SCHOLARLY STUDIES

'At Least' the Registered Office. Regulatory Arbitrage, European Company Law, and the Role of Harmonization[1]

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Abstract: *Analysing the wording of art. 86b Dir. (EU) 1132/2017, passed in 2019 and to be implemented by 2023, the article addresses the issue of connecting factors for companies in Europe, as elements capable of defining their nationality and, therefore, the applicable law. It is argued that the mentioned rule has in fact superseded that of the affirmed equivalence before the treaty, as connecting factors, of the registered office, the location of the central administration or the principle place of business, granting prevalence to the first factor: this puts in serious doubts the viability of the real seat criterion, still adopted by some Member States. Indeed, the authority of Member States to impose their own corporate legislation on foreign or even formally-foreign companies, as shown in the recent case relating to the Tor Crescenza Castle (Edil Work), can only be an exception, permissible if motivated by overriding reasons in the public interest. Thus, the risk of a race to the bottom between legal systems, discussed in the US, arises in Europe too, as is demonstrated, e.g., by the emigration of Italian listed companies to the Netherlands in search for a more favourable legislation granting multiple votes to shareholders not holding a real majority. An issue on which a harmonisation at EU level may be desirable, in an attempt to avoid spontaneous convergence on rules potentially harmful for minorities.*

Keywords*: European Company Law, Connecting Factors, Real Seat Theory, Incorporation Theory, Registered Office, Harmonizations, Convergence.*

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1. Article 86b, Dir. (EU) No. 1132/2017 and the definition of 'cross-border conversion'

Article 86b, Dir. (EU) No. 1132/2017 - introduced in 2019, for implementation by 31 January 2023 - states that a 'cross-border conversion' means "an operation

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whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers *at least* its registered office to the destination Member State, while retaining its legal personality" (emphasis added).

The expression *at least* constitutes the keyword of a new course of European company law concerning the criteria for connecting companies to the Member States in which they are incorporated and operate. This simple expression, in fact, seems likely, on the one hand, to consolidate and, on the other hand, to significantly innovate the *acquis communautaire* on the nationality of companies incorporated and operating in the European Union. Therefore, it determines the applicable company law. Not explicitly, but certainly not unconsciously, a very famous statement made by the Court of Justice in 1988 in *Daily Mail*[2] and then recalled in almost all subsequent provisions on the freedom of establishment of companies shall be reconsidered: namely, that the Treaty "has placed the registered office, the central administration and the principal place of business on the same footing as the connecting criteria."

In deciding that first, relevant case of (denied) right to cross-border mobility of a company incorporated and operating in the then European Economic Community - in *Daily Mail*, as is well known, an English company intended to move only its central management in the Netherlands, retaining the English nationality whilst becoming tax resident in the Netherlands - the Court observed that, as regards the connecting factor, "certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory [so-called *real seat theory*] […]. The legislation of other States permits companies to transfer their central administration to a foreign country [so-called *incorporation theory*] but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another. […] No convention in this area has yet come into force."

However, following Dir. (EU) No. 2121/2019, which introduces the aforementioned Article 86b, Dir. (EU) No. 1132/2017, a cross-border conversion occurs if *at least* the registered office is transferred abroad. This expression (plainly) means that the transfer of the registered office abroad is a *necessary* and *sufficient* fact for a given company already incorporated in one Member State to become subject to the company law of another Member State. The same expression, quite consciously, intends to go beyond the approach followed in the regulations establishing the EEIG (*European Economic Interest Grouping*), the SE (*Societas Europaea*) and the SCE (*Societas Cooperativa Europaea*), where the change of the applicable (residual) national law is subject to the simultaneous transfer of the registered office and of the

[2] EU Court of Justice, 27 September 1988, *Daily Mail*, C-81/87 (ECLI:EU:C:1988:456), paras. 20-21 (hereinafter '*Daily Mail*').

central management to a different Member State.[3]

In addition, the expression used in Article 86b, Dir. (EU) No. 1132/2017 also entails some relevant corollaries which, although requiring adequate demonstration, may be outlined as follows:

(a) the departure Member State may not require the company undergoing a cross-border conversion to *also* transfer abroad its central administration or the location of its principal place of business (a conclusion already clear with *Polbud*);[4]

(b) similar requirement is not permitted in the Member State of destination, which is bound - in the event of a cross-border conversion, i.e. a transfer of the registered office with a view to the application of a different *lex societatis* - to allow the company already incorporated under the laws of the Member State of departure to apply its own company law even in the absence of the transfer of the real seat (an innovative approach that partly overcomes *Polbud*);

(c) contrary to what was held in *Cartesio*, the transfer of the real seat to another Member State does not allow the Member State of incorporation in which *at least* the registered office is maintained to disqualify the legal person or deny the continued application of the company law chosen at the time of incorporation;

(d) the Member State where the real seat or the principal place of business is located not only cannot disregard the legal personality granted by the State of incorporation (a point addressed and solved by *Überseering*), [5] but cannot force the nationalisation of the formally-foreign company (a point implied by *Centros* and *Inspire Art*, touched upon but not solved by *Überseering*, considered by *Kornhaas* and, finally, explicitly solved by *Edil Work* in the recent case of Tor Crescenza Castle): [6] whether the company was originally incorporated abroad

[3] Reference is made to Regulations Nos. 2137/1985/EEC, 2157/2001/EC, 1435/2003/EC. In this respect, the following is of relevance: EU Court of Justice, 16 December 2008, *Cartesio*, C-210/06 (EU:C:2008:723), paragraph 117 (hereinafter '*Cartesio*'): "those regulations […] in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person." The Court emphasises, agreeably, that, "such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer." A thorough analysis is carried on by Boggio L. (2022), Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione Europea, 234 ff. (Giappichelli, Turin).

[4] EU Court of Justice, 25 October 2017, *Polbud - Wykonawstwo*, C-106/16 (EU:C:2017:804) (hereinafter '*Polbud*').

[5] EU Court of Justice, 5 November 2002, *Überseering*, C-208/00 (EU:C:2002:632) (hereinafter '*Überseering*').

[6] EU Court of Justice, 25 April 2024, *Edil Work,* C-276/22 (ECLI:EU:C:2024:348) (hereinafter '*Edil Work*' or '*Castello di Tor Crescenza*'); EU Court of Justice, 10 December 2015, *Kornhaas*, C594/14 -(EU:C:2015:806) (hereinafter '*Kornhaas*'); EU Court of Justice, 30 September 2003, *Inspire*

> or has become a foreign company as a result of a cross-border conversion, the Member State of the real seat cannot impose the application (or the continued application) of its national law merely because the central administration or the principal place of business is located or maintained unchanged in its territory.

The choice made in regulating cross-border conversions, and the corollaries it implies – as well as the long path that led from *Daily Mail*, to *Überseering*, to finish with *Kornhaas*, *Polbud* and *Edil Work* - has undermined the validity of the previously mentioned principle of equivalence before the Treaty of connecting factors which are considered relevant, respectively, by the incorporation theory and the real seat theory.

This paper aims at demonstrating that an autonomous connecting factor has now been established at the European Union level which combines preference for the incorporation theory with continuous possibility to change the applicable company law by transferring *at least* the registered office abroad. Such criterion for assessing the nationality of companies, precisely because it is laid down by a supranational rule binding EU Member States, prevails over the - possibly divergent - criteria adopted by the single Member States, be it that of incorporation or of the real seat. Hence, there is no longer a need – as affirmed in *Daily Mail* – for special conventions between States. At most, it may be appropriate to amend Article 54 TFEU in order to clarify that the three connecting factors indicated therein can no longer be regarded as being on the same footing; rather, the location of the registered office shall always prevail. The acknowledgment of such prevailing connecting factor, capable of founding a very broad freedom of establishment, should not, however, favour abuse of the freedom of establishment. Therefore, a question arises as to what extent is it permissible for Member States to adopt domestic provisions to prevent such an abuse, when reasons for overriding mandatory rules in the general interest are involved.

