European Commission

Study on the Law Applicable to Companies

Final Report

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PREFACE

The four authors herewith present to the European Commission DG Justice the final report in fulfilment of the contract following the 'Open call for tender JUST/2014/JCOO/ PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter'.

The report has four main parts: (i) a statistical data collection examining how far, in the EU, companies operate in some form in Member States different from the Member State in which they have been incorporated; (ii) an empirical survey dealing with the practical problems created by the legal uncertainty for companies caused by the current situation stemming from the potential for conflicts of laws in a context where the substantive laws of the Member States have not been fully harmonised; (iii) a comparative analysis of the conflicts of laws rules applicable to companies, as well as the related rules of substantive law, in the laws of all Member States; and (iv) a normative assessment suggesting possible solutions to the problem, including a possible harmonisation of conflict of laws rules in the area of company law

The abstract and the executive summary that follow the table of contents summarise the main findings of this study. The Annex of the report includes the 28 country reports that form the basis of the comparative part of the study.

We thank the country experts and our research assistants for their excellent work, the members of the steering committee and the survey respondents for their participation, and LSE Enterprise and the European Commission for their support.

We have sought to bring our work up to date to 1 May 2016, but some subsequent developments have been included where necessary or appropriate.

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London, June 2016

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TABLE OF CONTENTS

ABSTRACT

While the case law of the Court of Justice has been supportive of foreign incorporations and cross-border corporate mobility in Europe, many problems still persist in practice. This report analyses these practical problems and the relevant domestic rules, followed by normative recommendations. First, the statistical analysis revealed that corporate mobility is only a partial reality in the EU. Second, an empirical survey of lawyers from all Member States found, *inter alia*, that there is considerable legal uncertainty regarding the subject matter of this report in many of the Member States and that respondents support a possible harmonisation of conflict of laws rules. Third, the comparative part of the report provides a thorough analysis of the conflict of laws rules applicable to companies in all 28 Member States, based upon reports drafted by national correspondents from each Member State. Fourth, in the normative analysis, we recommend harmonisation of the relevant conflict of laws rules in a new 'Rome V Regulation'. This should generally be based on the incorporation theory, but it should also provide tools to protect the public interests of host Member States. The study also provides suggestions for a possible directive on seat transfers.

Bien que la jurisprudence de la Cour de justice soit favorable à la constitution de sociétés à l'étranger et à la mobilité transfrontalière des sociétés en Europe, de nombreux problèmes subsistent en pratique. Le présent rapport analyse ces problèmes ainsi que les règles nationales pertinentes et propose des recommandations législatives. Tout d'abord, l'analyse statistique a révélé que la mobilité des sociétés n'est pas complètement réalisée au sein de l'UE. Ensuite, une étude empirique réalisée auprès d'avocats exerçant dans tous les États membres a permis de constater, entre autres, qu'une insécurité juridique importante affecte le domaine couvert par le présent rapport dans la plupart des États membres, et que les personnes interrogées sont favorables à une harmonisation des règles de conflit de lois. En troisième lieu, la partie comparative du rapport fournit une analyse approfondie des règles de conflit de lois applicables aux sociétés dans l'ensemble des 28 États membres, sur la base de rapports rédigés par les correspondants nationaux de chaque État membre. Enfin, dans l'analyse normative, nous recommandons l'harmonisation des règles de conflit de lois applicables à la matière dans un nouveau « règlement Rome V ». Celui-ci devrait en principe reposer sur la théorie de l'incorporation, mais il devrait aussi offrir des instruments de protection des intérêts publics des États membres d'accueil. L'étude fournit également des suggestions quant à une éventuelle directive sur les transferts de siège.

EXECUTIVE SUMMARY

Introduction

Starting with the landmark decision in *Centros*, the case law of the Court of Justice has been supportive of foreign incorporations and cross-border corporate mobility in Europe, even where little or no economic activity takes place in the Member State of incorporation. However, this has not solved the problems of the applicable law of companies in the EU. All Member States have of course traditionally accepted a certain degree of economic activity by foreign companies in their territory without imposing their own company law rules on such entities as part of their private international law. They differ, however, in their traditional legal responses to foreign companies establishing particular commercial links with their national economies, as based on the following two theories:

The 'incorporation theory' assesses the rules applicable to companies by reference to the law at the place of incorporation, irrespective of the level of intensity of any commercial links between the foreign company and the host state. Conceptually, this acceptance of foreign law encompasses all core aspects of company law (as understood by an incorporation-theory country). Thus, following this approach, a validly constituted foreign corporation moving its headquarters (or any other part of its undertaking) to a jurisdiction will retain its capacity and internal organisation rules. The 'real seat theory', by contrast, aims at determining the jurisdiction the company is most closely connected with. There is no universally accepted way of determining what constitutes the 'closest connection', but corporate headquarters and the place where the most important decisions are made are often used by countries following this approach. Once identified, the connecting factor then typically again applies to all aspects of company law.

This basic dichotomy has been reshaped by the case law of the Court of Justice interpreting the right of establishment of companies incorporated in the EU Member States. In spite of the Court's case law, various nuances and complications persist, for example, about the relationship between the rules of the *lex societatis* and other areas of law (insolvency law, tort law etc) as well as the possibility of companies to transfer their seat. The following report addresses these issues in detail. It contains four main parts: a statistical data collection, an empirical survey, a comparative analysis, and a normative assessment suggesting possible solutions to the problem.

Statistical data collection

Companies that have their 'real seat' in a Member State different from the state of incorporation have, in the past, given rise to controversial legal questions and attempts to restrict their activities on the part of the host state. However, previous research on this topic is limited in at least two respects: it has been focussed on the analysis of foreign-based companies in the UK and it has mainly been concerned with differences in the costs of incorporation.

The statistical data collected and analysed for this report attempts to fill these gaps:

First, in the descriptive statistics, based on data from all Member States, we identified the UK as the most popular target destination. To a lesser extent, foreign incorporations also take place in other Member States, in particular in Central and Eastern Europe, with Estonia, Romania and Slovakia being popular target destinations. However, the network analysis of these data also showed that foreign incorporations typically happen between neighbouring countries with further linguistic, social and economic similarities; thus, the effect of the freedom of establishment on the mobility of companies *across all* Member States is still rather limited.

Second, the time series analysis of new incorporations in the UK and Slovakia from 1990 to 2015 found that the main changes happened after 2000, with many of them in the UK in the 2010s and in Slovakia in the mid-2000s, and that most changes are characterised by an increase in foreign incorporations. Thus, for the UK, all of those changes occurred a number of years after the case law of the Court of Justice liberalised the freedom of establishment of companies. The data from Slovakia show strong change points in or around the Slovakian accession to the EU in 2004. But here too it is difficult to relate this finding to the case law as this positive effect may also be due to other factors that have increased cross-border cooperation and business activity with EU enlargement.

Third, the regression analysis suggests that decisions about domestic or foreign incorporations are not merely a result of the differences in substantive company law. Rather, we found that private international law may also play some role: countries that have a clear-cut version of the 'incorporation theory' seem to benefit in this market for incorporations, as compared to companies that have retained elements of the 'real seat theory'. We also found that the extent to which private international law differ between a given country pair is significantly and negatively related to the foreign incorporations.

Fourth, it is therefore possible to draw the following policy implications from this analysis: the results show that the case law of the Court of Justice has not made all differences in the conflicts of laws rules applicable to companies obsolete. The significant negative effect of the differences between those rules may speak in favour of harmonisation in this area of private international law. The significant relationship between the 'pureness' of the incorporation theory and the use of a Member State's companies by foreign incorporators can also provide an indication about the possible direction of any harmonisation that aims to facilitate corporate mobility in Europe.

Empirical survey

The case law of the Court of Justice and recent law reforms in some Member States have liberalised the choice of the place of incorporation. Effective corporate mobility is, however, not only a matter of the 'law in the books' but also the 'law in practice'. The empirical chapter of this report presents the results of a survey of lawyers conducted in September 2015. The responses were evaluated with quantitative methods, also examining whether there are significant differences between groups of respondents and correlations between answers to specific questions. In addition, qualitative responses of the free-text comments were used to contextualise the results.

The main finding is that there are significant practical obstacles to corporate mobility in Europe. This shows in many of the survey answers and holds true for both the aggregate level of the responses and the analyses of the responses for particular groups of respondents. It also correlates with the view that supports European harmonisation in this area of law. More specifically, the following observations can be made:

First, the respondents do not regard the case law of the Court of Justice as a substitute for a possible harmonisation of conflict of laws rules. The support for harmonisation of conflict of laws rules was stronger than for harmonisation of substantive company law, while the latter still received considerable support; at the same time, there was a positive correlation between support for the two, showing that these areas of law are not seen as alternative choices for European harmonisation.

Second, it is noticeable that many of the respondents from the countries that have retained an element of the 'real seat theory' report various practical obstacles. Those problems have also been frequently mentioned in the free text comments, for example, indicating the problems in identifying the place of the 'real seat'.

Third, the analysis of group differences also shows that there is still a divide between the respondents from eastern European countries (or the countries with a lower GDP per capita, or the post-2004 Member States) and those from other countries. The respondents from the former countries are more likely to indicate lack of familiarity with the relevant procedures and to report practical problems in their dealings with domestic courts and commercial registers.

Fourth, as regards specific problems, the respondents often mentioned translation costs and problems of legal uncertainty. The relationship with related areas of law, notably insolvency law, is also seen as crucial; in particular, questions of taxation are a decisive factor for effective corporate mobility.

Fifth, there is also a strong positive correlation between respondents who are sceptical about their domestic law and who support harmonisation of conflict of laws rules. Interestingly, there is also a positive correlation between support for harmonisation of substantive rules and conflict of laws rules: thus, these areas of law are not seen as alternative choices for European harmonisation.

Comparative analysis

The conflict of laws rules applicable to companies follow certain common patterns across Member States, but they are also characterised by a significant degree of legal uncertainty and a fragmentary regulation of issues in the boundary region between the *lex societatis* and other legal areas. Member States have traditionally been divided into 'real seat states' and 'incorporation theory states', although this distinction has lost much of its relevance in light of the case law of the Court of Justice. Nevertheless, we can observe that certain elements of the real seat theory persist in a number of Member States and that the scope of application of these rules and their conformity with the freedom of establishment under the Treaty is often unclear.

The main results of the comparative analysis are as follows:

In virtually all Member States, it is now relatively well established that real seat theory-based private international law rules can no longer be applied to companies incorporated in other EU Member States. However, we find significant variation in how the relevant connecting factor is formulated and whether the conflict rules contain exceptions to this connecting factor where the foreign company has substantial links to the host state. Some countries still formally adhere to the real seat doctrine, but effectively disapply it in practice because of the use of presumptions. Others apply their domestic law to foreign companies at the choice of third parties if the company's real seat is located within the host state. Yet others apply specific provisions of their domestic company law (broadly understood) to foreign companies if idiosyncratic links of differing intensity with the host state are present, for example the location of assets in the host state or the carrying on of business activity.

Since companies are 'creatures of national law', Member States have in principle the authority to establish under which conditions domestic companies can be incorporated. About half of the Member States, usually those that traditionally followed the incorporation theory, provide for substantive company law rules that enable the incorporation of companies irrespective of the location of the company's headquarters, decision-making centre, or business activities, provided the company satisfies the minimal requirement of maintaining a postal address in the Member State of incorporation. The remaining Member States, on the other hand, currently require, or at least may require, companies formed under their company laws to establish and maintain some form of physical presence in that Member States, although the situation is sometimes unclear under national law.

Member States agree on a core area of company law issues that are considered to fall within the scope of the *lex societatis*. These comprise typically the formation and dissolution of the company, the corporate name, legal capacity, capital structure, rights and obligations of members, and internal management matters. Other relevant issues, however, are characterised differently in the Member States. In particular, it is unclear whether corporate group law – if it exists as a separate body of law in the Member States – should be governed by the *lex societatis* of the subsidiary or the parent, whether financial reporting requirements are part of the *lex societatis* or of public law, and how the liability of directors and members of the company directly to third parties should be classified. In addition, the comparative analysis has addressed the classification of obligations entered into before a company is registered in a commercial register. Most jurisdictions treat these matters as part of the *lex societatis* and, therefore, apply the law of the country in which the company seeks registration. Rules on corporate names are also regarded as falling within the scope of the *lex societatis*, but most Member States seek to apply either their own rules on business names or unfair competition laws to foreign-incorporated companies insofar as this is necessary to avoid the use of names that would be misleading or prohibited in the domestic jurisdiction. These requirements of the host state law are then qualified as overriding mandatory provisions.

The boundaries between the *lex societatis* and other areas of law (*lex concursus*, *lex contractus* and *lex delicti*) are generally not well defined in the Member States. Notably, we observe significant variation in how the Member States classify legal strategies that are designed to address risk-shifting in the vicinity of insolvency, for example the responsibility of directors for payments made after insolvency*.* Likewise, it is unclear whether the liability of shareholders for the company's debts (commonly labelled 'veil piercing') is to be characterised as an action in tort or as company law. A particularly contentious issue is the classification of the liability of directors for tortious acts that constitute simultaneously a breach of directors' duties or other provisions of company law or that cause a loss directly to shareholders, creditors, or other third parties. We can observe a tendency in the Member States to apply their own liability rules to the directors and managers of foreign companies, either in situations where the company has established a branch in the host state or the directors caused the insolvency of the company and the company carried on business in the host state.

Regarding cross-border reincorporations, several Member States do not provide for any legislative framework or make such transactions effectively impossible, despite the fact that the most recent case law of the Court of Justice interprets the freedom of establishment as granting companies incorporated in one Member State the right to convert into company types of another Member State if that Member State allows conversions for domestic companies. In this regard, the lack of uniformity among Member States also reveals that the case law is, at least in this respect, not sufficiently precise to facilitate the exercise of freedom of establishment in practice.

It can generally be observed that in most countries there is very little case law interpreting the relevant conflict of laws rules and addressing problematic boundary issues identified in the reports, thus creating a significant degree of legal uncertainty for companies operating in more than one Member State. For instance, several reports state that no judicial decision has been taken regarding the definition of 'seat' under the Brussels I Regulation, the jurisdictional criterion for 'core' company law cases. Significant differences also exist in relation to the application of overriding mandatory provisions of domestic law to foreign-incorporated companies. In summary, the laws of the Member States seem to reveal a striking lack of uniformity or legal certainty as to several crucial aspects. It can be assumed that both the lack of uniformity and legal uncertainty are obstacles to market integration and corporate mobility in the EU, limiting the possibility of companies to make effective use of their freedom of establishment. Furthermore, lack of clarity and uniformity may give rise to opportunistic behaviours of shareholders at the expenses of creditors and other stakeholders.

Normative analysis

The last section of this report suggests a possible harmonisation of conflict-of-laws rules in the area of company law at the EU level in response to the significant legal variation and uncertainty identified in the Member States.

Given the persistent diversity of substantive company laws, conflict of laws rules will continue to play a crucial role. This study supports the idea of common EU conflict of laws rules applicable to companies. In the context of harmonisation of those rules, we do not, however, recommend harmonisation of substantive company law rules requiring companies to establish and maintain a physical presence in the Member State of incorporation.

In the medium/long term, it is suggested that a new regulation on conflict of laws rules applicable to companies and all existing (and forthcoming) 'Rome regulations' should be merged into one regulation. Such a consolidated regulation ('European Code of Private International Law') can best clarify ambiguities about the relationship between the *lex societatis*, the *lex contractus*, the *lex delicti* etc. and may therefore foster the 'unity of the legal order'. It can also provide for a consistent regulation of the common themes (*ordre public*, *renvoi* etc) that have been addressed in the existing Rome regulations and that are discussed in this report.

It is proposed that, as a general rule, a company shall be governed by the law according to which it has been incorporated, and an unincorporated entity by the law according to which it has been formed. It is useful to include in the definition of 'incorporated companies' all companies that acquire (full) legal personality upon entry in the commercial or companies register of the jurisdiction of formation. This provision should be supplemented by a 'residual clause' to the effect that the law of the closest connection shall apply if the law cannot be determined pursuant to the general rule.

The regulation should provide for a non-exhaustive enumeration of the matters governed by the applicable law in order to give guidance as to the future (autonomous) interpretation of the regulation. The enumeration should include the following matters: formation of the company and legal nature/personality; corporate name; capacity of the company and authority of its organs; capital structure; rights and obligations of the members; internal management matters (board structure, the composition of corporate boards, and the involvement of employees, if any); duties of directors and liability for a breach of duty and generally for breaches of company law; voluntary winding up; enforcement of the company's claims by its shareholders; the right of shareholders to challenge resolutions of the corporate organs; and financial reporting requirements.

The scope of the *lex societatis* should extend to the regulation of the consequences of a lack of capacity or power by the company or its organs. However, in order to protect third parties acting in good faith, the regulation should provide that, where the application of the *lex societatis* would lead to the invalidity of an act, this fact cannot be invoked against third parties if (i) a company organ purporting to act on behalf of the company enters into a legal relationship with the third party in a country other than the Member State of incorporation, (ii) the company has an establishment or acts through a personally present representative in the country where the legal relationship is entered into, (iii) according to the law of that country the relevant restriction would not exist, and (iv) the third party did not know and should not have known of the existence of the restrictions pursuant to the *lex societatis*

On the other hand, legal mechanisms designed to address problems arising specifically in insolvency or in the vicinity of insolvency shall not be included in the scope of the *lex societatis*, irrespective of the internal classification of the provision in the Member State's company or insolvency law. Such mechanisms are in particular legal provisions that derogate from common rules of civil and commercial law to protect the interests of the general body of creditors and mitigate risk-shifting in the vicinity of insolvency. However, in contrast to the jurisprudence of the Court of Justice interpreting the scope of the Insolvency Regulation, it would be irrelevant for the functional determination of the boundary region between company law and insolvency law suggested here whether the action in question was in fact brought by the liquidator in the context of insolvency proceedings.

The recitals of the regulation may emphasise that company law mechanisms designed to protect the position of controlled undertakings in a corporate group should be governed by the *lex societatis* of the controlled undertaking (rather than the controlling undertaking) and that other legal mechanisms governing the rights and obligations of group companies follow general principles of private international law. In addition, the recitals may clarify that the general criteria developed for the demarcation of the *lex societatis*, *lex concursus* and *lex loci delicti* determine how different types of legal mechanism imposing liability on the shareholders for the debts of the company shall be classified for purposes of private international law.

The regulation should further stipulate that formal requirements of both acts performed in the establishment of a company and the acts of corporate organs and shareholders shall be governed by the *lex societatis*, provided that the acts as such fall within the scope of the *lex societatis*. Alternatively, compliance with the formal requirements of the law of the Member State where the act was performed shall suffice, provided that the formal requirements in that Member State are functionally equivalent. If the rationale for the required involvement of a notary public includes the expectation that the parties involved receive some form of legal advice regarding the relevant act, the regulation should clarify that acts performed according to the laws of a Member State other than the Member State of incorporation shall only be regarded as equivalent where advice on the applicable law can also be given in the context of the compliance with formalities under the law of the Member State where the act was performed.

Notwithstanding a foreign *lex societatis*, Member States should be allowed to apply the overriding mandatory provisions of the forum or of a state where the company carries out relevant activities. Such mandatory provisions may be, in particular, provisions regulating the use of corporate names to avoid the creation of a misleading impression and rules on the eligibility and disqualification of directors.

Finally, due to persisting significant legal uncertainty as regards cross-border reincorporations, the report suggests that a directive of substantive company law should be adopted to provide for harmonised rules and procedures allowing companies created under the law of a Member State to convert into a company governed by the law of another Member State. Such reincorporations shall not result in the winding up of the company or in the creation of a new legal person. The Directive should also harmonise procedures for implementing cross-border reincorporations and provide minimum harmonisation of the rules on creditor protection, with the aim of avoiding opportunistic reincorporations at the expenses of creditors and other stakeholders.

RÉSUMÉ

Introduction

Depuis l'arrêt de principe rendu dans l'affaire *Centros*, la jurisprudence de la Cour de justice a été favorable aux constitutions de sociétés étrangères et à la mobilité transfrontalière des entreprises en Europe, même lorsque l'activité économique exercée dans l'État membre de constitution était faible ou nulle. Cependant, les problèmes relatifs à la loi applicable aux sociétés dans l'UE n'ont pas été résolus. Tous les États membres ont bien sûr généralement accepté que des sociétés étrangères exercent une activité économique sur leur territoire, sans imposer leurs propres règles de droit des sociétés à ces entités au titre de leur droit international privé. Toutefois, ils apportent des réponses juridiques différentes aux questions soulevées par des sociétés de droit étranger qui établissent des liens commerciaux spécifiques avec leur économie nationale, sur la base des deux théories suivantes.

D'une part, la « théorie de l'incorporation » rattache les règles applicables aux à la loi du lieu de constitution, indépendamment de l'intensité des liens commerciaux existants entre la société étrangère et l'État d'accueil. En théorie, cette reconnaissance de la loi étrangère englobe tous les aspects fondamentaux du droit des sociétés (tel qu'entendu par le pays ayant adopté la théorie de l'incorporation). Ainsi, suivant cette approche, une société étrangère valablement constituée transférant son siège (ou toute autre partie de son entreprise) dans un autre pays conservera sa capacité et ses règles d'organisation interne. D'autre part, la « théorie du siège réel » vise à identifier le territoire avec lequel la société entretient les liens les plus étroits. Il n'existe aucune méthode universellement admise permettant de définir le « lien le plus étroit », mais le siège social et le lieu d'adoption des décisions les plus importantes sont souvent utilisés par les pays qui retiennent cette approche. Une fois identifié, le critère de rattachement s'applique généralement à nouveau à tous les aspects couverts par le droit des sociétés.

Cette distinction fondamentale a été affectée par l'interprétation, fournie par la jurisprudence de la Cour de justice, de la liberté d'établissement des sociétés constituées dans les États membres de l'UE. En dépit de la jurisprudence de la Cour, des nuances et complications subsistent, par exemple, en matière de relation entre les règles de la *lex societatis* et d'autres domaines du droit (droit des faillites, droit de la responsabilité civile, etc.), ainsi qu'en ce qui concerne la possibilité pour les sociétés de transférer leur siège. Le rapport ci-après aborde ces questions de manière détaillée. Il se compose de quatre parties principales : collecte de données statistiques, enquête empirique, analyse comparative et évaluation normative suggérant des solutions possibles à ce problème.

Collecte de données statistiques

Les sociétés ayant leur « siège réel » dans un État membre autre que l'État de leur siège social ont, dans le passé, donné lieu à des questions juridiques controversées et à des tentatives de restriction de leurs activités par l'État d'accueil. Cependant, les études antérieures portant sur ce sujet sont limitées pour deux raisons au moins : elles sont axées sur l'analyse des sociétés étrangères présentes au Royaume-Uni et se sont essentiellement préoccupées des différences constatées dans les frais de constitution.

Les données statistiques recueillies et analysées dans le présent rapport visent à combler ces lacunes.

En premier lieu, dans les statistiques descriptives, reposant sur des données provenant de tous les États membres, nous avons identifié le Royaume-Uni comme la destination favorite. Dans une moindre mesure, les constitutions de sociétés à partir de l'étranger (ou sociétés étrangères) ont également lieu dans d'autres États membres situés notamment en Europe centrale et orientale, tels que l'Estonie, la Roumanie et la Slovaquie, qui sont les destinations cibles les plus recherchées. Cependant, l'analyse en réseau de ces données a également montré que les constitutions de sociétés étrangères se produisent généralement entre pays voisins présentant des similitudes linguistiques, sociales et économiques ; aussi, l'effet de la liberté d'établissement sur la mobilité des entreprises *dans l'ensemble* des États membres est encore assez limité.

En deuxième lieu, l'analyse chronologique des nouvelles constitutions de sociétés au Royaume-Uni et en Slovaquie entre 1990 et 2015 a révélé que les principaux changements sont intervenus après 2000, dont la plupart au Royaume-Uni dans les années 2010, et en Slovaquie au milieu des années 2000, et que la plupart des changements sont caractérisés par une augmentation des constitutions de sociétés étrangères. Ainsi, pour le Royaume-Uni, tous ces changements sont intervenus nombre d'années après l'assouplissement, par la jurisprudence de la Cour de justice, de la liberté d'établissement des entreprises. Les données venant de Slovaquie indiquent des évolutions fortes vers 2004, date d'adhésion de ce pays à l'UE. Dans ce cas également, il est difficile de rattacher cette constatation à la jurisprudence, dans la mesure où cet effet positif peut également découler d'autres facteurs qui ont conduit à une augmentation de la coopération transfrontalière et de l'activité commerciale du fait de l'élargissement de l'UE.

En troisième lieu, l'analyse des régressions suggère que les décisions concernant les constitutions de sociétés nationales ou étrangères ne résultent pas simplement des différences existant dans le droit matériel des sociétés. Au contraire, nous avons constaté que le droit international privé peut également jouer un rôle : les pays qui ont une version claire de la « théorie de l'incorporation » semblent tirer bénéfice de ce marché des constitutions de sociétés, par rapport aux Etats membres qui ont conservé des éléments de la « théorie du siège réel ». Nous avons également constaté que les constitutions de sociétés étrangères a des répercussions importantes et négatives sur variation du droit international privé entre deux pays donnés.

En quatrième lieu, il est donc possible de tirer de cette analyse les conséquences suivantes en termes de politique législative : les résultats montrent que la jurisprudence de la Cour de justice n'a pas rendu obsolètes toutes les différences existant dans les règles de conflit de lois applicables aux sociétés. L'effet négatif significatif des différences entre ces règles pourrait militer en faveur de l'harmonisation, dans ce domaine, du droit international privé. Le lien significatif existant entre la « pureté » de la théorie de l'incorporation et l'utilisation des sociétés d'un État membre par des fondateurs étrangers peut également fournir une indication quant à l'orientation possible d'une harmonisation visant à faciliter la mobilité des sociétés en Europe.

Enquête empirique

La jurisprudence de la Cour de justice et les réformes législatives récentes intervenues dans certains États membres ont libéralisé le choix du lieu de constitution. Cependant, la mise en œuvre concrète de la mobilité des sociétés constitue une question juridique qui ne peut pas être abordée d'une manière uniquement théorique. La partie empirique du rapport présente les résultats d'une étude réalisée auprès d'avocats en septembre 2015. Les réponses ont été évaluées selon des méthodes quantitatives, en se cherchant également s'il existe des différences significatives entre les groupes de personnes interrogées, ainsi que des corrélations entre les réponses à des questions spécifiques. En outre, les réponses figurant dans les commentaires en texte libre ont été utilisées pour replacer les résultats dans leur contexte.

La principale conclusion est qu'il existe des obstacles concrets considérables à la mobilité des sociétés en Europe. Cela apparaît dans la plupart des réponses au sondage et est confirmé à la fois par les réponses de manière globale et par les analyses des réponses fournies par des groupes particuliers de personnes interrogées. Cela milite également en faveur de l'harmonisation européenne dans ce domaine du droit. Plus précisément, les observations suivantes peuvent être faites :

En premier lieu, les personnes interrogées ne considèrent pas que la jurisprudence de la Cour de justice puisse se substituer à une éventuelle harmonisation des règles de conflit de lois. Le soutien était plus fort pour l'harmonisation des règles de conflit de lois que pour l'harmonisation du droit matériel des sociétés, alors que la dernière a néanmoins reçu un soutien considerable; en meme temps, il y a une correlation positive entre le soutien pour les deux qui montre que ces deux aspects de droit ne sont pas considerés comme des choix alternatifs pour l'harmonisation en Europe.

En deuxième lieu, il convient de remarquer que la plupart des personnes interrogées exercent dans des pays qui ont conservé un élément de la « théorie du siège réel » ont signalé différents obstacles pratiques. Ces problèmes ont également été fréquemment mentionnés dans les commentaires en texte libre, en faisant référence par exemple aux problèmes d'identification du lieu du « siège réel ».

En troisième lieu, l'analyse des différences entre les groupes montre également qu'il existe encore une distinction entre les personnes interrogées exerçant dans les pays d'Europe orientale (ou dans les pays dont le PIB par habitant est le plus faible, ou dans les États devenus membres après 2004) et celles se trouvant dans les autres pays. Les personnes interrogées présentes dans les premiers pays sont davantage susceptibles d'invoquer un manque de familiarité avec les procédures pertinentes et de rendre compte de problèmes pratiques dans leurs relations avec les tribunaux nationaux et les registres du commerce.

En quatrième lieu, en ce qui concerne les problèmes spécifiques, les personnes interrogées ont souvent mentionné les coûts de traduction et les problèmes d'insécurité juridique. La relation avec des domaines connexes du droit, notamment le droit des faillites, est également considérée comme essentielle ; en particulier, les questions de fiscalité sont un facteur décisif afin de permettre une mobilité réelle des sociétés.

En quatrième lieu, il existe une forte corrélation entre les personnes interrogées qui sont perplexes à l'égard de leur droit national et celles qui sont favorables à l'harmonisation des règles de conflit de lois. Fait intéressant, il existe également une corrélation entre le soutien en faveur de l'harmonisation des règles matérielles de droit des sociétés et le soutien à des règles harmonisées de conflit de lois : ainsi, ces branches du droit ne sont pas considérées comme des choix alternatifs dans le cadre d'une harmonisation européenne.

Analyse comparative

Les règles de conflit de lois applicables aux sociétés suivent certaines tendances communes dans les différents États membres, mais sont également caractérisées par un degré élevé d'insécurité juridique et une réglementation fragmentaire des questions juridiques situées à la frontière entre la *lex societatis* et d'autres domaines du droit. Les États membres ont traditionnellement été divisés en « Etats du siège réel » et les « Etats de la théorie de l'incorporation », bien que cette distinction ait perdu beaucoup de son intérêt en raison de la jurisprudence de la Cour de justice. Néanmoins, nous pouvons observer que certains éléments de la théorie du siège réel subsistent dans un certain nombre d'États membres et que le champ d'application de ces règles et de leur conformité au regard de la liberté d'établissement au sens du Traité est souvent imprécis.

Les principaux résultats de l'analyse comparative sont les suivants.

Dans quasiment tous les États membres, il est maintenant relativement bien établi que les règles de droit international privé reposant sur la théorie du siège réel ne peuvent plus être appliquées aux sociétés constituées dans d'autres États membres de l'UE. Cependant, nous constatons des variations significatives dans la façon dont ce facteur de rattachement pertinent est formulé et sur la présence d'exceptions à ce facteur de rattachement dans les règles de conflit, lorsque la société étrangère justifie de liens importants avec l'État d'accueil. Certains pays adhèrent encore formellement à la doctrine du siège réel, mais l'écartent en réalité dans la pratique en recourant à des présomptions. D'autres appliquent leur droit national à des sociétés étrangères en fonction du choix des tiers, si le siège réel de la société est situé dans l'État d'accueil. D'autres États membres appliquent des dispositions spécifiques de leur droit interne des sociétés (entendu au sens large) à des sociétés étrangères si des liens spécifiques d'intensité variable avec l'Etat d'accueil existent, tels que la localisation des biens dans l'État d'accueil ou l'exercice d'une activité commerciale.

Puisque les sociétés sont des « créatures du droit national », les États membres ont, en principe, le pouvoir de fixer les conditions dans lesquelles les sociétés de droit national peuvent être constituées. Environ la moitié des États membres, généralement ceux qui ont suivi traditionnellement la théorie de l'incorporation, prévoient des règles de droit matériel des sociétés qui permettent la constitution de la société, indépendamment de l'emplacement du siège, du centre de décision, ou des activités commerciales de la société, à condition que la société satisfasse l'exigence minimale de disposer d'une adresse postale dans l'État membre de constitution. Les États membres restants, d'autre part, exigent actuellement, ou tout au moins peuvent exiger, que les sociétés constituées en vertu des dispositions correspondantes du droit des sociétés, établissent et conservent une certaine forme de présence physique dans ces États membres, bien que la situation soit parfois incertaine en vertu du droit national.

Les États membres sont en accord sur les points essentiels qui relèvent du champ d'application de la *lex societatis*. Celles-ci comprennent généralement la formation et la dissolution de la société, la dénomination sociale, la capacité juridique, la structure du capital, les droits et obligations des associés et les questions de gestion interne. Cependant, d'autres points pertinents sont traités différemment selon les États membres. En particulier, il n'est pas clairement établi si le droit des groupes de sociétés – s'il existe en tant que corps de règles juridiques distinct dans les États membres - doit être régi par la *lex societatis* de la filiale ou celui de la société mère, si les exigences en matière d'information financière relèvent de la *lex societatis* ou du droit public, et de quelle façon la responsabilité des administrateurs et des associés à l'égard des tiers doit être classifiée. En outre, l'analyse comparative a abordé la question de la qualification des obligations contractées avant l'immatriculation de la société au registre du commerce. La plupart des pays considèrent que cette question relève de la *lex societatis* et, par conséquent, appliquent la loi du pays dans lequel l'immatriculation de la société est demandée. Les règles en matière de dénomination sociale sont également réputées rentrer dans le champ d'application de la *lex societatis*, mais la plupart des États membres cherchent à appliquer aux sociétés constituées à l'étranger soit leurs propres règles en matière de dénomination sociale, soit celles relatives à la concurrence déloyale, dans la mesure où cela permet d'éviter l'utilisation de dénominations qui seraient trompeuses ou interdites dans l'ordre juridique national. Ces exigences légales de l'État d'accueil sont alors qualifiées de lois de police.

La frontière entre la *lex societatis* et d'autres domaines du droit (*lex concursus*, *lex contractus* et *lex delicti*) est généralement mal définie dans les États membres. Nous observons notamment des divergences significatives dans la façon dont les États membres classifient les stratégies juridiques élaborées afin de gérer le transfert de risque lorsque la société se trouve proche de l'état d'insolvabilité, notamment la responsabilité des administrateurs au titre des paiements effectués après la déclaration d'insolvabilité. De même, il est difficile de déterminer si la responsabilité des actionnaires au titre des dettes de la société (généralement appelée « confusion de patrimoines ») doit être considérée comme une action en responsabilité délictuelle ou comme relevant du droit des sociétés. Une question particulièrement complexe porte sur la qualification de la responsabilité des administrateurs au titre des actes fautifs constituant en même temps une violation des obligations des administrateurs ou d'autres dispositions du droit des sociétés, ou causant directement une perte aux actionnaires, aux créanciers ou à d'autres tiers. On constate une tendance des États membres à appliquer leurs propres règles de responsabilité aux administrateurs et aux dirigeants de sociétés de droit étranger, soit lorsque la société a établi une succursale dans l'État d'accueil, soit lorsque les administrateurs ont causé la faillite de la société, et que la société exerçait son activité dans l'État d'accueil.

En ce qui concerne les transferts de sièges internationaux, plusieurs États membres ne prévoient aucun cadre législatif ou rendent en pratique ces opérations impossibles, en dépit du fait que la jurisprudence la plus récente de la Cour de justice interprète la liberté d'établissement dans le sens où elle accorde aux sociétés constituées dans un État membre le droit de se transformer en types de société d'un autre État membre, si ce dernier autorise les transformations des sociétés nationales. À cet égard, le manque d'uniformité entre les États membres révèle également que la jurisprudence, du moins à cet égard, n'est pas suffisamment précise pour permettre, dans la pratique, l'exercice de la liberté d'établissement.

On peut généralement observer que, dans la plupart des pays, il existe très peu de jurisprudence interprétant les règles pertinentes de conflit de lois et traitant des problèmes de frontière identifiés dans les rapports, créant ainsi une insécurité juridique significative pour les sociétés opérant dans plus d'un État membre. Par exemple, plusieurs rapports indiquent qu'aucune décision judiciaire n'a été rendue en ce qui concerne la définition du « siège » en vertu du règlement Bruxelles I, le critère de compétence fondamental en droit des sociétés. Il existe également des différences significatives en ce qui concerne l'application des lois de police du droit national aux sociétés constituées à l'étranger. En résumé, les droits des États membres semblent révéler un manque flagrant d'uniformité ou de sécurité juridique quant à plusieurs aspects fondamentaux. On peut supposer que le manque d'uniformité et d'insécurité juridique constitue des obstacles à l'intégration du marché et à la mobilité des sociétés dans l'UE, ce qui limite la possibilité pour les sociétés de faire un usage effectif de leur liberté d'établissement. En outre, le manque de clarté et d'uniformité peut donner lieu à des comportements opportunistes des actionnaires au détriment des créanciers et des autres personnes dont les intérêts sont concernés.

Analyse normative

La dernière section du rapport suggère une éventuelle harmonisation des règles de conflit de lois en matière de droit des sociétés au niveau de l'UE, en réponse aux divergences et à l'insécurité juridiques importantes constatées dans les États membres.

Étant donné le maintien de différences entre les droits matériels des sociétés, les règles de conflit de lois continueront de jouer un rôle fondamental. La présente étude est favorable à l'idée de règles communes de conflit de lois de l'UE applicables aux sociétés. Dans le contexte de l'harmonisation de ces règles, nous ne recommendons, cependant, pas l'harmonisation des règles matérielles du droit des sociétés obligeant les entreprises à établir et maintenir une présence physique dans l'État membre de constitution.

À moyen et long terme, il est suggéré qu'un nouveau règlement relatif aux règles de conflit de lois applicables aux sociétés et tous les « règlements Rome » existants (et à venir) soient fusionnés en un seul règlement. Un tel règlement consolidé (« code européen de droit international privé ») pourrait dissiper les ambiguïtés affectant la relation entre la *lex societatis*, la *lex contractus*, la *lex delicti*, etc., et pourrait donc favoriser l'unité de l'ordre juridique. Il pourrait également prévoir une réglementation cohérente des questions communes (ordre public, renvoi, etc.) qui ont été abordés dans les règlements Rome existants et qui sont discutés dans le rapport.

Il est proposé qu'une société soit en règle générale régie par la loi en vertu de laquelle elle a été constituée, et une société sans personnalité morale, selon la loi en vertu de laquelle elle a été formée. Il est utile d'inclure dans la définition des « sociétés constituées » toutes les sociétés qui acquièrent une personnalité juridique pleine et entière lors de l'immatriculation au registre du commerce ou des sociétés du pays de formation. Cette disposition devrait être complétée par une « clause résiduelle » afin que la loi du rattachement le plus étroit soit applicable si la loi ne peut être déterminée conformément à la règle générale.

Le règlement devrait prévoir une énumération non exhaustive des questions régies par la loi applicable, afin de fournir des orientations pour l'interprétation (autonome) future du règlement. L'énumération devrait inclure les éléments suivants : constitution de la société et nature/personnalité juridique ; dénomination sociale ; capacité de la société et autorité de ses organes ; structure du capital ; droits et obligations des associés ; questions relatives à la gestion interne (structure du conseil, composition des conseils d'administration, implication des salariés, le cas échéant) ; devoirs des administrateurs et responsabilité en cas de manquement et, plus généralement, en cas de violation du droit des sociétés ; liquidation volontaire ; exécution forcée des demandes de la société par ses actionnaires ; droit des actionnaires de contester les délibérations des organes de la société ; exigences en matière d'information financière.

