada de, “A Europeização...”, p. 575-580

⁹⁷ JOHNSTON, Andrew & SYRPIS, Phil, “Regulatory competition in European company law after *Cartesio*”, 2009, *European Law Review*, p. 18

variable of the same fundamental freedom⁹⁸. In addition, it is important to mention that perhaps one of the reasons why dealing with the change of *lex societatis* in Europe has been so difficult is because the *lex societatis* in the EU covers more than the relationships between directors and shareholders; it covers also the relationships with creditors, which implies more collateral effects in case of cross-border mobility and greater consequences to stakeholders⁹⁹. Being this one of the main reasons why reincorporations in EU need to be properly regulated.

b) Indirect and direct transfer of company's seat

As we have mentioned previously, the indirect transfer of company's seat in the EU is possible, since 2004, in an indirect way by the SE Regulation and, since 2005 by the CBMD.

On the one hand, transfer a company's seat using the SE Regulation is possible by transforming a company registered in a home Member State into a SE, then the SE can easily transfer its registered offices into another Member State and finally, once registered in the host Member State, it can transform again into a public limited company¹⁰⁰. This mechanism requires three stages instead of only one in order to permit the actual transfer of a company's registered office. Plus, we should bear in mind that SE is a *sui generis* EU corporate entity, not a company duly established as a creature under national law of any EU Member State¹⁰¹. Moreover, apart from being a complex process, the SE does not allow the transfer of a company's registered office, without the transfer of the company's real seat/center of management and control together, which means the SE Regulation made a choice and adhered to the real seat theory, what hinders the regulatory competition.

On the other hand, transferring a company's seat using the CBMD is possible by creating a subsidiary in the host Member State and then merging the company of the home Member State with its subsidiary¹⁰². This other mechanism requires two stages to

⁹⁸ BENEDETTELI, Massimo, "Sul trasferimento della sede sociale all'estero", 2010, *Rivista delle Società*, n.º 6, p. 1273

⁹⁹ SOUSA, António Frada de, "A Europeização...", p. 607-609; 662

¹⁰⁰ VARGOVA, Petra, "The Cross-Border Transfer of a Company's Registered Office Within the European Union", Central European University, LL.M. Thesis, 2010, p. 35-36

¹⁰¹ RAMMELOO, Stephan, "Freedom of establishment...", p. 576

¹⁰² Id., p. 24

permit a company changing its registered offices. The CBMD, conversely to the SE Regulation, does not follow any system of conflict of laws, being neutral in terms of the applicable law to cross-border merger. If both the home and host Member State adopt the real seat theory, then it will ask for the real seat to come along with the registered office, on the contrary if the host Member State adopts the incorporation theory the company can only transfer its registered office without the real seat¹⁰³.

Although these indirect options exist, they are not real options, once they are too costly and bureaucratic and so they are unattractive for entrepreneurs that would rather prefer a one-step solution. Because these options in the end of the day allow transfer of a company's seat, unfortunately, they have been used as a Commission's political excuse for "doing nothing" in terms of adopting the 14th directive.

We are well aware that after the revolution brought by *Cartesio* case, the direct transfer of company's seat is a reality and currently, Member States have to allow their companies to change their registered offices and consequently their applicable law, *i.e.*, to allow their companies to directly reincorporate. The problem is that direct reincorporation is under the purview of the very different Member States national law. So, it is up for each Member State to adapt its domestic regime to the *Cartesio* ruling, protecting the involved stakeholders, as they deem necessary. As a result, Member States are imposing very different conditions to enable companies' transfer of seat and also, very different rules to protect the stakeholders affected by these transfers. All those national differences create an atmosphere of uncertainty and discrimination and weaken the freedom of establishment hard-won.

So, if cross-border transfer of companies' seat is possible indirectly by the SE and the CBMD and directly by primary law, why do we need secondary law (the coveted directive)? First, because the indirect modalities of cross-border transfer of companies' seat force the incorporation of a new company, which implies a step more than what is actually needed and so they are costly and burdensome; second, because regulating the direct modality would "constitute an added value"¹⁰⁴ that would facilitate the freedom's implementation, in practical terms, to an extent the ECJ was unable to do.