This paper is organised as follows. Para. 2 will identify the powers of the Member State of origin towards a company incorporated and operating under its own company law aiming at a change of *lex societatis* by resorting to a cross-border conversion. Para. 3, a logical continuation of the previous one, will identify the powers of the Member State of destination in the process of cross-border conversion (or incorporation), in cases where the founders intend to locate there only the registered office and nothing else. Para. 4 deals with the situation, faced in *Cartesio* and *Polbud* in opposed terms, of a company moving the real seat abroad while claiming that the company law of the State of departure remains unchanged; and that of a company moving abroad only the registered office, for a change of the applicable *lex societatis*, while retaining the real seat in the State of departure. This paragraph outlines the connecting factor that Article 86b, Dir. (EU) No. 1132/2017 requires EU Member States national laws to comply with. Para. 5 addresses the issue of formally-

Art, C-167/01 (EU:C:2003:512) (hereinafter '*Inspire Art*'); EU Court of Justice, 9 March 1999, *Centros*, C-212/97 (EU:C:1999:126) (hereinafter '*Centros*').

foreign companies, highlighting that already the case law of the Court of Justice prohibits the nationalisation of foreign companies (even if these are *letterbox companies*) based on the location of the real seat. Para. 6 aims at identifying the cases where overriding reasons in the public interest permit Member States to prevent abuses of the freedom of establishment. Para. 7 states some conclusions, highlighting that enhanced freedom of establishment for companies requires that company law of the Member State shares harmonised principles. *De facto* convergence often leads to a race to the bottom. Thus, the Article concludes that harmonisation through approximation of laws is still desirable as regards fundamental principles of company law.

2. The powers of the departure Member State over outgoing companies. *Centros* and *Polbud* becoming statutory law

In order to define the powers of the Member State of departure, over companies incorporated under its national law and wishing to change the *lex societatis*, it is worth recalling the facts leading to *Polbud.* [7]

The case concerned a company incorporated under the law of a Member State, Poland, adopting the real seat criterion and which, even at the time, allowed companies to transfer the registered office abroad in a view to change the applicable company law while retaining legal personality. What was unclear and required a preliminary reference to the Court of Justice were the following two aspects:

(a) whether the Member State of departure could make the right to cross-border conversion subject to the same formalities as for the winding-up of the company, i.e. the discharge of all company debts before the cross-border transfer of seat could take place;

(b) whether it was permissible to acquire the nationality of the Member State of destination (that of Luxembourg) while retaining the central administration and

[7] *See*, in English, Horak H. *a*. Dumancic K. (2017), Cross-Border Transfer of the Company Seat: One Step Forward, Few Steps Backward, 14 *US-China L. Rev*. 711–728, Soegaard G. *a.* Werlauff E. (2018), Cross-border Transfer and Change of Lex Societatis After Polbud, C–106/16: Old Companies Do Not Die ... They Simply Fade Away to Another Country, 15 *ECL* 21–24; Mucha A. *a.* Oplustil K. (2018), Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud, 15 *ECFR* 270–307; Fillers A. (2020), Free Movement of Companies After the Polbud Case, 21 *EBOR* 571–590 (2020).
See also, in Italian, Mucciarelli, F.M. (2017), Trasformazioni internazionali di società dopo la sentenza Polbud: è davvero l'ultima parola?, *Società*, 1321; Pinardi, M. (2018), Trasformazione transfrontaliera: una sentenza rivoluzionaria?, *Foro it*., IV, 222; Bartolacelli, A. (2018), Trasformazione transfrontaliera e la sentenza Polbud: corale alla fine del viaggio?, *Giur. comm*., II, 428; de Luca, N.- Gentile, A. *a* Schiavottiello, F. (2018), Trasferimento della sede sociale all'estero ed effetto Delaware: il caso Polbud, *Giur. comm*., II, 454; Bernasconi, S. (2018), Il trasferimento all'estero della (sola) sede statutaria delle società di fronte alla Corte di giustizia: la sentenza Polbud, *RDIPP*, 635.

principal place of business in Poland, a country which, as mentioned, adopts the real seat criterion.

The Court of Justice answered both doubts in the affirmative, reversing the order.

On the one hand, the Court found in the Treaty itself the principle, which would later be fully translated into Article 86b, Dir. (EU) No. 1132/2017, according to which the transfer abroad of *at least* the registered office is a sufficient - at least from the perspective of the Member State of departure - for a cross-border conversion. [8] The retention of the real seat in the Member State of departure does not preclude the change of applicable law and must be permitted. According to *Centros*, indeed, the real seat may be located in the form of a branch in a Member State other than the Member State of incorporation. Unlike nature science to which the terms used refer, a 'branch' does not necessarily belong to a 'tree' or to a 'principal establishment'. [9] Therefore, the release from the authority of the Member State where incorporation took place cannot be conditional upon the transfer of the real seat together with the registered office; as we shall see in the next paragraph, the rules of the Member State of origin may only require coordination with those of the Member State of destination.

On the other hand, the Court clarified that a Member State may not require that a company wishing to take on a different nationality and a different applicable law winds-up and sets-up again. The Court noted, in this respect, the existence of a contradiction in the provisions of the legal system of the State of origin (Poland) which, on the one side, within the provisions of private international law applicable to companies, allowed Polish companies to transfer the registered office abroad without loss of its legal personality; [10] however, on the other side, within the provisions of substantial corporate law, required to follow the liquidation process,

[8] *Polbud* summarised the position of the Polish and Austrian Authorities, according to which «freedom of establishment cannot be relied on when the reason for the transfer of the registered office is not the pursuit of an actual business by means of a permanent establishment in the host Member State» (*Polbud*, para. 30). *Daily Mail* and *Cartesio* could support this statement. However, the Court emphatically replied that «that argument cannot be accepted», on the ground that freedom of establishment encompasses the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law another Member State (quoting *Daily Mail*, para. 17), provided that the conditions laid down by the legislation of that other Member State are satisfied (*Polbud*, para. 33).

[9] Freedom of establishment extends to a situation in which a company formed in accordance with the legislation of one Member State, where it has its registered office, wants to set up a branch in another Member State, even where that company was formed, in the first Member State, solely for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (*Centros*, para. 17). Equally, a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the test applied by the second Member State in order to determine the connection of a company to its national legal order, falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State (*Polbud*, para. 38).

[10] *Polbud*, para. 49.

i.e. completion of current business, recovery of debts owed to the company, performance of its obligations and sale of its assets, satisfaction or securing of its creditors, submission of a financial statement on the conduct of that process and indication of where the books and documents of the company in liquidation are to be deposited. [11] The latter provision was found liable to impede, if not prevent, the cross-border conversion of a company, thus constituting a restriction on freedom of establishment. [12]

In conclusion, Article 86b, Dir. (EU) No. 1132/2017 only confirms these principles with respect to the powers of the outgoing Member State. Other than in cases in which the company maintains in the Member State of incorporation *at least* the registered office (*see further* Para. 4), it adds little to what the case-law had already affirmed.

3. The powers of the destination Member State on incoming companies

Article 86b, Dir. (EU) No. 1132/2017, in stipulating that a cross-border conversion is based on the transfer to the Member State of destination of *at least* the registered office, prevents that the latter may *also* require the location of the real seat in its territory. [13] In other words, consistently with Member States' powers over outgoing companies, it is not permitted that a Member State of destination makes the application of its national law conditional upon the transfer of the real seat in addition to the registered office; indeed, this would be a standard rule for a State adopting the real seat principle.[14]

This principle - as opposed to the one that applies for defining the powers of the departure Member States - is innovative and goes beyond *Polbud.* [15]

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[11] *Polbud*, para. 50.

[12] *Polbud*, para. 51.

[13] The German lawmaker's decision to reform those company law provisions that required the coincidence of registered office and central administration goes in this direction. In 2008, in fact, § 4(2) *GmbHG* and § 5(2) *AktG*, which required the coincidence of registered office and central administration, were repealed. Nevertheless, even subsequently (in relation to a Swiss company, which therefore did not benefit from the European case law, but only from the existence of the bilateral agreements between Germany and Switzerland), the BGH confirmed the application of the real seat theory. On this point, *see* the in-depth analysis by Mucciarelli, F.M. (2009), Il BGH conferma la "teoria della sede reale" (e attende le scelte del legislatore) (nota a BGH – sentenza 27 ottobre 2008 – II ZR 158/06), *Riv. dir. soc.*, 262.