La portée de la *lex societatis* devrait s'étendre à la réglementation des conséquences d'un manque de capacité ou de pouvoir de représentation de la société ou de ses organes. Toutefois, afin de protéger les tiers agissant de bonne foi, le règlement devrait prévoir que, lorsque l'application de la *lex societatis* entraîne la nullité d'un acte, ce fait n'est pas opposable aux tiers si : (i) un organe de la société prétendant agir au nom de la société conclut une convention avec un tiers dans un pays autre que l'État membre de constitution, (ii) la société a un établissement ou agit par l'intermédiaire d'un représentant présent dans le pays où la convention a été conclue, (iii) en application de la loi de ce pays, la restriction concernée n'existerait pas, et (iv) le tiers n'avait pas et n'aurait pas dû avoir connaissance de l'existence des restrictions en vertu de la *lex societatis*.

D'autre part, les mécanismes juridiques conçus afin de résoudre les problèmes spécifiques survenant en cas d'insolvabilité ou à proximité de celle-ci, ne doivent pas être inclus dans le champ d'application de la *lex societatis*, quelle que soit la qualification interne de la disposition dans le droit des sociétés ou de l'insolvabilité de l'État membre. Ces mécanismes consistent notamment en des dispositions légales dérogeant aux règles ordinaires du droit civil et commercial et destinés à protéger les intérêts de l'ensemble des créanciers et à atténuer le transfert des risques juste avant la déclaration d'insolvabilité. Cependant, contrairement à la jurisprudence de la Cour de justice interprétant la portée du règlement insolvabilité, il est sans intérêt aux fins de la détermination fonctionnelle de la frontière entre le droit des sociétés et le droit de l'insolvabilité ici suggérée, que l'action soit engagée ou non par le liquidateur dans le cadre d'une procédure d'insolvabilité.

Les considérants du règlement pourraient souligner que les mécanismes de droit des sociétés visant à protéger la position des entreprises contrôlées dans un groupe de sociétés, devraient être régis par la *lex societatis* de l'entreprise contrôlée (plutôt que par celle de l'entreprise contrôlante) et que les autres mécanismes juridiques régissant les droits et obligations des sociétés du groupe respectent les principes généraux du droit international privé. En outre, les considérants pourraient préciser que les critères généraux développés pour distinguer la *lex societatis*, de la *lex concursus* et de la *lex loci delicti* déterminent la façon dont les différents types de mécanisme juridique faisant peser une responsabilité sur les actionnaires au titre des dettes de la société, sont qualifiés au regard du droit international privé.

Le règlement devrait en outre prévoir que les exigences de forme applicables aux actes accomplis lors de la constitution d'une société et à ceux des organes et des actionnaires de la société, soient régies par la *lex societatis*, à condition que ces actes en tant que tels rentrent dans le champ d'application de la *lex societatis*. Alternativement, la conformité aux exigences formelles prescrites par la loi de l'État membre où l'acte a été accompli, doit suffire, à condition que les exigences formelles de cet État membre soient équivalentes d'un point de vue fonctionnel. Si la justification de la participation obligatoire d'un notaire fait présumer que les parties concernées reçoivent à cette occasion une assistance juridique concernant l'acte en question, le règlement devra préciser que les actes accomplis en vertu de la loi d'un État membre autre que l'État membre de constitution ne peuvent être considérés comme équivalents qu'uniquement lorsqu'une assistance portant sur la loi applicable peut également être fournie dans le cadre du respect des formalités prévues par la loi de l'État membre où l'acte a été accompli.

Nonobstant toute *lex societatis* étrangère, les États membres devraient être autorisés à appliquer les lois de police du for ou d'un État où la société exerce les activités concernées. Ces dispositions impératives peuvent, en particulier, porter sur l'utilisation des dénominations sociales, afin d'éviter l'instauration d'une impression trompeuse, et sur les conditions de nominations des administrateurs et les interdictions d'exercer.

Enfin, en raison de la persistance d'une insécurité juridique importante en matière de transformations transfrontalières de sociétés, le rapport suggère qu'une directive du droit matériel des sociétés soit adoptée afin de prévoir des règles et des procédures harmonisées permettant aux sociétés créées en vertu de la législation d'un État membre, de se transformer en une société régie par le droit d'un autre État membre. Ces transformations ne doivent pas entraîner la dissolution de la société ni la création d'une personne morale nouvelle. La directive devrait également harmoniser les procédures de transformations transfrontalières de sociétés et assurer une harmonisation minimale des règles relatives à la protection des créanciers, dans le but d'éviter des transferts de sièges opportunistes réalisés au détriment des créanciers et des autres parties concernées.

I. INTRODUCTION TO FIELD OF STUDY

1. Overview and conceptual understanding

Companies are by far the most important form for organising economic activity in the EU. Companies are creature of the legal system, and despite some partial harmonisation on the European level, companies in the EU are still mostly[1] creatures of *national* law. In particular, Member State law, which is still largely unharmonised, determines their legal capacity and governs their internal governance and operation ('*lex societatis'*).

A number of problems arise when companies operate in the context of another legal system. The first question for any legal system is whether it recognises the existence of a foreign company as a legal person on the basis of the foreign *lex societatis*, or whether (and *when*) it applies its own rules to determine the foreign company's status. All Member States have traditionally accepted a certain degree of economic activity by foreign companies in their territory without imposing their own company law rules on them. Member States differ, however, in their (traditional) legal responses to foreign companies establishing *particular* intense links with their territories.

Since company law rules are typically highly interdependent, it will often be desirable that only *one* company law framework, in its entirety, applies to any company. Doing otherwise would often lead to inefficient, unpredictable, and contradictory results.[2] The notion of the *lex societatis* largely follows from this problem and, as will be shown below, all private international law systems in the EU aim at ensuring that a single company law framework governs all aspects of company law, at least in principle.[3]

This is complicated, however, by the fact that Member States differ somewhat in their views of what they consider to form part of company law. As we will show below, there are of course rules that are regarded as forming part of company law in (virtually) all jurisdictions, such as a company's legal capacity or the appointment and authority of directors. However, there are also areas of law and types of rules that are close to the boundary between company law and other area of law, which are considered to belong to company law by some jurisdictions, while others regard them as forming part of another legal area.[4] Such questions arise particularly often near the boundary between company law and insolvency law, but there are also questions considered by some Member States to constitute company law, while others consider them to belong to tort, contract, or public law. Differences between Member States as to the classification of rules as belonging to company law or another area of law raise a number of problems that we will address in detail below.[5]

Even where a particular rule or type of rule is considered to form part of *company law* by both or all Member States involved, the question *which* set of rules apply to a given situation – i.e. domestic company law rules of the host state or foreign law – may be answered differently by different Member States. The answer generally depends on the relevant private international law rules and the connecting factors they use for the area of company law.

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[1] With the exceptions of the European Company ('SE'; see Council Regulation 2157/2001, [2001] OJ L 294/1), the European Economic Interest Grouping ('EEIG'; see Council Regulation 2137/85, [1985] OJ L 199/1) and the European Cooperative Society ('SCE', Council Regulation 1435/2003, [2003] OJ L 207/1).
[2] See C Gerner-Beuerle and EP Schuster, 'The Costs of Separation: Conflicts in Company and Insolvency Law in Europe' (2014) 14 *Journal of Corporate Law Studies* 287.
[3] See below Chapter IV, Section 1.1.
[4] See the discussion in Chapter V, Section 6 below.
[5] See Chapter V, Section 3 below.

2. Real seat v. Incorporation theory

There are two main private international law approaches used by the Member States to resolve the problems of defining the boundary between domestic and foreign law in the area of company law – the incorporation doctrine and the real seat doctrine. As will be shown in detail below, however, no Member State applies either of these doctrines in a pure or unmodified form. This holds true even in relation to third country companies.

Under the incorporation doctrine, the rules applicable to companies are determined by the law at the place of incorporation, irrespective of the commercial links between the foreign company and the host state. Thus, following this approach, a foreign company will be recognised and retain its legal capacity and internal organisation, even where its headquarters or significant parts (or indeed all) of its operations are located or moved to a host state following this approach.

The real seat doctrine, on the other hand, attempts to determine the jurisdiction the company is in fact most closely connected with. While there is no single way of determining what constitutes the 'closest connection', the central administration or headquarters of a company are often used by Member States following this approach, as will be shown below. This resembles the approach taken by most jurisdictions in corporate taxation, where taxation rights are typically asserted based on similar concepts.[6] The applicable law determined using this connecting factor then governs all aspects of company law.

The picture is somewhat more complicated as far as it concerns the relation between the incorporation state and its own companies (i.e. companies that have been formed under its laws). Jurisdictions following the incorporation doctrine tend to also apply their company laws to all domestically incorporated companies, irrespective of their commercial links to that jurisdiction. But this is not necessarily so: private international law rules may distinguish between domestic and foreign companies[7] and substantive company law rules may impose different types of residence requirements, even where private international law is based on the incorporation doctrine.[8] For instance, both cases decided by the European Court of Justice dealing with the relationship between a company and its *home* state (i.e. *Daily Mail*[9] and *Cartesio*[10]) concerned incorporation doctrine states,[11] but in both cases substantive rules of domestic company law (*Cartesio*) or tax law (*Daily Mail*) created a barrier to severing the link between the incorporation state and the company.

Similarly, the European Company Statute[12] effectively follows the incorporation doctrine from a private international law perspective, since European Companies are predominantly governed by rules on public companies of the Member State where their

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[6] See Chapter IV, Section 7.1 and Chapter V, Section 9.2 below; see also CH Panayi, *European Union Corporate Tax Law* (Cambridge: Cambridge University Press 2013) 171-175; P Behrens, 'General principles of residence of companies' in: G Maisto (ed.), *Residence of Companies under Tax Treaties and EC Law* (Amsterdam: IBFD Publications 2009) 5 et seq.
[7] See below Chapter IV, Section 3.
[8] See below Chapter IV, Section 2.
[9] Case 81/87 *The Queen v HM Treasury and Commissioners for Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483.
[10] C- 210/06 *Cartesio Oktato es Szolgaltato bt* [2008] ECR I-9641.
[11] The Hungarian private international and company law rules dealt with by the ECJ in the *Cartesio* case clearly followed the incorporation doctrine; see e.g. V Korom and P Metzinger, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06' (2009) 6 *European Company and Financial Law Review* 125. In *Daily Mail*, the question decided by the Court concerned a tax law rule that had little connection to UK private international law.
[12] Council Regulation 2157/2001 on the Statute for a European company (SE) [2001] OJ L 294/1 (hereinafter the 'SE Regulation').

registered office is situated.[13] At the same time, however, the substantive requirement of locating the 'head office' in the same jurisdiction as the registered office creates a result similar to the real seat doctrine.[14]

Even Member States following the real seat doctrine may permit companies formed under their laws to move their headquarters or central administration abroad without this affecting the continued application of that Member States' company law. This can be the result of either (i) different private international law rules applicable to foreign and domestic companies or (ii) the applicable *renvoi* rules, when foreign law refers back to domestic law.

The fact that Member States apply – or at least historically applied – different rules in order to determine the law applicable to companies can hinder the operation of the internal market, as this divergence may lead to different and often incompatible rules governing the same company. The same company could also be regarded as subject to a particular legal system by one Member States, while another concludes it is a company subject to another legal system, and yet another Member State may consider it not existing as a company at all. Attempts were made to address these problems through a Convention,[15] but these attempts were ultimately unsuccessful.[16] The questions have now, however, to a large extent been addressed in the case law of the Court of Justice.[17]

Problems in this area are linked to the connecting factors used by private international law. In order to discuss the solutions adopted by the Member States, particular attention has to be paid to terminology, as similar terms often have (subtly) different meanings across different jurisdictions. The terms 'registered office' and 'place of incorporation' are often used interchangeably, since all (registered) companies in the EU must have a registered office, and all, or virtually all, Member States require the registered office to be located in the jurisdiction of incorporation. Jurisdictions that adopt a version of the real seat doctrine, on the other hand, tend to use the terms '*seat*' to describe both the registered or official address of the firm *and* the head office or real seat.

3. Case law of the Court of Justice

Of particular significance to the questions addressed by this report is the interpretation of the freedom of establishment by the Court of Justice in a number of core cases concerning companies: *Daily Mail, Centros,*[18] *Überseering,*[19] *Inspire Art,*[20] *SEVIC,*[21] *Cartesio, National Grid Indus*[22] and *VALE*.[23]

In *Daily Mail*, a UK public limited company wanted to transfer its central management and control from the UK to the Netherlands for tax reasons. UK law required Treasury consent for such a transfer. Daily Mail applied for the consent, but this was denied unless Daily Mail paid taxes on (parts of) its capital gains in the UK. This refusal to permit the transfer was subsequently challenged as restriction of the freedom of establishment. In

[13] SE Regulation, article 9 (1)(c). On this topic see W-G Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 *Journal of Corporate Law Studies* 185.
[14] SE Regulation, article 7.
[15] Convention on the Mutual Recognition of Companies and Bodies Corporate (signed on 29 February 1968), Bulletin of the European Communities Supplement No. 2-1969.
[16] See J Rickford, 'Current Developments in European Law on the Restructuring of Companies: An Introduction' (2004) 15 *European Business Law Review* 1225, 1236.
[17] See Section 3, below.
[18] C-212/97 *Centros Ltd v Ehrvervs- og Selskabstyrelsen,* decided 9.3.1999.
[19] C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH*, decided 5.11.2002.
[20] C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*., decided 30.9.2003.
[21] C-411/03 *SEVIC Sytems AG v Amtsgericht Neuwied*, decided 13.12.2005
[22] C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, decided 29.11.2011.
[23] C-210/06 *VALE Építési kft.*, decided 12.7.2012.

addressing the question, the Court treated the relevant UK rule as one of private international law, determining whether Daily Mail could transfer its central management and control to the Netherlands *'while maintaining its legal personality and its status as a UK company',*[24] although UK law did not call into question Daily Mail's existence as a legal entity as a consequence of the (proposed) transfer. The Court held that

> *'articles [49 and 54 TFEU] confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.'*[25]

The *Daily Mail* decision was, however, not univocal. The Court, in particular, added that provisions on freedom of establishment

> *'also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation'.*[26]

This statement seems to imply that restrictions posed by the country of incorporation to companies' 'emigration' fall within the scope of freedom of establishment. Furthermore, the Court stressed that the Treaty's provisions on freedom of establishment do not confer a right to transfer a company's central management or central administration throughout the EU *'while retaining their status as companies incorporated under the legislation of the first Member State'.*[27] This statement seems to leave open the possibility that a company transfers its central management or its central administration into another Member State while not retaining the status of a company governed by the Member State of origin and converting into a company governed by the law of the Member State of 'arrival' (provided that the latter accepts this outcome).[28]

In *Centros*, a company was formed in the UK and intended to carry on business entirely in Denmark. It was clear that the founders' main motivation was to avoid the minimum capital requirements under Danish law.[29] The Danish authorities refused to register a branch of Centros in the commercial register because Centros did not plan to conduct business anywhere except in Denmark. The Court refused this approach, stating that *'a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law'*.[30] It held that Centros was exercising its freedom of establishment, and that the refusal to register was an obstacle to this freedom.[31]

It affirmed that Denmark was '*entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of [the freedoms]'.*[32] However, the mere fact that an incorporator *'chooses to form a company in the Member State whose rules seem to him the least restrictive and set up branches in other Member States'* did not *'in*

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[24] See Daily Mail, para 18.
[25] *Centros*, para 25
[26] *Daily Mail*, para 16.
[27] *Daily Mail,* para 24.
[28] See FM Mucciarelli, 'Company "Emigration" and EC Freedom of Establishment: *Daily Mail* Revisited' (2008) 9 *European Business Organization Law Review* 295.
[29] *Daily Mail*, para 18.
[30] Ibid, para 17.
[31] Ibid, para 22.
[32] Paragraphs 24, 25.

itself, constitute an abuse of the right of establishment',[33] even if Centros intended to operate exclusively in Denmark.

The decision was subsequently confirmed in *Inspire Art*, where a UK company was used to trade exclusively in the Netherlands, again mainly to avoid application of minimum capital requirements. Under Dutch law, such companies were subject to the rules of the 'Law on Formally Foreign Companies',[34] imposing a number of substantive company law rules on foreign-incorporated companies wholly or mainly operating in the Netherlands. The ECJ held that the requirements under Dutch law constituted a restriction of Inspire Art's freedom of establishment, stating that choice of law is 'a right inherent in the exercise of freedom of establishment'.[35]

Überseering was the first case in which the Court directly dealt with a rule of private international law. Überseering, a Dutch private company with real seat in Germany, brought a claim in a German court. The claim was dismissed on the basis that Überseering had its real seat in Germany, and was thus subject to German company law rules. However, as Überseering, naturally, was not incorporated under German law, the German court held that it lacked legal personality and thus capacity to be a claimant. The German Supreme Court referred two questions to the ECJ, asking in essence whether the German real seat theory-based private international law rule was compatible with the Treaty. The Court held that effectively requiring *Überseering* to reincorporate in Germany was an 'outright denial' of its freedom of establishment. The Court distinguished the case from its earlier decision in *Daily Mail*. It explained that the holding in *Daily Mail* applied only to the relationship between the company and the Member State under whose laws it was formed.[36] The Court thus created a 'reserved area' for the Member State under whose laws a company is formed, allowing that Member State to define what can be described as a residence requirement.[37]

In *SEVIC*, a German company applied to a German court to approve a merger with a Luxembourg-incorporated company. The German court refused to register the merger on the ground that the relevant German statute only applied to companies formed under German law. On appeal, the question whether this refusal violated the freedom of establishment was referred to the ECJ. The Court clarified that the freedom of establishment *'covers all measures which permit or even merely facilitate access to another Member State and pursuit of economic activity in that State […] under the same conditions as national operators'.*[38] The general exclusion of foreign companies from participating in mergers was thus a restriction and could not be justified, given its broad application.

In *Cartesio,* a Hungarian limited partnership registered in Hungary and with its head office located in Hungary, sought to move its central administration to Italy, without changing its Hungarian registration and while remaining subject to Hungarian law.[39] It applied to register its new head office in Italy, which was refused by the Hungarian authorities. Hungary is, and was at the time, an incorporation country,[40] but nevertheless required its companies to maintain its real seat within Hungary as a matter of substantive company law. The Court held that '*in the absence of a uniform*

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[33] Paragraph 27.
[34] Wet op Formeel Buitenslandse Vennootschappen.
[35] *Inspire Art*, para 121.
[36] *Überseering*, para 70.
[37] See also below, Chapter V, Section 4.
[38] *Sevic*, para 17.
[39] Hungarian law required central administration and technical registered office to be in the same place and regarded the two as a single concept: see V Korom and P Metzinger, 'Freedom of Establishment for Companies: the ECJ confirms and refines its Daily Mail decision in the Cartesio Case' (2009) 6 *European Company and Financial Law Review* 125, 141-144.
[40] See e.g. Korom and Metzinger, ibid.

Community law definition of […] a single connecting factor determining the national law applicable to a company, the question whether article [49 TFEU] applies, like whether a natural person is a national […] is a preliminary matter which as Community law now stands can only be resolved by applicable national law'. It further held that *'a Member State has the power to define […] the connecting factor required if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment'*. This includes the power *'not to permit a company governed by its law to retain that status if it intends to reorganise itself in another Member State by […] moving its seat'* there, *'thereby breaking the connecting factor required under the national law of the Member State of incorporation'*.[41]

Importantly, however, the Court also stated, albeit *obiter dictum*, that this does not apply to situations where a company intends to reincorporate – i.e. to convert its status and become a company governed by the law of another Member State. Such a reincorporation constitutes an exercise of the freedom of establishment. The Member State of (original) incorporation may not, therefore, restrict reincorporations *'by requiring the winding-up or liquidation of the company'*,[42] provided that the destination Member State permits this conversion. As far as outbound reincorporations are concerned, therefore, Member State laws do not enjoy *'any form of immunity'* from scrutiny under the Treaty principles. In other words, such rules do not fall within the 'reserved area'.

Related to this, *National Grid Indus*[43] addressed the question of exit taxation, holding that Member States cannot create tax obstacles for companies moving their tax residence abroad unless they can justify this restriction.

Finally, in *VALE*, an Italian company intended to *'transfer its seat and its business to Hungary'*, reregistering under Hungarian law as VALE Építési kft. After having been deregistered by the Italian registrar, the company applied for registration with the Hungarian court, stating in its application that VALE Costruzioni Srl was the 'predecessor in law' of VALE Építési kft. The Hungarian court refused the application, because the transaction 'cannot be regarded as a conversion under Hungarian law since national law on conversions applies only to domestic situations'[44], and that the entry of a predecessor is confined to such conversions.[45]

The Court of Justice held that the Member State of incorporation *'unquestionably has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law […] and the connecting factor required if the company is to be able subsequently to maintain that status.'*[46] National law, however, *'cannot escape all review in the light of articles 49 and 54'*,[47] and Member States must provide *'the same possibility'* for conversion to foreign EU companies as they provide to domestic companies.[48] Member States thus must comply with the principles of equivalence and effectiveness, and thus the recording of the status of predecessor in law could not be denied to VALE Costruzioni if it was granted in domestic conversions.

[41] Paragraph 110.
[42] Paragraph 112.
[43] See n 22 above.
[44] Paragraphs 12-15.
[45] Although Hungarian law does in effect provide for a similar mechanism for cross-border mergers.
[46] Paragraph 29, citing both *Daily Mail* and *National Grid*.
[47] Paragraph 45,
[48] Paragraph 41.

4. Summary

A useful way to summarise the case law on the freedom of establishment is to look at the two main ways in which a corporate mobility can be exercised – relocation of a company's real seat and reincorporation in another jurisdiction.

First, a company may simply want to relocate its real seat, however defined, to another 'host' Member State. As the Court made clear in *Centros, Überseering,* and *Inspire Art*, host Member States cannot apply their company law rules to such companies, irrespective of the level of activity in the host and home Member States, unless they can justify this under the *Gebhard* test,[49] requiring restrictive national measures to be applied in a non-discriminatory manner; justified by imperative requirements in the general interest; suitable for securing the attainment of the objective which they pursue; and not go beyond what is necessary in order to attain it.

Second, a company may intend to reincorporate under a foreign Member State law. As the Court made clear in *Cartesio* and *National Grid Indus,* the Member State under whose laws the company has been formed (the state of origin) cannot adopt legislation that would render such a reincorporation less attractive. In particular, that Member State cannot require liquidation, nor adopt restrictive exit taxes, unless these pass the *Gebhard* test (because the exit tax is necessary to preserve the allocation of taxing powers between the Member States and it is proportionate in doing so).

As for the Member State of destination, the EU law constraints in this scenario are somewhat less clear. The desired 'new' incorporation state can certainly require the company to fulfil the general incorporation requirements under its law – including minimum capital and disclosure requirements, etc. In *VALE*, the Court applies *'equivalence and effectiveness principles'*, rather than requiring justification based on *Gebhard*. This means that the destination Member State needs to allow reincorporations, at least where it allows comparable domestic conversions.[50] We will further address the implications of the Court of Justice's case law in chapter V below.

[49] C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165.

[50] All EU company laws must have a mechanism to achieve universal succession as part of their implementation of the Third Company Law Directive (now Directive 2011/35/EU).

II. STATISTICAL DATA COLLECTION

1. Introduction

In the EU, companies enjoy the freedom of establishment that, in principle, should enable them to operate in some form in Member States different from the Member State in which they have been incorporated. But to what extent is this the reality? More specifically, how widespread are companies that have their 'real seat' in a Member State different from the state of incorporation? Such companies have, in the past, given rise to controversial legal questions and attempts to restrict their activities on the part of the host state.[1] However, previous research on this topic is limited in at least two respects: following the ECJ case *Centros*,[2] it has been focussed on the analysis of foreign-based companies in the UK, and it has been mainly concerned with differences in the costs of incorporation, such as the minimum capital requirements.

This chapter aims to fill these gaps. It presents data on all incorporations of foreign businesses in the commercial registers of each Member State today, as well as time series of new incorporations from two Member States for 1990-2015. It also examines the impact of differences in the conflict of laws rules applicable to companies: based on regression analysis, it evaluates whether countries that have a clear-cut version of the 'incorporation theory' benefit in this market for incorporations, as compared to countries which have retained some elements of the 'real seat' theory.

This chapter is structured as follows: Section 2 provides an overview of the previous empirical research on corporate mobility in the EU and explains the data collection of the present study. Section 3 presents descriptive statistics of foreign-based private companies in all Member States today, also employing tools of network analysis. Section 4 evaluates two Member States (UK and Slovakia) in more detail with time series data on new incorporations. The regression analysis in Section 5 turns to the question of whether the country differences can be explained by differences in conflict of laws rules applicable to companies and/or other factors. The concluding Section 6 reflects on the implications of the findings, and the Annex in Section 7 contains further information relating to the data collection.

2. Data collection

2.1 Previous research

The European study on the application of the Cross-Border Mergers Directive explained the problems with collecting statistical data on questions of cross-border company mobility and on cross-border mergers in particular, as follows:

> 'Collecting this data proved extremely challenging, as the information that the national registries keep is partial, and the commercial databases were inconsistent and scarce. Indeed, previous studies on parallel topics encountered the same problems in gathering accurate and quality information'.[3]

The task of collecting data on the number of companies that operate in a Member State different from the one in which they have been incorporated or have their real seat is also a demanding one. To start with, it is therefore helpful to present an overview of the existing empirical research.

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[1] See Chapter I, above.

[2] *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (1999) C-212/97 (where two Danish citizens living in Denmark and only doing business in Denmark incorporated a UK ltd).

[3] *Study on the Application of the Cross-Border Mergers Directive*, prepared by Bech-Bruun and Lexidale for DG MARKT, 2013, at p 962.

Table 1. Overview of empirical research on corporate mobility in the EU[4]

Paper	Topic / countries and time frame		Methodology of data collection	Main empirical findings
Armour (2005)[5]	German businesses incorpora-ting as UK ltds	1999 to 2004	• Identified companies in the Companies House database, which had a largely German-language name and the name was ending with 'Limited' • Limitations: data merely impressionistic, potentially under or over-inclusive	• Surge of 'German' companies incorporating in UK after *Überseering* and *Inspire Art* in 2002 and 2003 respectively
Becht et al. (2008)[6]	Businesses from all Member States (as of 2006) and EEA countries incorporati ng as UK ltds	1997 to 2006	• Data obtained from the FAME database (Bureau van Dijk) • Where FAME data was incomplete, correction factors were applied (based on a comparison between FAME and Companies House databases) • Directors' residence as main criterion (with 50% and 100% thresholds)	• *Centros* ruling associated with large international flows of companies into the UK and from Germany, France, the Netherlands and Norway • Increases in post-*Centros* company migration rates primarily explained by country-specific incorporation costs and minimum capital requirements • ECJ rulings are leading to regulatory competition between EU Member States to provide low-cost company law

[4] In addition, some empirical studies, not discussed here, have analysed the incorporation of businesses as a European Company (SE), see e.g. H Eidenmüller, A Engert and L Hornuf, 'How Does the Market React to the Societas Europaea?' (2010) 11 *European Business Organization Law Review* 35; Study by Ernst & Young on the operation and the impacts of the Statute for a European Company (2009), available at http://ec.europa.eu/internal_market/company/societas-europaea/history/index_en.htm.

[5] J Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition' (2005) 58 *Current Legal Problems* 369.

[6] M Becht, C Mayer and H Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 *Journal of Corporate Finance* 241.

Becht et al (2009)[7]	Registration of branches of UK ltds in Austria, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Poland, Sweden	2006	• Data obtained through field experiments with assistance from country correspondents • Country correspondents reported on their attempts to incorporate and branch back a UK ltd • Information recorded in the experiments includes the number of procedures involved, their cost and duration, as well as any obstacles encountered	• Despite the ECJ rulings, the total cost of 'round trip' *Centros* incorporation differs substantially between Member States • Total cost differences are mainly caused by differences in the translation and certification costs; aside from financial hurdles, national idiosyncrasies may further hinder branching • Eleventh Directive should therefore be revised; endorsement of Commission's Proposals for administrative burden reductions and integration of the national registers
Laamanen et al. (2012)[8]	Relocation of HQs in 17 European countries	1996 to 2006	• News databases by Lexis/Nexis and Reuters; further internet checks • Data mainly capture larger public companies	• Highest gross flow from UK to Switzerland; overall most relocations in Western and Central Europe • Tax reasons and export orientation of firms most significant determinants for relocations
Braun et al. (2013)[9]	Incorporation of private companies in Spain, France, Hungary, Germany, Poland	One year +/- law reform	• Most data collected from the AMADEUS database (Bureau van Dijk); for Germany and Poland, data collected directly from national company registers • Directors' residence as main criterion	• Company law reforms, including reductions in registration costs, not only encourage incorporations but also more generally boost the overall entrepreneurial activity in the countries examined, irrespective of the legal form chosen for a new company

[7] M Becht, L Enriques and VE Korom, 'Centros and the Cost of Branching' (2009) 9 *Journal of Corporate Law Studies* 171. Modified version also in M Becht, L Enriques and VE Korom, 'Centros and the cost of branching', in *Perspectives in Company Law and Financial Regulation* 91 (M Tisen et al., eds., Cambridge: CUP 2009).
[8] T Laamanen, T Simula and S Torstila, 'Cross-Border Relocations of Headquarters in Europe' (2012) 43 *Journal of International Business Studies* 187.
[9] R Braun, H Eidenmüller, A Engert and L Hornuf, 'Does Charter Competition Foster Entrepreneurship? A Difference-in-Difference Approach to European Company Law Reforms' (2013) 51 *Journal of Common Market Studies* 399. Also published in L Hornuf, *Regulatory Competition in European Corporate and Capital Market Law: An Empirical Analysis* (Cambridge: Intersentia 2012).

Muller et al (2013) [10]	Cross-border mobility of SEs and transfers of registered office to Malta	2009 to 2011 and 2007 to 2012	• Regarding mobility of SEs, the European Trade Union Institute's European Company database was used together with the Orbis database (Bureau van Dijk) • Regarding mobility of other companies, national business registers were directly contacted, generally to no avail (exception of Malta); indirect data collection (matching de-registrations with new registrations, Zephyr database used to track cross-border mergers)	• Increase of cross-border seat transfers of SEs (significantly) and transfers of companies' seat to Malta (slightly) • Cross-border mobility of registered offices of companies in Europe not yet achieved; legislative action recommended as administrative costs of implementation would be relatively small, while savings would be substantial
Bech-Brunn & Lexi-dale (2013) [11]	Cross-border mergers in EU	2008 to 2012	• Timing of reincorporation tracked through direct and indirect enquiries (Thomson Knowledge, LexisNexis, Thomson Reuters) • Further information collected from various reports and the European Trade Union Institute	• Increase in cross-border mergers but at a relatively low level; mainly private companies • Companies from Germany and Luxembourg frequently involved in these mergers
Ringe (2013) [12]	German and Austrian businesses incorpora-ting as UK ltds	2004 to 2011	• Data on German and Austrian companies collected from the Companies House via FAME database • *Centros* type companies identified through three classifications: (i) company incorporated in the UK (ii) with at least one German director (iii) where the company shares its registered office with at least 100 other companies (proxy for	• Popular view that the 2008 reforms of German company law have effected a decline in UK letterbox incorporations among German entrepreneurs is unsupported by data as Austrian incorporations in the UK have also decreased • Instead, the decline may be attributed to closing down of loopholes that previously made ltd attractive to

[10] P Muller, S Devnani, R Ladher and P Ramada, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive), Annex II: Economic and Social Effects of the Requested Legislative Instrument - Research paper by London Economics' (Brussels 2013), available at www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET%282013%29494460%28ANN02%29_EN.pdf.
[11] See supra note 3.
[12] WG Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition' (2013) 10 *European Company and Financial Law Review* 230.

			the involvement of an incorporation agency)	entrepreneurs; underestimation of the costs of compliance with disclosure obligations; reputation costs
Sick (2015)[13]	German business with more than 500 employees incorpora-ted in foreign legal form	1995 to 2014	• Combination of primary and secondary data sources, including: Federal Gazette's company reports, previous studies, corporate websites and other corporate databases	• Steady increase of foreign forms used since 2000 • As a result, tensions with the German codetermination system as employees are no longer able to exercise their rights; minimum European standard on codetermination laws recommended
Teich-mann and Knaier (2015)[14]	Austrian businesses incorpo-rating as German GmbHs / UGs	2009 to 2012	• Data was derived from the German Commercial Register by the Bundesanzeiger Verlag • German 'letterbox' companies doing business in Austria were identified through two classifications: (i) in small businesses, shareholder is usually also the managing director (ii) who usually lives where the company does its main business	• To a certain extent, Austrian entrepreneurs appeared to have been swayed by the new German legal form, however the counterfactual could not be established due to limited scope of the study • Incentive to avoid minimum capital (i.e. move from Austria to Germany) rapidly decreases in proportion to the distance from the border between the two countries

Methodologically, this literature suggests different proxies to identify the nationality of a company. It has been observed that the registration of branches is not strictly enforced in some Member States.[15] Therefore, the most promising strategies may proceed indirectly by examining the company's filings in the state of incorporation. One possibility is to use the address of the directors as an indication of the company's real seat. The proxy can be further varied by, for example, classifying a company as formally foreign if all directors live abroad, or if the majority lives abroad.[16] As far as the information is available, it can also be revealing to identify whether the managing director is also a shareholder (or even the sole shareholder).[17]

[13] S Sick, 'Der deutschen Mitbestimmung entzogen: Unternehmen mit ausländischer Rechtsform nehmen zu' *Mitbestimmungsförderung*, Report February 2015, available at www.boeckler.de/pdf/p_mbf_report_2015_8.pdf.
[14] C Teichmann and R Knaier, 'Experiences with the Competition of Regulators - a German Perspective', in AJ Viera González and C Teichmann (eds), *Private Company Law reform in Europe: The Race for Flexibility* 209 (Cizur Menor: Aranzadi, Thomson Reuters 2015).
[15] Becht et al., supra note 6, at 245.
[16] Both definitions were used by Becht et al., ibid, and Braun et al., supra note 9.
[17] As used by Teichmann and Knaier, supra note 14.

Alternatively, one may go further and aim to collect information about companies without any physical connection of the company to the country of incorporation. In order to identify such companies some studies have examined whether the company's registered office was shared with at least 100 other companies – i.e. it having a mere 'letterbox' in the country of incorporation. This is said to work well for the UK where registration agents use the same address for a large number of companies without any business activity in the state of incorporation,[18] while in other countries this strategy is less reliable.

In this respect, a terminological but also substantial clarification has to be made. In the literature, the term 'letterbox companies' is occasionally used for such companies that do business in one country, but are incorporated with only a 'letterbox' in another one.[19] However, frequently, the term 'letterbox companies' is also equated with companies that are mere 'special purpose entities' (also called 'conduit companies'): those too merely have a 'letterbox' in the country of incorporation, but they only hold financial assets and are not involved in any business activity in any country, and their main purpose is to benefit from the tax advantages that can be gained by using 'special purpose entities' as intermediate legal entities.[20] This type of letterbox companies is often associated with companies established in offshore tax havens, for example in the British Virgin Islands,[21] but such regimes also exist in some EU Member States.[22] Those companies are not of core interest to the present study; due to their lack of economic activity, they are unlikely to raise problems of conflict of laws rules applicable to companies resulting from a mismatch between statutory and real seat.

2.2 Strategic considerations of this study

EU law requires the registration of companies in the commercial registers of the Member States[23] and, as of June 2017, those registers will be interconnected at EU level as part of the Business Registers Interconnection System (BRIS).[24] At present, however, the commercial registers do not provide researchers with deep-level access to company data from all Member States. While it is possible to identify the websites of the commercial registers,[25] searching for data about all companies established in the EU presents various practical problems: the websites are usually only available in the official language of the country in question and its search functions are often very limited. Furthermore, deep-level access to the information that is of interest to this study, such as the nationality and addresses of directors, is not available for free but instead is typically charged per access to information on each individual company. It is therefore not feasible to compile a comprehensive dataset of European companies through the websites of the commercial registers.

For the purposes of this project, we also sought direct communication with the national commercial registers. In most Member States it was straightforward to identify the

[18] Ringe, supra note 12, at 247. In addition, Ringe searched whether at least one director was German.
[19] Ringe, ibid; Teichmann and Knaier, supra note 14; KE Sorensen, 'The Fight Against Letterbox Companies in the Internal Market' (2015) 52 *Common Market Law Review* 85.
[20] See, e.g., Eurodad, 'Fifty Shades of Tax Dodging. The EU's role in supporting an unjust global tax system' pp. 18-19 (Brussels: Eurodad 2015), available at http://www.eurodad.org/files/pdf/5630c89596bec.pdf; UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' pp. 189-190 (New York: UN 2015), available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.
[21] As discussed recently following the leaked information from the Panamanian law firm Mossack Fonseca, see e.g. 'Panama Papers: How assets are hidden and taxes dodged' (BBC News, 3 April 2016), available at www.bbc.co.uk/news/business-35943740.
[22] Eurodad, supra note 20, mentions Luxembourg but also Austria, Cyprus, Hungary and Spain.
[23] Directive 2009/101/EC, art. 3.
[24] See Directive 2012/17/EU and the Commission implementing regulation (EU) 2015/884.
[25] List of register are provided at https://e-justice.europa.eu/content_business_registers_in_member_states-106-en.do and http://www.ebr.org/index.php/member-countries/.

general contact email address of the commercial register.[26] We contacted the registers at these email addresses. In addition, in some cases, we used more specific contact details provided by the national correspondents of this project. About half of the registers responded to our inquiry. However, only two of them were able and willing to provide us with relatively comprehensive data about individual companies in their Member States. Some of the other registers provided us with general aggregate data, for example, about the types of companies established in the Member State, sometimes also indicating how many of those have foreign directors, yet, without elaborating on the home countries of these directors. Thus, overall, it had become clear that this strategy did not provide us with comparable and comprehensive information about all, or even a majority, of the Member States.

The most promising path is to make use of the commercial databases provided by Bureau van Dijk (BvD). Some of those databases cover company data for specific countries,[27] but, for our purposes, it is helpful that all of the national databases of European countries are integrated in the general BvD databases Amadeus and Orbis.

The company data available in Amadeus are the European data of the Orbis global dataset, but there are also some differences between those two datasets. Amadeus consists of various subsets of the European company data, for example, Amadeus Managers, Amadeus Owners, Amadeus Auditors etc. and it is possible to download the data from one of those subsets without restrictions in size. By contrast, Orbis only allows the download of a limited amount of firm data (with details depending on the items included). However, overall, it seemed to us to be preferable to use Orbis. The search functions of Orbis offer more choices, in particular since it is possible to search the entire dataset without any restrictions to a particular subset. Moreover, searching for company data from 2014 and 2015, we established that Orbis is more frequently updated since many of these data are not available through Amadeus.

Since Orbis is composed of information from various domestic sources, the completeness of the information varies between countries. For example, for the UK and Ireland, it is based on BvD's Fame database, which contains comprehensive information on over 9 million active and inactive companies registered in the UK and Ireland.[28] For almost all of the other EU Member States, the coverage of the companies included (for the precise information available see the next section) is very good, as we confirmed by way of comparing the number of companies in Orbis and the data provided by the commercial registers as well as previous research.[29] But there are some exceptions. The most notable one concerns the Greek data where many companies are missing. A query to BvD confirmed that their data only cover about 5% of the active businesses in Greece.

A further limitation concerns the information about branches. In order to identify companies having their real seat, however defined, in a Member State different from the state of incorporation, we started our data collection by downloading information on EU-incorporated companies with linked branch data. Our analysis, based on the records of over 1.5 million limited company records, revealed however that the data on registered foreign branches is not linked efficiently to the legal entities in question. This holds true even for those countries with the best data availability, such as the UK and Ireland. The most effective strategy is therefore to focus on the company information available in the country of registration, as the following will explain.

