School of Law

Cross-Border Mobility of Companies in the European Union: Current Legal Framework and Persistent Barriers

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Sommario

I. FREEDOM OF ESTABLISHMENT AND EUROPEAN COMPANY LAW 6

II. FREEDOM OF ESTABLISHMENT AND PRIVATE INTERNATIONAL LAW 7

III. THE EVOLUTION OF ECJ CASE LAW ON THE FREEDOM OF ESTABLISHMENT: FROM DAILY MAIL TO EDIL WORK 10

IV. THE EVOLUTION OF EU LEGISLATION: NEW RULES ON CROSS-BORDER OPERATIONS 13

V. CONCLUSION 14

I. Freedom of establishment and European company law

The development of a common market for goods and factors of production has always been one of the main goals pursued by the European Union within the process of European integration[1]. In this context, the regulation of firms plays a major role, not only because the movement of goods and factors of production (essential for the maintenance and development of the single market) is linked to the exercise of entrepreneurial activity, but also because the integration of markets requires that firms are put in a position to operate without barriers on a transnational scale and to freely transfer their seat and place of business from one Member State to another.

As well known, business activity is mainly organised in associated form, i.e. through the set-up and management of companies. For this reason, the EU lawmaker focused on company law to achieve some of the main EU institutional goals.

European company is based on two main components: (i) a set of provisions laid down in the Treaty on the Functioning of the European Union ("TFEU") and in secondary legislation (regulations, directives and recommendations); (ii) a set of principles expressed in the judgments of the European Court of Justice ("ECJ") to ensure the correct application and interpretation of the Treaty.

The TFEU provisions and the judgments of the Court of Justice lay down the principles on the freedom of establishment of companies, whereas the secondary legislation mainly contains provisions harmonising Member States' company law. The goal of economic integration is thus pursued by the European legislation and case-law through a two-pronged approach to company law. On the one hand, conditions are created to ensure maximum mobility of companies within the Union through the recognition of the right to freely move to a different Member State for the exercise of any permanent economic activity. On the other hand, differences between national laws governing the organisation and management of companies are reduced to ensure that companies from different Member States operate on an equal footing in an integrated market.

The two lines of action share the ultimate goal of economic integration and are functionally connected, because harmonising company law is essential for fully realising the freedom of establishment.

In particular, the harmonisation of national company laws aims at removing the barriers to the mobility of companies from one Member State to another, represented by the existence of heterogeneous national laws. The existence of such a functional link is confirmed by the Treaty itself, which entrusts the Council and the Commission with the task of coordinating «to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union» (Article 50(2)(g) TFEU). The provision – which is the legal basis for the adoption of the company law directives – is included, not by chance, in the section of the Treaty devoted to the right of establishment.

The instrumental role of the harmonisation of company law with respect to freedom of establishment has also long been emphasised by the Commission. The Commission has pointed

(*) Part of this paper is taken from P. TULLIO, *Libertà di stabilimento e legge applicabile alle società nell'Unione europea*, in Luiss Law Review 2/2022, p. 73-96.
[1] According to Article 26(2) of the Treaty on the Functioning of the European Union (hereinafter "TFEU" or "Treaty"), the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

out that within each State, companies formed in accordance with the laws of other States would find it difficult to gain access to credit and, in general, to means of financing, if major divergences existed between the provisions regulating the status of the various forms of company in the Member States[2].

More generally, the link between harmonisation and market integration is highlighted by art. 115 TFEU, which promotes the «approximation of the laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market».

The process of "approximation" of company law began in the 1960s with the adoption of the First company law directive[3], which was then followed by several other company law directives that harmonised the rules on the organisation and management of companies[4].

In recent years, the main company law directives were consolidated into a single directive (Directive 2017/1132/EU relating to certain aspects of company law) «in the interests of clarity and rationality», as stated the first recital of the directive.
In addition to the adoption of harmonisation directives, the European lawmaker has also introduced new supranational types of companies, such as the European Company (SE) and the European Cooperative Society (SCE)[5], which have also fostered cross-border mobility within the single market (see § 4).

II. Freedom of establishment and private international law

The freedom of establishment (Articles 49 ff. TFEU) grants the right to engage in stable and continuous economic activities in any Member State other than the home Member State[6].

This right applies both to natural persons who are nationals of Member States (Art. 49 TFEU) and to «companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union» (Art. 54 TFEU)[7].