In a word, "neither legal certainty nor efficiency can be achieved solely by the 'direct effect' of primary law [...] [that] does not provide a comprehensive set of rules in order

¹⁰³ SOUSA, António Frada de, "A Europeização...", p. 661

¹⁰⁴ MÖRSDORF, Oliver, "The Legal Mobility of Companies Within the European Union Through Cross-Border Conversion", 2012, Common Law Market Review, no. 49, p.658

to fill the gaps formed as a result of the inapplicability of national law”¹⁰⁵. Given this scenario it is urgent to finally adopt the 14th directive that should regulate the conditions of direct reincorporations.

Truth to be told, we should all be wondering by now, why is that the EU has conceived the SE and the CBMD, regulating more complex systems of mobility and it was not capable of adopting a directive that regulates a much simpler reality like the transfer of registered offices? The typical *a fortiori* argument should be considered “*a maiori ad minus*”, which means that if the EU company law was able to discipline more complex forms of corporate mobility, then the EU company law must regulate and therefore facilitate (in the same way as it does for SE and cross-border merger, *i.e.* in a direct and unequivocal way) the exercise of company’s freedom of establishment by simply moving their registered office to another Member State.

¹⁰⁵ MÖRSDORF, Oliver, *op.cit.* p. 659

4. How should the 14th directive be designed?

a) The long way towards the 14th directive

Since long time ago, several efforts have been made towards a directive on cross-border transfer of companies' registered office, however they were all, so far, inconclusive. That is why academics usually describe the route to the 14th directive as "long and winding"¹⁰⁶.

In 1993, the KPMG European Business Center in Brussels carried out a study named "Study on Transfer of the Head Office of a Company from a Member State to Another", where concluded that since it was not effective to allow both theories of conflict of laws to operate, one should be chosen and two different solutions were presented. Those solutions assumed a form of two alternative directives, the first would be a directive based on the incorporation theory and the second would be a directive based on the real seat theory¹⁰⁷. However, the Commission never fought for these directives, perhaps because it was convinced that they were condemned to fail due to Member States lack of will to give up on their connecting factor. But, on 1997, the Commission decided to prepare a draft that even though it was never presented externally as a proposal, it was inspired by the 1993 proposals¹⁰⁸. Despite the fact the proposal opted to keep the neutrality regarding the conflict of laws, it was important to keep the discussion going on the lack of freedom of establishment in the EU.

But the story continues and as a good "suspense" movie it is full of turnarounds and unforeseen events, such as: on 2003 the Commission presented an Action Plan on "Modernizing Company Law and Enhancing Corporate Governance in the EU" where the 14th directive was included as a priority; on 2006 the EU Parliament recalled that "the transfer of a registered office is today either impossible or hindered by the requirements imposed at national level, that a directive in this area is crucial for freedom of establishment, and that the long-awaited Fourteenth Company Law Directive would fill a lacuna in the system of the internal market for companies"¹⁰⁹.

¹⁰⁶ RAMMELOO, Stephan, "The long and winding road towards freedom of establishment for legal person in Europe", Maastricht Journal of European and Comparative Law, 2003

¹⁰⁷ KPMG European Business Centre, Office for Official Publications of the European Communities, 1993

¹⁰⁸ PANAYI, Christiana HJI, *op.cit.*,p.25

¹⁰⁹ European Parliament resolution on recent developments and prospects in relation to company law (2006/2051(INI)), of 4 July 2006

On 2007 in its resolution the Parliament asked directly, for the first time, the Commission to elaborate a proposal on the needed directive¹¹⁰; but, on this exact same year (2007) after developing an impact assessment¹¹¹, the Commission in the person of the European Commissioner Charlie McCreevy announced the lack of need of action in this area and that the Commission would not proceed with the proposal because companies are already able to transfer their registered offices through the SE and the CBMD and also, because ECJ's case-law would resolve the matter soon enough (through the *Cartesio* case that was pending).