[14] A Member State of destination, although traditionally adopting the real seat criterion, may impose very limited requirements on companies that have already entered the Union for the first time. This issue is explored in greater detail by Boggio, L. (2022), 260 ff., who appropriately distinguishes the entry of a company into a given jurisdiction as a result of cross-border transformation ('subsequent entry') from so-called 'first entry': the hypothesis of subsequent entry is characterised by the presence of prior relationships deserving protection, which, however, remain governed by the guarantees already granted by the Member State of first entry. In other words, the author excludes 'contributions of the legislation of the receiving State to the protection of (pre-existing) shareholders' and creditors' rights' (at 264).

[15] And it also departs, as anticipated, from the approach of the regulations establishing the EEIG, the SE, and the SCE, whereby the Member State to whose territory the registered office of one of these entities is transferred is instead permitted to object that the transfer of the real seat did not take place

On the ground that there was no harmonization in EU law regarding the connecting factor that determines the national law applicable to a company, *Polbud* stated that the right to convert into a type of company governed by foreign law should be made subject to the conditions laid down by the law of the Member State of destination. Indeed, outgoing companies should satisfy the test adopted by the destination State to determine the connection of a company or firm to its national legal order. [16] Directive (EU) No. 2121/2019 is, however, innovative in this regard, where it requires that any Member State of destination must consider it sufficient, for the purposes of the application of its company law to a company already incorporated under another law of another Member State, that *at least* the registered office be located in its territory. Furthermore, as stipulated in Article 54(1) TFEU, since 'foreign' companies shall be treated equally as 'national' companies, foreign companies cannot be treated better than national companies. This means that Member State shall treat equally both existing companies in the process of a cross-border operation and companies making their first entry into the Union by submitting to the legislation of that Member State.

4. The definition of a European Supranational connecting factor. Overcoming *Daily Mail* and *Cartesio*

In light of the approval of Art. 86b, Dir. (EU) No. 1132/2017 and the new paradigm of Member States' inbound and outbound powers for companies wishing to move their registered office, certain statements in *Cartesio*, long considered general principles, should be questioned. [17]

It may be worth recalling that in *Cartesio* a similar question arose to that discussed in *Daily Mail* - a case to which, in fact, the decision of the Court of Justice makes ample reference - but with a significant differential element. The analogy lay in the fact that in both cases the companies intended to transfer abroad only the real seat, with the intention of maintaining the applicable company law unchanged. The differential element lies in the different connecting factor chosen by the outgoing Member State: that of incorporation in the case of *Daily Mail*, that of the real seat in the case of *Cartesio*. The specific issue at stake in this second case was, therefore, whether the outgoing Member State could prevent the retention of legal personality

at the same time. If these rules were intended to avoid collisions between national laws adopting different connecting factors for companies - collisions excluded *in nuce* by the fact that the registered office and real seat must coincide - any conflicts of private international law that might arise from a disassociation between registered and real seat must now be reconciled on the basis of the prevalence of the (formal) criterion of the registered office, which even Member States traditionally adopting to the real seat criterion must respect.

[16] *Polbud*, para. 35.

[17] On this decision, *see*, in English, Korom V. *a*. Metzinger P. (2009), 'Freedom of Establishment for Companies: The European Court of Justice Confirms and Refines its Daily Mail Decision in the Cartesio Case C-210/06', 6 *ECFR* 125–160; Vossestein G.-J. (2009), 'Cross-border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment', 6 *ECL* 115–123; Petronella V. (2010), 'The Cross-border Transfer of the Seat after Cartesio and the Non-portable Nationality of the Company', 21 *EBLR* 245–265; Szydło M. (2010), 'The Right of Companies to Crossborder Conversion under the TFEU Rules on Freedom of Establishment', 7 *ECFR* 414–443.

and the applicability of its company law to a company wishing to transfer only its real seat to a Member State that adopts the incorporation criterion and therefore does not require the nationalisation of the company.

In this regard, the Court of Justice held that the freedom of establishment granted by the Treaty does not preclude the "legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation." [18] This implies that a State adopting the criterion of the real seat may require the winding-up and re-incorporation of a domestic company wishing to transfer abroad only its real seat, *i.e*. its central management or principal place of business, while not being able to maintain the application of the company law of the Member State of incorporation.

However, not only this principle does not fit with the subsequent findings in *Polbud*, but it clearly also conflicts with Article 86b, Dir. (EU) No. 1132/2017: in fact, making reference to the case underlying *Cartesio*, if a company incorporated and operating in Italy wished to convert into a Hungarian company without transferring its central management or principal place of business to Hungary, it shall be entitled to do so, since the transfer of *at least* the registered office would be sufficient. In contrast, if the principle expressed in *Cartesio* would still be valid, the same company could not do the reverse, *i.e.* set up the company *ab origine* in Hungary and then transfer its real seat to another Member State (e.g. Italy).

The unequal treatment of two identical final situations (a company with its real seat in Italy, but subject, by virtue of the location of its registered office, to Hungarian law), albeit with reversed starting points (incorporation in Italy or Hungary), calls into question whether the principle expressed in *Cartesio* can be confirmed. [19] It must be stated that, in the light of the new course of European company law, as the transfer of *at least* the registered office abroad is sufficient to determine a cross-border conversion, similarly*, at least* the maintenance of the registered office in the Member State of departure must be considered sufficient to avoid the cross-border conversion: thus, to avoid the application of the company law of the Member State of incorporation, in which, however, the location of the company's business is no longer intended to be maintained.

The overcoming of the principle of full state sovereignty over companies affirmed in *Daily Mail* - verbatim: "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist

[18] *Cartesio*, para. 124.

[19] It is stated in *Cartesio*, para. 119, that "Cartesio merely wishes to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable." If the observation (made in para. 115) that the provisions contained in the EEIG, SE and SCE Regulations would not have been helpful in this respect, since they required the simultaneous transfer of the registered office and real seat, and thus prevented the preservation of the national law of the Member State of origin, this observation, on the contrary, can no longer hold in the presence of a supranational rule, such as Article 86b, Dir. (EU) 1132/2017.

only by virtue of the varying national legislation which determines their incorporation and functioning" [20] - and confirmed in *Cartesio* makes it possible to go as far as to affirm that, subsequent to the introduction of the rules on cross-border conversion, the matter of the connecting factors for companies in Europe is no longer the exclusive competence of the Member States. Indeed, these must comply to the principle that a company incorporated under the laws of any EU Member State may not only transfer *at least* its registered office in order to change the applicable company law, but may freely transfer (and thus also locate *ab origine*) its central administration and/or principal place of business in another Member State in order to maintain the application of the company law of the State of incorporation. [21] The possible conflicts (if any) between connecting factors laid down by the different Member States shall be solved in favour of the laws of the Member State where the registered office has been originally located or later moved. [22]

In this regard, it is worth mentioning that, in the immediate aftermath of *Polbud* (precisely on 25 April 2018), the European Commission, in approving the texts of the Company Law Package, also included the text of the directive that would give regulatory recognition to cross-border conversion. Knowing the troubled path of the proposed Directive on cross-border transfer of seat, it is evident how the case law of the Court of Justice was decisive for this long-awaited and useful regulatory intervention. As has emerged in the preceding pages, it has indeed led to the overcoming of the principle of equivalence before the Treaty of the various company connecting factors. Therefore, in order to avoid the doubt that the same may apply only at the time of the transfer of the registered office abroad and not also at the time of incorporation, it would be desirable to amend Article 54(1) TFEU as follows: "companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of applying the provisions of this Chapter, be treated in the same way as natural persons who are nationals of Member States. For these purposes, the location in a Member State of *at least* the registered office shall always be considered sufficient."

5. The regime of foreign branches of formally foreign companies: from *Centros* and *Inspire Art* to *Edil Work*

Once the company is incorporated, or has changed *lex societatis*, it is subject to the company law of the Member State where the registered office is located. *Nulla*

[20] *Daily Mail*, para. 19.

[21] For the anticipation of these conclusions in the immediate aftermath of *Polbud*, *see* de Luca N., Gentile A., Schiavottiello F. (2018), 460 ff.