When a company transfers its registered office, central administration or principal place of business to a Member State other than its State of origin, the company is exercising the *primary* right of establishment. The registered office, as stated in the articles of associations, coincides with the place of incorporation and, at least as a rule, determines the nationality of the company[8]; the central administration is the place where the administrative body takes the decisions regarding the management of the company (e.g., the place where board meetings are held); finally, the principal place of business is the place where the activity is mainly (if not exclusively) carried out.

[2]Commission Communication 7823/III/C/65 of 15 June 1965.
[3]Directive 68/151/EEC on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.
[4]Directives have been adopted on the following subjects: formation of public limited companies and the maintenance and alteration of their share capital (Second Directive); mergers and divisions of public limited companies. (Third and Sixth Directives); cross-border mergers (Tenth Directive); disclosure requirements for foreign branches of companies (Eleventh Directive); single-member limited liability companies (Twelfth Directive); takeover bids (Thirteenth Directive); company accounting and auditing (Fourth, Seventh and Eighth Directives); exercise of rights by shareholders in listed companies and encouragement of long-term shareholder engagement (dir. 2007/36/EC and 2017/828/EU). On the other hand, the proposed Fifth Company Directive on corporate governance, the draft Ninth Company Directive on corporate groups, and the proposed Fourteenth Directive on the cross-border transfer of the registered office, have not been implemented. The adoption of these directives found a number of obstacles in the deep-rooted differences in the legal traditions of each of the Member States.
[5]Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
[6]As such, the freedom of establishment is distinct from the freedom to provide services, which instead concerns the temporary and occasional exercise of an activity in another Member State.
[7]According to Art. 54.2 TFEU, «companies or firms shall mean companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making».
[8]However, it may happen that a jurisdiction defines the nationality of companies on the basis of elements other than the place of incorporation, such as the nationality of the controlling shareholder or the nationality of the directors.

When a company permanently sets up an agency, a branch or a subsidiary in another Member State, while retaining its main seat in its home Member State, the company is exercising the *secondary* right of establishment[9].

Pursuant to Article 49.2 TFEU, the exercise of the right of establishment must take place «under the [same] conditions laid down for its own nationals by the law of the country where such establishment is effected» (thus also in respect of its own companies, by virtue of the equivalence made by Article 54 TFEU). The rule gives companies that establish themselves in a Member State other than their State of origin the right to receive the same treatment as the companies of that State. In other words, Member States are, as a rule, prohibited from implementing discriminatory measures based solely on the nationality of the subjects.

Only by way of exception are Member States authorised to apply «provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health» (Article 52 TFEU).

The Court of Justice has specified that Article 52 must be interpreted restrictively, since it is an exceptional rule that entails a derogation from one of the fundamental freedoms guaranteed by the Treaty; as such, it can only be applied in the presence of a «genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society»[10].

Moreover, again according to the Court, the compatibility with European law of restrictive national measures is subject to the fulfilment of four conditions (the so-called compatibility test): in addition to being non-discriminatory, such measures must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it (so called *Gebhard test*)[11].

In this context, the full realisation of the principles on the freedom of establishment of companies has over the years encountered a number of obstacles represented by the application of restrictive and discriminatory measures by the Member States[12].

In particular, the exercise of the primary right of establishment of companies has mainly clashed: (i) with the question of the recognition of foreign companies by host Member States when the company intends to transfer only its real seat (i.e. its central administration and/or principal place of business) to that State (in such cases one speaks of an "entry barrier", as the destination Member State hinders the entry of a foreign company);
(ii) with the problem of retaining legal personality and the status of a company governed by the law of the home Member State when the company intends to transfer only its real seat, or only its registered office, to another Member State (in such cases one speaks of an "exit barrier", since the home Member State hinders the transfer of a company abroad).