Despite the fact the Commission has abandoned the 14th directive on 2007, from then on many scholars have not accepted the Commission's decision and have tirelessly drawn the attention to the need of some legislative measure to be taken regarding transfer of registered offices: "the justification the Commission provides for not submitting a proposal for a Directive on cross-border transfer of the registered office is not convincing. It is to be doubted, incidentally, whether the Commission can provide a thorough argument. In the absence of such justification [...], the Commission should answer the European Parliament's repeated call to submit a proposal for a '14th Company Law Directive'"¹¹².

Not only scholars were attentive to that need, but also the Parliament was, since in 2009 it presented a resolution where "a legislative proposal for a directive laying down measures for coordinating Member States national legislation in order to facilitate the cross-border transfer within the Community of the registered office"¹¹³ was requested. This resolution came together with several recommendations that besides updated were similar to the recommendations presented on 2004 in the context a Commission's consultation paper.

Since the resolution fell on deaf ears, in 2012, the Parliament presented another resolution with recommendations on a 14th company law directive on the cross-border

¹¹⁰ European Parliament resolution on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat of 25 October 2007

¹¹¹http://ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf

¹¹² VOSSESTEIN, Gert-Jan, "Transfer of the registered office: The European Commission's decision not to submit a proposal for a Directive", March 2008, *Utrecht Law Review*, Vol. 4, Issue I, p. 65

¹¹³ European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI))

transfer of company seats¹¹⁴, requesting the Commission to submit a proposal following the Parliament's recommendations specified in the report's annex.

Notwithstanding, later in the same year the Commission decided to launch a consultation on the future of European company law and the results were 68% of the respondents supported the need for directive in order to facilitate cross-border transfer of company's registered office¹¹⁵. However, in the end of 2012 in its Commission Communication: Action Plan, the Commission looked like it was not entirely convinced about the need for EU future legislative measures on the transfer of seat and stated that more data were needed to confirm it: "The Commission acknowledges the importance of this issue. However, it considers that any future initiative in this matter needs to be underpinned by robust economic data and a thorough assessment of a practical and genuine need for and use made of European rules on transfer of seat. [...] Throughout 2013, the Commission will conduct public and targeted consultations to update its impact assessment on a possible initiative on cross-border transfer of registered office. Subsequently, the Commission will consider the appropriateness of a legislative initiative"¹¹⁶.

As so it was, in the beginning of 2013 (from January until March), the insatiable Commission launched the promised consultation on the cross-border transfers of registered offices of companies, having the results been revealed in last September on a feedback statement. It is curious to observe the Commission's comment on the feedback statement's overview about the small number of companies involved on the consultation "only 28 companies responded directly to the consultation providing a sample not entirely satisfactory when compared to the total amount of companies in the EU. The Commission is aware that such a relatively small feedback can be caused by many factors. However, it was precisely the reason why the consultation was important in obtaining data which otherwise is impossible or very difficult to collect"¹¹⁷; first, the Commission should bear in mind that perhaps one of the main factors for such a small participation might be the respondents' fatigue and also, that after so many consultations it is normal that the Commission starts to lose some of its credibility;

¹¹⁴ 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

¹¹⁵ http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf, p. 9

¹¹⁶ Commission Communication: Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, 12/12/2012, n. 4.1

¹¹⁷ http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/docs/summary-of-responses_en.pdf, p. 2

second, the above cited comment seems like the preparation of another excuse to avoid presenting a directive, in case the majority of the respondents support further legislative measures. As to the results, 43% of the respondents considered that recent ECJ case law did not provide an adequate solution for cross-border transfer of registered offices, against the 28% that answered positively.