[26] Ibid.
[27] See http://www.bvdinfo.com/en-gb/our-products/company-information/national (subscription required; we accessed BvD via the subscription by the London School of Economics and Political Science).
[28] See https://fame.bvdinfo.com/.
[29] Eg, E Wymeersch, 'Comparative Study of the Company Types in Selected EU States' (2009) *European Company and Financial Law Review* 71 at 73.

2.3 Data collection with Orbis

Private companies are more likely to be interested in foreign incorporations than public ones, for example, due to variations in minimum capital requirements.[30] Therefore, the present analysis focuses on private companies. Orbis has a search function that allows for the search of 'standardised legal forms', but it is more reliable to manually choose the precise types of company for each of the Member States.[31] This leads to a list of 14.7 million private companies incorporated in all Member States today.

Subsequently, we restricted the search to those companies where at least one director or senior manager is from a foreign country. For our purposes it makes sense to exclude someone who runs a business in another Member State but establishes a company in his or her country of nationality. In the regression analysis[32] we are interested in persons who want to incorporate companies in another Member State despite having no special attachment to that country. The situation is different for nationals of that other country: for example, the control variable of a common language speaks against a businessperson from Portugal incorporating a Finnish company, but this is an argument that would not apply if it were a Finnish national who runs his or her own business in Portugal.

This search operation also reduces the number of private companies available to a manageable size of 1.1 million companies. We also had to check to what extent this may exclude relevant information. In total, 63% of the private companies from all Member States provide information about the nationality of their directors and senior managers. For 13 of the 28 Member States, however, less than 50% of the companies include such information. But, generally speaking, for those countries any other information that may be helpful for the purposes of the present research is even less likely to be available in Orbis.[33] Thus, the best that can be done is to use means of extrapolation as far as the data are incomplete,[34] and, in the regression analysis, include control variables for the proportion of companies included in the dataset; here, as will be explained, we will also check for the robustness of any findings by way of excluding the countries where only limited data are available.

In the Orbis search results, we selected a number of fields relevant for the purposes of our research, also considering the proxies suggested by previous research.[35] Thus, for the main parts of the analysis, we downloaded information about (i) the address and contact details of the company, (ii) the number of current directors and managers, their nationality, place of residence and job title, and (iii) the nature of the company's shareholders, namely whether they are also the directors or senior managers of the company and whether they are natural or legal persons. With respect to the Orbis category 'directors and managers', it is not entirely clear which positions Orbis classifies under this heading. For most private companies, the main persons reported here are the executive directors/managers but for some of the bigger private companies it may also include other managers with the authority to act on behalf of the company. We suggest that it is justifiable to consider all of these positions in order to identify the companies of interest in this chapter since they can be indicators of the 'real seat' of a company. For the companies established in the UK, we also filtered the search results so as to only

[30] See the study by Becht et al., supra note 6.
[31] See the list in Section 7, below.
[32] See Section 5, below.
[33] The three exceptions are Belgium, Malta, and the Netherlands where the nationality of directors and managers is less readily available in Orbis than their place of residence.
[34] See Section 3.1 below.
[35] See Section 2.1 above.

include the companies' directors, but the actual findings were very similar – with a correlation of close to 0.99.[36]

Some of the current empirical literature examines not the total number of incorporated companies, but the new incorporations in a particular year.[37] This approach can enable interesting time series evaluations. For the purposes of the present study, we aimed to identify all new foreign incorporations from 1990 to 2015. Using the 'segmentation by year' function provided by Orbis, this can in principle be achieved without downloading all of the data. However, as will be explained in the following, sufficiently long and reliable time series data are only available for few of the Member States.[38]

3. Descriptive statistics of private companies in all Member States today

3.1 Variations in data availability

While Orbis is a valuable resource of international information about companies, any search for specific details has to address its variations in data availability: variations between countries but also those between the relevant information about directors and senior managers (in the following, the term 'managers' will be used to refer to both of these groups).

Table 2. Overview of relevant data as available in Orbis

				For companies with at least one foreign manager:			
				Information available for at least one manager or shareholder about …			Information available for *all* managers about their nationality
	Number of private companies in Orbis	Companies with information about nationality (in %)	Companies with at least one foreign manager	residence of at least one manager	managers being shareholders	shareholders being natural or legal persons	
Austria	175,152	75.26%	14,097	99.51%	100.00%	83.43%	79.73%
Belgium	292,802	6.53%	8,640	99.61%	100.00%	22.99%	49.34%
Bulgaria	500,277	89.39%	12,735	8.18%	100.00%	94.38%	84.49%
Croatia	111,131	8.07%	2,804	53.14%	100.00%	91.30%	48.86%
Cyprus	246,802	24.00%	8,069	99.93%	100.00%	81.71%	36.80%
Czech Rep.	336,325	98.52%	39,200	13.55%	100.00%	93.69%	98.57%
Denmark	208,472	82.42%	6,054	99.54%	100.00%	64.29%	77.42%
Estonia	154,608	20.15%	12,712	9.32%	100.00%	94.56%	66.83%
Finland	261,689	96.84%	21,517	99.11%	100.00%	50.22%	96.56%
France	1,048,007	5.73%	20,797	37.86%	100.00%	43.70%	69.39%
Germany	1,315,368	89.98%	61,737	99.18%	99.99%	86.26%	70.09%
Greece	24,193	65.34%	3,141	86.50%	100.00%	45.65%	65.39%
Hungary	412,160	66.72%	1,354	85.97%	99.93%	76.51%	62.70%
Ireland	109,127	72.89%	13,254	99.95%	100.00%	95.72%	54.69%
Italy	958,941	95.96%	16,029	94.67%	100.00%	87.38%	76.19%
Latvia	158,468	89.22%	15,295	100.00%	100.00%	99.86%	88.46%
Lithuania	84,135	24.88%	2,806	35.71%	100.00%	21.53%	91.45%
Luxembourg	50,243	36.07%	8,406	99.99%	100.00%	97.87%	60.96%
Malta	50,343	23.68%	8,887	99.76%	100.00%	36.77%	51.27%
Netherlands	867,632	6.30%	23,448	60.10%	100.00%	71.98%	54.09%

[36] Correlation of 0.9889 between (i) the 27 observations that count the number of ltds that have a board of directors only consisting of persons from one of the other 27 Member States and (ii) the 27 observations that count the number of ltds where all 'directors and managers' are from one of the other 27 Member States.
[37] E.g., Becht at al., supra note 6; Braun et al., supra note 9.
[38] See Section 4.1, below.

Poland	196,818	64.91%	11,926	43.78%	100.00%	87.53%	84.78%
Portugal	284,659	51.25%	8,634	12.93%	98.99%	99.24%	30.03%
Romania	887,697	98.93%	77,344	98.74%	100.00%	96.99%	99.83%
Slovakia	231,935	62.71%	32,473	14.13%	99.68%	97.50%	88.07%
Slovenia	73,105	19.17%	1,639	84.56%	87.68%	74.56%	55.64%
Spain	1,756,652	26.87%	19,551	36.55%	99.96%	48.89%	59.22%
Sweden	505,813	10.86%	20,020	26.36%	94.83%	57.56%	38.19%
UK	3,464,781	95.42%	622,983	99.99%	100.00%	99.54%	60.47%

The initial columns in Table 2 refer to the information already mentioned in the previous section: the first one shows the total number of private companies as available in Orbis, the second one shows the availability of information about the nationality of managers and the third one indicates the number of companies where at least one manager is a foreign national. This third data column has 1,097,199 companies in total, but as the final four columns show, with some further variation in the level of detail available.

It can be seen that in case of ten Member States, less than 50% of the companies with at least one foreign manager provide information about the residence of at least one manager. In addition, even as far as information is included in the Orbis data of a country, it is often not useful since it does not mention the private address of the manager but simply restates the company's address.[39]

Thus, instead of the residence of managers, the following will be based on their nationality. But, here, as the final column shows, it will also be necessary to consider that there is some variation in the availability of nationality data for *all* managers of a company. In addition, the regression analysis will, *inter alia*, need to control for migration patterns between the Member States.

The categories 'managers being shareholders' and 'shareholders being natural or legal persons' may be relevant since the foreign-incorporated companies that are of interest for this study are typically companies where natural persons are the main shareholders as well as the managers of the company.[40] From Table 2 it can be noted that the information about 'managers being shareholders' is particularly well reported in Orbis; thus, it will be used in the following.

3.2 Foreign-incorporated companies

Table 3 presents an extract of the results. Following on the considerations about possible proxies and data availability (see Table 2), it is based on companies with *all* managers being from one of the other Member States and the majority of those managers being shareholders.

[39] Notably this is the case in the UK.

[40] Such as in *Centros*, supra note 2. By contrast, special purpose entities (see Section 2.1, above) would often be subsidiaries of other companies.

Table 3: Top target countries of businesses incorporated in other Member States

Companies with all managers from one other Member State and majority of those being shareholders as reported in Orbis		As previous column but based on an estimation of all companies		As previous column but based on an estimation that excludes companies established by residents	
UK	156,087	UK	270,487	UK	227,064
Romania	31,646	Estonia	34,090	Estonia	33,524
Slovakia	16,072	Romania	32,045	Romania	30,123
Czech Republic	9,967	France	29,258	France	27,029
Germany	9,832	Slovakia	29,195	Slovakia	26,600
All Member States	*257,256*	*All Member States:*	*499,183*	*All Member States:*	*420,429*

The first column is based on the raw data as available in Orbis and reports the 'top five' target countries and the total for all Member States. But, as apparent from Table 2, the descriptive value of these figures is limited due to the discrepancies in the availability of information for each Member State. Thus, for the purposes of the second column, the target data have been extrapolated so as to estimate the total number of those companies across Member States.

The third column considers that some of the data about incorporations by foreigners may be due to those foreigners living in other Member States. Thus, based on migration data,[41] it has been estimated how many of the companies have been established by foreigners who are resident in the country of the register, a figure then deducted from the number in the second column. In order to check the robustness of this operation, these figures were also compared with those from the commercial registers that provide the most complete coverage of both nationality and residence, and where the latter address seems to refer to the private addresses of the directors.[42] Despite some variation in detail, the aggregate numbers for the two data lines are then very similar.[43]

In substance, it follows from Table 3 that the UK is by far the most popular target country, accounting for 60% of the companies in the raw data and 52% in the two versions of the adjusted data (columns 2 and 3). In all versions of the ranking, it is then followed by three Central and Eastern European (CEE) countries as well as Germany/France. Comparing the total numbers in the second and third column, it can be seen that about 15% of the foreign incorporations are due to foreign EU citizens in the country in question.

The popularity of some CEE countries as target countries for companies is an interesting but not implausible finding. After the fall of communism, the business laws of the CEE countries have been going through various phases of reform, thereby increasing the potential of some of them to attract foreign incorporations. An internet search also

[41] See Section 5.2, below.
[42] Assumed where there is a correlation of more than 0.95 between the immigration-adjusted nationality data and the residence data.
[43] Based on data for Denmark, Germany, Latvia, Poland and Romania, the total difference drops from 17.73% to 2.84% (while the absolute difference for each observation drops from 22.26% to 21.25%).

confirms that there are a number of web sites that promote incorporation of businesses in Estonia, Romania and Slovakia.[44]

Moreover, it is likely that the situation in the CEE countries is not only about matters of company law, but is also related to other areas of law such as favourable tax and labour laws.[45] For example, we may think about the situation of a Finnish businesswoman who registers a private company in Estonia and rents an office there, but keeps her own residence in Finland from where she manages the company.[46] Such a scenario is therefore different from the sub-category where the company has no physical connection to the country of incorporation.[47] However, such companies are also of interest to our present purposes since, for example, the Finnish businesswoman could also have incorporated the company in Finland while merely renting an office in Estonia. The question of how far the place of incorporation is a deliberate choice – and therefore the impact of conflict of law rules related to the freedom of incorporation – is therefore also a relevant one in this scenario.

3.3 Network presentation and clusters

To get a fuller picture of the relationship between origin and target countries, it is necessary to consider the information for all countries, namely the matrix of each pair of possible countries which leads to 28 x 27 = 756 observations. This information can be presented as a network.

[44] See, eg, http://www.estoniancompanyregistration.com/, http://www.companyincorporationestonia.com/, http://www.romania-company.com/, http://www.theromanianclub.com/, http://www.slovenskespolocnosti.sk/en, http://zugimpex.com/slovakia-company.html

[45] For corporate tax law see also Section 5.2, below.

[46] Another example might be that of an Italian businessman who incorporates a new company in Romania in order to relocate part of its production into this latter country. Although the Italian businessman is the sole shareholder and director of the Romanian company, he just spends few days a week in Romania, thanks to cheap flight connections, and kept his official residence in his hometown, where part of the production is still situated. This situation might not be uncommon.

[47] See Section 2.1 above.

Figure 1. Network of businesses incorporated in other Member States with > 50 businesses

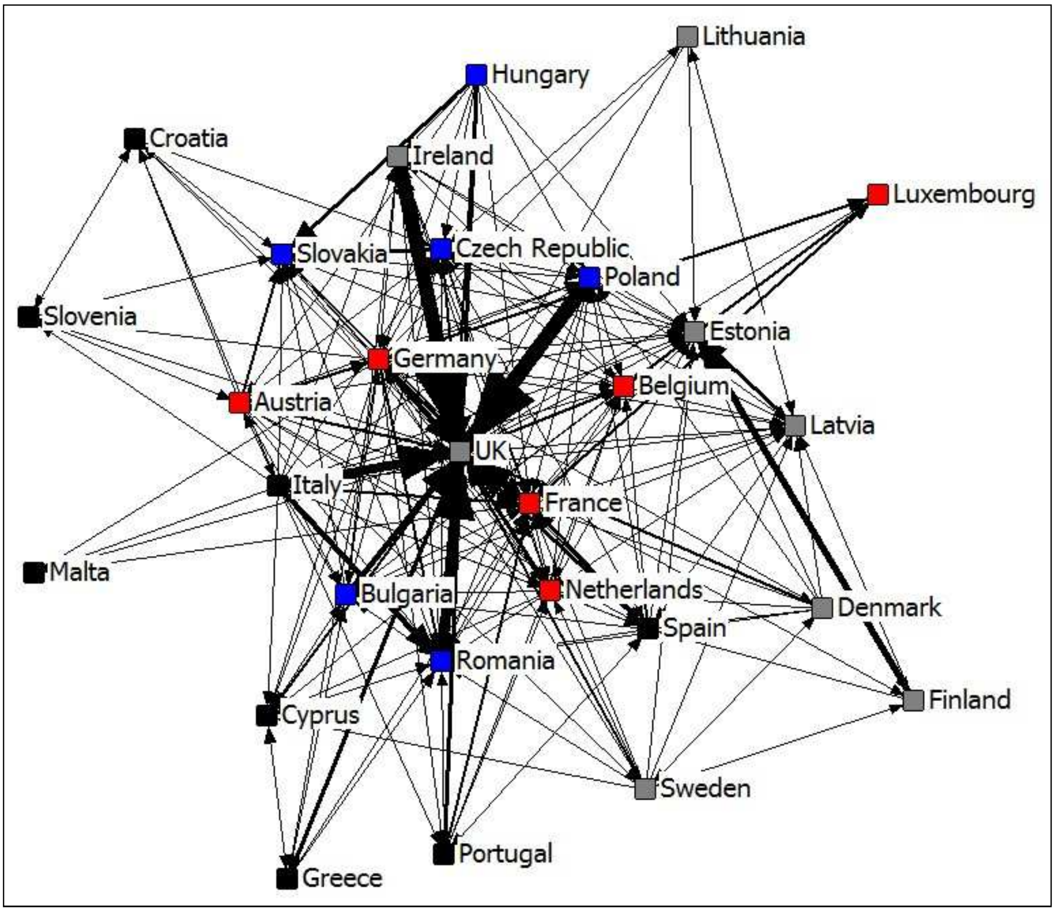
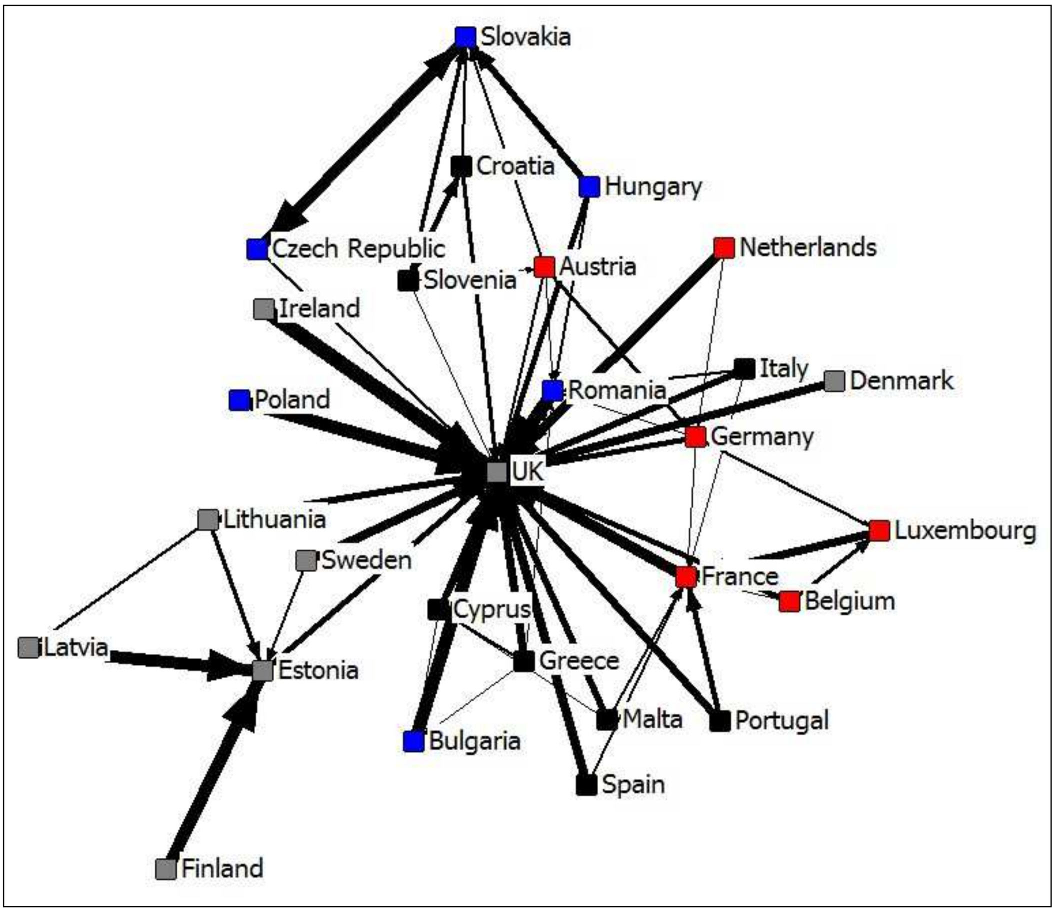


Figure 1 displays all of the country pairs that have a tie-strength of at least 50: i.e., based on the estimated figures, there are at least 50 businesses from the origin country that incorporate a company in the target one. The direction of the arrows indicates which country is the origin and which is the target country. The network analysis program was also instructed to shift the position of countries according to the strength of their relationships based on the technique of 'spring embedding'.[48] Finally, following the classification scheme of the United Nations Statistics Division,[49] the colours of the nodes indicate the geographic classification into Eastern European (blue), Northern European (grey), Southern Europe (black) and Western European (red) countries.

In a figure such as Figure 1 it is clear that the countries with a small population (e.g., Slovenia, Malta) are bound to have weaker ties since – regardless of any incoming incorporations – they tend to have fewer businesses that can establish a business abroad. Thus, it is also helpful to scale all countries in terms of outgoing ties to 100%. This has been done in Figure 2, below. It displays all ties that are above 10%, so a link is shown if more than 10% of the businesses from the outgoing Member State that incorporate in all other Member States do so in the incoming Member State.

[48] See http://faculty.ucr.edu/~hanneman/nettext/C4_netdraw.html.
[49] Available at http://unstats.un.org/unsd/methods/m49/m49regin.htm.

Figure 2: Network of businesses incorporated in other Member States with > 10%



It can be inferred from both Figures 1 and 2 that the UK is the centre of this mobility network. Many of the close connections appear to match geographic and linguistic similarities (e.g., Cyprus and Greece; the Czech Republic and Slovakia; Slovenia and Croatia; Sweden, Finland, Estonia, Latvia and Lithuania).

The closeness, according to these network data, can also be established more formally. Network analysis provides various tools to identify community structures.[50] Some of those tools rely on binary data, but for a valued network – such as the current one – it is preferable to use tools that consider the full information in the dataset. One such method is to calculate 'optimisation clusters'. This refers to a formal method that 'optimises a cost function which measures the total distance or similarity within classes for a proximity matrix'.[51]

Optimisation clusters require that the researcher specifies in advance how many clusters shall be created. In Table 4 this has been done, based on the absolute number of incorporations, for up to ten clusters since, with more clusters, we would often only have meaningless clusters of only one or two countries.

[50] See, e.g., A Ferligoj, P Doreian and V Batagelj 'Positions and Roles', in *The SAGE Handbook of Social Network Analysis* 434 (J Scott and P.J Carrington eds., London: Sage, 2011).
[51] Definition at http://www.analytictech.com/ucinet/help/2cvtid.htm.

Table 4: Clusters of legal systems based on foreign incorporations[52]

Clusters	Countries									
2 (r^2=0.053)	AT BG CZ FR DE HU IE IT NL PL PT RO SK ES UK	BE HR CY DK EE FI EL LV LT LU MT SI SE								
3 (r^2=0.101)	AT BE CY CZ EL HU LU SK SI	HR DK EE FI LV LT MT SE	BG FR DE IE IT NL PL PT RO ES UK							
4 (r^2=0.146)	AT BE CZ DE HU LU SK	DK EE FI LV LT NL SE	BG FR IE IT PL RO ES UK	HR CY EL MT PT SI						
5 (r^2=0.190)	AT HR CZ HU SK SI	EE FI LV LT SE	FR DE IE IT PL RO UK	BG CY DK EL NL	BE LU MT PT ES					
6 (r^2=0.232)	FR IE IT PL RO UK	CZ HU SK SI	EE FI LV LT SE	BG HR CY EL	AT BE DE LU NL	DK MT PT ES				
7 (r^2=0.271)	FR IE IT PL RO UK	DK PT ES SE	EE FI LV LT	BG CY EL	HR MT SI	BE DE LU NL	AT CZ HU SK			
8 (r^2=0.308)	IE IT PL RO UK	CZ HU SK	BE DE LU NL	FR PT ES	BG CY EL	AT HR SI	EE FI LV LT	DK MT SE		
9 (r^2=0.346)	HR MT SI	EE FI LV	IE IT PL RO UK	DK LT SE	FR PT ES	CZ HU SK	BG CY EL	AT DE NL	BE LU	
10 (r^2=0.375)	EE FI LV	HR SI	LT MT	BE LU	IE IT PL RO UK	FR PT ES	CZ HU SK	BG CY EL	DK SE	AT DE NL

The table also indicates how well the respective clusters explain the entire dataset (R^2). It can be seen that this number is low for the divisions with few clusters, but that it gradually increases with more clusters being added. For example, the eight-cluster division can then be seen as a plausible one, consisting of the following clusters (in the order from the table): a mixed one, an Eastern European one, a Western European one, a South-West and a South-East European one, a Central European one, and two mainly Nordic-Baltic ones.

It is also helpful to 'track' the position of individual countries throughout the ten clusters. It can then be seen that the following groups of countries are always in the same respective cluster: the Czech Republic, Slovakia, and Hungary; Finland, Estonia and Latvia; Poland, Romania and Italy; the UK and Ireland; Cyprus and Greece; and Belgium and Luxembourg. These groups may be seen as intuitive ones as they are those of neighbouring countries with further linguistic, social and economic similarities.[53] However, in the context of the present study, it may also be noted that it shows the rather limited effect of the freedom of establishment on the mobility of companies *across all* Member States.

4. Time series of new incorporations in the UK and Slovakia, 1990-2015

4.1 Data availability

It is interesting to assess how fluctuations in new foreign incorporations have evolved in the popular target countries over the last decades. In principle, Orbis enables a search for new incorporations each year. However, for many Member States, data are not

[52] The abbreviations follow the official EU abbreviations (see http://publications.europa.eu/code/en/en-370100.htm): Belgium (BE); Greece (EL); Lithuania (LT); Portugal (PT); Bulgaria (BG); Spain (ES); Luxembourg (LU); Romania (RO);; Czech Republic (CZ); France (FR); Hungary (HU); Slovenia (SI); Denmark (DK); Croatia (HR); Malta (MT); Slovakia (SK); Germany (DE); Italy (IT); Netherlands (NL); Finland (FI); Estonia (EE); Cyprus (CY); Austria (AT); Sweden (SE); Ireland (IE); Latvia (LV); Poland (PL); United Kingdom (UK).

[53] For further evaluation see the regression analysis in Section 5 below.

available about incorporations of companies that are not active any more – or, as far as they are available, information about the managers (their nationality and them also being shareholders) is missing. Thus, having checked the data availability for the most popular eight target countries (according to the results of the previous section), it was found that only the data from the UK and Slovakia are of good enough quality to enable an analysis of the evolution in new incorporations over the last two and a half decades.

The following is based on the 'segmentations by year' criterion that is available in the Orbis search function. The use of this particular Orbis search option has also influenced the way foreign businesses were identified in the analysis in this section (in some respects, deviating from the approach of the previous section). The main restriction was that we searched for firms where all of the directors (for UK ltds) or senior managers (for Slovak SROs) are nationals from another Member State.[54] In addition, we imposed the search restriction that all of those directors/senior managers had to be shareholders of the company (with any participation).

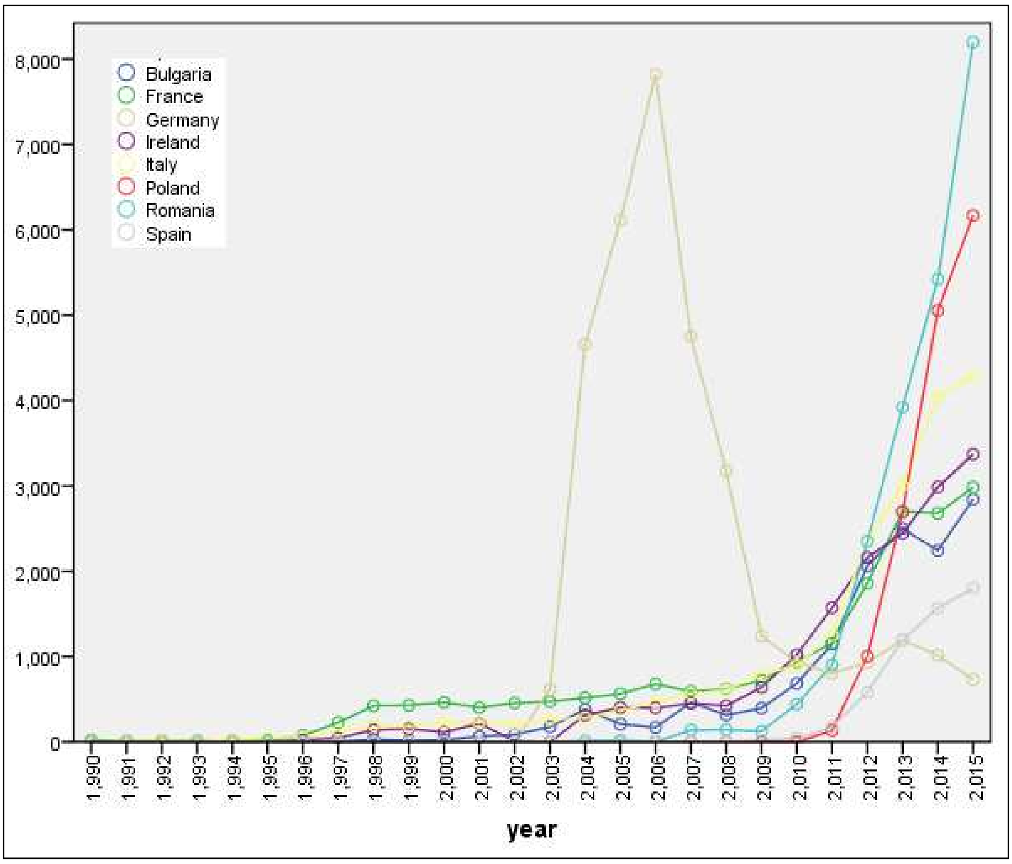
Similar as with the data reported in the previous section, the focus on foreign nationals means that some of them may have actually been resident in the UK or Slovakia. Thus, based on migration data published by the UN,[55] we estimated how many of the companies were established by foreigners who are resident in the UK or Slovakia at the time of incorporation, a figure then deducted from the total number. In order to check the validity of this calculation, we compared the resulting data with the residence data in the study of UK incorporations by Becht et al.[56] for the years 1997 to 2006: those are highly correlated (0.986) which gives us confidence in this technique of identifying companies established by foreigners who also live in their country of nationality.

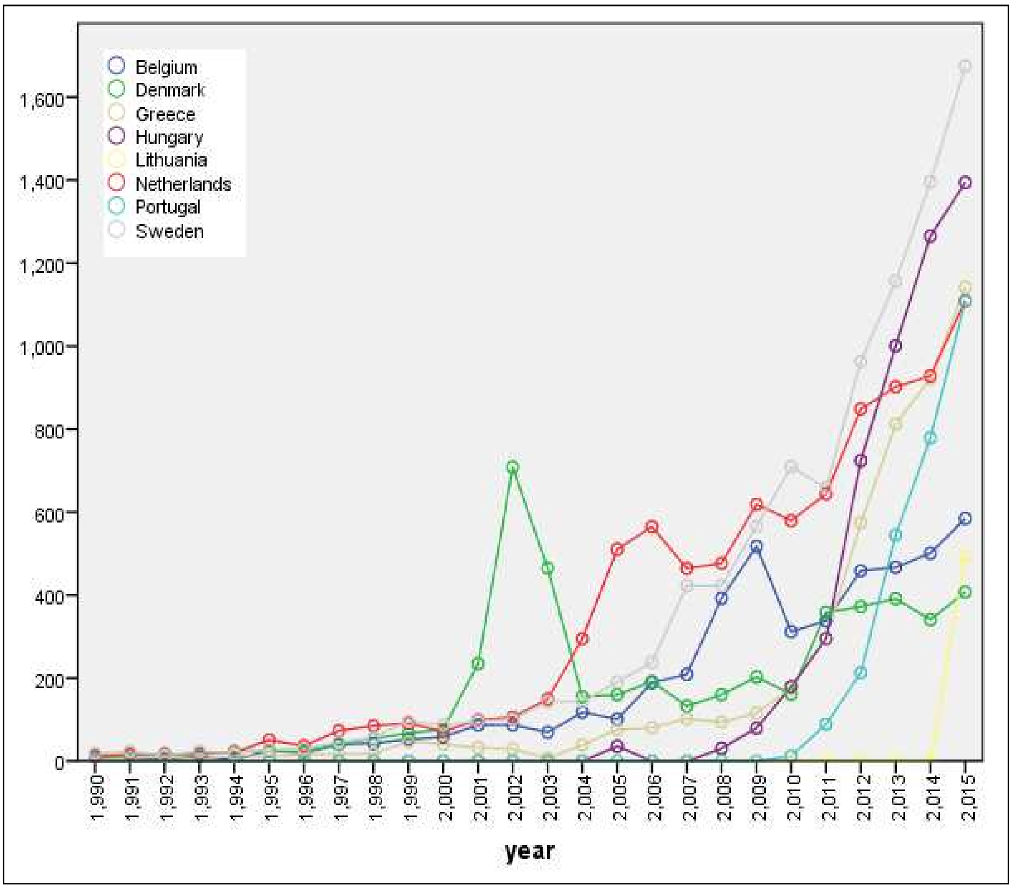
4.2 General results

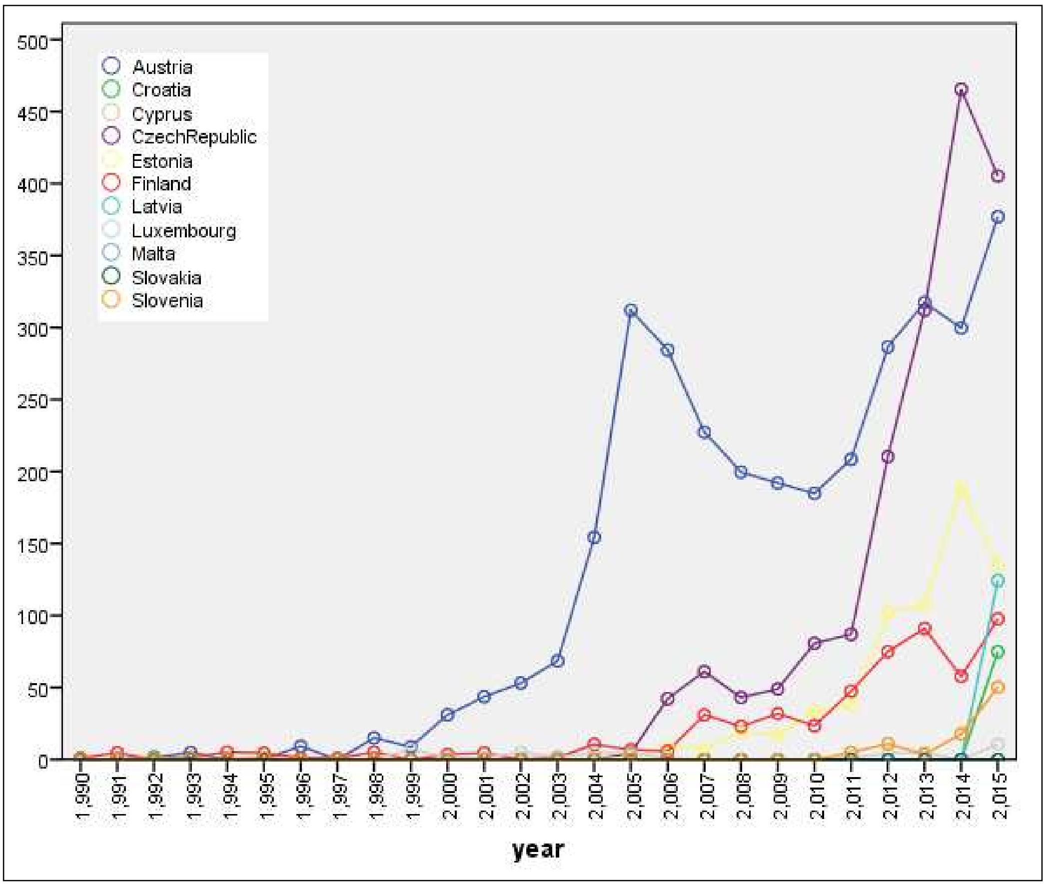
The following figures report the time series for incorporations of such foreign-based private limited companies in the UK and Slovakia (i.e. with all directors/senior managers being shareholders and nationals from another Member State but deducting the companies established by foreigners living in the UK or Slovakia). As the scale of incorporations differs considerably, the first of those figures reports the eight countries with the highest numbers of foreign incorporations in the UK/Slovakia, the second figure the next eight countries, and the final figure the remaining Member States.

[54] While Orbis only allows the search of companies with at least one director/senior manager from a particular country, it is possible to search for all companies with any directors from all countries of the world with the exception of this particular country, which can then be deducted from the total number of companies with information about the nationality of directors/senior managers.
[55] See Section 5.2, below.
[56] Becht at al., supra note 6.

Figures 3 to 5: Time series of newly incorporated foreign-based UK ltds







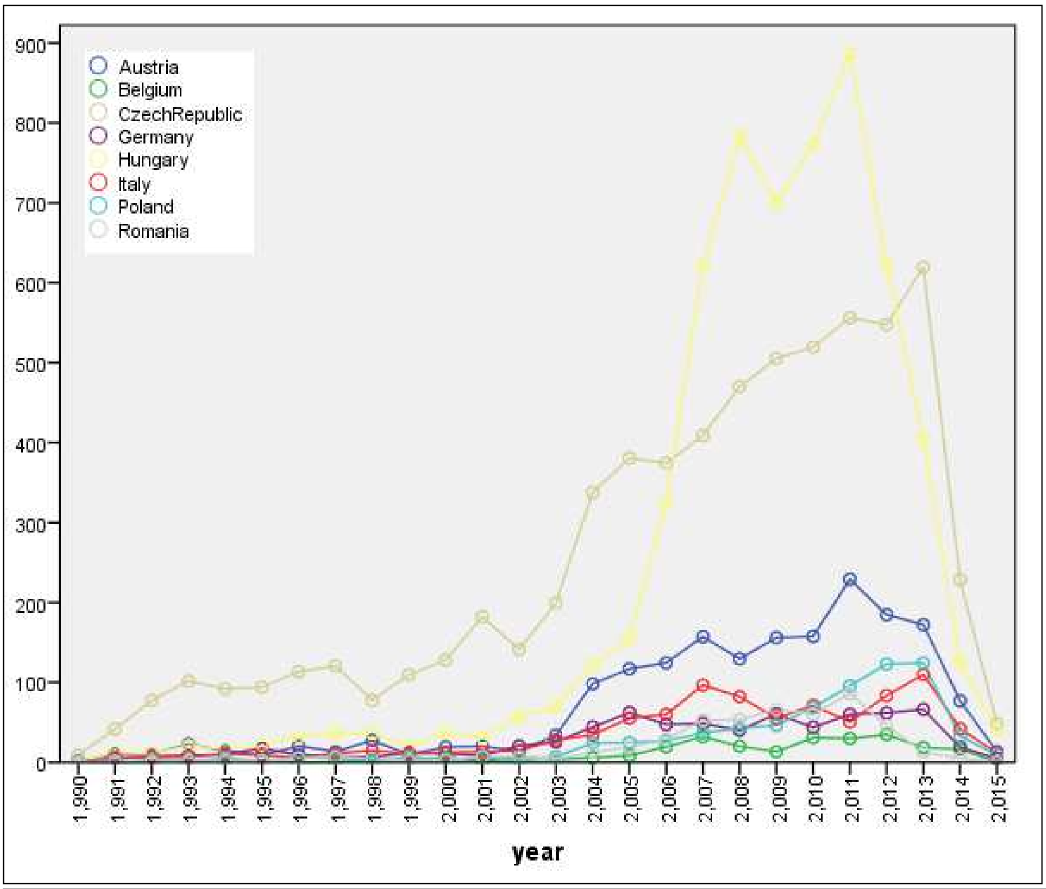
The UK data show that prior to the 2000s most curves are flat, then followed by a rise of ltd incorporations, first, in some of the 'old' Member States (notably, Germany, Denmark, the Netherlands and Austria), but in the 2010s also across all Member States (both 'old' and 'new' ones). In terms of the countries that are at the top of the curves, it is no surprise that more populous countries have more companies incorporated in the UK. With respect to the countries of Central and Eastern Europe (CEE), it needs to be noted that it is possible that the residence adjustment underestimates the number of citizens from these countries resident in the UK who established ltds.[57]

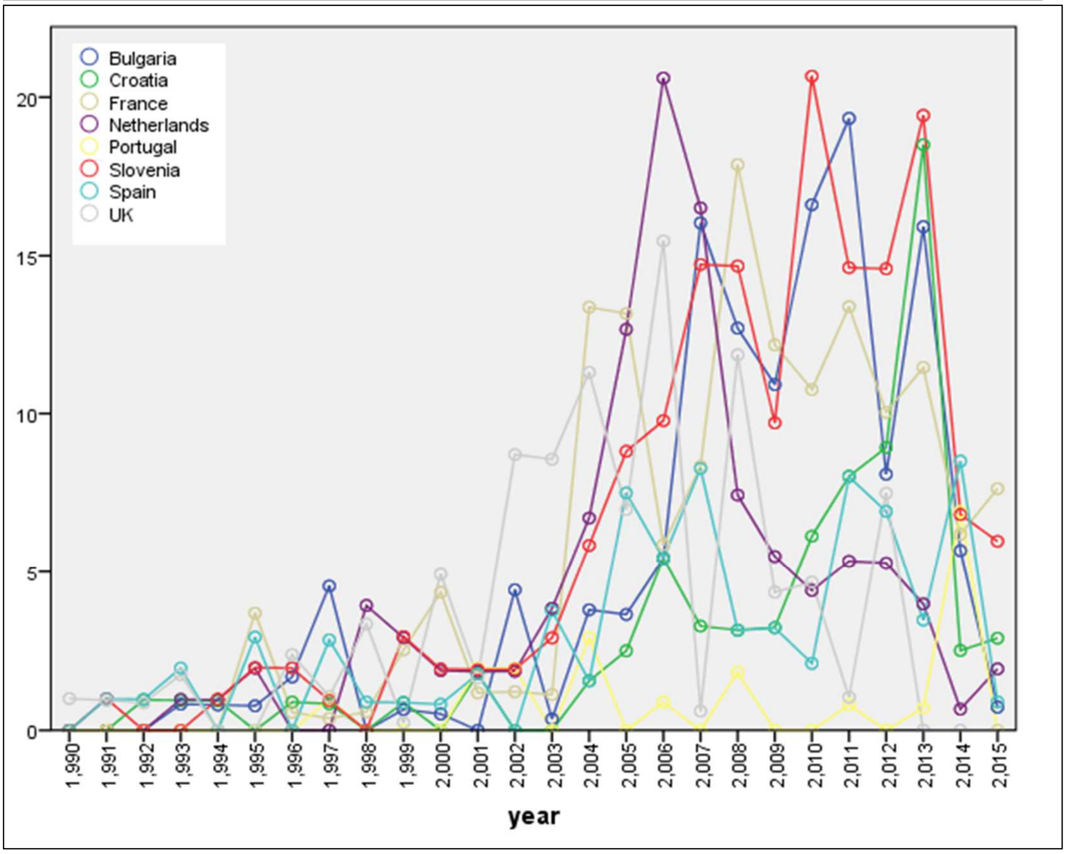
In some Member States, there has been a rise of UK ltds but then also a decline, at least for some years. As already noted by Ringe,[58] this happened in Germany in particular with a reform of the law of private limited companies (MoMiG), but the figures also show some reversals of the general trend for Spain, Denmark, Belgium and Austria. However, overall, the number of newly incorporated foreign ltds has continued to rise. Thus, we do not confirm Ringe's assessment of mere 'flash in the pan'.