[22] In this respect, European law looks more straightforward than US law, where the only way to submit to the law of a federal state other than the state of incorporation is a reverse merger with a newCo incorporated under the laws of the destination state. On the process of reincorporation and conversion, reference is made to Rock E., Davies P., Kanda H., Kraakman R., Ringe W.G. (2017), Fundamental changes, in *The anatomy of corporate law. A comparative and functional approach*, 196 ff. (eds. Kraakman et al., 3rd ed., Oxford University Press, Oxford).

quaestio if registered office and real seat are coincident. More uncertain, on the other hand, is the regime of companies which, as soon as they are incorporated or as a result of a cross-border conversion, create multiple real seats or, in the most extreme and significant case, fully separate the location of the registered office from that of the real seat or seats, thus becoming, in the Member State of effective operation, formally-foreign companies.

The legal treatment of branches of so-called formally-foreign companies is an issue that has been widely addressed by the Court of Justice: from *Centros* and *Inspire Art* to the very recent *Edil Work*.

It should be premised that, in *Überseering*, the Court of Justice extracted from Articles 49 and 54 TFEU a principle of very great importance: [23] namely that Member States, which adopt the real seat principle (Germany in the present case), may not disregard the legal personality of a company recognised by another jurisdiction that adopts the principle of incorporation (the Netherlands in the present case), even if that company does not carry on any activity in the State of incorporation. In other words, even jurisdictions that adopt the real seat theory must recognise foreign incorporated companies as existing.

Although more recent than *Centros*, *Überseering* did not clarify which company law regime should be applicable to the (branch of the) formally-foreign company: this led to some uncertainty in the German courts. [24]

The foundations for such conclusions had, however, been fully laid in 1999 by *Centros*, certainly the most significant ruling on the subject. [25] The case concerned

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[23] *See*, in English, Wooldridge F. (2003), Überseering: Freedom of Establishment of Companies Affirmed', 14 *EBLR* 227–235; Ebke W.F. (2005), The European Conflict-of-corporate-laws Revolution: Überseering, Inspire Art and Beyond', 16 *EBLR* 9–54; Gildea A.J. (2004), 'Uberseering: A European Company Passport', 30 Brook. J. Int'l L. 257–292 (2004). *See also*, Ventoruzzo M., Conac P.-H., Goto G., Mock S., Notari M., *a*. Reisberg A., Comparative Corporate Governance 74–89 (West Academic Publishing, St Paul MN, 2015).

[24] According to a ruling of the *Bundesgerichtshof* (*BGH*, 1 July 2002, II ZR 380/00*, ZIP*, 2002, 1763) issued a few months before *Überseering* decision, but in the midst of the relevant debate, a foreign company that has lost the connection of its administrative seat with its country of origin, because it has transferred it to Germany, must be considered to exist in the latter country as a *Gesellschaft bürgerlichen Rechts-GbR*, thus enjoying of the legal capacity only by virtue of forced nationalisation (this is the operative part in German: «eine ausländische GmbH, die ihren Sitz nach Deutschland verlegt und - unter Zugrundelegung der bislang herrschenden "Sitztheorie" - ihre Rechtsform verliert, ist in Deutschland (zumindest) eine - nach neuerer Rechtsprechung rechts- und parteifähige - GbR (§ 705 BGB)»). This solution seems to formally comply with *Überseering*, whilst misrepresenting its rationale.

[25] *See*, in English, Werlauff E. (1999), Using a Foreign Company for Domestic Activities, 10 *EBLR* 306-313; Carruthers J. *a*. Villiers C. (2000), Company Law in Europe – Condoning the Continental Drift?, 11 *EBLR* 91–101; Werlauff E. (2001), The Main Seat Criterion in a New Disguise, 12 *EBLR* 2-6 (2001); Lauterfeld M. (2001), "Centros" and the EC Regulation, 12 *EBLR* 79-88; Holst C. (2002), European Company Law after Centros: Is the EU on the Road to Delaware?, 8 *Colum. J. Eur. L.* 323-341; Werlauff E. (2009), A "Copenhagen Effect"? Denmark's Answer to Centros: A Far-reaching Company Law Reform Aimed at Strengthening the "Free Movement of Companies", 6 *ECL* 160-168 (2009); Eidenmüller H., Enriques L., Helleringer G., *a.* van Zwieten K., Centros at 20:

two Danish spouses, Mr and Mrs Bryde, who, with the unconcealed aim of avoiding having to meet the minimum capital requirements for limited liability companies prescribed by their own national law, decided to set up a company in the United Kingdom, taking advantage, on the one hand, of the possibility of providing it with a trivial statutory capital (GBP 100) – which, in addition, was not even fully paid up – and, on the other hand, of being able to set it up as a letterbox company, i.e. without any effective establishment in the UK (the only registered office being located at the home of a friend of the founders). When the founders attempted to register a *branch* in the Danish commercial register, the territory in which the company's entire business would be carried on, the register authorities contested, however, the legitimacy of the company's operation, as it would not be a branch, rather a principle establishment, with the only purpose of circumventing the minimum capital requirements for Danish companies (DKK 200,000.00 at the time).

In affirming the contrast of this refusal with the (secondary) freedom of establishment, the Court of Justice expressed principles that have been later constantly reiterated and clarified. First of all, referring to a previous case of lesser interest (*Segers*), the Court confirmed that "it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted." [26] On the contrary, it did not even matter that the founders of Centros had, admittedly, set up the UK company in order to circumvent Danish law: in fact, "the question of the application of those articles of the Treaty [*sc*. granting freedom of establishment] is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty." [27] In this regard – and this is the main point of the decision – "the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment." [28] At most, the Member State where the company actually conducts its business is entitled to apply its own legislation only in cases required by overriding reasons of general interest and provided that this is done in accordance with the principle of reasonableness (to be verified with the Gebhard test). However, this was not the case in *Centros*, for a number of reasons, [29] including the fact that the State concerned

Regulatory Arbitrage and Beyond – An Introduction, 20 *EBOR* 399-405 (2019); Sibony A.-L. (2019), 'Centros and the Internal Market', 20 *EBOR* 407-424; Gerner-Beuerle C., Mucciarelli F.M., Schuster E., *a.* Siems M. (2019), The Illusion of Motion: Corporate (Im)Mobility and the Failed Promise of Centros, 20 *EBOR* 425-465; Gelter M. (2019), Centros and Defensive Regulatory Competition: Some Thoughts and a Glimpse at the Data, 20 *EBOR* 467-492.

[26] *Centros*, paras. 17 and 29, citing EU Court of Justice, 10 July 1986, *Segers*, C-79/85 (EU:C:1986:308), para. 16.

[27] *Centros*, paras. 18 and 23.

[28] *Centros*, para. 27.

[29] Because if the company had carried on some activity in England, the refusal could not have been made (*Centros*, para. 35); because the creditors were in any case perfectly aware that it was an

may not merely refuse to recognise the entity, but may adopt "any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State." [30]

The principles affirmed in *Centros* were confirmed and partly clarified in 2003 in *Inspire Art.* [31] The case is very similar to *Centros*, as it concerned the registration in the Netherlands of a branch of a company incorporated in the United Kingdom, and which carried out no activity in the state of incorporation. The distinguishing element was the fact that, unlike in Denmark, in the Netherlands a special law of 17 December 1997 had been passed regulating the legal regime of formally-foreign companies ("formel buitenlandse vennotschap"), this meaning "a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies." [32] In essence, the aforementioned law not only made the registration of the formally-foreign company in the Commercial Register conditional on its formal qualification as such, but above all required it to be subjected to a number of specific obligations, including minimum capitalisation, in (substantial) conformity with the requirements of the Dutch Civil Code for companies incorporated under national law. As long as these conditions were not fulfilled, the directors would be held personally, jointly and severally liable for corporate obligations. [33]

The Court, entirely confirming *Centros*, [34] recognised that the Dutch legislation on formally-foreign companies had the "effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty:" [35] as

English company (*Centros*, para. 36); because the refusal to register is a radical reaction, whereas there could be more appropriate and less intrusive means of ensuring protection for creditors (*Centros*, para. 37).

[30] *Centros*, para. 38.

[31] EU Court of Justice, 30 September 2003, *Inspire Art*, C-167/01 (EU:C:2003:512) (hereinafter "*Inspire Art*"). *See*, in English, Wooldridge F. (2003), The Advocate General's Submissions in Kamer van Koophandel: Further Emphasis on the Right of Establishment', 14 *EBLR* 497-505; de Kluiver H.-J. (2004), Inspiring a New European Company Law? – Observations on the ECJ's Decision in Inspire Art from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member States, 1 *ECFR* 121-134; Hirt H.C. (2004), Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd, 15 *EBLR* 1189-1222.