These issues are two facets of the same problem[13], which results in the impossibility for com-

[9]According to European case law (ECJ, 22 November 1978, Case 33/78, *Somafer Sa v. Saar-Ferngas A.G.*), «the concept of a branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension». The subsidiary is, on the other hand, regarded as an entity with its own financial autonomy and legal personality.
[10]ECJ, 27 October 1977, Case C-30/77, *Bouchereau* and C. Just. EC, 26 November 2002, Case C-100/01, *Oteiza Olazabal*.
[11]ECJ, 31 March 1993, Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, and ECJ, 30 November 1995, Case C-55/94, *Reinhard Gebhard v. Council of the Bar Association of Milan*. The formula is taken from the well-known *Cassis de Dijon* judgment on the free movement of goods (ECJ, 20 February 1979, Case C-120/78).
[12]In addition to measures that hinder the exercise of the right of establishment, measures that merely discourage or make less attractive the exercise of that freedom are also regarded as restrictive (ECJ, 29 November 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, paragraph 36). See also ECJ, *Gebhard*, cited above, paragraph 37; ECJ, 5 October 2004, case C-442/02, *CaixaBank France*, paragraph 11; ECJ, 6 December 2007, Case C-298/05, *Columbus Container Services BVBA & Co.*, paragraph 34.
[13]The question of recognition of companies is linked to the fact that «unlike natural persons, companies are creatures of the law and [...] exist only by virtue of the varying national legislation which determines their incorporation and functioning» (ECJ, 27 September 1988, Case C-81/87, *The Queen v Daily Mail and General Trust PLC*, paragraph 21).

panies to transfer their seat between Member States, unless they dissolve in the State of origin and reincorporate ex novo in the State of destination. Such a constraint represents a significant barrier to the mobility of companies, which should be free to move from one Member State to another while retaining, without interruption, their legal personality and thus without being forced to bear the costs of the procedures for the liquidation and subsequent reincorporation of the company.

These difficulties arise mainly from the application of national rules of private international law that dictate the connecting factors for determining the law applicable to companies (*lex societatis*) and thus also for recognising them as validly incorporated entities having legal capacity.

Trying to sketch out the terms of an extremely complex problem, it can be said that the difficulties arise mainly when a Member State (of origin and/or destination) recognises companies as entities having legal capacity only if their real seat (i.e. the centre of their main activity) is located in the territory of the State where the registered office is also located. This approach (*real seat doctrine or Sitztheorie*) requires a coincidence between the real seat and the registered office: thus, in order to move from one State to another, the company has no choice but to wind-up in the State of origin and then re-establish according to the law of the State of destination.

No such problems arise when, on the other hand, a company exercises its right of establishment between Member States that follow the *incorporation doctrine* (or *Gründungstheorie*). These States recognise companies as entities validly incorporated under the law of their State of origin (where they keep their registered office), irrespective of the location of their real seat, thus making the formal element prevail over the substantive one. Under the incorporation doctrine, companies can choose to incorporate in the Member State with the most favorable legislation, irrespective of where they plan to conduct their activities after incorporation[14].

Moreover, States following the theory of incorporation leave companies free to transfer their real seat from one Member State to another while retaining their legal personality and status of company governed by the lex societatis of the State of incorporation.

The dichotomy between States following the real seat approach and States following the incorporation doctrine has not yet been overcome in Europe[15], although it is considered that the choice of the former approach has represented, and may still represent, a barrier to the full exercise of the right of establishment of companies. The connecting factors for the recognition of companies have never been harmonised, although this was expressly provided for in the Treaty of Rome (Article 293, now repealed)[16].

It follows from this that – as the Court of Justice has repeatedly emphasised – in the absence of harmonisation, all connecting factors determining the national law applicable to companies are on an equal footing and the choice to follow one or the other connecting factor still falls within the competence of each Member State[17].

[14]This has sometimes led States that follow the theory of incorporation to apply measures to curb the phenomenon of so-called *pseudo foreign companies* (or *letterbox companies*), i.e. companies that have no real link with the State of incorporation. An example is provided by the Danish system, which has also attempted to attract companies by offering a more attractive company law (see E. WERLAUFF, A *"Copenhagen Effect"? Denmark's Answer to Centros: A Far-Reaching Company Law Reform Aimed at Strengthening the "Free Movement of Companies", in 6 European Company Law* 4/2009, p. 160).
2009, p. 160).
[15]Member States following the real seat approach include Austria, Belgium, Germany (though gradually abandoning it), Greece, Luxembourg, Poland and Portugal; the theory of incorporation is followed by, among others, Denmark, Finland, Ireland, the Netherlands and Sweden. The connecting factors chosen by individual Member States are often quite complex, so that it is not always easy to classify a Member State's law into one or the other family. For instance, the classification of French, Spanish and Hungarian private international law is controversial. In other cases, the coexistence of different connecting factors has led the doctrine to frame some jurisdictions in a third category of States with "mixed" criteria, which would include Italy, Estonia, Lithuania and Slovenia (see S. CRESPI, *La mobilità delle società nell'Unione europea*, Turin, 2016, pp. 14-15). For an in-depth examination of the connecting factors chosen by different States, see C. GERNER-BEUERLE, F.M. MUCCIARELLI, E. SCHUSTER, M. SIEMS (eds.), *The Private International Law of Companies in Europe*, Munich, 2019.
[16]Article 293 TEC provided that «Member States shall, so as far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48 [now Article 54 TFEU] [and] the retention of legal personality in the event of transfer of their seat from one country to another». This norm has never been implemented.
[17]This principle, first stated by the Court of Justice in *Daily Mail*, was later reaffirmed and confirmed in *Cartesio and Polbud* (see § 3). The same principle is now also expressed in the third recital of Directive 2019/2121/EU (see § 4).