In short, after so many consultations, Parliament recommendations, academic papers, entrepreneurs' pleas, implied messages from the ECJ in its latest cases (especially in *VALE*), will the Commission ask for even more data or will it finally have the courage to do what it should have been done a few years ago?

b) The proposed model for the 14th directive

The concept of corporate mobility has been refined by the Court that through striking decisions has recognized the companies' right to incorporate and to reincorporate into another Member State and so, the right to convert into a 'foreign' company. However, the Court has only carved the principle, not the procedural rules for that principle to take place. It is up for the Member States through their national laws to give real shape to the principle of freedom of establishment.

In what concerns the right to incorporate, the Court's case-law has recognized the right for a company to choose a Member State to incorporate and apart from being subjected to the chosen Member State applicable law, the company can develop all its activity in another Member State. This means that creditors from the country where the company develops its activity are or should be informed *a priori* that they are dealing with a foreign company, having then the choice to ask for additional warranties or not to engage in a relationship with that company¹¹⁸. However, not all creditors are in the position to have that choice, so being forced to establish a relationship with the company. Nevertheless, it should be considered that those "unwilled" creditors have the same level of protection as if they were in a relationship with a national company, once besides the different national laws, they all grant equivalent protection.

The problems arise in what regards the right to reincorporate because in this situation creditors engaged into a relation with the company assuming that the current company's

¹¹⁸ SOUSA, António Frada de, "A Europeização...", p. 754 et seq.

lex societatis will be the one applicable, which changes after the company reincorporates into another Member State. The rules are changed in the middle of the game, which is unfair if stakeholders cannot react to that. Each Member State should guarantee that the stakeholders affected by reincorporations are protected through the enactment of domestic law that confers the adequate protective mechanisms. But the fact that each Member State adopts its own different mechanisms may lead to inconsistent and discriminatory situations, which can easily be avoided if the 14th directive is adopted and plays its regulatory role coordinating the current regulatory arbitrage on this matter.

Throughout this paper we have been drawing the attention to the undeniable need to adopt the 14th directive; now we should take a step forward and analyze broadly the model and the key factors of this directive.

In the 2007 Commission's Impact Assessment two approaches were designed for the directive, being the first one considered the "limited" or the "narrow" approach and the other the "extensive" or the "broad" approach. The first legislative approach is considered limited due to the fact that it only allows the transfer of registered offices to another Member State with the real seat together and the second legislative approach is considered extensive for allowing the transfer of the registered office together without the real seat to another Member State. This extensive approach with a safeguard measure related to the 'absence of any economic activity in the host Member State' should be the one chosen for the 14th directive, once it is friendlier to regulatory competition¹¹⁹.

The 14th directive should respect the following principles: "the transfer should not affect the legal personality of the company; the transfer should not affect the contractual relationships of the company; the transfer should not imply that the main business activity also be transferred; and minority shareholders should be protected"¹²⁰.

We have mentioned above that the Court has implicitly stated on *VALE* case some essential concerns the future directive must address, namely those aspects that could justify restrictions to freedom of establishment such as "protection of the interests of

¹¹⁹ See SOUSA, António Frada de, "Company's Cross-border...", p. 56-74 for a complete analysis of the two approaches and a comparison between each approach and the SE Regulation and the CBMD

¹²⁰ BÖCKLI, Peter, DAVIES, Paul L., FERRAN, Eilis, FERRARINI, Guido A., GARCIA, José M. Garrido, HOPT, Klaus J., PIETRANCOSTA, Alain, PISTOR, Katharina, SKOG, Rolf, SOLTYSINSKI, Stanislaw, WINTER, Jaap W. & WYMEERSCH, Eddy, "The Future of European Company Law" (May 1, 2012), Columbia Law and Economics Research Paper No. 420, p. 8

creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions”¹²¹. Beyond that, the future directive should “offer a simplified procedure [...] [that] could be modelled on the existing Directive on Cross-border Mergers”¹²². This option seems to be the best solution for the 14th directive for several reasons, being the first one consensus. One of the most difficult elements to achieve in order to adopt a directive is consensus on its actual need and on its content (“it took more than twenty years of negotiation before the EU legislature could obtain approval for the adoption of [the Cross-Border Mergers] Directive”¹²³). Regarding the consensus on its actual need, we believe that despite the Commission’s stubborn skepticism, it was already achieved taking into consideration the latest consultations performed, the most recent academic papers and the Parliament’s resolutions. In relation to the consensus on the future directive’s content, it has been considered a good strategy to adapt the model of the CBMD, once it provides adequate regulatory mechanisms that ensure a comprehensive protection of stakeholders¹²⁴.