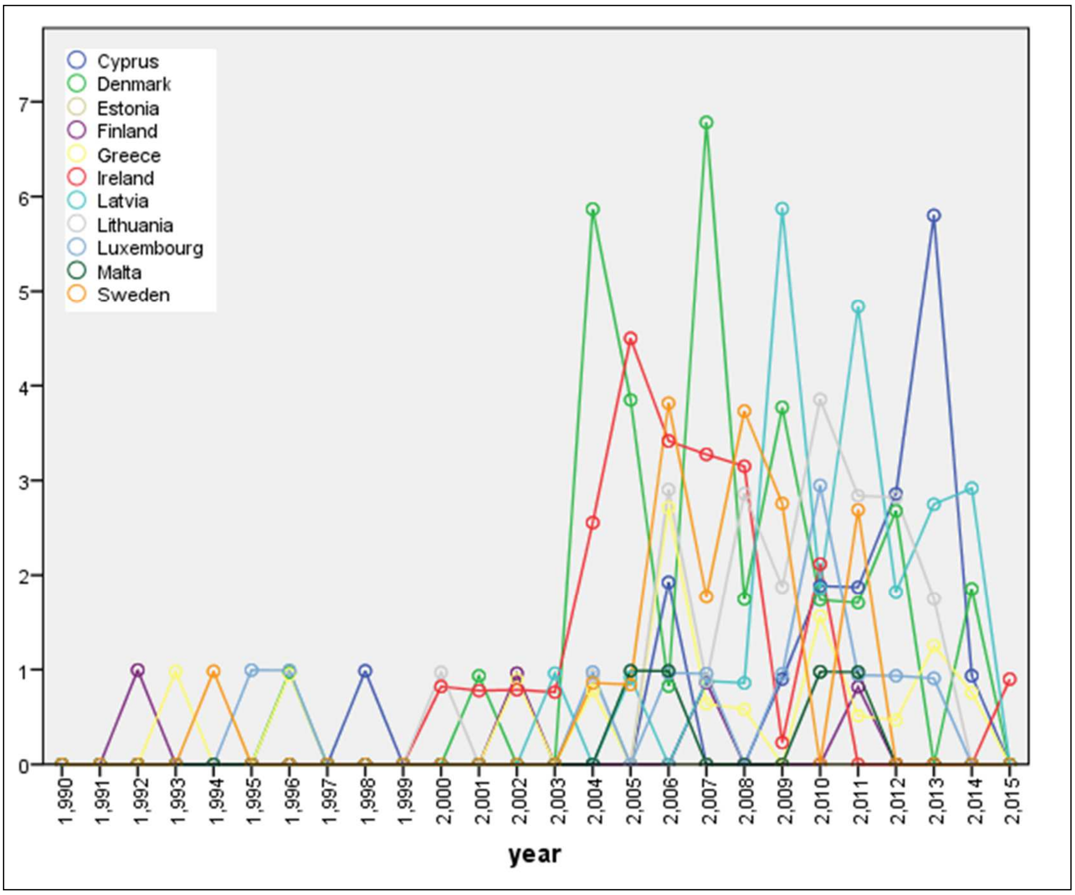
[57] Notably, this may be the case for the Romanian and Bulgarian data in the years 2007 to 2013, given the restrictions to immigration in the UK for Romanians and Bulgarians but with an exemption for the self-employed. See http://immigrationmatters.co.uk/uk-border-agency-rules-for-bulgarian-and-romanian-nationals.html.

[58] Ringe, supra note 12.

Figures 6 to 8: Time series of newly incorporated foreign-based Slovakian SROs







The numbers for foreign-based SROs are, generally speaking, lower than those for foreign-based UK ltds. The figures also show that the trend lines are flat and low until the EU accession of Slovakia in 2004, with the exception of businesses established from the Czech Republic.[59] Throughout the time series it is noticeable that incorporations from the neighbouring countries, i.e. Czech Republic, Hungary and Austria are at the top of the curves.

The general time trend is that after 2004 foreign incorporations increased for a number of years, but then most of the curves peaked in the early 2010s and subsequently declined, in particular in 2013, 2014 and 2015 (while the very low 2015 data should be treated with caution as Orbis may not yet have fully recorded all companies from that year). It is suggested that these changes do not simply reflect the variations in minimum capital requirements and the ease of incorporation since most CEE countries have followed the same trend in facilitating the incorporation of private companies.[60] Rather, it may be linked to changes in the investment climate in Slovakia. For example, it can be observed that, in Slovakia, inflows in foreign direct investment have declined in the last few years, in particular since 2011,[61] which has been attributed to Slovakia's 'malfunctioning judiciary', 'excess bureaucracy', 'poor infrastructure', as well as an

[59] It may also be noted that, until 1993, both countries were still part of the same country; thus, the data from the first years of the time series should be treated with caution.
[60] For example, the minimum capital requirements reported in Becht et al., supra note 6, at 251, for 2006 have been reduced in the subsequent years in Slovakia, Hungary and the Czech Republic. Further comparisons of the ease of incorporation across time can be assessed with the Doing Business Reports, see Section 5.2, below.
[61] See data at http://databank.worldbank.org/data/reports.aspx?source=2&country=SVK&series=&period and www.tradingeconomics.com/slovakia/foreign-direct-investment.

increase in the corporate tax rate above the rates of the Czech Republic, Hungary and Poland.[62]

4.3 Structural breaks

The previous section pointed towards possible changes in the time series after the ECJ case of *Centros*, *Überseering* etc. and the EU accession of the CEE countries. These possible 'structural breaks' can also be assessed more formally with tools of change-point detection.[63] The following uses two of those techniques: first, Stata implements a test for structural breaks in time series data, using a Wald test.[64] This test tries to identify exactly one break in the time series. However, in the present time series, it may not be unrealistic to assume that there can be more than one break point. Thus, second, with the software 'Change-Point Analyzer',[65] we use a CUSUM change point detection test which can identify multiple change points and provide further information about the strength and direction of these structural breaks of the time series.

Table 5: Change point evaluation of foreign-based UK and Slovakian limited companies

	UK limited companies (ltds)		Slovakian private companies (SROs)	
Test:	*Wald*	*CUSUM (with level)*	*Wald*	*CUSUM (with level)*
Austria	2004	**2004(2)**	2004	**2004(1)**, 2014(4)
Belgium	2008	2004(3), **2008(2)**	2006	**2000(2), 2006(1)**
Bulgaria	2012	2010(5), 2012(3)	2007	**2007(1)**
Croatia	2012	no	2010	**2004(2), 2010(1)**
Cyprus	no	no	2010	**2010(1)**
Czech Rep.	2012	**2006(2), 2013(1)**	2004	**2004(2)**, 2014(3)
Denmark	2001	**2002(2)**, 2004(3)	2004	**2004(1)**
Estonia	2012	2008(3), **2012(1)**	no	no
Finland	2011	**2007(2), 2012(1)**	2012	no
France	2012	1998(3), 2012(4)	2004	**2004(1)**
Germany	2004	**2004(1), 2008(2)**	2004	**2004(1)**
Greece	2012	1998(6), 2010(3), **2012(2)**	2006	**2006(1)**
Hungary	2012	2012(3)	2006	1996(6), 2006(3), **2007(2)**, 2013(4)
Ireland	2011	1998(4), **2011(2)**	2004	**2000(1)**, 2004(3), **2009(2)**
Italy	2012	2007(5), **2012(2)**	2005	1997(3), **2003(2), 2014(1)**
Latvia	2012	no	2009	**2003(2), 2009(1)**
Lithuania	2012	no	2006	**2006(1)**

[62] US State Department, '2015 Investment Climate Statement – Slovakia', available at www.state.gov/e/eb/rls/othr/ics/2015/241740.htm.
[63] For references and an application to legal data see D Katelouzou and M Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013' (2015) 15 *Journal of Corporate Law Studies* 127 at 141-2.
[64] See www.stata.com/new-in-stata/structural-breaks/.
[65] Available at www.variation.com/cpa/index.html.

Luxembourg	1999	no	2006	**2006(1)**
Malta	no	no	2005	**2005(1)**
Netherlands	2005	2005(3), **2012(2)**	2004	1998(3), **2005(1), 2008(2)**
Poland	2012	**2013(2)**	2008	**2004(2), 2010(1)**
Portugal	2012	2013(3)	2001	no
Romania	2012	2013(5)	2006	2004(3), 2007(3), 2013(4)
Slovakia	no	no		-
Slovenia	2012	1996(4), 2015(3)	2005	**2005(2), 2014(1)**
Spain	2012	2013(4)	2005	**2005(1)**
Sweden	2010	2007(6), 2013(3)	2004	**2004(1)**
UK		-	2002	**2000(1)**

Notes for CUSUM test: (i) Black for positive change; red for negative change (ii) lower level indicates more important change point; the lowest two levels (i.e. (1) and (2)) are in bold.

The results in Table 5 confirm some of the interpretations from the previous section, namely that the main changes happened after 2000, with many of them in the UK in the 2010s and in Slovakia in the mid-2000s, and that most changes are characterised by an increase in foreign incorporations, though with some exceptions (Denmark and Germany for the UK, and a number of countries for Slovakia, mainly for 2013 and 2014).

Focussing on the results of the CUSUM test, it is worth highlighting the most important changes, i.e. those with the levels (1) and (2). In the UK data, all of those changes happened a number of years after the ECJ case of *Centros*; thus, apparently, this judgment alone did not give non-UK businesses the confidence to establish a company in the UK. It may also be noticeable that we only have such strongly important changes for less than half of the post-2004 Member States; thus, this also justifies a cautious assessment of the effectiveness of the ECJ case law for corporate mobility in the EU. The data from Slovakia show strong change points in or around the Slovakian accession to the EU in 2004. But it is difficult to strictly relate this finding to the ECJ decisions of *Centros* etc. as this positive effect may also be due to other factors that have increased cross-border cooperation and business activity with the EU enlargement.

5. Regression analysis: does private international law matter?

5.1 Methodological considerations

In order to assess the relevance of differences in conflicts of laws rules applicable to companies, the following regression analysis will be based on the cross-sectional data of currently incorporated companies.[66] While time series data can be helpful to establish causal relationships, the aforementioned limitations of data availability mean that only the cross-sectional data enable us to conduct a meaningful analysis of the relevance of differences in private international law for companies incorporated across all Member States.

The incorporation data are count data. This indicates a Poisson or negative binomial distribution with a Generalized Linear Model (GLM). In the present case, negative

[66] As reported in Section 3, above.

binomial is preferred due to overdispersion.[67] We use standard errors clustered by the countries of the commercial register, thus addressing the possibility that our data are correlated within groups of observations sharing the same country.[68]

In all of the subsequent models, we use the original data on companies with all managers from another Member State and the majority of them being shareholders, both criteria as reported in Orbis. We then also control for the availability of the relevant data in Orbis and migration to the country of the register (see Table 7 below: 'multiplicator' and 'migration'). This approach was preferred over the use of the adjusted data (see Table 3, above). The adjustment was based on the assumption that migrants incorporate a company as frequently as the native population. But it is also possible that migrants are more likely to incorporate their own companies since it may be difficult for them to find employment in the public sector or local businesses. Thus, the use of migration as an explanatory variable is helpful since it would also capture any higher (or lower) rate of incorporations per capita of the migrant population.

In the main regressions we exclude the six countries with the most limited data (below 5%).[69] To check the robustness of the findings, we also ran regressions with all countries but the UK, the eleven countries with the most comprehensive data (above 50%)[70] and all 28 Member States.

5.2 Explanatory variables

Starting with *Centros*, the case law of the ECJ (now CJEU) has facilitated the incorporation of companies in other EU Member States.[71] The Court of Justice has based its reasoning on the Treaty's freedom of establishment, not arguments of conflict of laws rules applicable to companies. However, a strict application of the 'real seat' theory for incorporations (and re-incorporations) in intra-EU scenarios would not be in compliance with the freedom of establishment. Still, there may be 'remnants' of the real seat theory in some Member States, which might variously refer to the location of the administrative office or other fact-based criterions, in order to mitigate certain effects of a 'pure' incorporation theory.[72] We can code the level of 'pureness' of the incorporation theory as follows:

> *A country gets '1' if a connecting factor based upon the incorporation theory is clearly formulated in legislation or through judge-made law (i.e. in a way that everyone, even non-experts, can grasp it) and no exceptions are provided (i.e. no additional connecting factors based upon the location of a company's real seat). The score '2/3' denotes either (i) the situation that a connecting factor based upon the incorporation theory is clearly formulated but that this criterion is subject to exceptions, or (ii) that legal experts can identify that the country follows a connecting factor based upon the incorporation theory and no exceptions are provided, but non-experts are uncertain about this position. The score '1/3' refers to the previous scenario (ii) but exceptions to the incorporation theory clearly exist. Finally, '0' is about to the scenario where even legal experts cannot*

[67] In Stata, we use 'negative binomial parameter estimated via ML'.
[68] For further technical details on regressions using count data see, eg, R Winkelmann, *Econometric Analysis of Count Data* (Berlin, Springer 5th ed 2008); S Coxe et al., 'The Analysis of Count Data: A Gentle Introduction to Poisson Regression and Its Alternatives' (2009) 91 *Journal of Personality Assessment* 121.
[69] These are Belgium, Croatia, France, Greece, the Netherlands and Sweden, see Table 2, above.
[70] These were Bulgaria, Czech Rep, Denmark, Finland, Germany, Italy, Latvia, Poland, Romania, Slovakia, UK.
[71] For details see Chapter I of this report.
[72] It is worth reminding that in this section we are not making any statement on the compatibility of such remnants of real seat theory with the freedom of establishment: we merely describe the reality of Member States' private international law as it emerged from the country reports.

identify that the country follows a connecting factor based upon the incorporation theory.

In addition, in some Member States, rules of substantive company law contain requirements for companies to establish or maintain a specific connection to the territory of the Member State. This was coded as follows:

A country gets '1' if domestically incorporated companies do not have to have their headquarters or any other fact-based criteria on the domestic territory; a country gets 1/2 if domestic companies should have some factors on the domestic territory but this rule is uncertain; it gets '0' otherwise.

Based on these definitions and the comparative analysis,[73] this leads to the following classifications:

Table 6: Country classifications in private international and substantive company law

(1) 'Pureness' of incorporation theory under private international law (max. 1)

(2) Substantive company law free from 'real seat elements' (max. 1)

	(1)	(2)		(1)	(2)
Austria	2/3	0	*Italy*	2/3	1
Belgium	2/3	0	*Latvia*	1/3	0
Bulgaria	1	1	*Lithuania*	1	0
Croatia	2/3	1	*Luxembourg*	1/3	0
Cyprus	1	1	*Malta*	1	1
Czech Republic	1	1	*Netherlands*	1	1
Denmark	1/3	1	*Poland*	0	1/2
Estonia	2/3	0	*Portugal*	0	1
Finland	1	1	*Romania*	2/3	1
France	2/3	0	*Slovakia*	1	1
Germany	2/3	1	*Slovenia*	2/3	0
Greece	1/3	0	*Spain*	2/3	0
Hungary	1	1	*Sweden*	1	1
Ireland	1	1	*United Kingdom*	1	1

Incorporation in another country can also be driven by a number of other factors. For this purpose, we use various control variables, see Table 7. The main aim is to test whether other characteristics of the country of incorporation may be more important than conflict of laws rules. Further variables account for the closeness of the country pairs.

We also needed to consider that the data on private companies as they exist today are likely to be influenced by both the recent past and the present: while the past is of importance for the incorporation decision, the present is also relevant since companies

[73] See Chapter IV of this report.

that still exist today make the implicit choice to keep the present legal form.[74] For the collected data, 74% of the companies were established between 2005 and 2015: thus, as far as the control variables have been subject to change, the regressions use the average value over this period.[75]

Table 7: Description of explanatory variables

Name	Description (for country of incorporation unless stated otherwise)	Source
Incorporation score	'Remnants' of the real seat theory under private international law or substantive company law.	Own research, see definition about coding in text above
Substantive company law		
Incorporation costs	Indicator that measures minimum capital, costs, procedures and time for establishing a company	http://www.doingbusiness.org/data/exploretopics/starting-a-business
Corporate tax rates	Corporate tax rate	https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html
Rule of law	Rule of Law score based on Word Governance Indicators	http://info.worldbank.org/governance/wgi/index.aspx#home
Legal origin	Dummy variable for countries of the same legal origin (English, French, German and Nordic)	La Porta et al. 2008, data available at http://scholar.harvard.edu/shleifer/publications/economic-consequences-legal-origins
Official language	Official language of country pairs	http://www.cepii.fr/CEPII/en/publications/wp/abstract.asp?NoDoc=3877
Spoken language	Language spoken by at least 20% of population of country pairs	as previous
Geographic distance	Distances between the cities constituting the economic centres between country pairs, weighted by share of country's population	as previous
Population	Population	http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics

[74] Thus, the present analysis is different from the one by Becht at al., supra note 6, and Braun et al., supra note 9, which only analysed the new incorporations in particular years.
[75] This was done for the variables on incorporation costs, corporate tax rates, rule of law and migration.

Companies per capita	Limited companies (as reported in Orbis) per capita	Own calculations, see also Table 2, above
Difference conflict rules	Absolute difference in conflict of laws rules as regards pureness of incorporation theory	Own calculations based on Table 6, above
Multiplicator	Factor correcting for variations in data availability	Own calculations, see Table 2, above
Migration	Number of international migrants	http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml
Country dummies	Dummy variables for each country (UK as the reference category)	

To elaborate, instead of conflict of laws rules, it could rather be low incorporation costs, low corporate tax rates and a good rule of law rating of the country of incorporation that attract foreign businesses. With respect to the possible relevance of corporate tax law, it is worth noting that the concept of tax residence diverges from the mere formal registered seat and is normally a fact-intense criterion, which, for instance, considers the place of a company's business or its headquarter.[76] Thus, such a variable is unlikely to be significant for companies that merely have a 'letterbox' in the incorporation country while doing business in another Member State.[77] However, it is likely to be relevant with regard to companies having a physical connection to the country of incorporation, so that the tax authorities apply domestic tax law, despite its managers being foreign-based.[78] Those cases are also within the scope of the present analysis.[79]

More generally, it can also be speculated that businesses may not choose a legal system by way of incorporation that is too unfamiliar to them: the variable on whether countries belong to the same 'legal origin' (English, French, German or Nordic), based on the contentious studies by La Porta and Djankov et al.,[80] aims to account for this factor.

Of course, it is not only the legal similarities that play a role. Language could matter since registration of a company typically requires the use of the official language of the respective country. It can also be relevant as far as the choice of a place of incorporation may mean that the founders may become involved in legal disputes in the target country. Geography is likely to matter for businesses that operate in a border region – which can also mean that the main place of business could be in the neighbouring country.

The population of the incorporation country could also be relevant. In the US, the popularity of the small state of Delaware is, *inter alia*, said to be due to the fact that Delaware can focus on being attractive to foreign incorporations while more populous

[76] For a good overview see G Maisto (ed.), *Residence of Companies Under Tax Treaties and EC Law* (Amsterdam: IBFD, 2009) (also on how the definition of these factual terms differs from the corresponding terms in the conflict of laws rules applicable to companies).
[77] For the ambiguous phrase 'letterbox companies' see also Section 2.1, above.
[78] Or where, in practice, tax authorities are not fully informed as regards the factual connections of the company to another country, or are lenient in the way they apply the law as regards this connection.
[79] See Section 3.2, above.
[80] For further discussion, see M Siems, 'Varieties of legal systems: towards a new global taxonomy', *Journal of Institutional Economics*, forthcoming (FirstView available at http://dx.doi.org/10.1017/S1744137415000545).

states have to balance more diverse interests.[81] But the reverse is also possible, namely that countries with a larger population are considered as being a more secure choice for incorporating a company. This variable also controls for the effect that some of the companies in question may do some business in their country of incorporation and may therefore benefit from the larger market of this country.

The control variable of companies per capita may capture a variety of factors. Some of those overlap with reasons already mentioned, such as costs of incorporation. But it is also worth testing whether, more generally, the form of the private limited company is popular in the country of incorporation, thus controlling for other difficult-to-code details of company law.[82]

The variable about the absolute difference in conflict of laws rules as applicable to companies takes the classification according to 'pureness' of incorporation theory (see Table 6, above) as a starting point. It then establishes the difference between each country pair; thus, for example, countries get a '0' in difference if both of them follow the pure incorporation theory or if both of them still have many remnants of the real seat theory. This variable can potentially be interesting as it may indicate whether any harmonisation of conflict of laws rules in this area (i.e. regardless of the substance) may be beneficial to corporate mobility.

It was already mentioned (see 5.1, above) that the control variables 'multiplicator' and 'migration' are necessary since the regressions use the original data of companies as reported in Orbis. Finally, the dummy variables for the country of the managers consider that there are many unobservable reasons that may determine why people from a particular country want to incorporate a private company in the first place. For example, this variable may capture differences in innovation or in labour and social laws.

5.3 Regression results

The first three regression outputs report the results excluding the six countries with the most limited data for the place of incorporation (see 5.1, above). They are therefore based on 22 (place of incorporation) x 27 (place of business) = 594 observations.

[81] See, e.g., R Romano, *The Genius of American Corporate Law* (1993). For a US/EU comparison see, e.g., F Mucciarelli, 'The Function of Corporate Law and the effects of Reincorporations in the U.S. and the E.U.' (2012) 20 *Tulane Journal of International and Comparative Law* 421.
[82] Also considering that the existing quantifications of company law focus on the law of public companies. See, e.g., http://www.cbr.cam.ac.uk/research/research-projects/completed-projects/law-finance-development/.

Table 8: Negative binomial regressions (1) – dependent variable: number of companies with all managers being citizens of another Member State and more than half of those also being the shareholders of the company

Independent variables:	(1)		(2)		(3)	
Incorporation score	2.080279	**	1.469544	*		
Substantive company law	-0.8176418		-0.7902481		-0.81764	
Costs of incorporation	0.1040623	**	0.0834384	*	0.104062	**
Corporate tax rate	-0.0758701		-0.0330982		-0.07587	
Rule of law	-0.6018829		-0.7245814		-0.60188	
Legal origin	0.7639068	**	0.7502287	**	0.763907	**
Official language	1.607175	**	1.242886	*	1.607175	**
Geographic distance	-0.0013462	**	-0.0014363	**	-0.00135	**
Population	6.20E-08	**	6.26E-08	**	6.20E-08	**
Companies per capita			13.93519	*		
Difference conflict rules					-4.16056	**
Multiplicator	-0.143194	*	-0.31475	**	-0.14319	*
Migrants	3.40E-06		3.63E-06		3.40E-06	
Country dummies	#	**	#	**	#	**
Constant	-0.44684		0.630225		1.633443	
Log pseudolikelihood	-2825.4477		-2802.8148		-2825.4477	
	n=594		n=594		n=594	

** significant at 1% level, * at 5% level; # highest degree

The results show that, as far as the legal variables are concerned, the incorporation score, the costs of incorporation and legal origin are consistently statistically significant, but not the variables on 'real seat' elements in substantive company law, corporate tax law and the rule of law. The lack of significance of the substantive law 'real seat' coding is not implausible as it may be doubtful how important this difference is in practice: for example, in Estonia, which we coded as having such a requirement, the country report suggest that 'there is no effective mechanism that would restrict the foreign-administrated companies to be registered in Estonia'.[83]

The variables about official language and geography are significant with the expected signs. In further regressions (not reported here), we also examined the role of the spoken language, but it was found to be less significant than the official language. The variable on population shows that in the EU, larger countries have an advantage in attracting foreign incorporations.

Model (2) includes the variable on 'companies per capita' and confirms that other factors may play a role for the incorporation decision. However, the incorporating score also retains its significance in this specification; thus, it can be seen that it is not simply a proxy for other differences.

Model (3) shows that it is not only the substance of the conflict of laws rules that matters but also the absolute difference between them. This regression also includes other variables that deal with differences between countries (legal origin, language etc.) and those also retain their statistical significance. Thus, here too, we can be confident

[83] See country report Estonia, Section 2.

that this result is not simply due to a possible correlation between conflict of laws rules applicable to companies and other similarities between countries.

Table 9: Negative binomial regressions (2) – dependent variable: as Table 8

Independent variables:	(4)		(5)		(6)	
Incorporation score	3.382553	**	2.104793	**	1.578953	**
Substantive company law	-0.95515		-0.65626		-0.69515	
Costs of incorporation	0.10797	**	0.101664	**	0.063953	*
Corporate tax rate	-0.29792	**	-0.0836		-0.07589	*
Rule of law	0.139134		-0.44879		-0.73922	*
Legal origin	0.706026	*	0.749897	**	0.762654	**
Official language	0.400527		1.388102	**	1.171581	**
Geographic distance	-0.00158	**	-0.00138	**	-0.0015	**
Population	8.04E-08	**	5.75E-08	**	3.60E-08	**
Companies per capita						
Difference conflict rules						
Multiplicator	0.685718		-0.16251	**	-0.13767	**
Migrants	7.79E-07		3.37E-06	*	3.22E-06	*
Country dummies	#	**	#	**	#	**
Constant	0.833491		-0.133796		3.916033	
Log pseudolikelihood	-1714.925		-3172.2658		-2865.7440	
	n=297		n=756		n=729	

** significant at 1% level, * at 5% level; # highest degree

To check the robustness of the findings, models (4) to (6) report the regression results for the specification of model (1) for modified country groups. Model (4) examines the eleven countries with the most comprehensive data, and model (5) does so for all 28 Member States (even the six with the very limited data). Model (6) excludes the UK as a possible outlier given that more than 50% of the foreign incorporations are registered in the UK.[84] It should be noted that this is a *hypothetical* scenario since in an EU without the UK, it may well have been the case that a Member State with a similar law (perhaps Ireland) would have taken the position of the UK as a popular target destination.

The main results are unchanged in all of the three models. In model (4) the lower significance level for some of the variables is likely to be due to the lower number of observations. In models (4) and (6) it is however also interesting that the variable on corporate tax rate is now statistically significant, with the expected negative sign. In addition, in model (6) the negative significance of the rule of law variable is likely to be due to the popularity of some of the Central and Eastern European countries as popular target destinations (see Table 3, above). It can also be speculated that the lower rule of law score may not always be against the interest of companies since it may go hand in hand with lighter requirements in terms of doing business. In this respect, model (6) may indicate a possible 'market segmentation':[85] businesses which only aim at reducing the initial incorporation costs do so in the UK, while those which also aim at reducing taxation (and have a more general preference for laxer laws) incorporate in other countries.

[84] See Section 3.2, above.
[85] See Section 3.2, above.

Table 10: Interpretation of coefficients in model (1)

Independent variables:	Coefficient and significance		Change per 1 Unit Increase (IRR)	Change per Standard Deviation
Incorporation score	2.080279	**	700.67%	213.79%
Substantive company law	-0.8176418		-55.85%	-26.54%
Costs of incorporation	0.1040623	**	10.97%	68.23%
Corporate tax rate	-0.0758701		-7.31%	-50.42%
Rule of law	-0.6018829		-45.22%	-27.66%
Legal origin	0.7639068	**	114.66%	52.92%
Official language	1.607175	**	398.87%	75.38%
Geographic distance	-0.0013462	**	-0.13%	-97.55%
Population	6.20E-08	**	0.00%	143.22%
Multiplicator	-0.143194	*	-13.34%	-127.28%
Migrants	3.40E-06		0.00%	31.68%

Count data regressions do not lend themselves to intuitive interpretation as easily as OLS models; however, it is possible to say that a coefficient of x means that a change in the respective independent variable of 1 will result in a multiplication of the predicted count by e^x.[86] In Table 10, we present the interpretation of the coefficients of the most convincing model (1). The column 'change per 1 unit increase' enables the calculation of an effect of changes to this variable, holding the other variables constant.

The next column follows the same approach but examines the percentage impact of a one standard deviation increase. This is the best way to compare the effects of the individual variables. It can be seen that the incorporation score plays the largest role, followed by the population, geographic distance, official language, costs of incorporation and legal origin.

6. Conclusion

The empirical research about corporate mobility in the EU has so far been limited in two respects: it has been focussed on the analysis of foreign-based companies in the UK and it has mainly been concerned with differences in the costs of incorporation.

This chapter had the aim to fill these gaps. First, in the descriptive statistics, based on data from all EU Member States, we identified the UK as the most popular target destination. To a lesser extent, foreign incorporations also take place in other Member States, in particular in Central and Eastern Europe, with Estonia, Romania and Slovakia being popular target destinations. However, the network analysis of these data also showed that the foreign incorporations typically happen between neighbouring countries with further linguistic, social and economic similarities; thus, the effect of the freedom of establishment on the mobility of companies *across all* Member States is still rather limited.

Second, the time series of new incorporations in the UK and Slovakia found that the main changes happened after 2000, with many of them in the UK in the 2010s and in

[86] Similar to the discussion in the US, see, eg, M Barzuza, 'Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction', (2012) 98 *Virginia Law Review* 935. For Europe see A Zorzi, 'A European Nevada? Bad Enforcement as an Edge in State Competition for Incorporations', University Ca' Foscari of Venice, Dept. of Economics Research Paper Series No. 12 (2016), available at http://ssrn.com/abstract=2766174.

Slovakia in the mid-2000s, and that most changes are characterised by an increase in foreign incorporations. Thus, for the UK, all of those changes happened a number of years after the case law of the ECJ liberalised the freedom of establishment of companies. The data from Slovakia show strong change points in or around the Slovakian accession to the EU in 2004. But here too it is difficult to relate this finding to the ECJ case law as this positive effect may also be due to other factors that have increased cross-border cooperation and business activity with EU enlargement.

Third, the regression analysis established that decisions about domestic or foreign incorporations are not merely a result of the differences in substantive company law, in particular the costs of incorporation.[87] Rather, we found that private international law plays a key role. Countries that have a clear-cut version of the 'incorporation theory' benefit in this market for incorporations, as compared to companies that have retained elements of the 'real seat theory'. We also found that the extent to which private international law differ between a given country pair is significantly and negatively related to the use of pseudo-foreign companies.

These findings have important policy implications. They show that the case law of the ECJ (now CJEU) has not made all differences in the conflicts of laws rules applicable to companies obsolete. The significant negative effect of the differences between those rules may speak in favour of harmonisation in this area of private international law. The significant relationship between the 'pureness' of the incorporation theory and the use of a Member State's companies by foreign incorporators can also provide an indication about the possible direction of any harmonisation that aims to facilitate corporate mobility in Europe.

7. Annex: Forms of companies from EU Member States in Orbis

Country	Forms of private companies	Forms of public companies
Austria	Private limited company – GmbH	Public limited company – AG
Belgium	Private limited liability company – SPRL/BVBA	Limited company by shares – SA/NV
Bulgaria	One-person private limited company - EOOD, Private limited company – OOD	One-person public limited company - EAD, Public limited company – AD
Croatia	Limited liability company – d.o.o., Limited liability company, simplified – j.d.o.o.	Joint stock company - d.d.
Cyprus	Private limited company	Public limited company
Czech Republic	Limited liability company - S.R.O.	Joint stock company - A.S.
Denmark	Private limited company – ApS	Limited company – A/S
Estonia	Limited liability company – OÜ	Joint stock company - AS
Finland	Private limited company – OY	Public limited company – OYJ
France	Limited company, simplified – SAS, Limited liability company – SARL	Limited company – SA
Germany	Limited liability company – GmbH [includes data for UG]	Public limited company – AG

[87] See also the previous research summarised in Table 1.

Greece	Limited liability company - E.P.E, Limited liability company - sole shareholder, Private capital company - I.K.E.	Limited company - S.A.
Hungary	Limited liability company – KFT	Public limited company - ZRT and NYRT
Ireland	(Private) limited liability company	Public company
Italy	Limited liability company - SRL	Joint stock company – SPA
Latvia	Limited liability company – SIA	Joint stock company – AS
Lithuania	Limited liability company – uab	Joint stock company – ab
Luxembourg	One-person company with limited liability, Private limited liability company – SARL	Limited company by shares – SA
Malta	Limited liability company, Limited liability company - private exempt, Limited liability company - private non-exempt	Limited liability company – public non-exempt
Netherlands	Private limited liability company – BV	Public limited liability company – NV
Poland	Limited liability company - Sp. z.o.o.	Joint stock company – SA
Portugal	Limited liability company - LDA	Public limited company – SA
Romania	Limited liability company – SRL	Joint stock company – SA
Slovakia	Limited liability company - S.R.O.	Joint stock company - A.S.
Slovenia	Limited liability company - d.o.o.	Joint stock company - d.d.
Spain	Limited liability company – SL, One-person company with limited liability	Public limited company – SA
Sweden	Limited liability company – AB	Public limited liability company - AB publikt
UK	Private limited company	Public limited company

III. EMPIRICAL SURVEY

1. Introduction

Starting with the landmark decision in *Centros*, the case law of the Court of Justice of the European Union has been supportive of cross-border mobility of companies in Europe.[1] In some Member States, legal reforms of the conflicts of laws rules have also liberalised the choice of the place of incorporation.[2] However, despite these developments, there may be significant problems in practice.

In this chapter, we report the results of an empirical survey conducted in September 2015. The content of the survey closely follows the call for tender,[3] which asked to conduct an empirical analysis of the practical problems created by the legal uncertainty for companies caused by the current situation stemming from the potential for conflicts of laws in a context where the substantive laws of the Member States have not been fully harmonised. This should also consider the case law of the Court of Justice relating to the freedom of establishment and the existing European company law framework.

The main finding is that the respondents do not regard the European case law as a substitute for a possible future harmonisation of conflict of laws rules. In particular, it is notable that many of the respondents of the countries that have retained an element of the 'real seat theory' report various practical obstacles. There is also a strong positive correlation between respondents who are sceptical about their domestic law and who support EU harmonisation of conflict of laws rules. Furthermore, the analysis of group differences shows that there is still a divide between the 'old' and 'new' Member States as respondents from latter former countries are more likely to indicate lack of familiarity with the relevant procedures and to report practical problems in their dealings with domestic courts and commercial registers.

The subsequent text is structured as follows: Section 2 will outline the design of the survey, Section 3 will present and discuss the main findings followed by a conclusion in Section 4. Section 5 contains the Annex of this chapter with the cover email and the text of the survey.

2. Survey design: scope, procedure and respondents

2.1 Form and scope of survey

The survey design aimed to reflect the benefits of a multi-method approach:[4] the survey therefore asked both multiple-choice and open-ended questions[5] in order to collect information that, on the one hand, can easily be compared across the 28 Member States and that, on the other hand, captures factors unique to each jurisdiction.

The aim of the survey was to collect empirical information on the practical problems due to the lack of harmonisation of conflict of laws rules. This means that the survey had to consider that it is possible that some legal problems existing in theory do not materialise in practice and vice versa. For example, on the one hand, there can be the situation that the law of a particular country is unclear or unsupportive of cross-border operations of

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[1] Though with some variation in details. See Chapter I, above.
[2] See Chapter IV, below.
[3] See http://ec.europa.eu/justice/newsroom/contracts/files/2014s149-267126/invitation_en.pdf at p 13.
[4] See, e.g., LB Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research', in P Cane and HM Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press 2010), pp. 951-975.
[5] For types of questions in empirical legal analysis, see, e.g., RM Lawless, JK Robennolt and TS Ulen, *Empirical Methods in Law* (Austin: Wolters Kluwer 2010), pp. 71-4; L Epstein and AD Martin, *An Introduction to Empirical Legal Research* (Oxford: Oxford University Press, 2014) pp. 74-80.

companies, but that this may not be a problem in practice, say, because lawyers have found a way around these rules (or even because there is no demand for such operations in this particular country). On the other hand, it may be the case that the law is relatively supportive of cross-border operations, but that in practice these may be problematic due to other hurdles, such as language differences, finding appropriate legal advice, and local judges and commercial registrars being unfamiliar with the case law of the Court of Justice.

A related point is that there may be differences between the actual law and perceptions about the law. In particular, this may concern perceived differences between the laws of the Member States. For example, in related empirical research, the Oxford Civil Justice Survey asked in-house lawyers whether they thought that there was considerable variation in the contract laws and civil justice systems of the EU Member States, with the result that, with respect to contract laws, 71% answered in the affirmative, and, with respect to civil justice systems, 84% gave an affirmative answer.[6] Correspondingly, the present survey aimed to evaluate to what extent in the field of this study such views about a high degree of divergence are widespread.