[32] *Inspire Art*, para. 22.

[33] *Inspire Art*, paras. 27-28.

[34] *Centros*, paras. 17-18, 20.

[35] *Inspire Art*, para. 101.

consequence, minimum capital requirements and rules on directors' liability should not be applied. [36] *Inspire Art* also confirmed, as had been anticipated in *Centros*, that the measures provided for in the Dutch legislation did not pass the Gebhard test and therefore could not be justified. [37]

Centros and *Inspire Art*'s conclusions, later confirmed by *Kornhaas*, [38] were lastly further clarified by *Edil Work*, a case decided in 2024. [39]

The case at hand, less known than the leading cases in European company law, concerned an Italian company to which a castle near Rome (the Tor Crescenza Castle), often the location of film sets and VIP weddings (such as that of the soccer player Francesco Totti), was registered. Probably for tax reasons, in 2004 the real estate company had been converted into a limited company under Luxembourg law, by locating there only the registered office and – as castles are immovable, obviously – nothing else. However, the sole director of the new entity had appointed a third-party as general attorney to implement the entire corporate purpose. Appointment that the latter had interpreted so broadly as to even allow him to confer the château, the company's sole asset, to other companies. [40]

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[36] *Inspire Art*, para. 104.

[37] *Inspire Art*, paras. 106, 142.

[38] In *Kornhaas*, the Court of Justice made it clear that the replacement or supplementation of the liability rules of the directors of a foreign company with those of the country in which the company's business is conducted (this was an English company operating exclusively in Germany) can only be accepted where the rules are of an insolvency nature, not a company one: Starting from the assumption that the rule on the liability of directors for making payments beyond the time limit for filing a petition for declaration of insolvency (today § 15b *InsO*, formerly § 92 (2) *AktG* and § 64 *GmbHG*) is of an insolvency nature and not of a company nature (in spite of its location in company laws at the time), the Court clarified that it is not precluded by Art. 49 and 54 TFEU, since such a rule does not relate either to the incorporation of the company or to its subsequent establishment in another Member State. *See Kornhaas*, para. 28: «the application of a provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG in no way concerns the formation of a company in a given Member State or its subsequent establishment in another Member State, to the extent that that provision of national law is applicable only after that company has been formed, in connection with its business, and more specifically, either from the time when it must be considered, pursuant to the national law applicable under Article 4 of Regulation No 1346/2000, to be insolvent, or from the time when its over-debtedness is recognised in accordance with that national law. A provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG does not, therefore, affect freedom of establishment».

[39] EU Court of Justice, 25 April 2024, *Edil Work*, C-276/22 (ECLI:EU:C:2024:348) (hereinafter *Edil Work*). On this case, *see*, in English, de Luca N. (2024), Immovable Castles, Movable Companies and the Real Seat Criterion in Troubles (Edil Work, C-276/22), 21 *ECL* 82-88.

[40] Curious facts of the pink chronicle are highlighted by Mucciarelli F.M. (2024), Società estere con amministrazione o sede sociale in Italia e libertà di stabilimento: la giurisprudenza della Corte di Giustizia nasce da errori, equivoci e curiosi fatti di cronaca rosa, *Giur. comm*, II, 936: "the issue appears further entangled (or, perhaps, clearer) if we observe the history of STE *s.à.r.l.*, which was established as an Italian limited liability company (Agricola Torcrescenza s.r.l.) and in October 2004 "converted" into a Luxembourg company, transferring its registered office to the Grand Duchy as permitted by the Civil Code rules then in force. A year after the transfer of the castle, STE *s.à.r.l.* had second thoughts (probably explainable only by reading the magazines of the time in which the disagreements between Ms S.B. and Mr F.F. had some prominence) and brought an action before the

The doubt arising before the national courts and which was the subject of the reference to the Court of Justice for a preliminary ruling concerned the applicability of an Italian rule of private international law, Article 25(1)(2), of law No. 218/1995, according to which when the real seat of (formally) foreign companies is located in Italy, Italian company law applies. In fact, although Italy generally adopts the incorporation theory, that of the real seat would be applicable to foreign companies exclusively operating in Italy, thus forcing them to be nationalised. Indeed, the application of Article 2381 of the Italian Civil Code was debated in the proceedings: according to such provision, as the board of directors may delegate its powers only to its members, so also in case of a single director this may not entrust a third party, as a general agent, with the entire management of the company.

In those circumstances, the Court of Justice clarified that a national provision requiring application of the company law of the place where the activity is carried on also to companies incorporated under foreign law and benefiting from the freedom of establishment provided for in Articles 49 and 54 TFEU precisely conflicts with these rules. The fact that the formation of the company abroad or the cross-border conversion took place for the sole purpose of taking advantage of the more favourable company law does not matter. Indeed – as clearly stated already in *Centros* [41] - the treatment of branches of formally-foreign companies (i.e., for which there is no corresponding principal establishment in the State where the registered office is located) must be the same as that of branches of 'real' foreign companies: only company law of the home Member State shall apply.

Ultimately, the outcome of *Edil Work* is that, in matters of applicable company law, the real seat criterion, although placed "on the same footing" by the Treaty, [42] conflicts with the freedom of establishment provided for by Articles 49 and 54 TFEU, precluding the Member State where the real seat of a company is located from applying its own company law to companies subject to another legislation based on the incorporation criterion. [43]

6. *Edil Work* and the 'overriding reasons in the general interest' in corporate matters. The case of operations entailing *de facto* modification of the corporate purpose

The conclusions of the previous paragraph must be clarified, considering that the case law of the Court of Justice, as expressed in *Centros*, *Inspire Art* and *Edil Work*, still confirms the existence of areas of national exclusive sovereignty in matters of company law.

Court of Rome to have the deed of disposal declared ineffective, arguing that the appointment of an agent with full powers would be null and void under Italian company law".

[41] *Centros*, para. 35, stated that a refusal to register the branch of a foreign company on the grounds of the absence of a principal establishment in the Member State of incorporation is arbitrary, since the same reasons of protection of creditors and third parties may also apply where the company has an establishment in the Member State of incorporation.

[42] The already mentioned famous quote in *Daily Mail*, para. 21.

[43] For broader reasoning, *see* de Luca N. (2024), 86 f. and Id. (2025), European Company Law (3rd Ed., forthcoming, Cambridge University Press, Cambridge).

As mentioned above, it was clearly stated in *Centros* that "the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty." [44] Nevertheless, the Member State where the company carries on its activity "may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty." Moreover, it may impose on foreign companies the application of rules of its own legislation, if this is required by overriding reasons of general interest, provided that this is done in compliance with the principle of reasonableness, to be verified with the Gebhard test. [45] Both *Centros* and *Inspire Art* confirmed that the rules on minimum capitalisation of companies, although provided for at the European level for public limited companies and although considered in some national legal systems - including, at least then, Denmark, the Netherlands and Italy - as essential for the protection of creditors' interests also in other types of companies, are nevertheless not of such nature: indeed, they are not the only appropriate measures for the protection of those interests, since the legislation of the Member State of incorporation of the company concerned - whether formally foreign or just foreign - may provide for other equivalent measures.

Considering the above, however, it remains uncertain what actions can be taken by national legal systems to place legitimate limitations on the freedom of establishment in cases where this collides with overriding reasons of general interest.

Interesting suggestions con be found in *Edil Work*. The Court emphasised that not only the interests of creditors and third parties in general, but also those of shareholders, and in particular of minority shareholders, may constitute sufficient grounds for the application of a national rule even to foreign companies.

In its defence of Article 25(1)(2), law No. 218/1995, the Italian Government had argued that the restriction on freedom of establishment determined by that provision was justified by the objective of protecting shareholders, creditors, employees and third parties. In this regard, the Court clarified that Articles 49 and 54 TFEU do not, in principle, preclude measures of a Member State aimed at ensuring that the interests of creditors, minority shareholders and employees of a company, which has been incorporated in accordance with the law of another Member State but which carries out the greater part of its activities in the national territory, are not unduly prejudiced. [46] However, the mere fact that a foreign company carries on the greatest part of its activity in the territory of another Member State cannot in itself constitute

[44] *Centros*, para. 27.
[45] *Centros*, paras. 18 and 23.
[46] Thus, *Edil Work*, para. 40, as well as *Polbud*, para. 54 and case law cited therein.

sufficient ground for replacing the entire foreign company law with national rules. Indeed, the restriction of the right of establishment is compatible with the Treaty only in cases where it is possible to verify the existence, in a specific case, of a risk of harm to the interests of creditors, minority shareholders or workers which the application, as a whole, of foreign law would not allow to be protected.