The comprehensive protection of stakeholders is present on the elaboration and publication of the common draft terms of the cross-border merger and on the necessary reports of the management body and of an independent expert and this should be transposed to the 14th directive.

It is crucial to enhance the protection given to the employees in the CBMD, inspired in the German co-determination regime, that through the mandatory rule of article 16 confers, when applicable, to the employees the right of negotiation the regime to be applied after the transfer; furthermore, the CBMD leaves room for other additional measures to be taken by Member States in order to grant more protection to employees (article 4/2 CBMD)¹²⁵. In what concerns creditors and minority shareholders the Member States should adopt rules that ensure their protection. The 14th directive should develop a similar framework based on the dialectic between optional and mandatory standards, which are designed to guarantee that Member States ‘dance in the same rhythm’.

¹²¹ Paragraph 39 of *VALE* Case

¹²² HANSEN, Jesper Lau, *op.cit.* p. 15

¹²³ MCCAHERY, Joseph A. & VERMEULEN, Erik P.M., “Understanding Corporate Mobility in the EU Towards the Foundations of a European ‘Internal Affairs Doctrine’”, 2007, A Working Paper Prepared for the 5th European Company Law and Corporate Governance Conference 46 in Berlin on 27/28 June 2007, p. 18

¹²⁴ SOUSA, António Frada de, “A Europeização...”, p. 762

¹²⁵ SOUSA, António Frada de, “A Europeização...”, p. 763

In a word, Member States should set forth their own mechanisms that should be in accordance with the Treaty, thus enabling freedom of establishment, meaning that Member States should not adopt too restrictive mechanisms that hinder corporate mobility, nor too permissive mechanisms that leave the stakeholders position unprotected. Member States legislations should find a balance between these two majors' interests at stake: corporate mobility and stakeholders' protection, which may lead to a 'responsible corporate mobility'. Since «*in medio stat virtus*» and given that the middle ground is hard to find when multiple stimuli and pressures interact, the 14th directive should be the compass that guides Member States to a regulated environment, where in the end they will continue to be the responsible to legislate.

As we said previously, the Parliament presented two resolutions, one in 2009 and the other in 2012, both containing annexes with detailed recommendations as to the content of the proposal requested such as the right to inform and consult employees' representatives before the transfer's decision and also the Member States' possibility to ensure appropriate protection for minority shareholders who oppose the transfer, granting the right to retire from the company, in accordance with the legislation applicable in its home Member State.

In sum the arena is ready for the adoption of the 14th directive and the main issues to take into consideration have been addressed, so it is time for the Commission to act. The Commission should analyze the recommendations suggested by the Parliament and by scholars and finally present a consistent proposal of a directive. However, once the adoption of the 14th directive may not happen as soon as desired due to the fact of being somehow trapped to the Regulation of the *Societas Privata Europaea*, it has been well considered by some Member States the analogical application of the CBMD regime to the direct reincorporations, as a solution to protect the stakeholders affected in the meanwhile and to combine the different legislations involved in the process¹²⁶.

¹²⁶ SOUSA, António Frada de, "A Europeização...", p. 769

5. Conclusions

“Now to sum it up,’ said Bernard. ‘Now to explain to you the meaning of my life. Since we do not know each other (though I met you once I think, on board a ship going to Africa), we can talk freely.”