The specific survey questions also provided brief scenarios asking the respondents to assess whether and how in practice particular situations can be implemented in their Member States. Here the questionnaire also explained that the survey was specifically interested in the practicalities of these situations, for example, which tools may be used in order to transfer a company's seat to another jurisdiction and about the experience of lawyers in their dealings with the national commercial register.

2.2 Survey procedure

The survey was drafted by members of the core group of the project. It was subsequently presented to and pre-tested by members of the project's steering committee.[7] It was then modified and some of the questions were streamlined in order to improve the response rate to the survey.

The survey was aimed at lawyers and other legal practitioners who have expertise in situations where companies operate, or plan to operate, across borders for each of the Member States. In order to identify possible respondents, we asked each of the national correspondents of the project[8] to provide us with the contact details of at least 30 names, with the aim to have 50 or more names for the larger economies.[9] We confirmed with the national correspondents that, given the international dimension of the topic, all of the respondents were able to answer a questionnaire in English. For a minority of countries, it was necessary to supplement these names, provided by the national correspondents, with our own research in order to identify 30 (or 50) names of such legal practitioners per country.[10]

This approach of a relatively small sample per country was chosen due to the highly specialised nature of the survey questions. For example, if we had included just any lawyer with a public email address, it would certainly have increased the number of responses. However, the external validity of the responses would have been inferior to

[6] S Vogenauer, *Civil Justice Survey 2008*, available at http://denning.law.ox.ac.uk/iecl/ocjsurvey.shtml. See also S Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Empirical Evidence', (2013) 21 *European Review of Private Law* 13.
[7] For the need to pre-test surveys, see Lawless et al., supra note 5, at 79.
[8] I.e. the persons responsible for the country reports of this study.
[9] This can be regarded as a form of 'snowball sampling' that, for the entire group of respondents, approximates a random sample, as described in Lawless et al, supra note 5, at 149.
[10] Based on independent databases such as http://www.chambersandpartners.com/; http://whoswhole-gal.com/; http://www.legal500.com/.

the present survey which deliberately targeted the main legal practitioners of each country with expertise on questions of cross-mobility of companies.

The survey was distributed via Surveymonkey on the 7th of September 2015. Reminders were sent on the 14th and the 22nd of September. The survey was closed at midnight on the 30th of September 2015.

2.3 Survey respondents

The survey was sent to 992 lawyers and other practitioners. The survey 'bounced' for 14 respondents as they seemed to have opted out of Surveymonkey emails, which means that 978 persons have received the survey. 177 of those responded to it. This leads to a response rate of 18.1% which is a good rate of response for an online survey.[11]

The initial questions of the survey asked respondents to provide some personal information. The first two questions concerned their expertise in the legal systems of one or more countries, as summarised in Table 1.

Table 1: Legal expertise of respondents (n: 177)

Question 1: The legal system of which country is most familiar to you? Question 2: Have you also studied or worked in other jurisdictions for a substantial period (at least six months)? [multiple answers possible]					
Country	*Q. 1*	*Q. 2*	*Country*	*Q. 1*	*Q. 2*
Austria	9	4	Luxembourg	3	6
Belgium	8	7	Malta	3	-
Bulgaria	7	-	Netherlands	5	5
Croatia	5	2	Poland	6	-
Cyprus	1	1	Portugal	8	-
Czech Rep.	10	1	Romania	8	-
Denmark	3	-	Slovakia	3	3
Estonia	2	1	Slovenia	9	1
Finland	6	1	Spain	8	3
France	7	10	Sweden	9	1
Germany	13	14	UK	5	28
Greece	7	-	*Angola*	-	1
Hungary	2	3	*Belarus*	-	1
Ireland	3	1	*Hong Kong*	-	1
Italy	18	1	*Serbia*	-	1
Latvia	5	2	*US*	-	28
Lithuania	4	1			

It can be seen that the survey was answered by respondents from a good mix of countries. Some of the larger Member States – notably the UK but also Germany and France – are also well represented by respondents who have additional educational and professional experience in those jurisdictions. With respect to Question 2, it can also be noted that the majority of respondents (94 out of 177, i.e. 53.1%) indicated that they had studied or worked in at least one other jurisdiction. Given the topic of this survey, it does not come as a surprise that the increasingly influential group of lawyers with transnational experience[12] is prominently reflected in our responses.

[11] Cf. MP Couper and M Bosnjak, 'Internet surveys', in PV Marsden and JD Wright (eds.), *Handbook of Survey Research* (Bingley: Emerald, 2nd ed. 2010), pp. 536-8.
[12] See, e.g., Y Dezalay and B Garth (eds.), *Lawyers and the Construction of Transnational Justice* (London: Routledge 2013).

Table 2: Further personal characteristics of respondents

Questions 3 to 5:	*Answer options*	*Response Count*	*Response Percent*
Q3. What is your current employment? [multiple answers possible] (n: 174)	Lawyer in law firm	147	84.5%
	In-house lawyer	11	6.3%
	Notary	7	4%
	Legal scholar/academic	39	22.4%
	Other (please specify)	10[13]	5.7%
Q4. Who are your main clients? (n: 176 with 14 responses 'N/A'; thus 162 substantive responses)	small firms (up to 49 employees)	21	12.96%
	medium-sized firms (50 to 249 employees)	52	32.1%
	larger firms (250 or more employees)	89	54.94%
Q5. Have you been involved in work that concerned corporate mobility and/or problems of the conflict of laws rules applicable to companies? (n: 175)	more than 10 times	79	45.14%
	5 to 9 times	33	18.86%
	1 to 4 times	49	49 28%
	not yet	14	8%

The subsequent three questions asked about the current employment, the main clients and the relevant expertise of the respondents. Table 2 shows that the main respondents of the survey were lawyers in law firms and that many of those were from large firms with extensive experience in matters of corporate mobility and problems of the conflict of laws rules applicable to companies.

2.4 Evaluation based on all respondents and groups of respondents

The following sections will, to start with, always report the quantitative results based on the data for all respondents. Those general results will also be presented in bar or pie charts and, if relevant, the text will report further quantitative findings, such as correlations between variables, as well as qualitative responses from free-text comments.

In addition, the findings differentiate between groups of respondents as far as there are statistically significant differences between those groups.[14] The group classifications follow from the personal characteristics identified in questions 1 to 5 (see Tables 1 and 2, above). However, group divisions based on the answers to questions 2, 3 and 5 were not statistically significant in any of the specifications. The division according to the main client (Question 4) was significant in only one response.[15] Most fruitful were classifications based on the main location of the respondents. Here we used the following classification schemes:

First, we examined a geographic classification into countries from eastern, northern, southern and western Europe since the survey responses may reflect different economic and business structures in those geographic regions.[16] Based on the classification

[13] The answers were: 'lawyer in consulting firm', 'investment banking', 'insolvency administrator', 'solicitor (England and Wales)'; 'legal consultant (international law)', 'tax lawyer', 'judge', 'official of counsel of law firm', 'legal adviser in insurance company', 'insolvency practitioner'.

[14] Based on a significance level of 5%.

[15] See Question 6 in Section 3.1, below.

[16] As has become apparent in the context of the Eurozone crisis. See, eg, PA Hall, 'Varieties of Capitalism and the Euro Crisis' (2014) 37 *West European Politics* 1223.

scheme of the United Nations Statistics Division,[17] this leads to the following division: (i) eastern Europe (n = 6): Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia; (ii) northern Europe (n = 8): Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Sweden, the UK; (iii) southern Europe (n = 8): Cyprus, Croatia, Greece, Italy, Malta, Portugal, Slovenia, Spain; (iv) western Europe (n = 6): Austria, Belgium, France, Germany, Luxembourg, the Netherlands.

Second, we divided the countries into Eurozone and non-Eurozone countries since it is possible that there may be more cross-border mobility of companies within the Eurozone, as well as the view that any remaining obstacles should be removed by EU harmonisation. Based on the time when the survey was conducted in September 2015, the resulting division is: (i) Eurozone countries (n = 19): Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain; (ii) non-Eurozone countries (n = 9): Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Poland, Romania, Sweden, the UK.

Third, it is interesting to classify according to pre-2004 and post-2004 EU Members States since respondents from the former countries may have more experience in matters of corporate mobility and law makers and judges from the latter countries may have only recently started considering the case law of the Court of Justice on corporate mobility. The division is as follows: (i) pre-2004 EU Member States (n = 16): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, the UK; (ii) post-2004 EU Members States (n = 12): Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia.

Fourth, a division of Member States into strong and weak economy countries may be relevant since in the former group there may be more experience in and desire for cross-border mobility of companies. The division is based on the differences in GDP (PPS) per capita,[18] as compared against the EU average, normalised to '100': (i) GDP (PPS) per capita > 100 (n = 11): Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Sweden, the UK; (ii) GDP (PPS) per capita < 100 (n = 17): Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain.

Fifth, despite the case law of the Court of Justice, some Member States have remnants of the real seat theory in their conflict of laws rules in their relationship to other EU Member States. It is therefore possible to distinguish between (i) such countries with elements of the 'real seat theory' (n = 16): Austria, Belgium, Croatia, Denmark Estonia, France, Germany, Greece, Italy, Latvia, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain; and (ii) other countries, i.e. more 'pure' incorporation theory countries (n = 12): Bulgaria, Cyprus, Czech Republic, Finland, Hungary, Ireland, Lithuania, Malta, the Netherlands, Slovakia, Sweden, UK.[19]

[17] Available at http://unstats.un.org/unsd/methods/m49/m49regin.htm.

[18] Available at http://ec.europa.eu/eurostat/en/web/products-datasets/-/TEC00114 (data from 1 December 2015).

[19] This is based on the comparative analysis, Chapter IV, below.

3. Quantitative and qualitative findings

3.1 General perceptions about EU company law and conflict of laws

Question 6 asked respondents to express their opinion on six controversial statements about EU company law and conflict of laws relevant to this study. This uniform design was chosen in order to allow for comparisons between the corresponding answers.

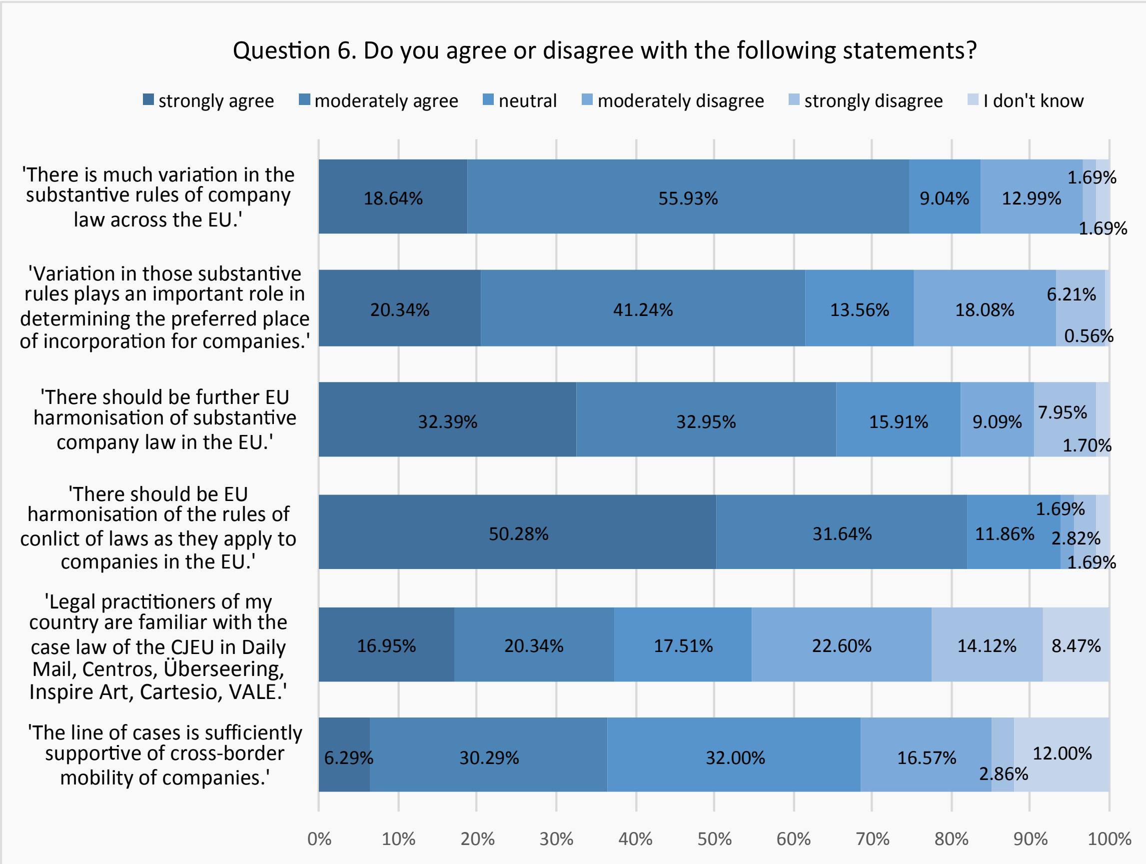

Table 3: Response count of Question 6

Answer Options (as chart)	strong-ly agree	mode-rately agree	neu-tral	modera-tely disagree	strong-ly dis-agree	I don't know	Response Count
(1)	33	99	16	23	3	3	177
(2)	36	73	24	32	11	1	177
(3)	57	58	28	16	14	3	176
(4)	89	56	21	3	5	3	177
(5)	30	36	31	40	25	15	177
(6)	11	53	56	29	5	21	175

The responses show that, first, the majority of respondents hold the view that there is much variation in the substantive rules of company law across the EU and that this variation plays an important role in choosing the place of incorporation. Second, the majority of respondents support harmonisation of substantive company law as well as conflict of law rules, with stronger support for conflict-of-laws harmonisation (above 80%). Third, the responses to the final two questions show that the case law of the Court of Justice in *Daily Mail*, *Centros*, *Überseering*, *Inspire Art*, *Cartesio*, *VALE* is no substitute since it is only partially known by legal practitioners in the Member States and is only partially supportive of cross-border mobility of companies. Thus, overall, these responses seem to support the harmonisation of conflict of laws rules applicable to companies.

Interestingly, there are also strong correlations between many of the individual responses (based on a coding of 1-4 from 'strongly agree' to 'strongly disagree'; the 'don't know' answers were disregarded[20]):

Table 4: Correlations of answers in Question 6

Answers	1	2	3	4	5	6
1	1	.406**	0.065	0.119	0.035	-0.074
2	.406**	1	.385**	.384**	0.038	-.205*
3	0.065	.385**	1	.574**	-0.145	-.210**
4	0.119	.384**	.574**	1	-0.08525	-0.138
5	0.035	0.038	-0.145	-0.085	1	.264**

**: correlation is significant at the 0.01 level (2-tailed)
*: correlation is significant at the 0.05 level (2-tailed)

It can be seen that there is a strong positive correlation between answers 1 and 2: thus, those who say that there is much variation also claim that this variation plays a significant role. Similarly, noting the strong positive correlation between answers 2 and 3, those who claim that variation plays a significant role in determining the place of incorporation also often argue that there should be further harmonisation of substantive EU company law.

Next, there is a strong correlation between answers 3 and 4: thus, those respondents who endorse further harmonisation of EU company law also often endorse harmonisation of conflict of laws rules as they apply to EU companies. Apparently, therefore, for many respondents, harmonisation of substantive law or conflict of laws rules is not seen as an alternative.

The strong positive correlation between answers 5 and 6 means that those who indicate that their legal practitioners are familiar with the EU case law also say that this case law is sufficiently supportive of cross-border mobility. Interestingly, there is also a significant negative correlation between answers 3 and 6: thus, those who advocate further harmonisation of EU company law disagree that the line of cases is sufficiently supportive of cross mobility, i.e. this line of cases is not seen as a substitute to formal harmonisation.

[20] Corresponding correlations were observed using binary coding of 0-1 for 'disagree' and 'agree' respectively.

Table 5: Statistically significant group differences for Question 6

Sub-question	Respondents who *agree* more than other respondents (significance levels)	Respondents who *disagree* more than other respondents (significance levels)
'There is much variation in the substantive rules of company law across the EU.'	western European countries (<0.001)	
	strong economy countries (0.011)	
'Variation in those substantive rules plays an important role in determining the preferred place of incorporation for companies.'	southern European countries (0.016)	northern European countries (0.050)
	Eurozone countries (0.049)	strong economy countries (0.047)
'There should be further EU harmonisation of substantive company law in the EU.'	southern European countries (0.005)	strong economy countries (0.001)
	post-2004 EU countries (0.021)	
'Legal practitioners of my country are familiar with the case law of the CJEU in Daily Mail, Centros, Überseering, Inspire Art, Cartesio, VALE.'	lawyers with large clients (0.002)	
	western European countries (<0.001)	
	pre-2004 EU countries (0.037)	
	strong economy countries (0.002)	
	Eurozone countries (0.006)	

Table 5 reports the categories of Question 6 where there are statistically significant group differences.[21] Those differences can be interpreted as follows: respondents from western European and strong economy countries have more experience in cross-border activities and are therefore more likely to be aware of the variation in substantive rules of company law. In the next two categories it is noticeable that respondents from strong economy countries (and in one instance, the northern European ones) are less likely to perceive differences as problematic and to support harmonisation of substantive law rules. In addition, according to the final category, respondents from strong economy countries (as well as some other groups and respondents working for larger clients) are more likely to say that lawyers in their respective countries are familiar with the European case law. Thus, a plausible explanation of all of those responses is that, for the groups mentioned above, there are more cross-border activities and respondents are more aware of the European case law and perceive the need for EU harmonisation as less urgent.

By contrast, respondents from southern Europe – as well as, for some categories, Eurozone and post-2004 Member States – are more concerned about variations of substantive rules and even more likely to support their harmonisation. This may reflect deficiencies in their domestic laws.[22] It can also be related to the fact that, at least in some of those groups, cross-border corporate mobility may be less developed: thus, having EU laws on this topic is considered particularly helpful.

[21] Here, and in the following, Levene's test has been applied in order to determine whether or not to assume equal variances.
[22] See also Section 3.3, below.

3.2 *Specific scenarios for mobility of companies in Member States*

Questions 7 to 11 asked about the practical problems of companies that intend to move or reorganise within the internal market, with the scenarios drafted keeping the corresponding case law of the Court of Justice in mind. Question 12 then asked whether the situation would be different for the relationship to non-EU countries. In all questions respondents were encouraged to provide free text comments – which many of them did.[23]

The first of those questions asked about the scenario of an initial split between the country of incorporation and the headquarters, taking the perspective of the former country:

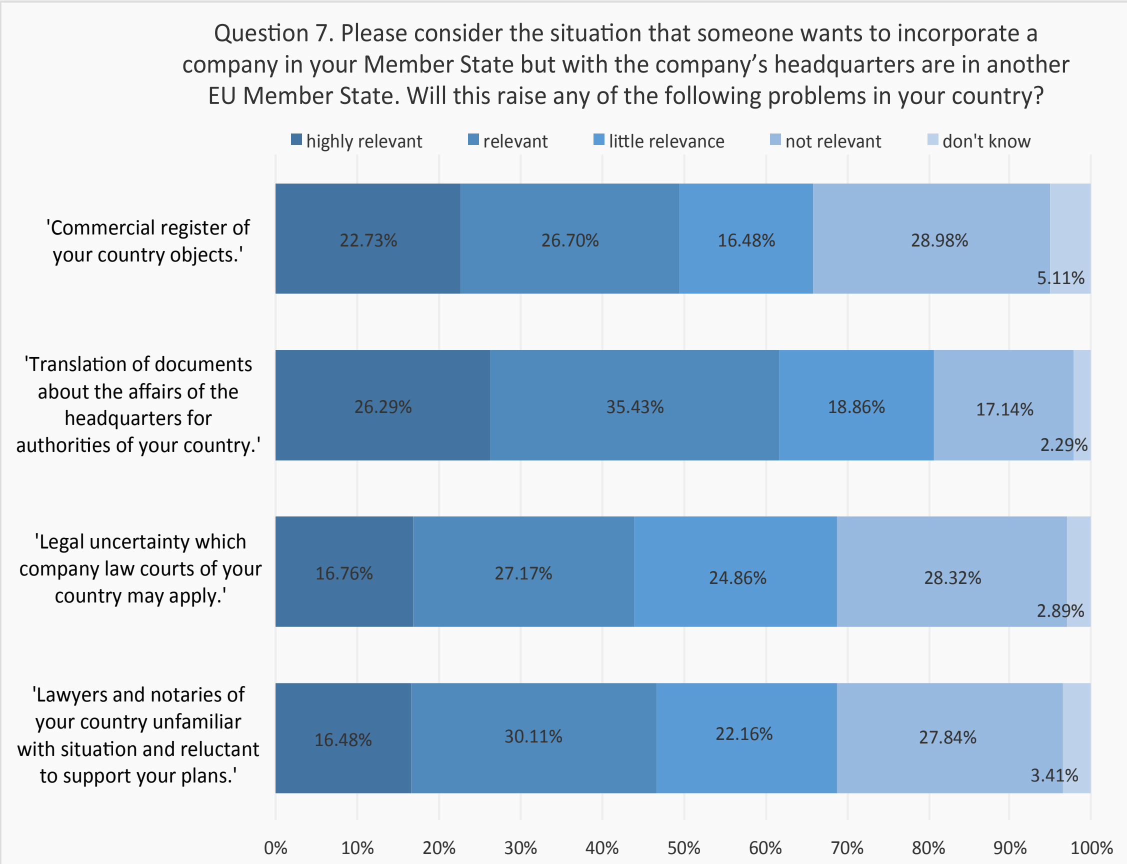

Table 6: Response count of Question 7

Answer Options (as chart)	highly relevant	relevant	little relevance	not relevant	don't know	Response Count
(1)	40	47	29	51	9	176
(2)	46	62	33	30	4	175
(3)	29	47	43	49	5	173
(4)	29	53	39	49	6	176

[23] The following number of free text comments were provided: 47 in Q7; 32 in Q8; 36 in Q9; 33 in Q10; 17 in Q11; 16 in Q12; 14 in Q13; 16 in Q14; 12 in Q16.

Excluding the 'don't know' answers, it can be seen that the majority of respondents indicate that it could be a problem that the commercial register of the country of incorporation objects and that the translation of documents about the affairs of the headquarters for authorities of this country may be needed. A strong minority of more than 40% also indicates that there may be problems due to the legal uncertainty concerning which company law will the courts of the country of incorporation decide to apply and due to lawyers and notaries of this country being unfamiliar with the situation and reluctant to support the plans.

Table 8: Correlations of answers in Question 7

Answers	1	2	3	4
1	1	.506**	.466**	.615**
2	.506**	1	.363**	.451**
3	.466**	.363**	1	.617**
4	.615**	.451**	.617**	1

**: Correlation is significant at the 0.01 level (2-tailed)

As in the previous part, it is interesting to identify correlations between the individual responses.[24] It can be seen from Table 8 that the responses to the four answer options presented in Question 7 are all strongly correlated: in other words, whenever one potential problem is mentioned, the others are as well.

Many of the free-text comments to this question refer to the 'real-seat theory', in parts still applied by some of the Member States.[25] For example, one of the respondents wrote that 'Belgium is a real seat state. If the company is transparent about its intentions, this will cause a lot of confusion and problems'. Others were even more definitive, for example, saying that 'it is not possible to incorporate a company in Latvia with a registered address in another EU Member State' and that 'the competent judges / clerks will not register an Austrian NewCo with headquarters in another Member State'.

In the context of the answer option about translations, many respondents referred to the fact that judges and employees at the local registers lack foreign language knowledge. For example, according to one respondent the (Italian) 'commercial register doesn't accept documents written in non-Italian language' and according to another one: 'Polish is the official language in the Republic of Poland. Many people in Poland still do not know foreign languages; especially the ones that work in the public administration.'

Other responses also referred to more general legal and institutional problems. For example, for Spain a respondent bemoaned the 'lack of conflict of laws' rules' and a respondent from Italy expressed the view that 'the formalism of the Italian company law as applied by notaries is frequently an obstacle to this kind of transactions and increases the costs of the transaction'. As elsewhere in the survey, many also referred to issues of taxation, here specifically referring to income revenues of the company and the corresponding place of establishment under tax law.

[24] Here and in the following, this is based on a coding of 1-4 from 'highly relevant' to 'not relevant'; the 'don't know' answers were disregarded.
[25] See the country reports and the comparative analysis (Chapter IV) for details.

Table 9: Statistically significant group differences for Question 7

Sub-question	Respondents who perceive factors more often as *relevant* than other respondents (significance levels)	Respondents who perceive factors more often as *irrelevant* than other respondents (significance levels)
commercial register of your country objects	southern European countries (0.001)	northern European countries (0.030)
	real seat countries (<0.001)	
	weak economy countries (0.019)	
translation of documents about the affairs of the headquarters for authorities of your country		northern European countries (0.024)
legal uncertainty which company law courts of your country may apply	southern European countries (0.018)	northern European countries (0.002)
	real seat countries (0.012)	
lawyers and notaries of your country unfamiliar with situation and reluctant to support your plans	southern European countries (<0.001)	northern European countries (0.003)
	weak economy countries (0.003)	
	real seat countries (0.013)	

The group differences also show that there is a high correlation between the answers to the sub-questions. In substance, it is revealing that respondents from northern Europe are more content with the situation in their countries. By contrast, respondents from southern Europe, weak economy and real seat countries point towards more problems – which may be due to less effective domestic institutions, less familiarity of local registers, lawyers and notaries with the case law of the Court of Justice,[26] and the remnants of the real seat theory leading to objections by the commercial register, problems of legal uncertainty and the lack of support from local lawyers and notaries.

The next question asked about the scenario of a subsequent split between the country of incorporation and the headquarters, again taking the perspective of the former country:

[26] See also the responses to Question 6 in 3.1, above.

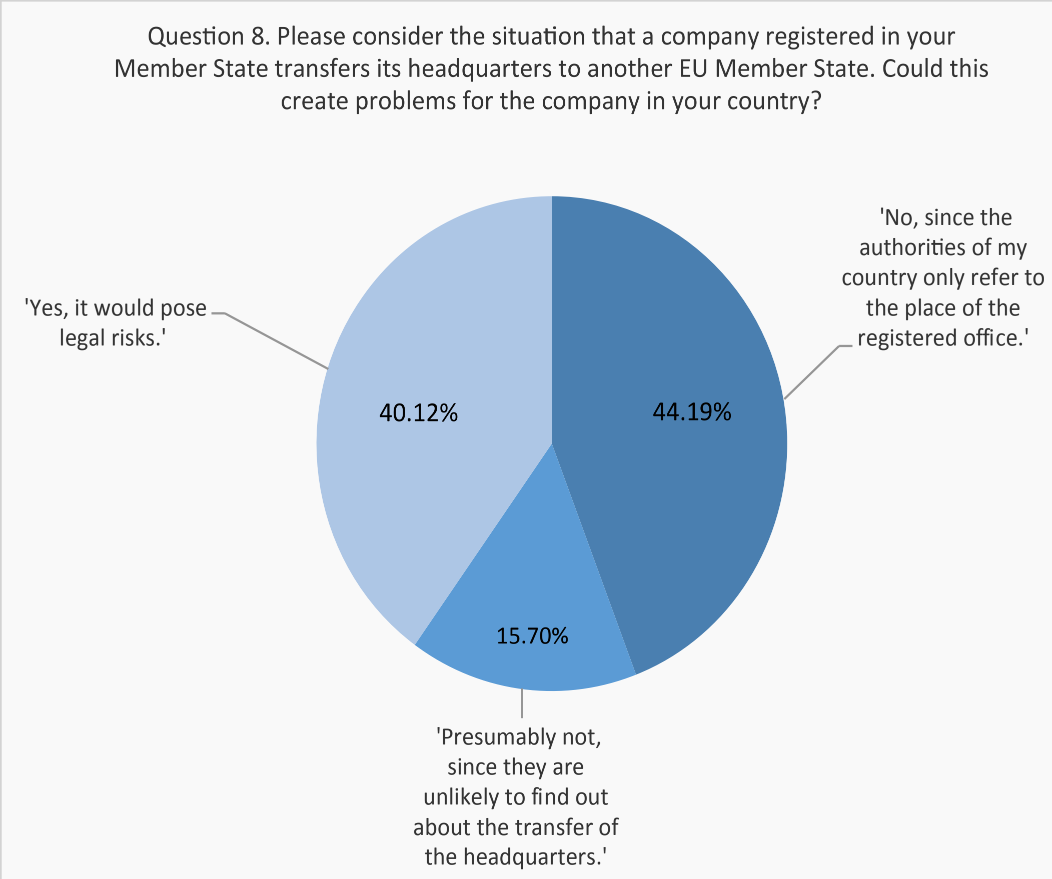

Table 10: Response count of Question 8

Answer Options (as chart)	Response Count (n: 172)
no …	76
presumably not …	27
yes …	69

The general picture of the answers to Question 8 corresponds to those to Question 7 since, here too, many respondents regard the split between registered seat and headquarters as at least potentially problematic. This question also made it explicit that there may be a mismatch between the 'law in the books' and the 'law in practice' since the headquarters of a company may not be easily identifiable to the authorities, a position shared by at least some of the respondents.

Correspondingly, in the free text comments, a respondent from Belgium indicated that 'a lot will depend on how transparent the company is, but if transparent, this will create problems'. By contrast, two other respondents from Belgium phrased the problem in different ways: the first one wrote that 'in theory this situation would pose legal risks, but in practice the Belgian real seat doctrine is applied in a unilateral way (i.e. only to "inbound" cases)', while the second one expressed the view that 'it is not even a question of "unlikely to find out". I do not think anyone in Belgium wants to disqualify Inbev as a Belgian company because it is de facto being run out of New York (hypothetically)'.

In the comments many of the respondents also referred to other problems, for example, 'issues with suppliers, debt collection and place of legal disputes' and 'questions as to outstanding liabilities to employees and suppliers/third party contractors'. A particular concern involved taxation as can be seen in a response from Sweden: 'The biggest risk is the tax risk. Swedish tax authorities would consider this as moving the operations outside of Sweden and impose a considerable (prohibitive) exit tax'; similar statements have been received from respondents from Belgium, Luxembourg, Latvia, France, Slovenia, Spain, and the Netherlands. Returning to the quantitative data, it is therefore possible that some responses in the answer option 'pose legal risks' also reflect such risks related to questions of tax law.

Table 11: Statistically significant group differences for Question 8

Respondents who *more often perceive problems* than other respondents (significance levels)	**Respondents who *less often perceive problems* than other respondents (significance levels)**
real seat countries (0.003)	northern European countries (<0.001)
Eurozone countries (0.020)	

With respect to group differences,[27] it is again the case that respondents from northern Europe report fewer problems than other regions. Respondents from real-seat (and Eurozone) countries are generally more sceptical of the situation where a company registered in a Member State transfers its headquarters to another country. This shows again the problems with the remnants of the real seat theory in some Member States.

Question 9 asked about the reverse situation from Questions 7 and 8, namely that a company from another Member State only has its headquarters in the Member State of the respondent, i.e. from the perspective of the latter Member State this company may be regarded as a 'pseudo-foreign company'.

[27] The information was coded as follows: yes =2; presumably =1; no =0.

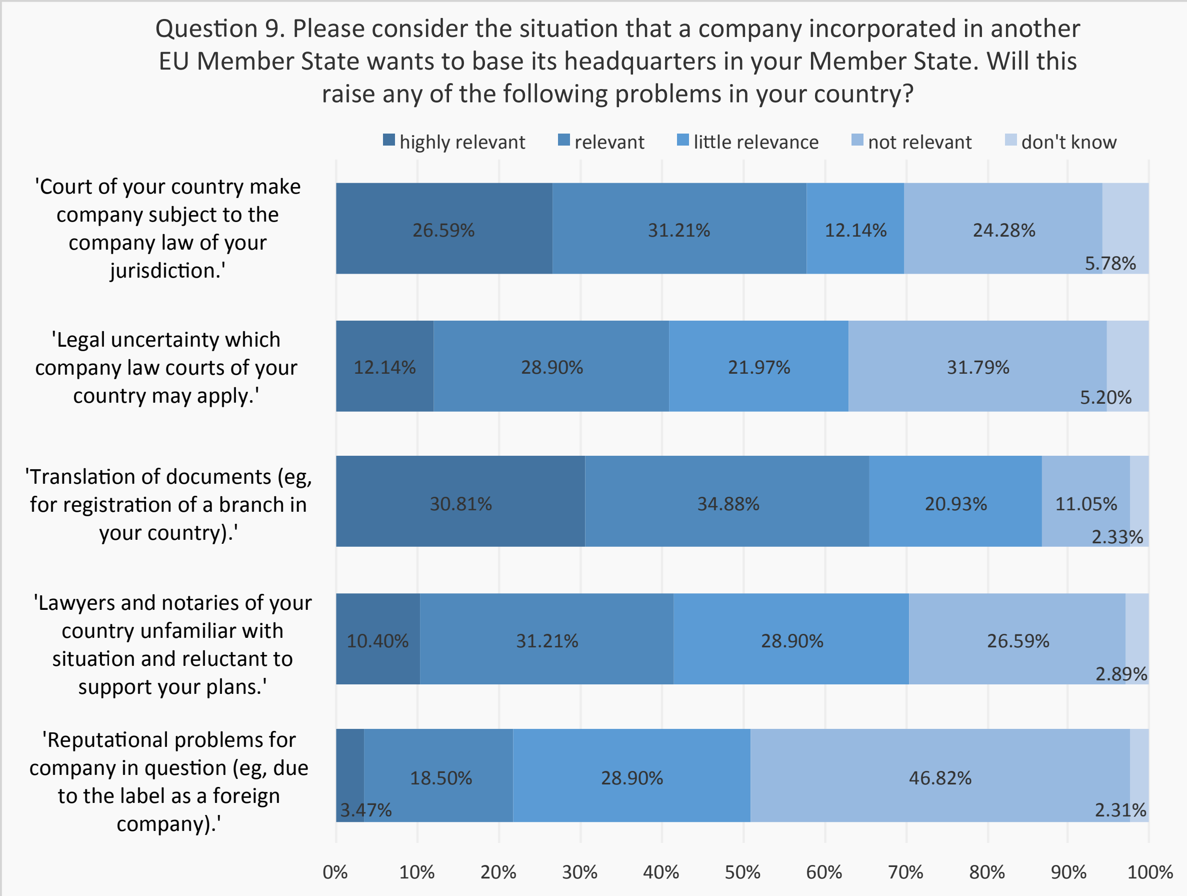

Table 12: Response count of Question 9

Answer Options (as chart)	highly relevant	relevant	little relevance	not relevant	don't know	Response Count
(1)	46	54	21	42	10	173
(2)	21	50	38	55	9	173
(3)	53	60	36	19	4	172
(4)	18	54	50	46	5	173
(5)	6	32	50	81	4	173

The responses to answer options 1, 2 and 4 – with between 41% and 58% approval ('highly relevant' or 'relevant') – indicate that some Member States regard this situation as problematic. For example, two respondents from Belgium and Spain expressed the view that, based on the place of the company's headquarters, Spanish and Belgian company law would be applicable. Respondents from Italy, Greece and the Netherlands also indicated that at least parts of their countries' company law may apply. These are interesting statements given the fact that the case law of the Court of Justice is most likely to be understood as requiring Member States to accept validly incorporated companies from other Member States.[28]

The answer option 3 was also mentioned in some of the free-text comments. In particular, many respondents referred to the registration of a branch in their respective

[28] At least since the decision in *Überseering*, see Chapter I, above.

Member States and the corresponding costs.[29] For example, a respondent from Slovakia explained that 'all incorporation documents of the founder of the branch must be provided in original/certified copies and translated into Slovak; annually, the financial accounts of the founder must be (at least pursuant to law, though this duty is widely avoided) officially translated into Slovak and filed with the Slovak Commercial Register.' The same respondent also provided an explanation to answer option 5 referring to reputational problems of companies 'incorporated in non-EU tax havens such as Belize, or to a lesser degree Cyprus'.

Concerning further issues, a respondent from the Republic of Ireland indicated that the assets of the foreign company in Ireland are subject to Irish insolvency law (and some of the other respondents also referred to the COMI in a number of questions in this survey). Taxation was again frequently mentioned, in particular if – in the words of a respondent from Portugal – the place of establishment of the company can be shown to be in the Member State of the headquarters.

Table 13: Correlations of answers in Question 9

Answer	1	2	3	4	5
1	1	.585**	.398**	.469**	.319**
2	.585**	1	.366**	.532**	.422**
3	.398**	.366**	1	.410**	.268**
4	.469**	.532**	.410**	1	.492**
5	.319**	.422**	.268**	.492**	1

**: Correlation is significant at the 0.01 level (2-tailed)

Applying the same method as in Question 7 (see above), it can be that all answers are strongly positively correlated with each other; thus, whenever one potential problem is mentioned, the others are as well.

[29] For previous empirical research on this topic see M Becht, L Enriques, and V Korom, 'Centros and the Cost of Branching' (2009) 9 *Journal of Corporate Law Studies* 171.

Table 14: Statistically significant group differences for Question 9

Sub-question	Respondents who perceive factors more often as *relevant* than other respondents (significance levels)	Respondents who perceive factors more often as *irrelevant* than other respondents (significance levels)
courts of your country make company subject to the company law of your jurisdiction	real seat countries (0.018)	northern European countries (0.007)
legal uncertainty which company law courts of your country may apply	real seat countries (0.049)	northern European countries (0.030)
lawyers and notaries of your country unfamiliar with situation and reluctant to support your plans		northern European countries (0.006)
reputational problems for company in question (eg, due to the label as a foreign company)	western European countries (0.012) strong economy countries (0.008)	post-2004 EU countries (0.010)

Distinguishing between groups of responses, as previously, those from northern Europe report fewer problems in a number of categories. Respondents from real-seat countries were more likely to mention problems with their own courts and legal uncertainty as relevant problems – which is consistent with the expectation that remnants of the real seat theory can hinder cross-border corporate mobility. In terms of reputational problems, respondents from Western Europe and strong economy countries are more likely to mention problems than other groups, while those from post-2004 Member States are less likely to report problems. This difference is likely to reflect the fact that the domestic legal forms of the countries from the former groups are better known (thus, foreign forms are potentially seen in a more sceptical light), while in the latter group there may be the perception that foreign legal forms may actually be advantageous to domestic ones.

Questions 10 and 11 deal with the ways a company's registered seat may be transferred.