III. The evolution of ECJ case law on the freedom of establishment: from *Daily Mail* to *Edil Work*

In recent decades, the Court of Justice has frequently ruled on the interpretation and application of Treaty provisions regarding the freedom of establishment and on the compatibility of national measures, which may potentially restrict this freedom, with European law[18].

In an early, and now well-known, judgment (*Daily Mail*, 1988)[19] the Court dealt with the case of a British company that had been refused permission by the UK tax authorities to transfer its head office to the Netherlands while retaining its status as an entity under UK law (exit barrier to the exercise of the primary right of establishment).

The Court held that, in the absence of directives or conventions harmonising the connecting factors and the rules on seat transfers, Articles 49 TFEU and 54 TFEU must be interpreted as conferring «no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State».

According to the Court:
(a) «unlike natural persons, companies are creatures of the law and [...] exist only by virtue of the varying national legislation which determines their incorporation and functioning»;
(b) the «Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions [...]. In the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move in».

With the *Daily Mail* ruling, the Court of Justice has, in fact, claimed the precedence of national rules over the Treaty provisions on freedom of establishment, denying the direct effect of the latter and making their effects conditional on the adoption of European directives or international conventions[20].

Several years after *Daily Mail*, the Court of Justice again ruled on primary establishment (*Überseering*, 2002)[21]: the German authorities had refused to recognise the legal capacity of a company incorporated under Dutch law that had transferred its central administration to Germany (entry barrier).

In a reversal of its previous ruling, the Court stated that:
(a) the non-adoption of an international convention on the recognition of companies under Article 293 TEC (now repealed) does not prevent the application of Articles 43 and 48 TEC (now Articles 49 and 54 TFEU), which have direct effect: while such a convention could facilitate the freedom of establishment, its exercise cannot depend on the existence of harmonised rules.
(b) Member States shall recognise companies duly incorporated under the law of another Member State; this duty entails the application of the incorporation principle instead of the real seat doctrine, the latter being incompatible with the principles on freedom of establishment.

[18] The literature on this topic is almost endless; it is worth mentioning here two recent contributions offering an overview of the development of ECJ case law: GERNER-BEUERLE, MUCCIARELLI, SCHUSTER, SIEMS, cit., p. 1; N. DE LUCA, *European Company Law*, Cambridge, 2021, 2nd ed., p. 93.
[19] ECJ, *Daily Mail*, cited above.
[20] As mentioned above, Article 293 TEC has not been implemented. No convention on the recognition of companies has ever entered into force (the 1968 Brussels Convention on the Mutual Recognition of Companies and Bodies Corporate has not been ratified by all States, as required for it to be effective) and the Commission's proposal for a Fourteenth Company Directive on the transfer of the registered office of a company form one Member State to another has not been followed up either.
[21] ECJ, 5 November 2002, Case C-208/00, *Überseering v. Nordic Construction Company Baumanagement GmbH*.

Three years later, in Sevic (2005)[22], the Court of Justice continued the process of progressive recognition of the right to exercise the primary establishment without constraints. The case concerned a cross-border merger: the German authorities had rejected the request for registration in the national commercial register of a merger by absorption of a Luxembourg company into a German company (entry barrier). German law (UmwG - *Umwandlungsgesetz*) referred exclusively to domestic mergers, thus creating a difference in treatment between companies based on whether the merger was domestic or cross-border; the Court found this incompatible with the right of establishment.

In particular, the Court stated that:
(a) «harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment laid down by Articles 43 EC and 48 EC» (now Articles 49 and 54 TFEU), which have direct effect;
(b) «the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators». These measures include cross-border mergers.