Virginia Woolf, “The Waves”

After having tried to respond the questions we proposed to answer in the beginning, namely “is it”, “why is it” and “how should it” it seems clear to us that there is an undeniable need of a discipline for direct reincorporations in the EU that should be fulfilled through the adoption of the 14th Directive on Cross-Border Transfer of Company’s Seat.

We have confronted the two opposing EU’s conflict of laws and we have inferred that the ECJ through its case-law has been able to resolve the impasse between them, assuming that there is space for both theories in the EU as long as they comply with the Treaty. In the Court’s case law analysis we realized that “[a]fter its restrictive interpretation in *Daily Mail* the Court took a more liberal approach with regard to the freedom of establishment of companies”¹²⁷. Unfortunately the Court’s case law has not been as consistent as desirable, but different political and economic contexts led to it. Notwithstanding of not agreeing with previous decisions, the Court has been unable to directly contradict them and therefore to clarify and deepen its understandings on several corporate mobility issues. Some authors have argued that “it is unlikely that the [ECJ] will develop the case law to its fullest logical conclusions [...] as this could contradict case law that has been confirmed repeatedly by the Court”¹²⁸.

Nevertheless, the Court in a more or less objective way has been recognizing the rights’ existence thus paving the way for EU’s effective corporate mobility. Following, the Commission has given a hand on fleshing out and on harmonizing some issues such as those of indirect reincorporations, *i.e.* the SE Regulation and the CBMD. In what concerns direct reincorporations, following the Court’s recognition through *Cartesio*

¹²⁷ ALTINIŞIK, Ulvi, “Free Movement of Companies Within the EU”, Ankara Bar Review, 2012/1, p. 116

¹²⁸ BORG-BARTHET, Justin, “Free at last? Choice of corporate law in the EU following the judgment in Vale”, ICLQ, 2013, 62 (2), p. 504

and *VALE* cases, no legislative action has been taken yet to discipline the regulatory competition scenario it left uncovered.

In sum, our final argument is that as a consequence of that EU's current regulatory competition model that was mainly stimulated by the ECJ's case law, Member States have the freedom to adopt their own unique direct reincorporations' regime. This freedom to 'draw' so different paintings can be dangerous for the hardly achieved EU's corporate mobility because it may create obstacles that will undermine its exercise. There is a need to discipline this Member States' area of freedom, in order to guarantee a 'healthy' regulatory competition, where stakeholders are protected and the national rules are within the EU law limits. For that it is crystal clear the need of a specific directive, the long awaited 14th directive ("Cross-border migration of company registration offices having been established as a principle, national laws have to be harmonized at short notice. This goal can and must be reached by passing, at long last, the 14th EU Company Law Directive on cross-border company seat transfers"¹²⁹).

Finally, the chosen model for the 14th directive should be inspired in the CBMD, once it has already obtained the difficult and necessary consensus and it has developed an adequate regime to guarantee the protection of the affected stakeholders. The analogical application of the CBMD regime that some Member States have considered as a solution to protect in the meanwhile the stakeholders affected confirms the unequivocal need of the 14th directive and that the model should be inspired in the CBMD. The 14th directive "may also, by the introduction into the law of Member States of a set of similar provisions, ensure that all national legal systems correspond to the requirements of a genuine internal market in which the freedom of establishment is guaranteed"¹³⁰.

Now that 'we can talk freely', it is time to pressure the Commission to have the dignity "to abandon the 'wait and see' strategy regarding the adoption of the 14th Company Law Directive"¹³¹ and to stop playing the 'catch me if you can' because it was already 'caught'. It is time for Europe to have the courage to 'talk freely', to face its future with strength and hope and to finally build that kind of "United States of Europe"

¹²⁹ RAMMELOO, Stephan, "Freedom of establishment...", p. 588

¹³⁰ JOHNSON-STAMPE, Johanna, "The Need for a 14th Company Law Directive on the Transfer of Registered Office", 2010, Master thesis of the University of Lund, p. 41

¹³¹ SOUSA, António Frada de, "Cross-Border Transfer of Seat and Companies' Freedom of Establishment in the EU – Where Are We Now?", Movement of Persons and Tax Mobility in the EU: Changing Winds, Ana Paula Dourado, IBFD, 2013, p. 79

that we have been waiting for since long.