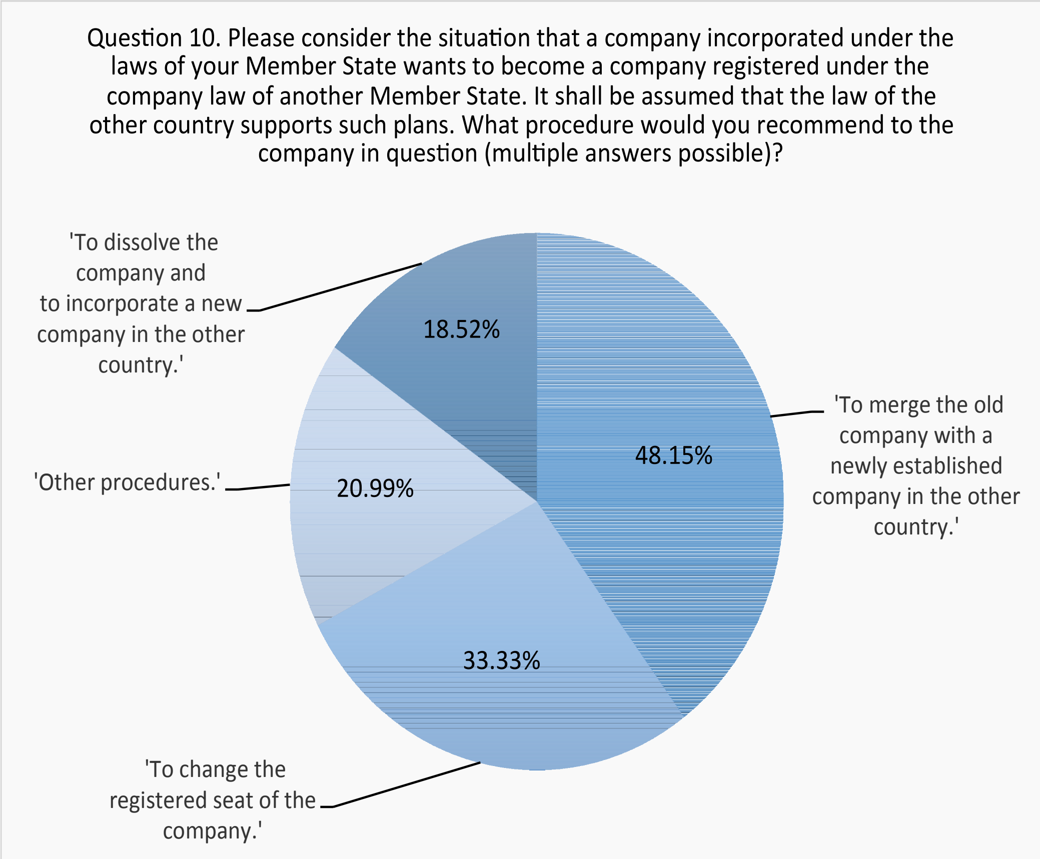

Table 15: Response count of Question 10

Answer Options (as chart)	Response Count (n: 162)
to dissolve the company and to incorporate a new company …	30
to merge the old company with a newly established company …	78
to change the registered seat of the company	54
other procedures (please specify)	34

It follows that the use of a cross-border merger for corporate re-incorporation is the most popular option, but there is also some support for the possibility to change the registered seat of the company or to simply dissolve the company and to incorporate a new company. As far as the choice of 'other procedures' in Question 10 was explained in the comments, respondents from France, Greece, Latvia and Sweden made reference to the possibility of converting the company into an SE and transferring its seat. A respondent from Sweden indicated that, as an alternative, one could 'incorporate a subsidiary or the like in the new jurisdiction and have the company make a public takeover bid for its own parent'.

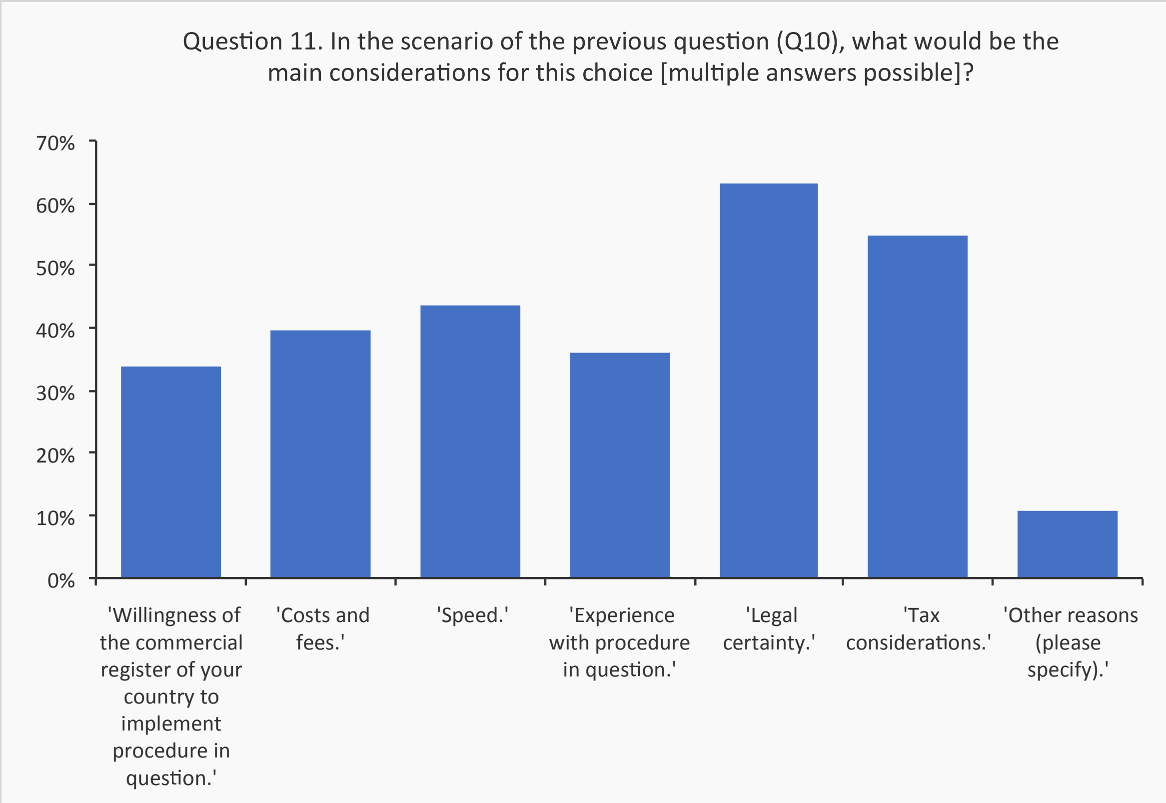

Table 16: Response count of Question 11

Answer Options	Response Count (n: 169)
willingness of the commercial register …	57
costs and fees	67
Speed	74
experience with procedure in question	61
legal certainty	107
tax considerations	93
other reasons (please specify)	18

For Question 11 about the determinant factors for the choice of procedure, problems of legal certainty have most frequently been mentioned (thus, possibly, confirming the need to harmonise seat transfers despite the case law of the Court of Justice); tax considerations were also regarded as very important.

The free text comments also referred to other reasons, such as the possibility of universal succession in rights and obligations (respondents from Bulgaria and Slovakia), the automatic transfer of IP rights (respondents from Slovakia and Sweden), the need to consult employees (respondents from Sweden and the UK) and an unanimity requirement for changing the registered seat (respondent from Luxembourg).

Interestingly, a respondent from Slovakia observed that 'in Slovakia we have noted [a] couple of successful changes of registered seat (mainly between Slovakia and Hungary and all concerning very small companies) although, in my opinion this was only [a] result of the fact that Slovak Commercial Register does not materially review the registration process. Therefore, this cannot be a recommended procedure.'

Table 17: Relationship of answers to Questions 10 and 11

	Options of Q11 (in absolute numbers, in %, significance level)						
Options of Q10 (and n)	willing-ness of register	costs and fees	speed	expe-rience	legal certain-ty	tax con-sider.	other
to dissolve and incorporate a new company (30)	9	12	18	9	22	14	1
	30.00%	40.00%	60.00%	30.00%	73.33%	46.67%	3.33%
			*				*
to merge the old with a newly established company (78)	35	21	23	35	58	38	7
	44.87%	26.92%	29.49%	44.87%	74.36%	48.72%	8.97%
	**	**	**	**	**		
to change the registered seat of the company (54)	12	29	32	13	23	32	8
	22.22%	53.70%	59.26%	24.07%	42.59%	59.26%	14.81%
	**	**	**	*	**		
other procedures (34)	8	12	12	13	17	25	4
	23.53%	35.29%	35.29%	38.24%	50.00%	73.53%	11.76%
						**	

**: statistically significant difference from all other respondents at 0.05 level
*: statistically significant difference from all other respondents at 0.1 level

It is also revealing to scrutinise the relationship between the forms chosen and the relevant considerations. The simple but rather crude solution to dissolve the old and incorporate a new company is mainly preferred by respondents who regard it as quicker and as more certain than the, in the view of those respondents, more complex other options. Merging the old with a new company is also seen as a certain procedure by the respondents who would choose it; however, it requires more experience and may be less quick. The most straight-forward solution, to change the registered seat of the company, is – in the views of the respondents who indicate that such a procedure is feasible – inexpensive and speedy; in addition, it can have tax advantages since the existing company will not be dissolved.

Since these reasons only report the answers of respondents in support of their own option, further considerations can account for the lack of choice of the other options. For example, in the comparative part of this study we show that the case law of the Court of Justice on seat transfers (*VALE* etc.) has not been applied consistently throughout the EU.[30] Thus, in some countries, it may not be feasible (or too uncertain) to pursue this strategy in order to change the registered seat of the company. This relevance of the local context can also be seen in the statistically significant group differences:

[30] See also Chapter IV, Section 6, below.

Table 18: Statistically significant group differences for Questions 10 and 11

Options	Respondents *more likely* to suggest than other respondents (significance levels)	Respondents *less likely* to suggest than other respondents (significance levels)
to dissolve the company and to incorporate a new company in the other country	Eastern European countries (0.003)	Western European countries (<0.001)
		pre-2004 EU countries (<0.001)
		Eurozone countries (0.004)
		strong economy countries (0.002)
to merge the old company with a newly established company in the other country	Western European countries (0.001)	Eastern European countries (0.004)
	pre-2004 EU countries (0.005)	Southern European countries (0.029)
	Eurozone countries (<0.001)	
	strong economy countries (0.001)	
to change the registered seat of the company	Southern European countries (0.002)	Northern European countries (<0.001)
relevance of speed	*Southern European countries (0.005)*	
	weak economy countries (0.031)	
relevance of experience with procedure in question	*Western European countries (0.014)*	
relevance of legal certainty	*post-2004 EU countries (0.029)*	

For the answers to Questions 10 and 11, differences between three main groups can be identified. First, there is the group of respondents from Eastern Europe and the post-2004 Member States. They are more likely to suggest that the company should dissolve itself and create a new company in the other country, less likely to suggest that the company merges the old company with a newly established company in the other country and more likely to refer to legal certainty as a relevant consideration. All of this can be interpreted as showing that in those countries practicing lawyers, as well as registers and courts, have less experience with seat transfers than elsewhere in Europe.

Second, respondents from western Europe (as well as pre-2004 Member States, Eurozone countries and strong economy countries) are very unlikely to propose the 'dissolve and create a new company in other country' procedure but are likely to suggest that the company merges the old company with a newly established one in the target Member State. This is the more sophisticated procedure (and it has also been the traditional model for reincorporations in the US[31]), and therefore it also makes sense that respondents from western Europe are more likely to consider experience with the procedure in question as a relevant consideration.

Third, respondents from southern Europe have a relative preference for the direct change of the registered seat. This may be due to the implementation of such a strategy

[31] For a comparison see, eg, F Mucciarelli, 'The Function of Corporate Law and the effects of Reincorporations in the U.S. and the E.U.' (2012) 20 *Tulane Journal of International and Comparative Law* 421.

in the laws of those countries.[32] In addition, the survey responses indicate that those respondents put more emphasis on the importance of speed, as, indeed, as far as this option is available, it can be quicker than other forms of seat transfers.

In contrast to the intra-EU scenarios found in Questions 7 to 11, Question 12 asks respondents to assess the situation as regards third countries:

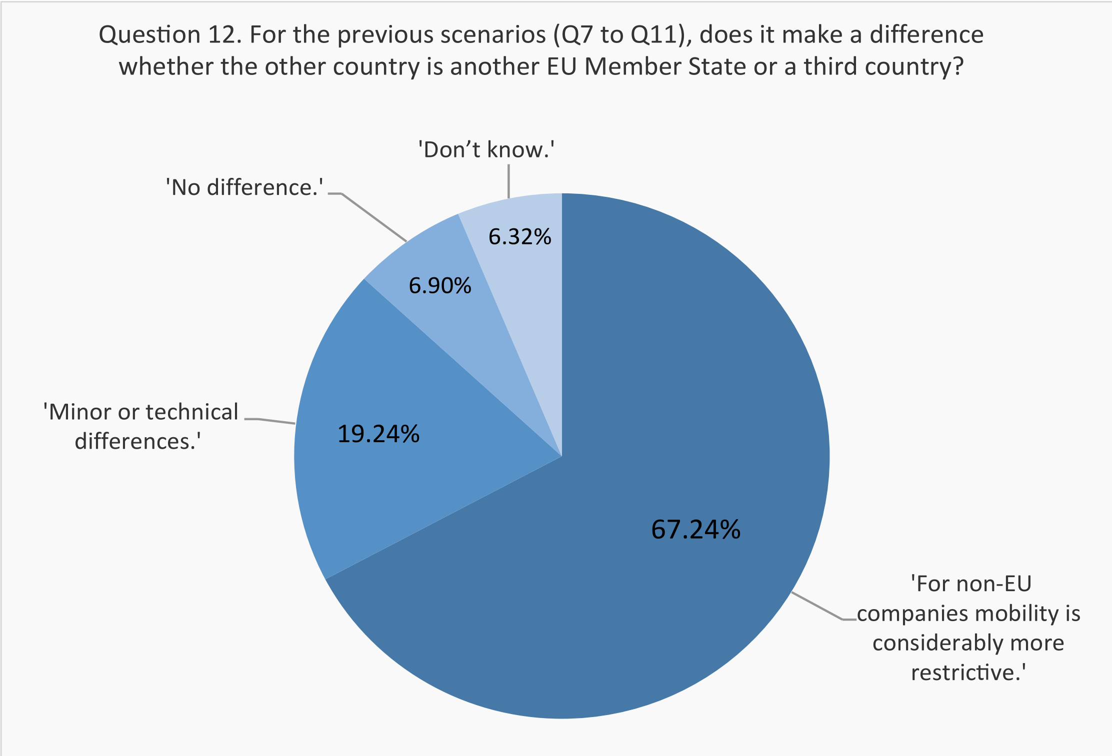

Table 19: Response count of Question 12

Answer Options	Response Count (n: 174)
for non-EU companies mobility is considerably more restrictive	117
minor or technical differences	34
no difference	12
don't know	11

Thus, a clear majority answered that corporate mobility is considerably more restrictive for non-EU companies than in the intra-EU settings. This may be partly a result of the case law of the Court of Justice. The free text comments, however, mainly referred to legislative measures having led to improvements of mobility within the EU (or, to be precise, within the EEA) – more specifically, the Cross-Border Merger Directive (noted by respondents from Sweden and Portugal), the Statute of the European Company (noted by a respondent from Latvia) and the Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions etc (noted by a respondent from Greece).

Other comments provide further reasons why the involvement of non-EU companies can be problematic. Respondents from Spain and Greece mentioned that the 'real seat

[32] See also comparative analysis Chapter IV, Section 6, below.

doctrine' will be strictly applicable here, thus making corporate mobility more difficult than in intra-EU settings. Respondents from France and Luxembourg referred to the risk that in the relationship with non-EU countries companies may be seen as dissolved, thus losing their legal personality. Finally, many respondents noted that further details would depend on the rules of the non-EU country in question and any available international agreements between the countries concerned.

3.3 Further questions about situation in Member States

While Questions 7 to 12 asked the respondents to assess specific scenarios, the following three questions deal with more general topics relevant to the issues of conflict of laws in the Member States.

Table 20: Question 13: Are there any law firms or other advisory firms in your country that actively promote legal mobility? [multiple answers possible]. In case there are such firms, please specify - if possible - in or from which jurisdictions and provide names or websites of these firms.

Answer Options	Response Count (n: 174)	Response Percent
yes, there are firms that promote the incorporation of domestic businesses in other countries	38	21.8%
yes, there are firms that promote the incorporation of foreign businesses in my country	43	24.7%
no, I don't think so	71	40.8%
I don't know	48	27.6%

An article from 2008 emphasised, amongst others, the role of incorporation agents for the incorporation of companies in other Member States (notably continental European businesses in the UK).[33] The responses to Question 13 show, however, that about 2/3 of the respondents (categories 'no, I don't think so' and 'I don't know') could not confirm their activity.

As far as respondents choose one or both of the first two answer options, some of the free text comments made general references to major law and audit firms, as well as consulting firms that promote incorporation in overseas tax havens. Specifically for Slovakia, a respondent from a major law firm mentioned that they promoted the 'founding of UK start-ups', but that they also used to promote Slovakian companies 'vis a vis Austria, Germany and other jurisdictions' due to low corporate tax rates in Slovakia (though those have now been increased).[34] A respondent from Greece explained that here incorporation goes 'from Greece to the UK, Cyprus, Luxembourg, Malta, Bulgaria, Romania etc.'

Only two of the free-text comments indicate specialised companies that promote corporate mobility in Europe: an Italian respondent referred us to two Italian websites that promote inward and outward incorporations[35] and a Belgian respondent mentioned a Belgian firm that promotes incorporation of UK limiteds.[36]

[33] M Becht, C Mayer and H Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 *Journal of Corporate Finance* 241 at 254-5.
[34] See also the statistical analysis, Chapter II, Section 4.2 above.
[35] See www.italianlimited.it (aimed at Italian firms incorporating in the UK, Malta, Ireland, or Cyprus) www.italiancompanyformations.com (aimed to promote incorporation in Italy).
[36] See www.coventis.be/bvba/ltd-oprichten-voor-en-nadelen.html.

Table 21: Statistically significant group differences for Question 13

Options	Respondents *more likely* to suggest than other respondents (significance levels)	Respondents *less likely* to suggest than other respondents (significance levels)
yes, there are firms that promote the incorporation of domestic businesses *in other countries*	Western European countries (<0.001)	Northern European countries (0.040)
	pre-2004 EU countries (0.003)	
	Eurozone countries (0.002)	
	strong economy countries (0.006)	
yes, there are firms that promote the incorporation of foreign businesses *in my country*	Eurozone countries (0.009)	

Analysing group differences, it is noticeable that respondents from western European, Eurozone, pre-2004 and strong economy Member States are more likely to report that firms exist that promote the incorporation of domestic businesses in other countries. This is likely to be due to the fact that in these countries there is more experience with cross-border mobility than elsewhere in Europe. With respect to firms that promote the incorporation of foreign businesses in their own country, the only significant difference is that the respondents from Eurozone countries were more likely than non-Eurozone respondents to state that there are those firms, with the plausible explanation that European integration – and thus prevalence of those firms – is more advanced within the Eurozone.[37]

Table 22: Question 14 - Do you think there is considerable legal uncertainty in the application of the conflict of laws rules of your Member State on the following topics? [multiple answers possible]

Answer Options	Response Count (n: 163)	Response Percent
the main connecting factor ('real seat', 'statutory seat' etc)	67	41.1%
the boundary between the applicable company law and other areas (eg, insolvency, tort, contract law)	97	59.5%
the scope of overriding rules of domestic law that may interfere with foreign company law	94	57.7%
other topics	16	9.8%
I don't know	23	14.1%

The responses to Question 14 confirm the finding of the comparative part of this project[38], namely that the boundary between the applicable company law and other areas (e.g., insolvency, tort, contract law) and the scope of the overriding rules of domestic law (e.g., questions of *ordre public*) are often difficult to determine. The overall picture of the responses also shows considerable uncertainty about the applicable law:

[37] However, for all of the results in Table 21 it needs to be noted that (even) in the 'more likely' categories, it is always less than 50% of respondents who state that there are such firms.
[38] See Chapter IV, below.

excluding the 'don't knows', only 9.8% of the respondents say that there is no uncertainty, while more than 55% indicate two or more issues.[39]

With respect to the first answer option, it needs to be considered that for countries that clearly follow the 'incorporation theory', the main connecting factor may not pose major problems. By contrast, the responses from 'real seat' countries and from countries with unclear or mixed legal positions tend to express more uncertainty as regards the main connecting factor. For example, according to a respondent from Belgium, 'the determination of the principal establishment (real seat) requires a factual assessment, and this will almost automatically result in legal uncertainty'.

Regarding other topics of legal uncertainty, only some responses have been provided. For example, a respondent from Luxembourg refers to the topics of 'business license, filing of annual account and the competent body for decisions' and a Greek respondent to the law applicable to the piercing of the corporate veil, problems with transactions made by company representatives abroad and transactions involving foreign subsidiaries.

In the more general free text comments, an Estonian respondent expresses the view that 'it is exceedingly rare for such issues to come up before Estonian courts and I would be inclined to think they have never arisen.' By contrast, a respondent from the Republic of Ireland indicates that 'all of these issues are pretty well settled', and one from the UK suggests that 'the law on seat is fairly clear in the UK but confused by poor guidance derived from ECJ determinations'.

Table 23: Statistically significant group differences for Question 14

Sub-question	Respondents who perceive factors more often as *relevant* than other respondents (significance levels)
the boundary between the applicable company law and other areas (eg, insolvency, tort, contract law)	real seat countries (0.010)
	Southern European countries (0.019)
	Eurozone countries (0.004)
the scope of overriding rules of domestic law that may interfere with foreign company law	Southern European countries (0.002)

The analysis of group differences also shows that real seat country respondents are more likely to report problems, specifically for the boundary question.[40] Respondents from southern Europe are also more likely to report uncertainty about the contentious boundary issues as well as the scope of mandatory laws than other respondents. A cautious interpretation can be that the court proceedings in these countries are slower and less efficient than elsewhere in Europe, thus, accounting for this increased uncertainty.

[39] The precise numbers are: 4 issues mentioned by 4 respondents = 2.45% of the respondents; 3 issues by 30 = 18.4%; 2 issues by 55 = 33.74%; 1 issue by 58 = 35.58%; and none by 16 = 9.8%.
[40] As regards uncertainty about the 'main connecting factor', the corresponding difference between respondents from real seat and incorporation theory countries is significant at the 10% level.

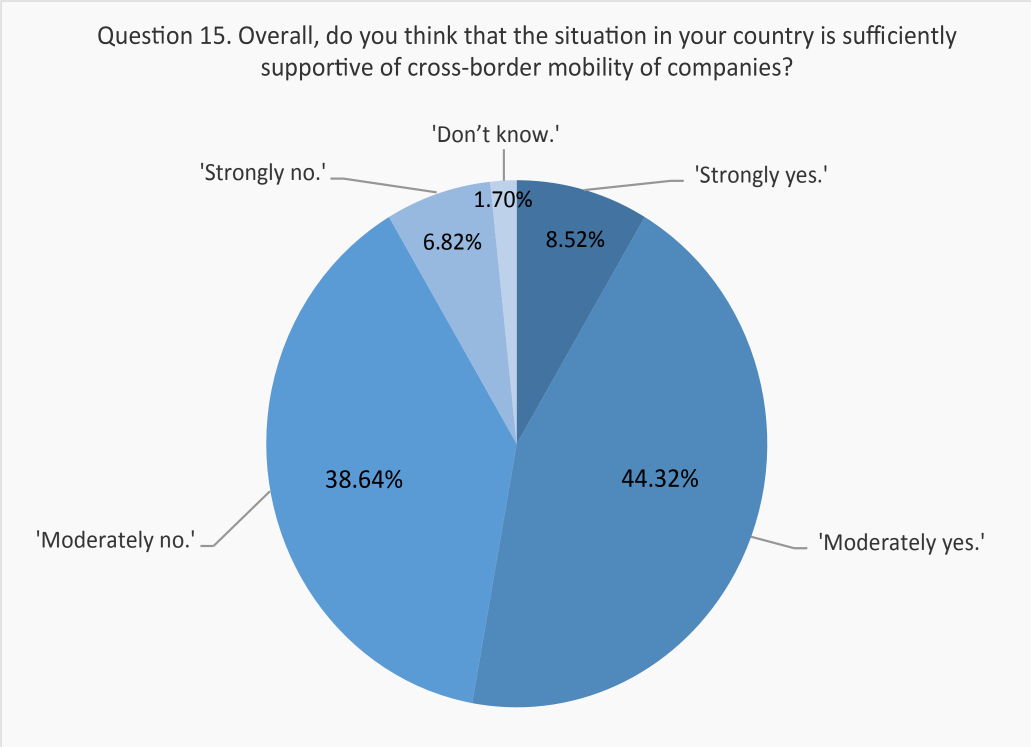

Table 24: Response count of Question 15

	Answer Options					
	strongly yes	moderately yes	moderately no	strongly no	don't know	Total
Response Count	15	78	68	12	3	176

Despite the complexity of the foregoing topics, Question 15 asked respondents to make an overall assessment of whether their domestic law sufficiently supports cross-border mobility. A slight majority answered in a positive way ('strongly yes' and 'moderately yes'). But it is also interesting to compare these figures with those in Question 6 where more than 80% expressed a positive view about a possible EU harmonisation of the rules of conflict of laws as they apply to companies.

Relatedly, it is revealing to examine how the precise responses to Question 15 correlate to the six statements in Question 6. For three of those, the relationship is statistically significant. It shows that those who think that the domestic law is sufficiently supportive of cross-border mobility answered in Question 6 that (i) there is not much variation of substantive rules of company law across the EU (correlation: -0.18, significant at 5% level), that (ii) the EU should not harmonise rules of conflict of laws as they apply to companies (correlation: -0.202, significant at 1% level), and (iii) that the case law of the Court of Justice is sufficiently supportive of cross-border mobility (correlation: 0.228, significant at 1% level). By implication, those respondents who are more sceptical about their own domestic laws tend to be more supportive of harmonising conflict of laws rules as they apply to companies.

3.4 Other comments provided

The final part of the survey asked respondents the open-ended Question 16: 'Do you have any further comments on the themes of this questionnaire?'. Respondents took this as an opportunity to reflect on the main problems and the way forward.

As regards some of the major problems, the following views can be seen as representative. According to an Italian respondent 'there are big issues instead with reference to insolvency law and directors' duties in insolvent international groups.' A respondent from Slovakia mentions the issue that: 'despite being a lawyer, from practical point of view, and I do not like to admit it, the most important factors concerning mobility relate to taxes … not to regulation of corporate affairs.'

On the role of the European case law, a respondent from Luxembourg assesses that: 'CJEU case law together with the statute of the European Company (SE) are in theory sufficiently supportive of cross-border mobility of companies within the EU. In practice, CJEU case law is known and familiar to only few practitioners and there are frequently problems in the performance of the mobility in Member States where the law remains silent on this matter.'

The question is therefore how the EU should move forward. According to a respondent from the UK, there is a 'significant need for harmonisation on the question of corporate seat and jurisdiction as applied across EU Member States', and according to a respondent from Luxembourg 'further harmonisation of substantive corporate law adds no value, but the conflict-of-law rules need further harmonisation.' This latter scepticism as regards the harmonisation of substantive company law is not in line with the general responses that we have received from Question 6, above. However, the strong support of harmonisation of conflict of laws rules confirms the responses to Question 6.

4. Conclusion

Effective corporate mobility is not only a matter of the 'law in the books' but also the 'law in practice'. This chapter reported the results of a survey of lawyers conducted in September 2015. The responses were evaluated with quantitative methods, also examining whether there are significant differences between groups of respondents and correlations between answers to specific questions. In addition, qualitative responses of the free-text comments were used to contextualise the results.

The main finding is that there are significant practical obstacles to corporate mobility in Europe. This shows in many of the survey answers and holds true for both the aggregate level of the responses and the analyses of the responses for particular groups of respondents. It also correlates with the view that supports European harmonisation in this area of law.

More specifically, the following key findings can be identified:

- First, the respondents do not regard the European case law as a substitute for a possible harmonisation of conflict of laws rules, neither at the general level nor as regards specific questions (e.g., for seat transfers). The support for harmonisation of conflict of laws rules was stronger than for harmonisation of substantive company law, while the latter still received considerable support.

- Second, it is noticeable that many of the respondents from the countries that have retained an element of the 'real seat theory' report various practical obstacles. Those problems have also been frequently mentioned in the free text comments, for example, indicating the problems in identifying the place of the 'real seat'.

- Third, the analysis of group differences also shows that there is still a divide between the respondents from eastern European countries (or the countries with a lower GDP per capita, or the post-2004 Member States) and those from other countries. The respondents from the former countries are more likely to indicate lack of familiarity with the relevant procedures and to report practical problems in their dealings with domestic courts and commercial registers.

- Fourth, as regards specific problems, the respondents often mentioned translation costs and problems of legal uncertainty. The relationship to related areas of law, notably insolvency law, is also seen as crucial; in particular, questions of taxation are a decisive factor for effective corporate mobility.

- Fifth, there is also a strong positive correlation between respondents who are sceptical about their domestic law and who support harmonisation of conflict of laws rules. Interestingly, there is also a positive correlation between support for harmonisation of substantive rules and conflict of laws rules: thus, these areas of law are not seen as alternative choices for European harmonisation.

5. Annex to Survey[41]

5.1 Cover email sent to respondents

Survey on Corporate Mobility (European Commission study)

'Dear [CustomData],

On behalf of the European Commission, we are conducting a study on problems caused by the lack of harmonisation of the conflict-of-law rules concerning companies in the EU.

It would be great if you could help us by responding to a few survey questions: it should not take more than ten minutes!
Here is a link to the survey: [SurveyLink]

If you are interested in our final report, please enter your email address at [SurveyLink2]; we will then send you a copy of the report, based on this survey as well as further comparative research.

Many thanks!

Carsten Gerner-Beuerle, London School of Economics
Federico Mucciarelli, SOAS, University of London and University of Modena & Reggio Emilia
Edmund Schuster, London School of Economics
Mathias Siems, Durham University'

5.2 Survey text (as made available on Surveymonkey)

Survey on Corporate Mobility (European Commission study)

This study, funded by the European Commission, aims to evaluate the problems caused by the lack of harmonisation of the conflict-of-law rules concerning companies. Specific attention is paid to the practical problems of companies that intend to move or reorganise within the European Union.

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[41] We thank the respondents to our survey, in particular Dr. Lukas Fantur, Attorney at Law, Austria - Nikolaus Adensamer, KPRA attorneys at law, Austria - Vedran Obradovic, KWR Rechtsanwälte, Austria - Dr. Florian Linder, Viehböck Breiter Schenk & Nau Rechtsanwälte, Austria - Carl Clottens, Eubelius, Belgium - Stela Ivanova, bnt Neupert Ivanova, Bulgaria - Pavel Hristov, Hristov & Partners, Bulgaria - Danijel Pribanić, attorney-at-law in cooperation with Karanović & Nikolić, Croatia - JUDr. Radka Chlebcová, Ph.D., attorney, Czech Republic - Michal Pivarči, Clifford Chance, Czech Republic - Martin Chr. Kruhl, Lett Law Firm, Denmark - Catherine Cathiard, FIDAL, France - Dieter Leuering, Flick Gocke Schaumburg, Germany - Pavlos Masouros, Masouros Law Firm, Greece - Andreas Pantelakis , Pantelakis-Skaltsas , Greece - Sotiris Dempegiotis, Dryllerakis & Associates, Greece - Giuseppe A. Rescio, Notary, Catholic University of Milano, Italy - Giampaolo Salsi, K&L Gates, Italy - Giorgio Corno, Studio Corno Avvocati, Italy - Francesco Dagnino, Criscuoli Dagnino e Associati Studio Legale, Italy - Giovanni Gazzaniga, Allen & Overy partner, Italy - Marco Lamandini, Italy - Luca Masotti, Masotti & Berger, Italy - Prof. Alberto Saravalle, Bonelli Erede, Italy - Studio Legale Scarante & Partners, Lawyers, Italy and Spain - Maris Brizgo, Klavins Ellex, Latvia - Dovile Burgiene, Valiunas Ellex, Lithuania - Odeta Trucinskaite-Siusiene, Tark Grunte Sutkiene, Lithuania - Michael Psaila, Simon Tortell & Associates, Malta - Jean C Farrugia, DF Advocates, Malta - Raquel Montes Fernandes, CMS, Portugal - Catarina Belim, Vieira de Almeida & Associados, Portugal - Vasile Godinca-Herlea, Managing partner CITR, Romania - Lucian Bojin, Universitatea de Vest Timisoara, Romania - Radovan Pala, Taylor Wessing, Slovakia - Petra Ferk, PhD, Institute for Public-Private Partnership, Slovenia - Gorazd Šifrer, Notary public, Slovenia - Nana Šumrada Slavnič, LL.M., PhD, Slovenia - Mihai Carabas, Carabas, Lungu - Attorneys at Law, Romania - Angel M. Ballesteros Barros, University Pablo de Olavide, Spain - Pedro Tent, J&A Garrigues, S.L.P., Spain - Ericsson (law firm), Sweden - Jesper Schoenbeck, Vinge, Sweden - M Meiselles, solicitor, England and Wales, and law lecturer, UK - Steven Conybeare, Conybeare Solicitors, England, UK.

We would be very grateful if you could answer the subsequent questions of this survey. They concern (1) basic personal information, (2) general perceptions about company law and conflict of laws in the EU, and (3) specific practical questions about the mobility of companies (please note that we are interested in both private and public companies, but not partnerships, cooperatives and associations).

It should not take more than ten minutes to complete the survey (and it is also possible to skip questions). Of course, all responses will be treated strictly confidential and anonymous. This project is being carried out in accordance with the LSE Research Ethics Policy and Procedures. If you have any questions, please email us at pil-project@europeancompanylaw.net

Part 1: Basic personal information

1. The legal system of which country is most familiar to you? [note: this will be 'your Member State' in Parts 2 and 3 of this questionnaire]

2. Have you also studied or worked in other jurisdictions for a substantial period (at least six months)? Please specify [otherwise leave blank]

3. What is your current employment? [multiple answers possible]

- lawyer in law firm
- in-house lawyer
- notary
- legal scholar/academic
- Other (please specify)

4. Who are your main clients?

small firms (up to 49 employees)	medium-sized firms (50 to 249 employees)	larger firms (250 or more employees)	N/A

5. Have you been involved in work that concerned corporate mobility and/or problems of the conflict of laws rules applicable to companies?

more than 10 times	5 to 9 times	1 to 4 times	not yet

Part 2: General perceptions about company law and conflict of laws in the EU

6. Do you agree or disagree with the following statements?

	strongly agree	moderately agree	neutral	moderately disagree	strongly disagree	I don't know
'There is much variation in the *substantive rules* of company law across the EU.'						
'Variation in those *substantive rules* plays an important role in determining the preferred place of incorporation for companies.'						
'There should be further EU harmonisation of *substantive company law* in the EU.'						
'There should be EU harmonisation of the *rules of conflict of laws* as they apply to companies in the EU.'						
'Legal practitioners of my country are familiar the case law of the CJEU in *Daily Mail, Centros, Überseering, Inspire Art, Cartesio, VALE.'*						
'This line of cases is sufficiently supportive of cross-border mobility of companies.'						

Part 3: Specific practical questions about the mobility of companies with a view to conflict of laws rules

7. Please consider the situation that someone wants to incorporate a company in your Member State but with the company's headquarters in another EU Member State*. Will this raise any of the following problems in your country?*

	highly relevant	relevant	little relevance	not relevant	don't know
commercial register of your country objects					
translation of documents about the affairs of the headquarters for authorities of your country					
legal uncertainty which company law courts of your country may apply					
lawyers and notaries of your country unfamiliar with situation and reluctant to support your plans					

Comments (optional):
- please provide explanations for problems classified as 'highly relevant' or 'relevant'
- please specify any other problems

8. Please consider the situation that a company registered in your Member State transfers its headquarters to another EU Member State*. Could this create problems for the company in your country?*

no, since the authorities of my country only refer to the place of the registered office	presumably not, since they are unlikely to find out about the transfer of the headquarters	yes, it would pose legal risks

Comments (optional)

*9. Please consider the situation that a c*ompany incorporated in another EU Member State wants to base its headquarters in your Member State*. Will this raise any of the following problems in your country?*

	highly relevant	relevant	little relevance	not relevant	don't know
courts of your country make company subject to the company law of your jurisdiction					
legal uncertainty which company law courts of your country may apply					
translation of documents (eg, for registration of a branch in your country)					
lawyers and notaries of your country unfamiliar with situation and reluctant to support your					

	highly relevant	relevant	little relevance	not relevant	don't know
plans					
reputational problems for company in question (eg, due to the label as a foreign company)	▭	▭	▭	▭	▭

Comments (optional):
- please provide explanations for problems classified as 'highly relevant' or 'relevant'
- please specify any other problems

10. Please consider the situation that a company incorporated under the laws of your Member State wants to become a company registered under the company law of another Member State*. It shall be assumed that the law of the other country supports such plans. What procedure would you recommend to the company in question?*

to dissolve the company and to incorporate a new company in the other country	to merge the old company with a newly established company in the other country	to change the registered seat of the company
▭	▭	▭

Other procedures (please specify)

11. In the scenario of the previous question (Q10), what would be the main considerations for this choice [multiple answers possible]?

- ☐ willingness of the commercial register of your country to implement procedure in question
- ☐ costs and fees
- ☐ speed
- ☐ experience with procedure in question
- ☐ legal certainty
- ☐ tax considerations
- ☐ Other reasons (please specify)

12. For the previous scenarios (Q7 to 11), does it make a difference whether the other country is another EU Member State or a third country?

for non-EU companies mobility is considerably more restrictive	minor or technical differences	no difference	don't know
☐	☐	☐	☐

Comments (optional)

13. Are there any law firms or other advisory firms in your country that actively promote legal mobility? [multiple answers possible]:

☐ yes, there are firms that promote the incorporation of domestic businesses in other countries

☐ yes, there are firms that promote the incorporation of foreign businesses in my country

☐ no, I don't think so

☐ I don't know

In case there are such firms, please specify - if possible - in or from which jurisdictions and provide names or websites of these firms:

14. Do you think there is considerable legal uncertainty in the application of the conflict of laws rules of your Member State on the following topics? [multiple answers possible]

☐ the main connecting factor ('real seat', 'statutory seat' etc)

☐ the boundary between the applicable company law and other areas (eg, insolvency, tort, contract law)

☐ the scope of overriding rules of domestic law that may interfere with foreign company law

☐ I don't know

Other topics (please specify) and/or further explanations (in particular, if there is legal uncertainty as to any of the points above, please specify where this is the case)

15. Overall, do you think that the situation in your country is sufficiently supportive of cross-border mobility of companies?

strongly yes	moderately yes	moderately no	strongly no	don't know
☐	☐	☐	☐	☐

Part 4: Others

16. Do you have any further comments on the themes of this questionnaire?

Many thanks for your time!

Carsten Gerner-Beuerle, London School of Economics
Federico Mucciarelli, SOAS, University of London, and University of Modena & Reggio Emilia
Edmund Schuster, London School of Economics
Mathias Siems, Durham University

IV. COMPARATIVE ANALYSIS

1. Sources of law

Before comparing in detail the relevant substantive company law and private international law rules in the Member States, this section will start by providing an overview of the national sources of these rules. As we show below, the substantive rules of company law are largely codified in all Member States, with case law-based principles also playing an important role in most Member States, albeit to a varying degree. Company law may be codified in the following ways: (1) as a separate statutory instrument applicable to all kinds of companies (a 'Companies Act'); (2) several different statutes for individual company types; (3) a specific chapter of a more 'general' statute, such as a civil or a commercial code. Similarly, private international law rules may be codified either in a specific private international law statute or as part of the general domestic civil law statute or code. Table 1 below details the sources of company law and private international law in all Member States. Where available, we include references to statutes accessible online in the original language.