An open-minded approach is also to be found in other judgments since the *Daily Mail*, which, however, concern the exercise of the secondary right of establishment: in *Centros* (1999)[23] and *Inspire Art* (2003)[24] the Court of Justice stated that the choice of setting up a company in a certain Member State for the sole purpose of benefiting from the more advantageous legislation of that State does not in itself constitute an abuse of the right of establishment, even if the company carries out its entire activity in a different Member State[25].

The Court specified that this principle is also applicable when the choice of the State offering the more favourable law does not take place at the time of incorporation of the company, but is realised at a later stage by transferring the registered office through a cross-border conversion[26], or a cross-border merger or division[27].
In 2008, in the *Cartesio case*[28], the Court returned to rule on a case about an exit barrier to the exercise of the primary right of establishment (never addressed since *Daily Mail*).

The case arose from a transfer of a company's real seat from one Member State to another, without a change in the applicable law, i.e. without a conversion of the entity. A company incorporated in Hungary intended to transfer its principal place of business to Italy, retaining its status as a company governed by Hungarian law, but the Hungarian authorities rejected the application for registration in the commercial register of the change of the company's place of business because, under Hungarian law, a company incorporated in Hungary could not transfer its activity abroad and continue to be governed by Hungarian legislation.

The Court, in part, upheld *Daily Mail*, stating that «as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation».

[22]ECJ, 13 December 2005, Case C-411/03, *Sevic Systems Aktiengesellschaft v. Amtsgericht Neuwied*.
[23]ECJ, 9 March 1999, Case C-212/97, *Centros Ltd. v. Ehvers-ogSelskabsstyrelsen*.
[24]ECJ, 30 September 2003, Case C-167/01, *Kamer von Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*.
[25]The Court of Justice has thus legitimised the phenomenon of so-called *pseudo-foreign corporations*, with potentially important repercussions on the phenomenon of competition between jurisdictions. Exceptions are only cases of fraud or abuse (e.g. the circumvention of mandatory tax rules), to be determined on a case-by-case basis (ECJ, *Inspire Art*, cited above, and ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes v. Commission of Inland Revenue*), it being understood that «the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud» (ECJ, 25 October 2017, Case C-106/16, *Polbud - Wykonawstwo sp. z o.o.* in liquidation, paragraph 63).
[26]As noted in the *Polbud* (paragraph 38), «a situation in which a company formed in accordance with the legislation of one Member State wants to convert into a company under the law of another Member State [...] falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State».
[27]According to the Court of Justice, «cross-border merger operations, like other company conversions operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment» (ECJ, *Sevic*, cited above, paragraph 19); the same applies to cross-border divisions, as can be seen from the recitals to and the rules of Directive (EU) 2019/2121.
[28]ECJ, 16 December 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató bt*.

At the same time, the Court took the opportunity to state – albeit incidentally – that a Member State may not require a company to wind up in its State of origin and then reincorporate in the State of destination, if the company intends to transfer its seat to another State with a change of applicable national law and a conversion into a company form governed by the law of the host Member State (to the extent that it is permitted under that law to do so), i.e. in the case of a cross-border conversion (see paragraphs 111 and 112).

The first real case concerning a cross-border conversion was addressed by the Court of Justice a few years later in *Vale* (2012)[29]. The Hungarian authorities had rejected an application for registration in the commercial register by a company incorporated under Italian law that had decided to transfer both its place of business and its registered office to Hungary, converting into a company governed by Hungarian law (entry barrier). However, the Hungarian legislation covered only internal conversions and not also cross-border ones; this resulted in an unjustified difference in treatment between companies depending on the nature, internal or cross-border, of the operation to be carried out. The Court of Justice therefore found contrary to the right of establishment a national law which, like the Hungarian law, «enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company» (paragraph 63).

Another cross-border conversion case was addressed in *Polbud* (2017)[30]. The Polish authorities had rejected an application to remove a Polish company from the commercial register for failure to produce documentation on the liquidation process (exit barrier). The company, which would keep its principal place of business in Poland, intended to convert into a company under Luxembourg law while retaining its legal personality, i.e. without having to be wound up beforehand.