Although the Court of Justice has held that the wording of Article 2381 of the Italian Civil Code does not unequivocally address overriding reasons of general interest, the facts which gave rise to *Edil Work* constitute a good example for discussing in which cases Member States may allow themselves to pass company law rules of such nature, thus applicable on also foreign companies.

As mentioned above, the question submitted to the Italian courts concerned the validity or, in any event, the effectiveness of the transaction, under Luxembourg law, by which the sole director of a company granted all his management powers to a third party, who understood the appointment in such a broad sense as to allow him to dispose of the company's only asset, namely the Tor Crescenza Castle. According to the District Court of Rome, the general power of attorney was permissible and the validity or effectiveness of the transactions made by the agent on behalf of the company could not be questioned. [47] The Court of Appeal of Rome, [48] on the contrary, considered the delegation of powers to the agent to be null and void under Article 2381(2) of the Italian Civil Code, which allows the board of directors to delegate its powers to its members only and, therefore, not also to persons unrelated to the company. [49] Hence, it declared null and void the contract made by the general agent, engaging the company to contribute the real estate complex. The Court of Cassation, before deciding the case, tackled the question whether Italian or Luxembourg law should apply: hence, it referred a preliminary ruling on Article 25(1)(2) law No. 218/1995. [50]

As regards the applicable company law, it shall be noted that the *Edil Work* case seems to rest on a misunderstanding. [51] In fact, regardless of the investigation into the existence of an overriding mandatory rule of company law, there is no doubt that, under both Italian and Luxembourg law, the contract signed by the general representative of the company owning the Tor Crescenza Castle (largely) exceeded its powers. In this regard, Luxembourg law is more explicit than Italian law, as it expressly allows the entire management of current business ('*gestion journalière*') to be entrusted to third parties, extraneous to the management bodies of a capital company. [52] In Italian law, however, there are doubts as to the possibility of

[47] Unfortunately, there are no references to the first instance ruling.
[48] Rome Court of Appeals, 28 December 2018, no. 8288, *unpublished*.
[49] Although it is a sole director, the principle remains unchanged.
[50] Italian Court of Cassation, 11 April 2022, no. 11600, *Giur. it*., 2022, 2150.
[51] *See also*, Mucciarelli F.M. (2024), 940 ff.
[52] Article 441-10 *Loi du 10 août 1915 relative aux sociétés commerciales*, on the subject of public limited liability companies, allows management powers to be delegated also to persons outside the board of directors ("*directeurs, gérants et autres agents*") as long as they are limited to *day-to-day* business ("*gestion journalière*") (identically art. 442-8 for *sociétés à directoire*; as well as Art. 710-

entrusting general powers of attorney to third parties. [53] In any case, however, one thing is to entrust to third parties the day-to-day business or even the entire management of a company, quite another is to confer the power to sell its entire assets, such as the castle.

In this regard, it is indeed widely acknowledged that the sale of the entire assets or of very significant part of the assets of a company exceeds the powers of the company's management body. Due to its ability to substantially modifying the corporate purpose, such operation is a matter for the shareholders' meeting to decide. Performance of such operation based on a decision made by directors only - and, *a fortiori*, if made by a third party acting as general agent – shall be considered void and, thus, ineffective. [54]

The limitation to the powers of directors (or their general agents), in cases where the proposed action entails *de facto* modification of the corporate purpose, is a general principle of company law, also recognised by European Union law. [55] It is no coincidence that the principle emerged in case law and only then was incorporated also in pieces of legislation.

The principle originated in the legendary *Holzmüller* ruling of the German *BGH*, and was then refined in subsequent case law, namely the pair of *Gelatine* rulings. [56] The

15 concerning limited liability companies; and Art. 833-4 and Art. 833-9 concerning European companies). It remains the case also in Luxembourg – given its European origine - that the act exceeding the powers of representation, and possibly even exceeding the company object, is enforceable against a third party acting in bad faith. The general delegation of administrative functions to persons other than directors is only permitted in limited partnerships, *simple* (Art. 310-2) and *special* (Art. 320-3).

[53] It is common ground that neither directors may attribute their powers to persons who are not members of the board (*see*, e.g., Italian Court of Cassation, 23 April 1980, No. 2663, *Riv. not.*, 1980, 1590), nor may the articles of association so provide. On this point, *see* e.g. Bonelli F. (1985), Gli amministratori di società per azioni, 100 f. (Giuffrè, Milan), according to which the directors may not "entrust third parties with the entire management of the company's business, with a total emptying out of their powers, and with a substantial abdication in favour of third parties of their management functions."

[54] Many Italian courts declared both the decisions and their performance void: Milan District Court, 5 November 2017, *Notariato*, 2018, 439 (HLH Sardinia case); Rome District Court, 3 August 2018, *Società*, 2018, 1371 (Settembrini case); Rome District Court, 1 April 2019, *Banca, borsa, etc.*, 2019, II, 757 (Banca del Fucino case); Rome District Court, 27 January 2020, *Società*, 2020, p. 425 (Edil Habitat case). For the view that the act would merely be voidable, *see* Piacenza District Court, 14 March 2016, *Banca, borsa, etc.*, 2017, II, p. 377 (Bulli e Pupe case).

[55] Article 9, Dir. (EU) No. 1132/2017 gives relevance to the company's object as a general limit to the directors' powers. Although the act of representation that exceeds the aforementioned limit nevertheless binds the company, in two cases the excess is enforceable against the third party: a) when the latter has acted in bad faith to the detriment of the company; b) when the act exceeds the powers that the law allows the directors to be granted. This is precisely the case when actions taken by directors determine *de facto* modification of the corporate purpose.

[56] *BGH*, 25 February 1982, Az. II ZR 174/80 = BGHZ 83, 122 ("Holzmüller"); *BGH*, 26 April 2004, Az. II ZR 154/02 = BGHZ 159, 30 (33) ("Gelatine I"). The doctrine of unwritten competence of the general meeting, in Germany, goes back to Lutter M. (1973), Die Rechte der Gesellschafter beim Abschluß beim fusionsähnlicher Unternehmensverbindungen, *DB*, 21; and Ulmer P. (1975), Ungeschriebene Mitwirkungsbefugnisse der Hauptversammlung? Eine Buchbesprechung, *AG*, 15. Most recently, Mülbert P.O. (2017), vor § 119, in Aktiengesetz. Großkommentar, 87 ff. (de Gruyter,

same has had a wide international acknowledgment, being recognised by the OECD [57] and in Spain [58], as well as in Italy for private limited companies. [59] More recently, the Belgian lawmaker clarified that transactions involving the assets of listed companies to an extent of more than 3/4 are matters for the shareholders' meeting to decide. [60]

In conclusion, it can be affirmed with a certain degree of certainty that, whatever

Berlin); Hoffmann A. (2019), vor § 119, in Münchener Kommentar zum Aktiengesetz, 2132 ff. (Beck, München).

[57] In Section II (*Shareholders' Rights and Fundamental Functions Associated with Share Ownership*), under B, where it is stated that 'shareholders should have the right to be sufficiently informed and to participate in decisions concerning fundamental corporate changes such as: 1) amendments to the articles of association, memorandum of association or any similar document governing the governance of the company; 2) the authorisation of the issue of new shares; 3) extraordinary transactions, including the transfer of all or substantially all assets resulting in the sale of the company'.

[58] As a result of *Ley* 3 diciembre 2014, no. 31, art. 161 of the *Ley de sociedades de capital* (rubricato: *Intervención de la junta general en asuntos de gestión*), which reads as follows: "Salvo disposición contraria de los estatutos, la junta general de las sociedades de capital podrá impartir instrucciones al órgano de administración o someter a su autorización la adopción por dicho órgano de decisiones o acuerdos sobre determinados asuntos de gestión, sin perjuicio de lo establecido en el art. 234."

[59] Article 2479(2)(5) Italian Civil Code, stating that all operations entailing *de facto* modification of the corporate purpose or relevant modifications of the shareholders' rights are matters for the general meeting.