1.1 Overview of national laws

Table 1. Sources of law

Country	Conflict rules codified?	If yes, statutory sources	Sources of substantive company law (English where available)
Austria	Yes	Austrian Private International Law Act of 1978, as amended *(Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht – IPR-Gesetz)*, Federal Gazette Nr. 304/1978, consolidated version available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426.	Stock Corporation Act (AktG) for public companies, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002070 Limited Liability Companies Act (GmbHG) for private companies, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001720
Belgium	Yes	Private International Law Code of 16 July 2004 (PIL Code), Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht / Loi de 16 juillet 2004 portant le Code de droit international privé, Belgian Official Gazette 27 july 2004, see http://www.ejustice.just.fgov.be/wet/wet.htm; English translation: http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf	Belgian Corporate Code of 7 May 1999 (BCC), further executed in the Royal Decree of 30 January 2001 BCC: Wet van 7 mei 1999 houdende het Wetboek van vennootschappen / Code des sociétés de 7 may 1999, Belgian Official Gazette 6 August 1999, http://www.ejustice.just.fgov.be/wet/wet.htm Royal Decree: Koninklijk Besluit van 20 januari 2001 tot uitvoering van het wetboek van vennootschappen / Arrêté royal de 20 janvier 2001 portant exécution du code sociétés, Belgian Official Gazette 6 February 2001, http://www.ejustice.just.fgov.

			be/wet/wet.htm
Bulgaria	Yes	Private International Law Code (PILC), DV, No42 of 17 May 2005; English translation: http://www.ifrc.org/Docs/idrl/868EN.pdf	Bulgarian Commercial Act (CA), DV, No 48 of 18 June 1991 Law on Public Offering of Securities (LPOS), DV, No 114 of 30 December 1999
Croatia	Yes	Private International Law Act of 1991 (PILA). It was originally the private international law act of Yugoslavia, enacted in 1982. English translation by prof. Željko Matić, *The Yugoslav Act Concerning Private International Law*, 30 Netherlands International Law Review (1983), pp 220-239.	Company act 1993. Translations of the 2007 and 2009 amendments: http://www.mvep.hr/zakoni/Default2.aspx?pregled=zakon
Cyprus	No.[1]	-	Law of Companies, Cap.113 Consistently with Cyprus being a mixed legal system, Cap.113 is complemented by Cypriot case law interpreting its provisions and also citing English common law.
Czech Republic	Yes	Private International Law Act of 2012: http://obcanskyzakonik.justice.cz/home/zakony-a-stanoviska/preklady/english	Civil Code: http://obcanskyzakonik.justice.cz/home/zakony-a-stanoviska/preklady/english Business Corporations Act: http://obcanskyzakonik.justice.cz/home/zakony-a-stanoviska/preklady/english Transformations Act
Denmark	No	-	Danish Companies Act (selskabsloven) (CA): https://danishbusinessauthority.dk/sites/default/files/danish_companies_act.pdf
Estonia	Yes	Private International Law Act, https://www.riigiteataja.ee/en/eli/513112013009/consolide (English translation)	Commercial Code: https://www.riigiteataja.ee/en/eli/516062015010/consolide (English translation)
Finland	No	-	Companies Act 2006 (Fi. osakeyhtiölaki) (CA): http://www.finlex.fi/fi/laki/ajantasa/2006/20060624 (in Finnish) and http://www.finlex.fi/fi/laki/kaannokset/2006/en20060624.pdf (unofficial English translation)
France	Only partially codified.	Civil Code Article 1837: http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle	Civil Code and Commercial Code (see links in previous column)

[1] The Cypriot legal system is based on English law. In general, common law rules and principles only apply in the absence of domestic statutes. Private International law, however, is not codified and is based on common law rules and principles.

		=LEGIARTI000006444080&cidTexte=LEGITEXT000006070721 Commercial Code Article L. 210-3: http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006222350&cidTexte=LEGITEXT000005634379	
Germany	Yes, in general. Company conflict of law rules are however not codified.	General conflict rules codified in the Introductory Law to the Civil Code (EGBGB), http://www.gesetze-im-internet.de/englisch_bgbeg/index.html (English translation)	Stock Corporation Act (AktG) for public companies, http://www.gesetze-im-internet.de/aktg/ (English translation not available; but for a translation from 2010 see http://www.nortonrosefulbright.com/files/german-stock-corporation-act-109100.pdf) Limited Liability Companies Act (GmbHG) for private companies, http://www.gesetze-im-internet.de/englisch_gmbhg/index.html (English translation of the GmbHG)
Greece	Yes but only partially codified.[2]	Arts 4-33 of the Civil Code (part of 'General Principles of Civil Law'). Numerous other conflict of law provisions spread on national laws.	Law No. 2190/1920 on Limited Companies Law No. 3190/1955 on Limited Liability Companies Law 4072/2012 on new private company
Hungary	Yes	Decree-law no. 13 of 1979 on private international law: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=97900013.TVR	Civil Code, Third Book Act on conversions, mergers and demergers, no. 176 of 2013: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300176.TV
Ireland	No	-	Companies Act 2014: http://www.irishstatutebook.ie/2014/en/act/pub/0038/
Italy	Yes	Private International law Act 1995; English translation: http://www.unife.it/giurisprudenza/giurisprudenza/studiare/private-international-law/materiale-didattico/archivio/italian-statute-on-private-international-law-of-31-may-1995-no-218-as-originally-adopted-unofficial-english-translation	Civil Code, 1942, as amended: http://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile Italian Consolidated Financial Act 1998: Legislative Decree No 58/1998, as amended: http://www.consob.it/main/regolamentazione/tuf/tuf.html?queryid=main.regolamentazione.tuf&resultmethod=tuf&searc

[2] The basic provisions of conflict of law are found in the part of 'General Principles of Civil Law' of the Greek Civil Code. Apart from these provisions of the Civil Code, there are numerous other conflict of law provisions spread on national legislation, secondary EU law (mainly Regulations) and various international conventions and treaties which Greece signed and ratified

			h=1&symblink=/main/regolamentazione/tuf/index.html
Latvia	Yes, in general. Companies' conflict of law rules are however not codified.	Civil Law, http://likumi.lv/doc.php?id=225418	Commercial Law, http://likumi.lv/doc.php?id=5490
Lithuania	Yes	Lithuanian Civil Code http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404614 (English translation)	Law of Companies http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1025726
Luxembourg	Yes	Commercial Companies Act of 1915, Arts 2, 159	Commercial Companies Act of 1915 www.legilux.public.lu/leg/textescoordonnes/guides/law_commercial_companies
Malta	No	-	Companies Act 1995
Netherlands	Yes	Book 10, Title 8, Articles 117-124 Civil Code (CC), https://zoek.officielebekendmakingen.nl/stb-2011-272.html; English translation: http://www.dutchcivillaw.com/civilcodebook01010.htm	Book 2 Civil Code Law on Works Councils, Wet van 28 januari 1971, houdende nieuwe regelen omtrent de medezeggenschap van de werknemers in de onderneming door middel van ondernemingsraden (Wet op de Ondernemingsraden/Law on Work Councils, available at http://wetten.overheid.nl/BWBR0002747/geldigheidsdatum_18-12-2014# (for a translation from 2013 see https://www.ser.nl/~/media/files/internet/talen/engels/2013/works-councils-act.ashx)
Poland	Yes	Private International Law Act 2011: https://miedzynarodoweprawohandlowe.files.wordpress.com/2013/06/polish-prv-int-law-en-and-fr.pdf	Commercial Companies Code of 15 September 2000 Civil Code of 23 April 1964, Act on National Court Register of 20 August 1997, Bankruptcy Law of 28 February 2003 Act on Freedom of Economic Activity of 2 July 2004
Portugal	Yes	Portuguese Civil Code 1966: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis&so_miolo Article 3 Companies Act 1986 (see next column)	Companies Act 1986: http://www.cmvm.pt/en/Legislacao/LegislacaoComplementar/EmitentesOfertasInformcaoValoresMobiliarios/Pages/Commercial-Company-Act.aspx?v=
Romania	Yes	7th Book of the New Civil Code (NCC 2011)	Law no. 31/1990 (LS)

Slovakia	Yes	Act 97/1963 on International Private and Procedural Law	Act 513/1991 'Commercial Code' Act 40/1964 'Civil Code'
Slovenia	Yes	'Private International Law and Procedure Act' *Zakon o mednarodnem zasebnem pravu in postopku* (Official Journal of the Republic of Slovenia, Nos. 56/99 and 45/08) (abbreviated as ZMZPP), available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1258# (with English translation available at http://www.uaipit.com/files/documentos/0000004965_THE_PRIVATE_INTERNATIONAL_LAW_AND_PROCEDURE_ACT_1999_07_13.pdf)	'Companies Act' *Zakon o gospodarskih družbah* (Official Journal of the Republic of Slovenia, Nos. 56/09 et seq.) (abbreviated as ZGD-1), available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4291#(with English translation available at http://www.mgrt.gov.si/fileadmin/mgrt.gov.si/pageuploads/zakonodaja/ZGD-1_PREVOD__13-12-12.pdf).
Spain	Yes	Civil Code; Commercial Code; Capital Companies Act 2010 (*Ley de sociedades de capital*); Structural modifications of coampanies Act 2009 (Ley 3/2009); Regulation of commercial registry (*Reglamento del registro mercantil*)	Text of laws (see previous column) available at www.boe.es
Sweden	No	-	Aktiebolagslagen, Swedish Companies Act 2005 The Swedish Foreign Branch Offices Act 1992 (Sw. *lagen om utländska filialer m.m.*)
United Kingdom	No	-	Companies Act 2006, http://www.legislation.gov.uk/ukpga/2006/46/contents

1.2 Discussion

1. As can be seen above, in a majority of EU Member States, private international law rules are contained in statutory instruments. In several countries, a private international law act codifies in a single legislative instrument all relevant conflict of law rules and principles (this is the case in Austria, Belgium, Czech Republic, Estonia, Hungary, Italy, and Poland). Other countries regulate private international law issues within the general domestic civil code (France, Greece, Latvia, Lithuania, Netherlands, Portugal, and Spain).

2. 'Common law' jurisdictions (Cyprus, Ireland, Malta and the UK) do not provide for any legislative codification of private international law. Instead, conflicts of law rules are mainly based on the common law rules developed by the judiciary.

3. The rules of private international law are also not currently codified in the Scandinavian countries (Denmark, Finland, and Sweden).

4. Germany is in an intermediate case. The general private international law framework is codified in an act of parliament (the introductory act to the civil code), which however does not include conflict of law rules related to companies and other legal entities. In relation to company law, therefore, the applicable rules of private international law are based on the principles developed by the courts.

2. Preliminary questions about substantive company law

2.1 Overview

Before turning to the national rules on conflicts of laws in the area of company law, it is necessary to discuss the relevant substantive company law rules in which these conflicts rules are embedded.

Since companies are 'creatures of national law', each jurisdiction establishes under which conditions domestic companies can be incorporated. Such requirements are part of substantive company law, not of conflict of laws. By their nature, such company law requirements do not directly affect the legal position of foreign-incorporated companies, but they may effectively add to, or qualify, the conflicts of law approach a jurisdiction takes in relation to its own companies. For instance, while conflict of laws rules may generally use a company's registered office as the main connecting factor for both domestic and foreign companies,[3] the substantive company law of that jurisdiction may require that domestic companies establish (or maintain) their headquarters or principal place of business in the territory of the Member State in question.

All Member States currently require, for the types of companies of interest for the purposes of this Report, that companies maintain at a minimum, a 'registered office' (or similarly the 'statutory seat' or 'registered address') in the Member States of incorporation. Differences exist, however, as to the nature and quality of the registered office.

In 14 Member States, the registered office can in effect be a mere postal address at which the company receives mail. In the remaining Member States, there either is an explicit requirement for some level of business activity (beyond the ability to receive mail) at the registered office, or legal uncertainty exists in this regard. The additional requirements range from having actual business premises at the registered office to the requirement that the centre of effective management or principal place of business is located at the registered office, or at least elsewhere in the territory of the Member State in question.

Whether such legal requirements should be qualified as private international law or substantive company law may not always be self-evident and depends on the interpretation of the provision. A rule of law may be of a purely substantive nature but contain an international element, i.e. it may stipulate that it applies if a certain element is satisfied abroad or within the territory of the *lex causae*.[4] On the other hand, a

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[3] See Section 3.1, below.

[4] The latter type of rule has been described as a 'self-contained' or 'self-satisfied' provision of substantive law (G. Kegel, 'Die sebstgerechte Sachnorm', in E. Jayme et al. (eds), *Gedächtnisschrift für Albert A. Ehrenzweig* (Karlsruhe: C.F. Müller, 1976)). An example for the former type is the Hungarian law at issue in *Cartesio*, which stipulated that the Hungarian Company Act should only govern companies 'which have their seat in Hungary' (Article 1(1) of Law No CXLIV of 1997 on Commercial Companies, see Case C-210/06, *Cartesio Oktató Szolàltató bt* [2008] ECR I-9641, para. 11), and defined 'seat' as 'the place where [the company's] central administration is situated' (Article 16(1) of Law No CXLV of 1997 on the Commercial Register, Company Advertising and Legal Procedures in Commercial Registration Matters, translated in Case C-210/06, ibid., para. 17).

provision may contain a hidden conflict of laws rule that determines its international scope of application notwithstanding the *lex causae*. For the purposes of this part, we focus on rules that, where not complied with, do not (or at least not in itself) lead to the company ceasing to be subject to the law under which the company has originally been formed. In these cases, it may be said that the provision in question forms part of a country's internal company law.[5]

Any requirement going beyond a mere postal address, whether referred to nationally as 'registered office', 'statutory seat', or otherwise, can be regarded as a form of an 'effective residence requirement'. Effective residence requirements are generally permissible from the perspective of EU law, and they form what we refer to as the 'reserved area' of company law for Member States from the viewpoint of the Treaty. It is worth noting that effective residence requirements for domestic companies fall within the reserved area irrespective of their legal nature. Both, private international law rules and internal company law rules, resulting in such residence requirements fall outside the scope of Art 49TFEU, at least where they relate to the criteria in Art 54 TFEU.[6] They are 'preliminary matters' that determine whether a company is entitled to rely on the Treaty freedom and hence belong to the 'reserved area' where the Member States' legislative activity is not subjected to scrutiny under the Treaty.[7]

As the Court of Justice has made clear in *Daily Mail* and *Cartesio*, Member States have 'the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State […] and that required if the company is to be able subsequently to maintain that status.'[8] Although the Court's language in *Cartesio* and *Daily Mail* may suggest that it is primarily concerned with residence requirements resulting from private international law, the Court of Justice has also held more broadly that Member States are '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'.[9] Moreover, the rules at issue in both *Daily Mail* and *Cartesio* were both apparently *substantive*, not private international law, rules. It seems clear therefore that effective residence requirements grounded in substantive company law are compatible with EU law. [10]

A certain tension, of course, exists between, on the one hand, the permissibility of effective residence requirements under national law, and, on the other hand, the fact that the Court of Justice considers the ability of entrepreneurs to exercise choice of law in the area of company law as an 'inherent' feature of the freedom of establishment.[11] If all Member States decided to impose strict residence requirements for companies established under their laws, this would effectively rule out (pure) choice of law

[5] See e.g. the discussion in V Korom and P Metzinger, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06' (2009) 6 *European Company & Financial Law Review* 125, 136-139. A jurisdiction may require companies to maintain the head-quarters in its territory even where it follows an incorporation theory approach as a matter of private international law. See W-G Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 *Journal of Corporate Law Studies* 185, 188-190.

[6] Note that Art 54 TFEU does not itself constitute a private international law rule. However, use of the criteria mentioned in that provision in the context of a national private international law rule seems to provide a 'safe harbour' for such a rule under the jurisprudence of the Court of Justice. Whether this can be extended to other unilateral private international law rule criteria (i.e. ones that are used only in relation to domestic companies) is somewhat unclear.

[7] The Court in *Cartesio* explains that 'the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article [49 TFEU], can arise only if it has been established, in the light of the conditions laid down in Article [54 TFEU], that the company actually has a right to that freedom', Case C-210/06 *Cartesio* [2008] ECR I-9641, para. 109.

[8] Ibid. para. 110.

[9] Case C-208/00 *Überseering* [2002] ECR I-9919, para 70; Case C-210/06 *Cartesio* para 107.

[10] For a discussion see also e.g. G Eckert, *Internationales Gesellschaftsrecht* (Vienna: Manz 2010) 110.

[11] See *Centros* and *Inspire Art*.

throughout the Union. For the present purposes, however, this question seems to be of limited relevance, given that Member States currently tend to abolish, rather than to impose, such residence requirements.

It should also be highlighted that the exact limitations of the reserved area are far from clear. The Court seems to attach importance to the fact that Art 54 places the registered office, central administration and principal place of business on equal footing.[12] This may suggest that only effective residence requirements that are connected to the criteria in Art 54 firmly fall outside the scope of the right of establishment.

2.2 Overview of national laws

Based on the above, it thus seems useful to assess the requirements of internal company law defining the necessary connection with the state of incorporation before turning to the private international law rules determining the international scope of application of the Member States' company laws. Below, we therefore provide an overview of the substantive law requirements in all Member States based on the reports by our company experts.

Table 2 summarises, first, the effective residence requirements (if any) in all Member States, understood as any requirement ranging from a mere business address to the principal place of business of the company (columns (2) and (3)). Second, we analyse the consequences in case these requirements are not (or no longer) fulfilled (column (4)). These may consist in rendering the incorporation void or voidable, triggering administrative fines or other sanctions, or allowing third parties to rely on certain laws at the place of the real seat in addition to the incorporation law. Finally, we inquire whether commercial registers scrutinise in practice upon incorporation or on an ongoing basis that the company is in compliance with the substantive requirements of the state of incorporation (column (5)).

[12] See *Cartesio,* para 107.

Table 2. Substantive company law

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
Austria	Both private and public companies are required to specify a registered office (‘*Sitz*’) in their articles of association. The registered office has to be located in Austria. It does not have to coincide with the real seat (‘*Verwaltungssitz*’) of the company, but some link to the actual operations of the company is required.	The registered office must, at least initially, be at a place where the company has (i) a permanent establishment or operations (‘*Betrieb*’); (ii) its headquarter (‘*Geschäftsleitung*’); or (iii) its central administration (‘*Verwaltungssitz*’).	According to the prevailing view among legal scholars, subsequent changes do not lead to a dissolution of the company on substantive company law grounds.[191]	General obligation on the part of the competent court to scrutinise the legality of the incorporation documents. The actual fulfilment of one of the three criteria mentioned is at least occasionally scrutinised by the competent courts.
Belgium	Companies established according to Belgian company law must have their statutory seat and principal establishment in Belgium.	It is generally accepted that the statutory seat must be the place of the company’s principal establishment;[192] there is no statutory law in this respect, but it is argued that the application of the real seat theory in Belgium implies that the company’s statutory seat is its principal establishment In addition, companies must disclose each unit of establishment (a place that can be geographically identified through an address and where business activity takes place or is organised and/or monitored)	If the location of the real seat of the company is not at the same place of the (fictitious) statutory seat, third parties have the choice to address the company at the real seat or at the statutory seat The identification of an incorrect seat is not a ground for the annulment of the company If an incorrect seat is deliberately stated in the articles of association, the court can rule that the company as well as the directors and/or the founders have committed the offence of ‘forgery’, which is civilly and criminally sanctioned[193]	The coincidence of statutory seat and real seat is not regularly scrutinised.

[191] See Eckert, n 10 above, 111.
[192] See eg Antwerpen 13 March 2000, *TRV* 2000, (236) 240; Luik 27 maart 2001, *TBH* 2003, 144, note N. WATTE en V. MARQUETTE; Kh. Hasselt 10 November 2004, *TRV* 2005, 172, note S. CALLENS en H. MATTHYSEN.
[193] Article 196 of the Criminal Code; Antwerpen 14 March 2006, RABG 2008/8, 503.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
			- If the real seat of a Belgium company is transferred abroad, the company will generally 'lose its Belgian nationality' and be subject to the company law of the country where its real seat is found[194]	
Bulgaria	Generally, there is no residence requirement under Bulgarian law, although some legal uncertainty exists on this point. No explicit rule that requires the headquarters to be situated at the same place or in the same country as the registered office.	N/A	Bulgarian substantive law does not require the coincidence between statutory seat and actual place of management, but it requires shareholder meetings to take place at the 'statutory seat' which must be located in Bulgaria. In any event, lack of 'residence' cannot lead to a forced dissolution of the company.	The Commercial Register does not scrutinise in practice whether the place of the registered office has any physical connection to the company.
Croatia	No connection required between the registered office and the company's operations under Croatian law, although a coincidence of real seat and registered office may formally be required upon formation of the company (but not thereafter).	N/A	N/A	The court register is neither obliged nor authorised to check whether the registered business address corresponds to the company's real seat.
Cyprus	No. Other than the registered office, there are no additional requirements of a physical connection between the company's operations and Cyprus.	N/A	N/A	N/A

[194] Kh. Hasselt 10 November 2004, TRV 2005, 172.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
Czech Republic	The Civil Code does not place any restrictions on the situation of the real seat, and it can also be situated outside the Czech Republic (since 2009)	N/A	N/A	N/A
Denmark	The application for registration must specify the registered office, which is defined in s. 5(13) CA as the address in Denmark at which the company may be contacted. There is no requirement of a link between the company's activities and its registered office.	- It was the understanding of the Danish Business Authority (DBA) that the registered office should identify the 'seat' of the company, i.e. the place from which the company was actually managed - This interpretation was changed in 2008; no longer necessary that any actual business takes place at the premises, provided that the management can be contacted at the address, e.g. through a representative such as a lawyer	N/A	N/A
Estonia	Details are unclear, but some link between the company's activities and its registered office may be necessary, depending on the interpretation of the relevant Estonian rules.	A company is resident at the 'place where the permanent and continuous economic activity of the legal person or other activities specified in the articles of association of the legal person are carried out', but it is unclear whether this results in a mandatory link between the company's activities and its registered office	The companies register may impose a fine on the company.	In practice, this requirement (to the extent it applies) is not enforced by the register.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
Finland	No requirements regarding territorial connection to Finland except that the registered office must be in a Finnish municipality. No need to carry out any business activities in Finland or have business premises in the country. At least one board member and the managing director must have their residence within the EEA, unless the registration authority grants an exemption (in general granted for residence in Switzerland or the USA).	N/A	N/A	N/A
France	It is not entirely clear whether a link between the company's activities and its registered office are required. French law does not explicitly impose restrictions as to the choice of the registered office. According to some commentators, choosing a registered seat that does not coincide with the real seat/is unconnected to the company's activities may be treated by the courts as abuse of law.[195]	No formal requirements, but where the registered office does not coincide with the real seat this may have consequences in private international law.[196]	Only private international law consequences for the protection of third parties, but unclear in practice.[197]	No scrutiny by the registration court
Germany	Since 2008, the registered office no longer has to be the place where the central administration of the company is located Parts of the literature argue that it	-	-	No scrutiny by the registration court

[195] See e.g. P Merle, *Droit commercial: Sociétés commerciales* (Dalloz, 18th ed. 2015), para 105.
[196] See Merle, ibid; see also Table 3.1. below.
[197] See in more detail Table 3.1. below.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
	constitutes an abuse of law if no connection at all exists to the place of the registered office			
Greece	Real seat relevant for most companies (i.e. the traditional private and public company forms). Registered office for the newly introduced company form of company (IKE-PC), introduced with Law 4072/2012	For the 'traditional' companies: real seat, defined as the place of meetings of the board of directors and/or the shareholders. Some exceptions apply.	Not entirely clear, but no automatic nullity/dissolution of company	No scrutiny
Hungary	The registered office does not have to coincide with the company's real seat. Where the seat of the company does not coincide with the place of its central management, the place of the central management has to be indicated in the deed of foundation and mentioned in the trade register. A special provision addresses intra-EU situations.[198]	If the articles of association do not explicitly indicate that the place of a company's central management is located in a place different than the registered office, the latter is presumed to its central management.	A legal supervision procedure is possible against the company before the Court of Registration, compelling it to comply with the provisions of the law. As a result of this procedure, either the company complies with the law, or the Court of Registration fines the company and, as a last resort, will start a special winding up procedure for the termination of the company	The legal supervision may be opened by the Court of Registration either *ex officio* or on demand.
Ireland	No link between registered office and the company's central administration is required but the company must carry on an activity in Ireland. The registered office must be a physical location in Ireland. At least one director must be	N/A	N/A	N/A

[198] The law states in s. 7(B) of the Hungarian Act on the Registration of Firms that a company 'registered in the trade register is entitled to carry out its activity on a *primary basis* in another Member State of the European Union, as well as it is entitled to transfer the primary place of its activity to another Member State of the European Union. Such a decision of the firm does not require the amendment of the registration of the registered seat, unless a different provision of a specific norm provides for it.' This provision entered into force on September 1st 2007, i.e. after the Court of Justice decision in the *Cartesio* case.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
	resident in an EU/EEA Member State unless the company is bonded or is certified as having a 'real and continuous link' with economic activity in Ireland.			
Italy	No restrictions on the locations of the real seat (which can also be abroad), but a 'premise' should normally be in the place of the statutory seat.	General meetings should be normally held at the place of statutory seat (unless the articles of association provide for a different location).	N/A	N/A
Latvia	The legal definition of the filed 'company address' refers to the real seat (headquarters) and the registered office. Nevertheless, it seems to be possible for the registered office to be a mere postal address, although the exact position is somewhat unclear.	Apparently, no actual business premises are required, but details not entirely clear.	N/A	The register only checks whether consent for use as registered office has been given by the legal owner of the building in which the registered office is located.
Lithuania	Lithuanian company law seems to be based on the presumption that the registered office, the real seat, and the main business place coincide. In practice, however, this is not treated as a legal requirement.	Although the coincidence of the registered office and the real seat is not required in practice, a registered office that is completely unrelated to the companies activities (post-box) may be incompatible with Lithuanian law. The exact requirements are not entirely clear.	Depending on the interpretation of the residence requirement, the consequence may in principle be the liquidation of the company.	The Register of Legal Entities does not in practice check whether the actual business place or location of the permanent managing body of the company coincide with the registered office.
Luxembourg	Location of real seat in Luxembourg is required.	The requirement is in practice considered to be fulfilled where board meetings take place in Luxembourg, even if day-to-day management is conducted from abroad. Moreover, board meetings held	A Luxembourg company that does not maintain its real seat in Luxembourg may in principle be dissolved. However, the lack of reported cases suggests that this sanction has no practical relevance.	Not in practice.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
		via the Internet are deemed to have taken place at the registered office of the company, thus significantly diluting the real seat requirement.		
Malta	No. There is no requirement of a link between the company's activities and its registered office.	N/A	N/A	N/A
Netherlands	No. There is no requirement of a link between the company's activities and its registered office. The registered office must be in the Netherlands, but does not have to coincide with the company's real seat.	N/A	N/A	N/A
Poland	It is unclear whether a link between the company's activities and its registered office is required by Polish law. The majority view among legal commentators is that some link is required, although not necessarily the location of the real seat.	The majority of legal scholars implies that the registered seat shall be a place associated with the company's activity but not necessarily the real seat	Correction of filing can be required by the court. In principle, the company may ultimately be dissolved if it does not comply. The relevance of the rule depends on the interpretation of the residence requirement (if any), which is disputed in Poland.	Commercial registers do not scrutinise upon registration whether the company in fact conducts any of its business activity in a place of its registered seat or under the registered address. Since December 2014: founding members do not have to submit to the registry court documents showing the title to premises where the registered address is located.
Portugal	No specific connection of Portuguese companies with the domestic territory as a matter of Portuguese substantive company	N/A	N/A	N/A

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
	law. Portuguese private international law, however, results, in principle, in an effective residence requirement.[199]			
Romania	There seems to be no requirement of a link between the company's activities and its registered office.	N/A	N/A	N/A
Slovakia	No. There is no requirement of a link between the company's activities and its registered office. The company must prove that it has some control over the premises, but this does not in effect preclude the use of mere letter-boxes as registered office.	The only requirement, as far as the registered office is concerned, is for it to be under an ownership right or right to use the property attributed to the company, so as to avoid completely fictitious addresses. The company does not need to have actual business premises at the registered office address.	If the company loses the control over the premises (e.g. termination of the lease contract), the company might be terminated under s. 68 of the Commercial Code by the court in a special procedure.	The required control over/access to the registered office address is not regularly scrutinised by the register.
Slovenia	Unclear. Some commentators argue that private and public companies, companies need to have both their registered office (*statutarni sedež*)[200] and the real seat or head office (*dejanski sedež*) in Slovenia. According to other commentators, the real seat of the company may also be located outside of Slovenia as a matter of substantive company law.	Unclear, but according to some commentators, the headquarters have to be situated in Slovenia (although probably not necessarily at the registered office).	Unclear, as it depends on the interpretation of the substantive law requirement. It cannot be excluded possible that a company is subject to compulsory liquidation in case of a divergence between registered office and real seat. Most scholars, however, argue that companies should be given appropriate time to re-establish their operations in Slovenia (or transfer their registered office).	Not in practice.

[199] See Table 3.1. below.
[200] The Companies Act uses simply the term '*sedež*', i.e. 'seat', similarly as German GmbHG '*Sitz*', however, it derives from Article 29 of the Companies Act that this term is used to describe the registered office.

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
Spain	A company's registered office must be either at its real seat or at the place of its principal establishment. These have to be located in Spain.	The articles of association must specify whether the registered office is at the real seat or at the place of its principal establishment.	Courts can order an amendment of the articles. If neither the management nor the main establishment are in Spain, rules on involuntary seat transfers apply. Third parties are protected by the relevant private international law rules in case the registered office does not coincide with either the real seat or the place of principal establishment.	Regular scrutiny only at the time of incorporation.
Sweden	No requirement of a link between the company's activities and its registered office. Neither real seat nor headquarters have to be located in Sweden	N/A	N/A	N/A
United Kingdom	No link between registered office and the company's business is required. The registered office may be a mere postal address in the UK.	N/A	N/A	N/A

3. Determining the law applicable to companies

Most national approaches to private international company law are categorised as belonging to one of two basic doctrines, the so-called real seat theory and the incorporation theory. While legal systems will generally not adopt either approach in their 'pure form', but in many variations, their main features can be summarised easily. The incorporation theory refers to the place of incorporation, the country under whose laws the corporation is created. That legal system will determine the capacity of the corporation and all matters commonly regarded as falling within the ambit of corporate law, in particular issues relating to the corporation's internal management.[201] Likewise, a state applying the incorporation theory in its pure form will recognise a corporation validly formed in another country as a legal entity that is vested with corporate capacity and has standing to sue and be sued,[202] and such a state will not normally seek to intervene in issues falling within the scope of the incorporation law,[203] except in cases involving public policy considerations or where the state of incorporation applies a renvoi.[204]

The connecting factor under the real seat theory is inherently more ambivalent. First, there is no common understanding of the precise contours of the term, notably whether the real seat refers to the place of the company's central administration and management or to the location of other aspects of the company's business, such as its main operations. Furthermore, even under a well-established definition, the determination of the company's place of central decision-making may be difficult in practice, in particular in corporate groups or companies with a decentralised decision-making structure. An additional complication derives from the fact that countries may not apply the incorporation theory in its pure form, but provide for intermediate solutions that combine the place of incorporation as the primary connecting factor with other rules (to be classified either as conflict of laws rules or, as explained above,[205] as rules of internal corporate law, but in their effects similar) that are designed to prevent companies from making use of foreign law if most or all of their business operations are located within the country's territory. If such rules are not restricted in their scope of application to companies incorporated in third countries, the question arises whether they are in line with the right of establishment, as interpreted by the Court of Justice in *Centros* and *Überseering*.

Table 3.1 collects information on the Member State's general approach to determining the *lex societatis*: the definition of the main connection factor used by them, both as applicable to companies with connections to other EU Member States and companies that operate in, or are incorporated under the laws of, third countries (column (2)), and any exceptions to this primary connecting factor (which we also term 'additional connecting factors', see column (3)). The latter are typically triggered by an actual connection with the Member State's territory in cases where the registered seat of the company is located abroad. Finally, in column (4), we discuss whether the private international law rules of the Member States refer only to the substantive (internal) company law of the *lex causae* (so-

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[201] The scope of the *lex societatis* and the problem of classification will be discussed below in Section 4. On the classification problem, see also C Gerner-Beuerle and EP Schuster, 'The Costs of Separation: Conflicts in Company and Insolvency Law in Europe' (2014) 14 *Journal of Corporate Law Studies* 287, 320-323.
[202] See, for example, L Collins et al, *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), 30–011 (on UK law).
[203] Ibid. at 30-028.
[204] See C Gerner-Beuerle and M Schillig, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) 59 *International and Comparative Law Quarterly* 303.
[205] Section 2.

called internal law theory) or both to the substantive law and the private international law of that country, thus allowing for the further referral to the law of another country or the referral back to the *lex fori*, if different from the *lex causae* (*renvoi*).

An additional issue to be examined in this context is the potential existence and impact of what can be called 'outreach statutes'. Outreach statutes, making special provision for intervention in the internal affairs of certain foreign companies (without, however, leading to a change in the *lex societatis*), are well known internationally and can be found, for instance, in several US states. A leading example is California. If a foreign company is substantially connected with California,[206] a number of Californian mandatory company laws on internal affairs of the corporation apply, including rules on the election and removal of directors; directors' standard of care and indemnity; distribution rules and liability for their breach; shareholder majorities and cumulative voting; merger and reconstruction procedures; records and reports and state enforcement and inspection.[207] Such outreach provisions have been upheld as constitutional for many years,[208] although more recently the Delaware Supreme Court decided that Delaware law prevails over a (contrary) provision of the California statute for corporations formed under Delaware law.[209]

We distinguish between outreach statutes in a narrow sense, which we define as laws making special provision for intervention in the internal affairs of foreign-incorporated companies, without, however, leading to a change in the *lex societatis*, and outreach statutes in a wider sense, referring to laws not designed to apply specifically to foreign companies, but having an equivalent effect because they (i) regulate matters generally considered to form part of company law and (ii) apply on the basis of criteria separate from the general determination of the *lex societatis*, which typically capture not only domestic companies, but also companies incorporated abroad that have a significant link with the territory of the forum state. Outreach statutes in the narrow sense are often directed at so-called 'pseudo foreign' companies, i.e. companies with all or most of their business operations in a country other than the state of incorporation. An example is the Dutch law that was at issue in *Inspire Art*, imposing disclosure and minimum capital requirements on companies operating exclusively or predominantly in the Netherlands and lacking a 'real connection' with their country of establishment.[210] Outreach statutes in the wider sense often apply to foreign companies because the legal mechanism they promulgate is formally part of another legal area, for example administrative law in cases where enforcement is through a government agency (and the mechanism's international scope of application is, accordingly, defined by the territoriality principle) or capital markets regulation where the company's securities are listed on a domestic stock exchange.[211]

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[206] The test is complex but essentially requires a majority of California resident shareholders plus an average majority of sales, assets, and employees located within the state – Cal. CC Section 2113.

[207] See C Kersting, 'Corporate Choice of Law-A Comparison of the United States and European Systems and a Proposal for a European Directive' (2002) 28 *Brooklyn Journal of International Law* 1, 20.

[208] *Western Airlines Inc v Sobieski* 12 Cal Rep. 719 (Fed. CA 2nd D 1961). See also Kersting, n 207 above, 31.

[209] See *VantagePoint v. Examen, Inc.*, 871 A. 2d 1108 (Delaware Supreme Court 2005). For a discussion of the problem of outreach statutes from the US perspective see JB Jacobs, 'The Reach of State Corporate Law beyond State Borders: Reflections upon Federalism' (2009) 84 *NYU Law Review* 1149.

[210] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.*, [2003] ECR I-10155 (holding that the Dutch law constituted a violation of the Treaty).

[211] Outreach statutes in a narrow sense, but not so much those in a wider sense, will often rely on overriding mandatory provisions to protect public interests of general importance. They may accordingly be part of a country's *ordre public*, as we will discuss in more detail in Section 5 below. It is nev-

Table 3.2 summarises whether the Member States require all or some foreign (or 'pseudo-foreign') companies operating within their territory to comply with specific registration and disclosure requirements, which can be expected to be the most likely type of outreach statute (column (2)), and list the most important provisions that otherwise affect the legal position of foreign companies in the host state (column (3)).

3.1 Overview of national laws

Table 3.1. Connecting Factor

Country	*Main connecting factor (EU and non-EU incorporated companies)*	*Additional connecting factors (EU and non-EU incorporated companies)*	*Renvoi*
Austria	Real seat (place of central administration), but by the courts interpreted to apply only non-EU/EEA companies; for EU/EEA companies registered seat	-	Referrals comprise the PIL of the *lex causae*
Belgium	Real seat, Art. 110 PIL Code Defined as the location of the principal establishment ('plaats van de voornaamste vestiging') of a legal entity Criteria: the entity's centre of governance, the centre of its business and activities and, subordinately, its statutory seat, Art. 4, § 3 PIL Code[212] As long as third parties do not protest, it is assumed that the principal establishment is at the statutory seat, and courts will not investigate where the company's centre of governance, business etc. are located The literature argues that if the real seat theory leads to the application of Belgian law to a EU-foreign company, the respective rules constitute a restriction	-	In general, the law at the place of the real seat applies Exceptions: - If the real seat of a company is in a country that applies the incorporation theory, Belgian courts respect this choice and apply the incorporation law, Art. 110 PIL Code - If the company is established in Belgium and the real seat is transferred to an incorporation state, Belgian courts will (continue to) apply Belgian company law

ertheless useful to mention these mechanisms already at this point in order to give a comprehensive description of the Member States' approaches to defining the *lex societatis* and possible interferences with a foreign company law.