The Court of Justice ruled that national laws requiring the prior liquidation of a company before transferring its registered office to another Member State are incompatible with the right of establishment. It also clarified that the freedom of establishment includes the right for a company incorporated under the law of a Member State to convert – in accordance with the conditions laid down by the destination State – into a company governed by the law of another Member State, even if that company keeps its real seat in the State of origin (thus supplementing what had already been stated in *Cartesio*).

More recently, a notable development regarding the right of establishment for companies is the *Edil Work* judgment (2024)[31]. The Court of Justice found that an Italian private international law provision (art. 25 l. n. 218/1995) was incompatible with the freedom of establishment. The provision requires the application of Italian law to companies incorporated abroad if their central administration or principal place of business is located in Italy. The case involved an Italian company that, after converting into a Luxembourg entity, continued to conduct all its activities in Italy; a dispute subsequently arose over the applicability of Italian law to company's management decisions.

The Court ruled that «articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides generally for its national law to apply to the acts of management of a company established in another Member State but carrying on the main part

[29] ECJ, 12 July 2012, case C-378/10, *Vale Építési kft.*
[30] ECJ, *Polbud*, cited above.
[31] ECJ, 25 April 2024, Case C-276/22, *Edil Work 2 S.r.l. and S.T. S.r.l v STE S.a.r.l. See* N. DE LUCA, *Applicazione del diritto italiano alle società esterovestite: il no della Corte di Giustizia. Prime riflessioni sul caso del Castello di Tor Crescenza, in Foro it. 5/2024, IV, p. 235-244; G. DEMONTIS, Trasferimento della sede sociale all'estero, legge applicabile e libertà di stabilimento: la Corte di giustizia si pronuncia sull'articolo 25 l. n. 218/95; in Dir. comm. int. 3/2024,* p. 778-796; F.M. MUCCIARELLI, *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, in Giur. Comm. 5/2024, II, p. 936-942. Before the judgment of the Court, the case had already been commented on by L. BOGGIO, Trasformazioni transfrontaliere e lex societatis nel prisma della libertà di stabilimento, in Giur. it.* 2022, p. 2153-2159; F.M. MUCCIARELLI, *Il diritto societario italiano e le società estere con oggetto nel territorio nazionale, in Giur. Comm. 1/2023, II*, p. 65-71; P. TULLIO, *Libertà di stabilimento e legge applicabile alle società nell'Unione europea, in Luiss Law Review 2/2022*, p. 73-96.

of its activities in the first Member State». In particular, the Italian provision could require companies to comply simultaneously with both domestic and foreign laws, thereby making the right of establishment «less attractive» and constituting an obstacle to its exercise.

The *Edil Work* case then provided the Court with an opportunity to reaffirm that – as previously stated in *Centros*, I*nspire Art and Polbud* – «the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favorable legislation does not, in itself, constitute abuse». Additionally, building on its ruling in *Inspire Art*, the Court clarified that Member States cannot apply domestic rules not only on incorporations, contributions, and capital to foreign companies, but also on the management of such companies (unless it is demonstrated, through a case-by-case assessment, that these rules satisfy the *Gebhard* test).

In doing so, the Court has further reinforced its ongoing trend of progressively endorsing a broader recognition of the freedom of establishment.

IV. The evolution of EU legislation: new rules on cross-border operations

Similarly to case law, the European legislation has significantly evolved in recent years through the adoption of rules that have facilitated the cross-border mobility of companies.

A first important milestone in this direction was the adoption of the European Company (SE) Regulation in 200132 and the European Cooperative Society (SCE) Regulation in 2003 . These regulations allowed the establishment of SEs and SCEs through cross-border mergers or conversions by companies incorporated under the laws of the Member States.

These regulations were followed by the adoption of the Cross-Border Mergers Directive (Tenth company law directive) , later absorbed by Directive 2017/1132/EU divisions, introduced by Directive 2019/2121/EU[35].

It is important to highlight that these directives have not introduced ex novo the possibility of carrying out cross-border conversions, mergers and divisions, which were already common in practice. Instead, they merely established a harmonized legal framework to prevent legal fragmentation and reduce the uncertainty stemming from the absence of a comprehensive regulation. Such uncertainty could hinder the execution of such operations and, consequently, the exercise of the freedom of establishment (see the fifth recital of recital of Directive 2019/2121/EU). Therefore, these directives are relevant as they facilitate the mobility of companies within the European Union.
Lastly, Directive 2019/2121/EU translated into legislative provisions the principles already affirmed by the Court of Justice on cross-border conversions (see § 3). In particular, it reaffirmed that cross-border conversions[36] entail the registration of the company in the commercial register of the destination Member State and therefore can only take place if they are carried out in accordance with the rules that the destination State lays down on the registration of the companies in its commercial register (Article 86-p EU Directive 2019/2121/EU)[37].