[60] Article 7:151/1 Belgian Code des sociétés e des associations, entered into force on 8 April 2024, introduced by Article 163 *Loi* 27 mars 2024, no. 2, with the following text:
"Art. 7:151/1. § 1er. Dans les sociétés cotées, seule l'assemblée générale peut approuver une cession d'actifs qui porte sur trois quarts ou plus des actifs de la société. Pour déterminer si la cession proposée concerne au moins trois quarts des actifs de la société, cette cession doit être examinée au regard des derniers comptes annuels qui ont été publiés. Si la société cotée publie des comptes consolidés, le seuil des trois quarts doit également être calculé sur la base des actifs consolidés.
Les filiales non cotées d'une société cotée ne peuvent céder des actifs dont la valeur excède trois quarts des actifs consolidés de cette société cotée sans l'accord préalable de l'assemblée générale de cette société cotée. Toutes les cessions d'actifs effectuées par une société cotée et par des filiales non cotées de cette société cotée qui ont eu lieu au cours de la dernière période de douze mois et qui n'ont pas été approuvées par l'assemblée générale de cette société cotée sont additionnées à la cession d'actifs envisagée pour déterminer si celle-ci porte sur trois quarts ou plus des actifs, consolidés ou non, de la société.
Les alinéas 1er et 2 ne s'appliquent pas lorsque les actifs sont cédés à une filiale de la société cotée, excepté si la personne physique ou morale qui détient le contrôle direct ou indirect de la société cotée, détient directement ou indirectement, au travers d'autres personnes physiques ou morales que la société cotée, une participation représentant au moins 25 % du capital de la filiale concernée ou lui donnant droit, en cas de distribution de bénéfices par cette filiale, à au moins 25 % de ces bénéfices.
La décision de l'assemblée générale de céder trois quarts ou plus des actifs est déposée et publiée conformément aux articles 2:8 et 2:14, 4°.
Le Roi peut, après avis de l'Autorité des services et marchés financiers, préciser les critères déterminant la manière dont le seuil des trois quarts est calculé.
§ 2. Si une cession telle que visée au présent article est soumise à l'approbation de l'assemblée générale de la société cotée, l'organe d'administration de la société cotée justifie la cession proposée dans un rapport circonstancié, mentionné dans l'ordre du jour.
Une copie de ce rapport est mise à la disposition des titulaires d'actions, de parts bénéficiaires, d'obligations convertibles, de droits de souscription ou de certificats émis avec la collaboration de la société, conformément à l'article 7:132.
L'absence de ce rapport entraîne la nullité de la décision de l'assemblée générale.
§ 3. L'absence d'approbation de l'assemblée générale d'une cession visé au paragraphe 1er n'affecte pas le pouvoir de représentation de l'organe d'administration. "

national law applied to the case of Tor Crescenza Castle, it is not likely that such a significant sale of assets, enacted by a general agent without prior shareholders' meeting resolution, would be permitted by the law. Namely, the principle requiring that the shareholders' meeting makes decisions of primary relevance for the shareholders, such as those *de facto* modifying its corporate purpose, shall be considered an overriding mandatory rule, due to their very nature as general principles, usually unwritten. The acknowledged nature of the principle permits its application to also foreign companies, in cases where the company law of the state of origin should not grant adequate protection to the shareholders.

7. Concluding remarks. Convergence, race to the bottom, and the role of harmonisation

The introduction in 2019 of Article 86b, Dir. (EU) No. 1132/2017 marked a turning point in the area of connecting factors for companies. Whereas the Treaty had placed the various connecting factors set out in Article 54 TFEU on the same footing, permitting both the incorporation theory and the real seat theory, and thus admitting possible conflicts on the applicable company law within Europe, conversely, the new rule requires one of these criteria to prevail. The expression '*at least*', referred to the location of the registered office in a Member State, defines the connecting factor that all Member States must consider sufficient for the application of their company law: hence, the location in the same territory of the real seat cannot be sufficient – if the company already enjoys of the legal personality of another Member State (after *Überseering*) – nor be required. Moreover, as the case law of the Court of Justice has already affirmed, the use of a foreign vehicle, even in cases where it qualifies as a *letterbox company*, does not permit its 'nationalisation' by way of forced application of national company law. Application of national law of the real seat can only be justified when overriding reasons of public interest so require: these include not only the interests of third parties, creditors and employees, but also those of shareholders, especially minority shareholders.

In this respect, the case brought before the national courts concerning the Tor Crescenza Castle helped understand that both Italian and Luxembourg law would grant adequate protection of minority shareholders. Overriding reasons in the general interest emerge, therefore, only in exceptional cases, which would legitimate the application of national law to also foreign companies.

This leads to further reflection. It must be accepted that emigration of companies abroad can only be discouraged through spontaneous convergence, hence mimicking those more favourable regimes attracting foreign companies. [61] The historical antecedents of this phenomenon are widely known: first, the proliferation throughout

[61] In contrast to the United States, where there are multiple and heterogeneous elements that determine continuing interest to create Delaware companies (*see, generally*, Romano R. (1987), The State Competition Debate in Corporate Law, 8 *Cardozo L. Rev.*, 709-757; Hamermesh L.A. (2006), The Policy Foundations of Delaware Corporate Law, 106 *Colum. L. Rev.*, 1749-1792), so much so that states with substantially similar legislation - e.g. Maryland - are not significantly successful in attracting companies from other states, in Europe the re-drafting company law is often sufficient to avoid forum shopping and to guide the preference for incorporation in the state of operation.

Europe of almost capital-less limited liability companies, [62] a direct consequence of *Centros*, which in fact made it less attractive to set up letterbox companies in the United Kingdom; second, the sunset of the one share, one vote principle[63] in favour of consistent multiple or enhanced voting rights, [64] in an attempt - unsuccessful so far - to stop emigration of listed companies, especially from Italy to the Netherlands, perhaps the European Delaware.

These phenomena are consistent with the perspective of those proposing to overcome the era of harmonisation with that of spontaneous convergence between legal systems. [65] It may be rebutted, however, that spontaneous convergence does not

[62] It suffices to recall that the first European legislation to allow almost capital-less joint-stock companies was Germany, introducing in 2008 the figure of the *Unternehmergesellschaft* (UG), as a variant of the *GmbH*: this was followed by Italy, with the simplified s.r.l., France and Spain and, most recently, Belgium, with the provision of s.r.l. with no capital at all. On the Belgian limited liability company without capital, *see* Culot H. (2023), The Belgian private limited without capital: how is it faring?, *ECFR*, 6.

[63] As for Italy, in 2014, Article 2351(4) of the Italian Civil Code and Article 127d of the Consolidated Law on Finance were amended to allow, respectively, the introduction for non-listed companies of statutory provisions on multiple voting, up to a maximum of three per share, or, in listed companies, of statutory provisions on enhanced voting, to reward so-called loyal shareholders, *i.e*., those who maintain share ownership for over one year.

[64] Law No. 21 of 5 March 2024 (the so-called 'Capital Law'), with the proposed objective of developing the Italian market by fostering the demand for capital by companies, amended Article 2351(4) of the Italian Civil Code by increasing to ten the maximum number of votes attributable to each single multiple-vote share. For listed companies, the prohibition to issue multiple-vote shares remains in place (but may be maintained if those are issued prior to listing). Article 14 of the Capital Law, reforming Article 127d of the Code, has provided for the attribution of an additional vote for each year in which the shares are maintained in the portfolio of a given shareholder, up to a maximum limit of ten votes per share (in the past the maximum limit was two votes per share).