Bibliography

ABREU, Jorge M. Coutinho de (Coord.), “Código das Sociedades Comerciais em Comentário”, 2010, Vol. I, Reprint, Almedina, Coimbra

ALTINIŞIK, Ulvi, “Free Movement of Companies Within the EU”, Ankara Bar Review, 2012/1

ARMOUR, John, “Who Should Make Corporate Law? EC Legislation versus Regulatory Competition”, June 2005, ECGI Working paper no. 54/2005

BAREL, Bruno & ARMELLINI, Stefano, “Manuale Breve Diritto Internazionale Privato”, 2011, 6th edition, Giuffrè, Milan

BENEDETTELI, Massimo, “Sul trasferimento della sede sociale all'estero”, 2010, Rivista delle Società, no. 6

BIERMEYER, Thomas, “Shaping the space of cross-border conversion in the EU. Between right and autonomy: VALE”, 2013, Common Market Law Review

BÖCKLI, Peter, DAVIES, Paul L., FERRAN, Eilis, FERRARINI, Guido A., GARCIA, José M. Garrido, HOPT, Klaus J., PIETRANCOSTA, Alain, PISTOR, Katharina, SKOG, Rolf, SOLTYSINSKI, Stanislaw, WINTER, Jaap W. & WYMEERSCH, Eddy, “The Future of European Company Law”, 2012, Columbia Law and Economics Research Paper No. 420

BORG-BARTHET, Justin, “Free at last? Choice of corporate law in the EU following the judgment in Vale”, 2013, ICLQ, 62 (2)

CAHN, Andreas & DONALD, David C., “Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA”, 2011, Cambridge University Press

CORDEIRO, António Menezes, “Direito das Sociedades”, 2011, Part I, 3rd edition, Almedina

CRAIG, Paul & DE BÚRCA, Gráinne, “EU Law: Texts, Cases and Materials”, 2011, 5th edition, Oxford University Press

DEÁK, Daniel, “*Cartesio*: A Step Forward in Interpreting the EC Freedom of Emigrate”, 2009, Tax Notes International, Vol, 54, Number 6, p. 493-499

DRUCKER, Thomas C., “Companies in Private International Law”, 1968, v. 17, ICLQ

DRURY, Robert, “The regulation and recognition of foreign corporations: Responses to the «Delaware syndrome»”, 1998, The Cambridge Law Journal, Volume 57, Issue 01

EIDENMÜLLER, Horst, ENGERT, Andreas & HORNUF, Lars, “Incorporating under European Law: The *Societas Europaea* as a Vehicle for Legal Arbitrage”, 2009, European Business Organization Law Review 10

ENRIQUES, Luca, “Company Law Harmonization Reconsidered: What role for the EC?”, November 2005, ECGI Working paper no. 53/2005

GERNER-BEUERLE, Carsten, “Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in VALE”, 2013, Gore-Browne on Companies, Special Release, SSRN

HANSEN, Jesper Lau, “The Vale Decision and the Court’s Case Law on the Nationality of Companies”, 2013, ECFR

JOHNSON-STAMPE, Johanna, “The Need for a 14th Company Law Directive on the Transfer of Registered Office”, 2010, Master thesis of the University of Lund

JOHNSTON, Andrew & SYRPIS, Phil, “Regulatory competition in European company law after Cartesio”, 2009, European Law Review

MCCAHERY, Joseph A. & VERMEULEN, Erik P.M., “Understanding Corporate Mobility in the EU Towards the Foundations of a European ‘Internal Affairs Doctrine’”, 2007, A Working Paper Prepared for the 5th European Company Law and Corporate Governance Conference 46 in Berlin on 27/28 June 2007