[32]Council Regulation (EC) No. 2157/2001 of 8 October 2001.
[33]Council Regulation (EC) No. 1435/2003 of 22 July 2003.
[34]Directive 2005/56/EC of 26 October 2005.
[35]Directive 2019/2121/EU of 27 November 2019 amending Directive 2017/1132/EU as regards cross-border conversions, mergers and divisions.
[36]A cross-border conversion is defined as «the operation 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 [...] and transfers at least its registered office to the destination Member State, while retaining its legal personality (Article *86b* Directive 2019/2121/EU).
[37]In the same vein, it is also worth mentioning recital 44 of the directive, according to which the carrying out of a cross-border conversion «should not lead to the circumvention of the requirements for incorporation in the Member State in which the company is to be registered after that cross-border operation».

V. Conclusion

It is by now well established that, «in the absence of harmonisation of EU law, the definition of the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 TFEU, within the powers of each Member State, that article having placed on the same footing the registered office, the central administration and the principal place of business of a company or firm as such connecting factors»[38].

Starting from this interpretation of Article 54 TFEU, on the one hand the Court of Justice stated that each Member State has the power to define both the connecting factor required for a company to be regarded as incorporated in accordance with its national legislation and the conditions necessary for it to continue to retain that status[40]. This option – the Court further specified – includes the possibility for a Member State not to permit a company governed by its law to retain that status when the company intends to transfer its real seat to another State, thereby breaking the connecting factor required by the law of the State of incorporation[41].

On the other hand, since *Überseering*, the Court of Justice has placed a duty on Member States to recognise companies validly incorporated under the law of other Member States. This implies that the host Member State must refrain from applying its own rules of incorporation and attribution of legal capacity (whatever they may be) to the foreign company, because the question of the lawful incorporation of the entity falls within the exclusive jurisdiction of the company's home State.

In other words, each Member State is free to apply its own connecting factor (including that based on the real seat approach) to domestic companies only, and not to foreign companies because the latter do not fall in its jurisdiction.

Thus, the principle stated in *Daily Mail* and reiterated in *Cartesio*, that the home Member State may make the transfer of the seat conditional on the prior winding-up of the company, is still fully valid and not outdated[42]. As a consequence, a Member State is, in fact, free to prevent the exercise of the right of the establishment by companies (at least in part).

In addition, according to the Court of Justice (*Polbud*) and Directive 2019/2121/EU, cross-border conversions may only take place if the conditions dictated by the State of destination are met (see § 4).

For these reasons, the exercise of the right of establishment of companies may still face barriers. This raises the question of whether the introduction of harmonised legislation on the cross-border transfer of company seats in Europe might be appropriate, as it could further reduce legal uncertainties and the costs associated with cross-border company mobility.

[38]See *Polbud*, cited above, paragraph 34, confirming the validity of a principle that the Court of Justice had already stated on previous occasions.
[39]ECJ, *Cartesio*, cited above, paragraph 110; ECJ, National Grid Indus, cited above, paragraph 27; ECJ, Vale, cited above, paragraph 29; ECJ, *Polbud*, cited above, paragraph 43.
[40]ECJ, *Cartesio*, cited above, paragraph 110.
[41]Member States following the real seat approach will generally prevent the preservation of the status of company subject to the legislation of the home State, when the transfer of the real seat by the company removes the necessary coincidence of real seat and registered office required by the law of the State of incorporation (see § 2).
[42]In *Cartesio* (paragraph 107) and *National Grid Indus* (paragraph 27), it is recalled that, in *Überseering* (at paragraph 70), the Court held that «the question whether a company formed in accordance with the legislation of one Member State could transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation and, in certain circumstances, the rules relating to that transfer, [...] are determined by the national law in accordance with which the company had been incorporated. It concluded that a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country». It should also be pointed out that the *Überseering* judgment itself states that, «unlike Daily Mail and General Trust, which concerned relations between a company and the Member State under whose laws it had been incorporated [...] the present case concerns the recognition by one Member State of a company incorporated under the law of another Member State» (paragraph 62).

LUISS

School of Law

ISSN: 2282-4189