[65] The issue of convergence between legal systems was brought to the international debate by Armour J.- Hansmann H. – Kraakman R. (2009), What is corporate law?, in Kraakman R. *et al.,* The Anatomy of Corporate Law. A Comparative and Functional Approach (2nd ed., Oxford University Press, Oxford) 33 f. (the issue was not addressed in the first edition; more recently, see the third edition: Armour J.- Hansmann H.- Kraakman R.- Pargendler M. (2017), 21 ff.). The authors view the phenomenon discussed in this article favourably, referring in particular to the example of Delaware as the *leading* corporate law country in the United States, maintaining that regulatory convergence does not constitute a *race to the bottom*, but, on the contrary, can be appreciated as a stimulus to the creation of a legal framework that is as rational, effective and efficient as possible. From their perspective, the spontaneous adaptation that a different legal system makes to the substantive and/or procedural rules proposed by other legal systems, the positivity of which is attested by market success, is physiological. The proposed thesis is based on the well-known studies of Fischel D.R. (1983), The 'Race to the Bottom' Revisited: Reflection on Recent Devolpment in Delaware's Corporation Law, 76 *Northwestern Univ. L. Rev.*, 913 and Romano R. (1985), Law as a Product: Some Pieces of the Incorporation Puzzle, 1 *Journal of Law*, *Econ. & Org*., 225. These conclusions are, however, not unanimously agreed upon. Authoritative criticism comes from certain authors, including Cary W. (1974), Federalism and Corporate Law: Reflection Upon Delaware, 83 *Yale L. J.*, 673; Bebchuk L.A. (1982), Federalism and the Corporation: The Desirable Limits on the State Competition in Corporate Law, 105 *Harv. L. Rev.*, 1435, maintaining that, in the absence of any form of harmonisation, the various legal systems may end up accepting solutions that, instead of the best ones, lead to market inefficiencies.
Discussion made at comparative level, and originating from American studies on the Delaware phenomenon, is not always valid in the different and peculiar European context. Extensive literature on this subject includes, *inter alia*: Enriques L. (2004), EC Company law and the fear of a European Delaware, 15 *Eur. Bus. L. Rev.*, 1259; Gelter M. (2005), The Structure of Regulatory Competition in

always succeed in ensuring the dissemination of the best rules, as regards general interests to be protected. Rather, regulatory arbitrage allows to frequently choose those legislations granting realisation of particular interests, which other legal system - if not under pressure to safeguard the national economy - would have no reason to support.

Indeed, it is far from proven that it is appropriate to permit non-majority shareholders to gain (or retain) control over the company through enhanced or multiple voting rights. In contrast, it has been convincingly argued that "enhanced voting only allows the controlling shareholder to have a majority in the shareholders' meeting by holding a smaller share of capital (or, in financial terms, of economic rights). This makes the extraction of private benefits of control, i.e. the appropriation of value to the detriment of minorities, through related party transactions or excessive remuneration, more convenient. [...] In other words, the choice of enhanced voting per se harms minority shareholders." This leads to a twofold conclusion: on the one hand, that "putting a brake on migration to the Netherlands is justified by the need to protect not only the revenues of those who provide services related to Italian corporate law but also, and above all, minority shareholders and, more generally, the Italian stock market as a whole;" on the other hand, that "the best solution cannot be to allow companies that are already listed in Italy to do, by staying in Italy, what they

European Corporate Law, *Journal of Corporate Law Studies*, 247-284 (*see also*, Enriques L. – Gelter M. (2007), How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law, 81 *Tul. L. Rev.* 577); Armour J. (2005), Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, 58 *Current Legal Problems*, 369-413; Tröger T. (2005), Choice of Jurisdiction in European Corporate Law. Perspectives of European Corporate Governance, 6 *Eur. Bus. Org. L. Rev.*, 3-64; Halbhuber H. (2001), National Doctrinal Structures and European Company Law, 38 *Common Mkt. L. Rev.* 1385, who points out how European harmonisation leads to the proliferation of a number of previously neglected national issues. The sovereignty of the EU Member States, in fact, was voluntarily compressed by them on the understanding that, in order to achieve the single market, it was first necessary to conduct a process of harmonisation between company laws, which would serve as a prerequisite for a freedom of establishment that would not lower the level of protections deemed necessary, in particular, for the protection of shareholders and third parties. The Freedom of establishment shall now be considered acquired and not substantially compressible. However, in the absence of complete harmonisation between the systems of the various Member States (which is notoriously lacking in the area of the internal organisation of companies and groups), spontaneous convergence is often dictated not by the imitation of virtuous institutions of company law, but by the need to mitigate migratory phenomena, without any evidence of the goodness of the solution adopted. In fact, since - as noted in the text - it is not possible to impose the rules of domestic law on companies that have already migrated, except in very exceptional cases, convergence in fact achieves a pure and simple imitation of the regulatory model capable of determining attraction. Thus, in this context, convergence between legal systems proves to be anything but spontaneous; on the contrary, it appears to be necessitated by the interest in stemming the flow of migration without this being countered by restrictive measures, which are excluded by the need to ensure freedom of establishment. Whether these considerations should lead to completing the harmonisation process, or to a change of approach, is not easy to say. As is well known, the change of approach was authoritatively proposed by the drafters of the European Model Company Act (EMCA), 1st ed., 2017, precisely in order to overcome the traditional opposition between 'competition between jurisdictions' and 'harmonisation'. The idea of the EMCA would be to propose model legislation to the individual states, being the result of the best national legislations, thus a convergence achieved upstream, which favours spontaneous adoption and avoids, as far as possible, the phenomenon of downward convergence as a result of emigration to member states with lax legislation.

can achieve by moving to the Netherlands. This would solve the problem of the protection of revenues from services related to Italian company law, but would not protect the Italian stock market and minority shareholders, which perhaps enlightened politicians should take in greater consideration than others." [66]

It follows that, beyond all possible countermeasures to protect minorities, at least whilst the company is leaving the State of departure, one cannot help but hope that convergence between legal systems will still be guided by harmonisation, at least on those principles that should constitute the common ground of the entire European Union. [67] It would not seem, then, to be old-fashioned to suggest that, albeit in a context of affirmed and definitively acquired freedom of establishment, the European Union shall propose the adoption of rules preserving certain shared principles, such as the one share, one vote, [68] or at least that requiring a certain degree of correspondence between shareholdings and related corporate powers.

Some significant rulings of the Court of Justice, such as *Volkswagen*, already follow this path. Indeed, it was already considered incompatible with the free movement of capitals that a national law permits to put a cap on voting rights, in such a way which grants excessive powers to some minority shareholders (such as the Land of Lower Saxony). [69] Hence, expressing a principle that limits the possibility to depart from the one share, one vote rule would do nothing than clarifying a principle already enshrined in the Treaty. For the sake of clarity, and in an attempt to highlight shared values of the common market.

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[66] The quotes in the text are borrowed from Enriques L. (2023), Migrazioni societarie in Olanda e voto maggiorato, FCHub, 9 March 2023, https://fchub.it/migrazioni-societarie-in-olanda-e-voto-maggiorato/; Id. (2023), *Come tutelare i diritti delle minoranze in Olanda,* FCHub, 12 March 2023, https://fchub.it/come-tutelare-i-diritti-delle-minoranze-in-olanda/.

[67] Even authors who have criticised the effectiveness of harmonisation as an instrument for the construction of a modern and efficient company law, e.g., Enriques L. (2006), Company Law Harmonisation Reconsidered: What Role for the EC?, in European Company Law in Accelerated Progress, 59 ff., esp. 81 (eds. S. Bartman, Kluwer Law International, Alphen aan den Rijn), however, recognise that «harmonisation of focal point rules can be justified, provided that focal point rules are narrowly defined and rigorously identified».

[68] Ferrarini G. (2006), One Share – One Vote. A European Principle?, 3 *ECFR*, 147, holds that, as it is not justified by reasons of economic efficiency and there is no scientific evidence that companies with dual class shares represent an impediment to economic integration in Europe, the requirement at European level of the one-share, one-vote principle would not be necessary.

[69] Reference is made to EU Court of Justice, 23 October 2007, *Volkswagen*, C-112/05 (EU:C:2007:623) (hereinafter '*Volkswagen*'). This is the well-known case concerning the articles of association of Volkswagen AG, characterised by the presence of a cap on voting rights (originally differentiated for public and private shareholders, but later standardised for all) at 20% of the capital, whatever the shareholding held (the public shareholders were instead given the right to appoint more supervisory board members than the proportion of the shareholding). Even as a statutory provision introduced by law (rather than merely permitted by it), its suitability as a restriction on the freedom of establishment or the free movement of capital was debated. While the conflict with the freedom of establishment was not addressed by the Court of Justice, which considered that the Commission's arguments in this respect were not sufficiently grounded (*Volkswagen*, paras. 15 and 16), the question concerning the free movement of capital was examined and resolved to the effect that "by limiting the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, this situation is liable to deter direct investors from other Member States" (*Volkswagen*, para. 52).

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