MÖRSDORF, Oliver, “The Legal Mobility of Companies Within the European Union Through Cross-Border Conversion”, 2012, Common Law Market Review, no. 49

PANAYI, Christiana HJI, “Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths”, 2009, QMUL, Legal Studies Research Paper No. 26/2009

PANTAZATOU, Katerina, “National Grid Indus: The First Case on Companies’ Exit Taxation”, 2012, European Business Law Review

PASCHALIDIS, Paschalis, “Freedom of Establishment and Private International Law for Corporations”, 2012, Oxford University Press

PELLÉ, Philippe, “Companies crossing borders within Europe”, 2008, Utrecht Law Review, Vol. 4, Issue 1 (March)

PETROVIC, Siniša, and JAKSIC, Tomislav, “The ECJ Ruling in *Cartesio* and Its Consequences on the Right of Establishment and Corporate Mobility in the European Union”, 2010, *European Journal of Law Reform*

PICHEL, Paulo, “O âmbito espacial do regime de coligação societária à luz do Direito da União Europeia”, 2014, *Direito das Sociedades em Revista*, Ano 6, Vol. 11, p.225-259

PISTONE, Pasquale, SZABÓ, Daniel Gergely & SØRENSEN, Karsten Enssig, “Mobility of Companies in the European Union: A Jigsaw of Company Law and Tax Law, Case Law and Secondary Law falls into place?”, 2014, “Movement of Persons and Tax Mobility in the EU: Changing Winds”, IBFD

RAMMELOO, Stephan, “Corporations in Private International Law. A European Perspective”, 2001, Oxford University Press

RAMMELOO, Stephan, “Freedom of establishment: cross-border transfer of company ‘seat’ – The last piece of the puzzle?”, 2012, *Maastricht Journal of European and Comparative Law*

RAMMELOO, Stephan, “The long and winding road towards freedom of establishment for legal person in Europe”, 2003, *Maastricht Journal of European and Comparative Law*

SMIT, Daniël, “The National Grid Indus Case: A Pyrrhic Victory?”, 2012, *European Tax Studies*, 1/2012

SOUSA, António Frada de, “A Europeização do Direito Internacional Privado – os novos rumos na regulamentação das situações privadas transnacionais na UE”, 2012, *Doctoral Thesis*, Universidade Católica Portuguesa (Porto)

SOUSA, António Frada de, “Company’s Cross-border Transfer of Seat in the EU after *Cartesio*”, 2009, *Jean Monnet Paper 07/09*

SOUSA, António Frada de, “Cross-Border Transfer of Seat and Companies’ Freedom of Establishment in the EU – Where Are We Now?”, 2014, “Movement of Persons and Tax Mobility in the EU: Changing Winds”, IBFD

TERRA, Ben & WATTEL, Peter, “European Tax Law”, 2012, 6th edition

TIEBOUT, Charles, “A Pure Theory of Local Expenditures”, 1956, *The Journal of Political Economy*

VAN ARENDONK, Henk, “National Grid Indus and Its Aftermath”, 2013, *EC Tax Review*, Issue 4, p. 170-171

VAN DEN HURK, Hans, VAN DEN BROEK, Harm & KORVING, Jasper, “Final Settlement Taxes for Companies: Transfer of Seats, Interest Charges, Guarantees and Step-Ups in Value”, 2013, Bulletin for International Taxation

VARGOVA, Petra, “The Cross-Border Transfer of a Company’s Registered Office Within the European Union”, 2010, Central European University, LL.M. Thesis

VOSSESTEIN, Gert-Jan, “Transfer of the registered office: The European Commission’s decision not to submit a proposal for a Directive”, 2008, Utrecht Law Review, Vol. 4, Issue I

WYCKAERT, Marieke & JENNÉ, Filip, “Corporate Mobility”, 2010, SSRN

WYMEERSCH, Eddy, “The Transfer of Company’s Seat in European Company Law”, 2003, ECGI Working Paper 08/2003