[212] Antwerpen 13 March 2000, V&F 2000, 220, TRV 2000, 236 (*Super Club*), holding that the principal establishment of a holding company is where the general meetings and the meetings of the board of directors of the holding company take place, not where the subsidiary operates.

	that needs to be justified		
Bulgaria	Place of registration (*lex loci registrationis*), Art. 56(1) PILC	According to article 56(2) PILC, where no registration is required for the incorporation of the legal person, or where the legal person is registered in several states, the applicable law shall be the law of the state in which the statutory seat is situated (*siege social*) (unless one of the states where the company is registered is Bulgaria, in which case Bulgarian law applies). According to article 56(3) PILC if, in the cases under (2), the situs of the statutory seat is different from the situs of the actual place of management of the legal person, the law of the state where the actual place of management is situated shall apply.	With regard to *renvoi,* article 40(2) PILC provides that remission to Bulgarian law and referral to the law of a third State shall be inadmissible regarding the legal status of legal persons.
Croatia	Registered office; Croatia supports the incorporation doctrine (Art. 17(1) PILA)	By way of exception to the general rule, Art. 17(2) PILA provides that if a legal entity has its real seat in a state other than the one in which it was established, and according to the law of that other state is seen as a company established under the law of the real seat state, it shall be considered to be a legal person of that state. For example, if a company is registered in the UK but has its real seat in Belgium, Art. 17(2) PILA would require the court to apply Belgian law, thus possibly resulting in an infringement of the freedom of establishment. Third parties (e.g. creditors and tax	When Croatian conflict of laws rules lead to the application of foreign law this reference is understood, as a general rule, as a reference to the foreign law as a whole, including its conflict of laws rules (Art. 6 PILA). Croatian PILA therefore allows for a *renvoi* to domestic law or to another foreign law. In the opinion of the authors the general provision of Article 6 on *renvoi* does not apply in company law.

		authorities) can choose whether to invoke legal consequences dependant on the law at the real seat or the registered seat of the company.	
Cyprus	Place of incorporation	A relevant exception relates to the law applicable to the legal capacity of a company to enter into a legal transaction. According to Cyprus literature, this is governed by the Memorandum and Articles of Association of the company *and* by the law of the country that governs the transaction entered into by the company.	There is no relative statutory provision or relevant case law. It could be suggested that Cypriot courts would apply *double renvoi* as is the position in common law, an approach that finds support in case law, specifically in *Christopoulou.* However, this is the only Cyprus court decision that mentions renvoi.
Czech Republic	Law of the state under which the company was incorporated (Art. 30(1) PIL act)	In order for companies to be bound by agreements, it is sufficient for them to have been reached in accordance with the laws valid at the place where such an agreement was concluded (Art. 30(2) PIL act)	Both substantive law and private international law of a country apply (renvoi). If the provision of that country refers back to the Czech law: substantive Czech law applies (renvoi back) Where the provisions of foreign law refer to the law of another foreign state, the substantive-law provisions of that law shall apply if that third state 'accepts' the renvoi; otherwise Czech law applies.
Denmark	Recently prevailing view: registered office Other view: incorporation itself Older literature: actual centre of administration No case law dealing directly with this question[213]	-	If foreign law is applicable according to the Danish international private law, the referral comprises pursuant to general Danish conflict of laws principles only a referral to substantive law, and not to the private international law of that country; generally, renvoi has not become an issue of concern in Denmark for any questions that deal with the private international law of

[213] An older case, UfR1918.39H, has been seen as an acceptance of the real seat theory. However, the case concerned tax law, and the question was whether or not the company should be taxed as a Danish company or a foreign company. Thus, it is not clear from the case that the court would have taken the same approach to determine the *lex societatis*.

			companies
Estonia	Registered seat	Companies which are being managed or have their main activities in Estonia are governed by Estonian law; compatibility with EU law not discussed by the courts	Reference to the law means 'referral to both substantive law and private international law of that country'
Finland	Registration in Finland	-	-
France	Siège social, Art. 1837 Code Civil and L210-3 C.Com. Interpreted as registered office by the literature No case law, but criminal offence of *abus de biens sociaux* applied to directors of foreign incorporated companies with some activity (not necessarily their real seat) in France[214]	1) In case of fraud, case law allows interested persons to invoke the law at the real seat, if the real seat is in France[215] 2) Art. 1837 Code Civil and L210-3 C.Com.: 'Third parties may rely for legal purposes on the registered office …. However, the company shall not be entitled to raise this against them if its actual office is located elsewhere.' Thus, third parties may rely on the law at the real seat if different from the incorporation law Conformity with Inspire Art questioned by the literature, but no case law	No decision applying renvoi to companies during the last thirty years
Germany	EU/EEA: registered office Non-EU/EEA: centre of administration, defined as 'the place where the fundamental corporate decisions of the management are implemented in day-to-day managerial decision-making'[216]	-	Referrals comprise the PIL of the *lex causae*, but no double renvoi, Art. 4(1) EGBGB
Greece	Real seat relevant (based on case law); exception for maritime companies, but not for EU-incorporated companies Adjustments are discussed in the literature to make Greek law	-	Art. 32 of the Greek Civil Code prohibits renvoi and states that the 'applicable foreign law does not include the private international rules of the foreign State'.

[214] Cass. crim., 25 June 2014, n° 13-84445, Revue des sociétés 2015, p. 50, note M. Menjucq.
[215] Cass. crim., 21 nov. 1889, S. 1890, 1, 94; Clunet 1889. CA Paris, 31 oct. 1957, p. 850, RTD com. 1958, 345.
[216] BGHZ [Court Reporter of the German Federal Court of Justice] 97, 269, 272.

	compatible with the rulings of the Court of Justice		
Hungary	The State in whose territory the company was registered (s. 18(2) Decree on private international law).	Subordinated criteria: (a) Statutory seat if a legal person has been lawfully registered in accordance with the laws of several states or registration is not required under the rules applicable where the seat designated in the articles of association is actually situated (s. 18(3)) (b) Real seat when a company has no 'statutory seat' or has seats in more than one state (s. 18(4))	Hungarian private international law accepts the *renvoi* doctrine. Hence, Hungarian company law should apply if the private international law of the state of incorporation of a foreign company refers back to Hungary. The consequence would be that the company did not exist. No case law exists that deals with this problem.
Ireland	Place of incorporation	-	Likely that English approach would be persuasive if the issue were considered; *obiter* comments of Irisih courts indicate that they take dim view of *renvoi.*
Italy	Law of the State where the formation procedure was fulfilled (article 25 PIL Act) Literature divided on how to interpret this criterion, but for registered entities there are only minimal differences.	Italian law applies when the company has the administrative seat in Italy or when the 'principal object' of the company (that is to say its main activity or main operation) is situated in Italy (article 25 PIL Act). This rule only applies to non-EU companies only.	Italian private international law refers to both substantive law and private international law of the competent jurisdiction (renvoi). If the foreign private international law refers back to Italy, Italian substantive law applies.
Latvia	Real seat; but, de facto, focus on registered seat; also some bilateral treaties codifying relevance of registered seat		'If pursuant to the provisions of this [law] the law of a foreign state must be applied, but such law in turn stipulates that Latvian law is applicable, then Latvian law shall be applied'. But Latvian law accepts renvoi back to the Latvian law only (and not to any possible *lex fori*)
Lithuania	Registered seat	- If violation of foreign incorporation rules: state of main activity - If 'subdivisions' of foreign companies with 'head office, principal place of business or other [main] activity of the	Renvoi accepted in matters determining the civil legal status of a person; but rules do not apply where the applicable law has been chosen 'by the parties to a transaction, likewise in determining the applicable law to the form of a

		subdivision' in Lithuania: Lithuanian law determined the civil capacity of the subdivision	transaction and to non-contractual obligations.'
Luxembourg	Real seat (place of central decision-making, i.e. where the board of directors meets), but presumption that the real seat is at the place of the statutory seat	-	No case law, but most likely courts would follow French case law; hence, renvoi would be allowed
Malta	Place of incorporation	-	-
Netherlands	Registered office, Art. 10:118 CC	If no registered seat, the centre of activity at the moment of establishment of the company, Art. 10:118 CC If a company has its statutory seat in a different country form the country according to the law of which it was established, Dutch courts will consider all elements in determining the applicable law;[217] most likely, this means that courts will apply the law according to which the company has been established	No renvoi; the application of the law of a country is understood to be the application of the laws and rules of that country with the exception of private international law, Art. 10:5 CC
Poland	The 'seat' of a company. No specification whether 'real seat' or 'statutory seat'. Legal scholars divided between followers of the 'real seat theory' and 'incorporation theory', but the latter theory has become dominant. However, the Polish Supreme Court (12.3.2015) has maintained that a company's seat 'shall be construed as the place of actual activity' (company from Lvov, now in Ukraine: it is uncertain whether this decision is applicable to other situations). But Polish courts generally take the statutory seat as an	-	If the Private International Law of the country in which the company has its seat refers to the law of another country in which the company is actually incorporated, the law of the country of incorporation applies.

[217] As stated in parliamentary materials, see Kamerstukken II 2009/10, 32 137, nr. 3, p. 68.

	indication for determining the applicable *lex societatis* without analysing in detail the actual management centre of the company.		
Portugal	On paper, Portuguese PIL follows the 'real seat theory' (the place where the principal and effective office of administration is located: Art. 33(1) Civil Code, Art. 3(1) Companies Act). However, this rule is held as not applicable to EEA companies and several exceptions exist (see reincorporations and duty to re-incorporate)	Portuguese companies with their 'real seat' in a foreign country cannot invoke the law of such foreign country against third parties (Art. 3 Companies Act).	Renvoi doctrine applies: if foreign law is applicable, its private international law rules also apply. If foreign law refers back to Portuguese law, their substantive rules apply (Arts. 17-18 Civil Code). Therefore: if a company is incorporated in Portugal with its real seat abroad and the state of the real seat follows the incorporation theory, Portuguese law applies (and the company is validly incorporated).
Romania	Complex dual criterion: Statutory seat, but if the company has multiple establishments in different countries, what must be taken primarily into account is the real seat of that company (interpreted as the place where the main centre of decision-making is located), Art. 2571 al. 2 NCC This can support the conclusion that Romanian law follows, in fact, the real seat theory. In light of the rulings of the Court of Justice, the real seat criterion should be disapplied for EU-incorporated companies.	Additional problems are created by the incoherence produced by legislation as well as administrative practice: Art. 2582 NCC guarantees the automatic recognition of foreign companies. The Trade Registry, based on a text from the Trade Registry Law, reviews the company's existence by studying the law under which it was created (the law of the registered office), thus ignoring the current *lex societatis*. Thus, Art. 2571(2) NCC should be seen as exceptional, applied restrictively, only to pseudo-foreign companies.	Renvoi is admitted as a general solution.
Slovakia	Registered seat, s. 22 of the Commercial Code	-	There is a wide margin of appreciation on behalf of the judicial authority in relation to the application of renvoi. Section 35 of the Act on International Private and Procedural Law stipulates that, if based on the application of this Act, the legal system to be applied

			refers back to the national legal system or refers to the legal system of another state, such reference shall be used only if it reflects a reasonable and equitable arrangement of the relationship in question.
Slovenia	Registered seat; Art. 17 of the Private International Law and Procedure Act (PILPA). The country of incorporation is the main connecting factor for determining the applicable company law. The Slovene courts simply refer to the place of entry into the commercial register as the relevant factor to interpret the registered seat.	Art. 2 PILPA stipulates that the primary connecting factor is exceptionally not to be used, if it is clear that the relation with the *lex causae* is not the most important one and there is an essentially closer link to some other law. Art. 17(3) PILPA provides that 'if the actual head office of a legal entity is in a country other than the country in which it was founded, and under the law of this other country also belongs to it, it shall be considered that the company belongs to this other country'. However, this provision has been dismissed as not applicable.	Art. 6(1) PILPA accepts a referral to the law of a third country, as well as a *renvoi* back to Slovene law. In the latter case, only substantive (internal) Slovene law applies, the Private International Law and Procedure Act therefore does not allow for a double *renvoi*.
Spain	Companies that are domiciled in Spain (registered office in Spain) are governed by Spanish law, regardless of their State of incorporation (Art. 8 Capital Companies Act) [unilateral conflict rule, but case law applies this rule also to foreign companies] Companies whose principal establishment or business activity are located in Spain, will have to place their domicile in Spain (Art. 9(2)). Case law and scholars are divided on the interpretation of these rules; however, the dominant view (accepted by the courts) is that these rules are to be	Foreign companies with their principal establishment or main business activity in Spain are governed by Spanish law (Art. 9(2)); they have to convert into Spanish companies, otherwise they are treated as Spanish partnerships or civil companies Narrow interpretation of Art. 9(2): only applicable in limited cases and probably not to EU companies, but not yet confirmed by case law	Only renvoi back to Spanish law. No general Renvoi doctrine (Art. 12(2) Civil Code). No case law.

	considered as a version of the incorporation theory.		
Sweden	Registration in Sweden.	-	In general, Swedish private international law does not support the doctrine of renvoi. The principal rule is that the application of foreign law means a referral only to the substantive law of that country.
United Kingdom	1) Place of incorporation 2) No distinction between EU and non-EU	-	In general referral to internal law, no renvoi (internal law theory); by way of exception, total renvoi is used in some other areas, but probably not in company law.

Table 3.2. Outreach statutes

Country	Registration and disclosure requirements; compatibility with EU law	Others (e.g. directors' disqualification)
Austria	Registration requirements for branches of foreign companies. Non-EU/EEA companies are required to appoint a special representative for branches in Austria. All foreign companies are required to prove their legal existence and must file a translation of their articles of association.	-
Belgium	A foreign-incorporated company that opens a branch in Belgium must deposit its memorandum of association and the articles of association with the commercial court; before these documents are deposited, an action in law of the foreign company will be null and void	Persons who are responsible for the governance of the branch of a foreign company are liable to third parties in the same way as board members of a Belgian company (thus, the breach must be related to the operation of the branch, e.g. negligence in the disclosure requirements of branches or non-compliance with Belgian general principles of corporate governance), Art. 59 BCC The Belgian law on the employees' council is applicable regardless of the nationality of the company; branches of companies that employ on average more than 100 employees must establish an employees' council Both natural persons and legal entities can be disqualified from acting as director, supervisor or agent of a Belgian

		company and a Belgian branch of a foreign company;[218] it is irrelevant whether the criminal conviction or insolvency sentence on which the disqualification order is based was issued by a Belgian or a foreign court
Bulgaria	The publicity of the data provided for in article 17a CA regarding the branch of a foreign person aims at protecting creditors and third parties. Pursuant to article 17a in connection with article 17(2) CA the branch of a foreign person shall be registered in the Commercial register on the basis of a written application which discloses the seat and subject matter of activity of the branch, information about the foreign company and the person who manages the branch etc.	-
Croatia	Art. 612 Companies Act provides that foreign companies are not permitted to undertake business activities on a continuous basis before they establish a subsidiary in the territory of the Republic of Croatia. Business activity will be considered continuous if it is considered as such by established trade practice In order to establish a subsidiary foreign companies are also required to provide: evidence that the company is registered in another country (e.g. provide a certified court register excerpt), a valid decision on the establishment of a subsidiary in Croatia, a copy of the foreign company's articles of association and officially authenticated and abbreviated last annual financial statement of the foreign company. In 2011 the Croatian Constitutional Court held that such registration requirements are not contrary to the freedom of establishment.	-
Cyprus	Art. 347-353 Cap.113 are specific provisions of Cyprus Companies Law that are applicable to foreign companies. They concern the power to hold immovable property, service to such companies, information that needs to be stated on company documents and more. Section 351 establishes similar disclosure requirements to those	Article 101 specifically renders Part III of Cap.113 that contains provisions relating to the obligation of companies to register charges and record mortgages as well as to maintain relevant registers, applicable to overseas companies to the extent that the charges and mortgages concern immovable property in Cyprus and the overseas company has an established place of business in Cyprus.

[218] Royal Decree nr. 22 of 24 October 1934 *betreffende het rechterlijk verbod aan bepaalde veroordeelden en gefailleerden om bepaalde ambten, beroepen of werkzaamheden uit te oefenen*, *OJ* 27 October 1934 (KB nr. 22).

	imposed by Dutch law in Inspire Art. Yet, the issue of their compatibility with EU law does not seem to have arisen as yet. The aforementioned rules apply both to non-EU and EU-incorporated companies, though companies registered in an EU Member State are exempted from the obligations laid down in Article 350, amongst others, to file financial accounts, director's and auditor's report if the conditions provided in specific EU Directives are met (see Article 350, Cap.113).	By virtue of Article 362, Cap.113, Cyprus courts can wind up an overseas company if it conducts or has conducted business in Cyprus. Article 362, could, in this respect, be considered an outreach statute.
Czech Republic	See Table 5 below	Insolvency law (ss. 63, 64 Business Corporations Act): The insolvency court shall, even ex officio, decide that a director may not hold the office as a member of a governing body for a period of 3 years, if the way in which this person exercised his office resulted in the company's bankruptcy
Denmark	An EU/EEA-incorporated company doing business in Denmark must register a branch with the DBA if the company's activities in Denmark have a certain extent, s. 349 CA Other foreign companies: must obtain authorisation by the DBA to operate in Denmark via a branch The branch must be managed by one or more branch managers (filialbestyrere), s. 346(1) CA Branches must have an independent name, consisting of the name of the branch; name of the main company; its nationality; and the word 'filial' (branch); the compatibility of these requirements with EU law has been questioned[219]	Branches: the CA provides that '[t]he provisions of this Act regarding members of management generally apply, with such changes as are necessary, to branch managers,' s. 346(2) CA. This suggests that a broad range of provisions could be applicable. If that is the case, such requirements will potentially impose double burdens.[220] Other rules addressing the activities of foreign companies are contained in sector-specific legislation, e.g. the Financial Business Act, Alternative Investment Fund Managers etc. Act, Securities Trading Act New rules on bankruptcy quarantine entered into force in 2014, but difficult to enforce: directors of Danish company who are given bankruptcy quarantine can register as directors in another country and even operate in Denmark through a secondary establishment
Estonia	Foreign branches: name must include the words 'Eesti filiaal' ['Estonian branch']; if permanent activity, name of branch must be entered into commercial register. If a foreign company operating in Estonia has a web page directed to the public, it shall include at least a summary in Estonian about its field of activity or the goods and services	-

[219] E Werlauff, 'Can National Company Law Require a Branch of a Foreign Company to Have an Independent Name?' (2014) 11 *European Company Law* 165.
[220] For a discussion, see KE Sørensen, 'Branches of Companies in the EU: Balancing the Eleventh Company Law Directive, National Company Law and the Right of Establishment' (2014) 11 *European Company and Financial Law Review* 83.

	offered	
Finland	Registration requirements for branches of foreign companies	Finnish company law not applied to foreign companies
France	Special registration requirements for branches of foreign companies apply, distinguishing between EU and non-EU companies (Arts. R. 123-54, R. 123-57 et R. 123-58 C.Com.)	Financial markets regulations: considered as 'lois de police', which apply to both French and foreign listed companies[221] Abuse of corporate assets (*abus de biens sociaux*) applied to foreign companies having their real seat in France[222] and to foreign companies not having their real seat in France, but most of their activities there[223] (the court applies French company law, which is held to be the applicable *lex societatis* because of the company's actual real seat in France or because the real seat is deemed to be in France given the company's activities there)
Germany	The law on the registration of branches provides since 2008 that the eligibility requirements of the companies acts apply to 'the legal representatives of the company with regard to the branch' (ss. 13e(3)), 13f(5), 13g(5) HGB); the compatibility of this law with the 11th Directive (i.e. Directive 89/666) is questioned by some in the literature[224]	Eligibility of persons to serve as directors of public or private companies (ss. 76(3) AktG, 6(2) GmbHG): explicitly refer only to the German stock corporation and limited liability company, but were also applied to persons to be appointed as directors of a foreign company operating in Germany[225] (since 2008, this question is also addressed by the law on branch registration, see the column left)
Greece	Rules for foreign companies: special disclosure requirements for branches and agencies; non-EU companies have to register a branch.	Regarding the liability of signatories of the application for the ministerial decision authorising the establishment of a branch or agency in Greece of foreign (EU and non-EU) companies with limited liability, Art. 59 of Law 3190/1955 states that '(u)ntil the completion of the formalities mentioned in the above article, signatories who have contracted in the name of the company have unlimited and several liability'.
Hungary	No explicit outreach statutes in Hungarian law, no case law and no discussion in the legal literature; non-EU companies have to register a	See left

[221] CA, Paris, 13 January 1998, Bull. Joly Bourse 1998, p. 256; Rev. soc. 1998, p. 572: 'the provisions of the Act of July 2, 1996 are economic 'ordre public' provisions and the general regulation of the COB ("Commission des operation de bourse") applies to any operator who acts on a French regulated market'.

[222] *Cour de cassation* (crim.) 31 January 2007, *Nadhmi Auchi, Patrick Chamarre, André Guelfi, Jean Hamon et autres;* 10 March 2010, F-D, n°09-82.453, Rev. Soc. 2007.369, comment B. Bouloc.

[223] Cass. crim., 25 June 2014, n° 13-84445, Revue des sociétés 2015, p. 50, note M. Menjucq.

[224] But see Explanatory memorandum accompanying the proposal for a Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse (MoMiG), Bundestags-Drucksache 16/6140, p. 50 (stating that the Eleventh Company Law Directive is not affected because it is not concerned with the eligibility of directors and restrictions of the right of establishment are justified).

[225] BGH NZG 2007, 592 (arguing that in cases such as the one at issue, where a German national formed a pseudo-foreign company to circumvent domestic eligibility requirements, the conduct of the director should be qualified as abuse, and restrictions of the right of establishment were therefore justified).

	branch.	
Ireland	Rules on 'external' companies in Part 21 of the 2014 Act for foreign branches: filing obligations to Irish register	Chapter 5 of Part 14 (Compliance and Enforcement) of the 2014 Act for disqualification of company directors use a broad definition of company which includes 'every company and every body, whether corporate or unincorporated, that may be wound up under [the 2014 Act]'; thus this includes foreign companies.
Italy	Transparency requirements for foreign companies active in Italy (Articles 2507 to 2510 Civil Code). Not significantly applied and enforced.	-
Latvia	All foreign companies (both EU and non-EU) are required to file a proof on their registration in the country of incorporation (if there is a registration requirement in particular country) and a copy of their articles of association as well as to appoint an official representative of the branch (see Table 4.3 below for name of a branch)	In practice: administrative authorities in Latvia have difficulties in respecting incorporation country's laws as well as in ensuring that EU-based companies may enjoy their freedoms without hidden restrictions.
Lithuania	Branches of foreign companies must be registered in the Register of Legal Entities; name of the branch or the representative office must contain word *filialas* (branch) or *atstovybė* (representative office); at least one person acting on behalf of branch/office needs to reside in Lithuania (but does not apply to EU companies)	-
Luxembourg	No requirements going beyond the 11th Directive	No case law from Luxembourg courts, but note that French courts apply the criminal offence of *abus de biens sociaux* to directors of foreign companies with their real seat or most of their activity in France[226]; Luxembourg company law contains a similar provision on abuse of corporate assets (Art. 171-1)
Malta	The law does not contain provisions that can be properly described as outreach statutes and that would displace the law of the state of incorporation Special regulations for overseas companies with a branch or place of business in Malta, dealing principally with the delivery of documentation and records and financial reporting requirements; for EU companies the registrar waives the requirement that the accounts be presented in precisely the same form as would be required of a Maltese company	-

[226] See notes 222 and 223 above.

Netherlands	For non-EEA companies operating exclusively or predominantly in the Netherlands and lacking a 'real connection' with their country of establishment, the Act on foreign business corporations applies in its entirety (applying inter alia certain Dutch liability rules of board members, Arts. 2:9, 2:248, 2:216(3) CC, and requiring the drawing up of financial accounts and reports as Dutch companies, Arts. 2:360 et seq. CC) For EEA companies: parts of the Act on foreign business corporations continue to apply (directors are personally liable for damage caused to third parties due to misleading financial accounts, and 'de facto' directors are qualified as directors if they perform 'acts of administration', Arts. 2:249, 260, 261 CC)	If a foreign company that is subject to corporate tax in the NL becomes insolvent, Dutch rules on liability of directors (Arts. 2:138, 149 CC[227]) apply, Art. 10:121 CC
Poland	Requirements for 'foreign entrepreneurs': certain registration formalities; scope of the business activity of a branch and the use of a particular business name with the additional words: 'branch in Poland' (Act on Freedom of Economic Activity). Scholars argue that the above approach should be applied only in relation to foreign companies from outside EU/EEA.	-
Portugal	Foreign companies performing business activities in Portugal for more than one year must establish a permanent representation in Portugal and comply with the Portuguese commercial registry regime (Article 4(1) of the Companies Act). According to Article 4(2), if it does not do so, the company is bound by the acts carried out on its behalf in Portugal and is jointly liable with the persons carrying out the acts and with the company's managers or directors. These rules, however, do not apply to EEA companies that operate in Portugal under the freedom to provide services as provided for in Council Directive 2006/123 / EC (art. 4(4) Companies Act as amended by DL n.º 49/2010, of May, 19th).	Directors of foreign companies do not have to disclose whether they are eligible to act as directors. Eligibility constraints or limitations under Portuguese law are probably applicable to foreign companies that intend to register a branch in Portugal, based upon general principles of fraud against the law. No case law however.
Romania	If the local activities of a foreign company will be conducted through a branch, a specific registration in the	See 4.7 for the disqualification of directors in the case of their non-compliance with the typical requirements

[227] Joint and several liability for deficiencies in the company's assets if the directors manifestly performed their duties improperly and it is likely that this conduct was an important cause of the company's insolvency.

	Trade Registry is required. For the registration in the Trade Registry, the authorities require an affidavit signed by the would-be director by which he/she states that he/she fulfils the legal conditions for appointment in the capacity of Director.	during the registration process. Romania's Capital Market Law applies to all companies whose shares/securities are admitted to trading on a regulated market in Romania, irrespective of their national law.
Slovakia	The Commercial Code fully respects the incorporation theory	The court may decide that a director shall not hold office as a member of the governing body for a period of three years based on s. 13a of the Commercial Code.
Slovenia	A foreign company may carry out a gainful activity in Slovenia only by setting up a branch. There is disagreement regarding the proper interpretation of the relevant requirements and potential sanctions. The literature argues that financial penalties should apply, rather than disregarding the legal capacity of the foreign entity.	It is ambivalent whether the Slovene Employment Relationship Act applies to foreign companies. According to the Act, Slovene law shall apply to employment relationships when the employer is established or residing in Slovenia. However, the Act does not specify whether the statutory seat or the real seat should be taken into account.
Spain	Art. 9(2) Capital Companies Act (see above): not applicable to EU companies.	-
Sweden	Formally no 'outreach statutes'. In order for a foreign company to carry out business in Sweden, Section 2 of the Swedish Foreign Branch Office Act provides that such activities must be conducted through: i) a divisional office with independent management ii) a Swedish subsidiary iii) or an agency with operations in Sweden.	For certain types of business activities, considered important for the undisturbed operation of the economy, specific rules exist that address the activities of foreign companies. Examples include: i) credit institutions ii) securities companies iii) foreign insurers iv) central securities depositories v) foreign insurance brokers etc. Also, the managing director of a foreign branch office established in Sweden may be the subject of a prohibition on trading under the Swedish Trading Prohibition Act 2014 (Sw. *lagen om näringsförbud*).
United Kingdom	1) Registration as an overseas company and disclosures in the course of trading required if the company is incorporated outside the UK and opens an establishment (a branch or other place of business) in the UK, Part 34 (ss 1044-1059) CA 2006 and Overseas Companies Regulations 2009 (SI 2009/1801) 2) Name: an EEA company can always register its corporate name, unless this infringes the UK rules on permitted characters: a non-EEA company is subject to the same restrictions as UK companies (prohibition of offensive or misleading names)	Disqualification of directors under UK law is possible even if the company is incorporated abroad, e.g. where insolvency proceedings have been opened in the UK (Re Seagull Manufacturing (No 2) [1994] Ch 91)

3.2 Connecting factor

1. In virtually all Member States, it is now relatively well established that the real seat theory is no longer applicable to foreign companies incorporated in other EU Member States, at least not without modifications. However, we find significant variation in how the relevant connecting factor is formulated, whether the conflict rules contain exceptions or subsidiary connecting factors, and whether the operation and reach of the rules are well established or legal uncertainty persists. In order to describe the existing variation, we analyse first the main connecting factor that the Member States employ and then discuss whether, and if yes, under what circumstances they allow deviations from this connecting factor.

2. A number of Member States still formally retain the real seat as connecting factor.

    - In Austria, the codified law stipulates that the law applicable to companies is determined by the location of the company's central administration, but the courts have acknowledged that this provision cannot be applied to EU-incorporated companies. Instead, the applicable legal rules are exclusively determined by reference to the registered office as specified in the articles of association.[228]

    - Belgian and Luxembourg provide for a solution that formally adheres to the real seat doctrine but is in practice largely in line with the incorporation theory because of the use of presumptions. The real seat is defined as 'the location of the principal establishment', which in turn is determined by considering the location of the company's centre of governance or business activities (Belgium), or the place where the most important decisions of the company are taken, which will generally be the place where the directors and shareholders meet (Luxembourg).[229] However, both legal systems establish the presumption that the central administration of the company is located where the statutory seat is. This presumption can be rebutted if parties provide evidence that the organs of the company meet elsewhere.

    - In Greece, the relevant connecting factor continues to be the company's real seat. The lack of compatibility of this provision with the right of establishment of EU-incorporated companies has been discussed in the literature, but there is not yet any case law having changed the established doctrine or interpreted it restrictively.

    - Finally, Portuguese law also contains a connecting factor based on the real seat theory, but this provision does not seem to be applied in practice, since registrars and notaries tend not to verify whether the real seat of the company is located at the place of the statutory seat. Furthermore, the Portuguese Commercial Companies Act provides that a company with its statutory seat in Portugal cannot invoke the law of the country where it has its real seat against third parties.[230] The combination of these provisions and practices seems to ensure that the issue of the compatibility of the Portuguese rules with the case law of the Court of

[228] OGH, judgment of 29 April 2004, 6 Ob 43/04y.
[229] The Commercial Companies Act 1915, Art. 64bis, allows companies to provide in the articles of association that directors may participate in meetings of the board by videoconference. A meeting conducted by videoconference is deemed to be held at the 'seat of the company'.
[230] Portuguese Commercial Companies Act, Art. 3(1).

Justice has not yet arisen. Nevertheless, there is some uncertainty how cases should be treated that do not fall directly within the ambit of the Portuguese rules, for example where a company's real seat is located in Portugal, but not its statutory seat.[231]

3. Second, a number of Member States follow the incorporation theory in principle, but provide for subsidiary connecting factors that incorporate certain elements of the real seat theory. Often, the reach of these exceptions and their compatibility with the requirements of EU law are not well established.

   - A first group of exceptions provide for the alternative reliance on the statutory seat or the real seat if registration is not a precondition for the incorporation of the company or the registered seat cannot be identified for other reasons (Bulgaria, Hungary, and the Netherlands).

   - A second group of Member States stipulate that if the company's place of central decision-making or centre of business operations is located within the territory of the forum, the forum's company law will apply (Estonia,[232] Italy,[233] and Spain[234]).

   - Finally, a third group of countries allow parties to rely on the law at the place of the real seat for particular purposes (Croatia, France, and Portugal). Pursuant to Croatian law, third parties can choose whether to invoke legal consequences dependant on the law at the real seat or the registered seat of the company.[235] French law provides that the law at the real seat may be invoked in cases of fraud; and more generally, third parties are able to choose between the incorporation law and the real seat

[231] It is argued that Art. 3(1) Portuguese Commercial Companies Act should operate in a bilateral way, since it aims at protecting third party expectations, Luís de Lima Pinheiro, 'O Direito aplicável às Sociedades, Contributo para o Direito Internacional Privado das Pessoas Colectivas' in *Estudos de Direito Internacional Privado, Direito de Conflitos, Competência Internacional e Reconhecimento de Sentenças Estrangeiras* (Almedina, 2006) 87. This premusably means that companies have to be recognised as validly incorporated entities governed by the law of the state where the statutory seat is located, even if the real seat is in Portugal. However, it would not prevent third parties from relying on the law of the real seat state if these rules are more advantageous. See Portuguese country report, p. 4, for an overview of the discussion in the Portuguese literature.

[232] Estonian law applies to foreign-incorporated companies 'if a legal person is actually managed in Estonia or the main activities of the person are carried out in Estonia', § 14(2) PILA.

[233] Italian law applies when (i) the company has its administrative seat in Italy or (ii) the 'principal object' of the company (that is to say its main activities or main operations) is situated in Italy, Art. 25(1), sentence 2 Italian Private International Law Act. However, this provision does not lead to the denial of the legal existence of foreign companies or the 're-qualification' of such companies as Italian companies. Art. 25(1), sentence 2 only states that certain Italian rules should be applied to these foreign companies and should supplement the law of incorporation. It is controversial to what extent specific Italian rules can be applied to EU or EEA companies pursuant to this provision, MV Bendettelli, '«Mercato» comunitario delle regole e riforma del diritto societario italiano' (2003) 48 *Rivista delle Società* 710. Case law does not exist.

[234] Spanish Corporate Enterprises Act, Art. 9(2): 'Corporate enterprises whose main business establishment or operation is within the Spanish territory shall be required to have a registered office in Spain.' This provision, read together with Art. 8 ('All corporate enterprises with registered offices in Spain, irrespective of the place of formation, shall be Spanish and subject to this act.') would in principle require all companies with their real seat in Spain to convert into Spanish companies, and otherwise they would be treated as Spanish partnerships or civil companies. In the academic literature, it is suggested to interpret this provision narrowly, capturing only cases 'intimately linked to the Spanish market', i.e. pseudo foreign corporations (Spanish country report, pp. 14-15). In addition, it is argued that the provision is not applicable to EU companies (F Garcirmartín Alférez, *Derecho Internacional privado* (Madrid: Civitas/ Thomson Reuters, 2nd ed 2014) 361-362), but this has not yet been confirmed by case law.

[235] Croatian country report, Section 2.

law.[236] The Portuguese Commercial Companies Act stipulates that companies with their statutory seat in Portugal cannot invoke the law of the real seat state against third parties.[237] It is controversial in the Portuguese academic literature how this provision should be interpreted. A minority view argues that third parties can choose between Portuguese law and the law of the foreign country where the centre of administration and control (real seat) is located.[238] Others argue that Portuguese law as *lex societatis* is applicable in relation to third parties, with the exception of situations where such third parties are entitled to expect the application of the law of the real seat; for instance, if the company has its centre of administration in a state that follows the real seat theory and the company contracts with third parties who are aware of this.[239]

- In most of the above-mentioned countries, there is some discussion of the conformity of the relevant provisions with EU law in the academic literature. In some cases, it has been argued that the rules should not apply to EU-incorporated companies,[240] but case law that could give guidance is generally rare or non-existent.

4. An unusual subsidiary connecting factor not found in other Member States (with the exception of Slovenia) is the Croatian Private International Law Act of 1991 (PILA), which stipulates that if a legal entity has its real seat in a state other than the one in which it was established, and according to the law of that other state it is seen as a company established under the law of the real seat state, it shall be considered to be a legal person of that state.[241] For example, if a company is registered in the UK but has its real seat in Belgium, the PILA would require the court to apply Belgian law. The operation and purpose of this provision is unclear; it is not comparable to a renvoi, since Croatian law would declare UK law as applicable in the example, and it is unclear whether the provision results in the application of Belgian substantive company law, with the consequence that the company is not validly incorporated, or also Belgian private international law rules. Case law applying the provision does not exist. A similar provision is contained in the Slovenian Private International Law and Procedure Act, which provides that 'if the actual head office of a legal entity is in a country other than the country in which it was founded, and under the law of this other country also belongs to it, it shall be considered that it belongs to this other country'.[242]

5. Another unusual exception has been established by the Appellate Court of Ljubljana. Relying on general principles of Slovenian private international law,[243] the court held that the primary connecting factor shall exceptionally not be used if it is clear that the relation with the incorporation law is not the most important one and there is an essentially closer link to some other law.[244] The significance of this exception is unclear, in particular whether it

[236] French Commercial Code, Art. L210-3, and Civil Code, Art. 1837: Third parties may rely for legal purposes on the registered office …. However, the company shall not be entitled to raise this against them if its actual office is located elsewhere.'
[237] See n 231 above.
[238] A Marques dos Santos, *Direito Internacional Privado Sumários* (AAFDL, 1987) 66-67; 127-129; 259.
[239] L de Lima Pinheiro, *Direito Internacional Privado, Direito de Conflitos, Parte Especial* (volume II, 3rd Edition, Almedina, 2009) 136.
[240] See the Italian country report, Section 3.2.
[241] PILA, Art. 17(2).
[242] Slovenian Private International Law and Procedure Act, Art. 17(3).
[243] Slovenian Private International Law and Procedure Act, Art. 2.
[244] Judgment of the Appellate Court in Ljubljana, I Cpg 563/2010, ECLI:SI:VSLJ:2010:I.CPG.563.2010, 20 May 2010.

would generally lead to the application of the law of the real seat state to pseudo foreign companies.

6. In at least two countries, Belgium and Luxembourg, the continued application of the real seat theory seems to have the effect that companies obtain 'dual nationality' if they were established in a country following the incorporation theory, say the UK, and then move their real seat to Belgium or Luxembourg. From the perspective of the UK, the company would continue to be validly incorporated in the UK and governed by UK law. From the perspective of Belgium or Luxembourg, the company would be subject to Belgian or Luxembourg law. It has been argued that the company is in such a case governed by both legal systems and its articles of association should comply with the requirements of both company laws.[245] However, this view goes back to a relatively old decision of the Belgian Supreme Court.[246] Newer case law does not seem to exist, and it is questionable whether courts would uphold the ruling in light of the right of establishment jurisprudence of the Court of Justice. While the 'dual nationality' solution does not lead to a denial of legal personality in the sense of *Überseering*, it is difficult to see how the cumulative application of legal requirements from two company law systems could be justified.

7. To summarise, in the clear majority of Member States, it is now relatively well established that the incorporation theory shall determine the law applicable to companies in intra-EU cases (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden, and the UK), even though some of these countries have formally retained the real seat theory (Austria, Germany, Portugal, Spain). In the remaining countries (Belgium, Greece, Latvia, Luxembourg, Poland, and Romania), the implications of the continued adherence to the real seat theory have not been discussed widely. Some uncertainty seems to exist whether the legal situation is in line with the Treaty and how the connecting factor should be interpreted in order to ensure that the application of domestic company law to companies incorporated in another EU Member State does not infringe the right of establishment. Where there is a discussion of the problem, commentators in the academic literature suggest a restrictive interpretation of the existing rules or certain modifications. However, it is also not always clear whether the suggested solutions are fully compliant with the Treaty requirements,[247] and the legal situation is generally unsettled due to the scarcity of relevant case law.

8. In many Member States, third parties are protected if they rely in good faith on the capacity of the company according to the law where the transaction with the company is entered into or where the contracting party resides or where its place of business is located. Such rules are sometimes explicitly codified[248] and sometimes derived from an analogy to the existing good faith provisions that exist in other European legislation, notably the Rome I Regulation.[249] In the latter case, if the analogy mirrors the Rome I Regulation

[245] J-P Winandy, *Manuel de droit des sociétés* (Legitech, 2011).
[246] *Cour de cassation (belge)*, 12 november 1965 (*Lamot*), Pasicrisie 1966,I, 336, RCJB 1966, p. 392, comment J van Ryn.
[247] See, for example, the discussion of opinions expressed by the Greek literature, Greek country report, Section 3.2.
[248] For example, Estonian Act on Private International Law, § 16; Lithuanian Civil Code, Art. 1.22(2).
[249] Rome I Regulation, Art. 13. The provision of German law implementing Art. 13 (Art. 12 of the Introductory Act to the Civil Code) was applied by BGH NJW 1965, 487 to hold that the party contracting

closely, it is necessary for the person acting on behalf of the company and the third party to enter into the transaction in the same country.[250] Commonly, the good faith protection covers both the capacity of the company to enter into the transaction (which will generally only be problematic in countries still adhering to some form of the *ultra vires* doctrine[251]) and the power of the corporate organs (authority) to bind the company. In Poland, we find an extended version of the above good faith rule. In determining the capacity of the company, third parties acting in good faith may rely on the law at the place where the transaction with the company is entered into *or* where the company's enterprise (meaning a set of organized tangible and intangible assets designed to conduct business activity) is located.[252]

3.3 Outreach statutes

1. All Member States provide for registration and disclosure requirements if a foreign company operates a branch within the territory of the forum, as well as in some cases for additional obligations, such as authorisation or residence requirements. In several Member States, these requirements go beyond the disclosure obligations set out in Directive 89/666, so-called Eleventh Company Law Directive, (for example, Cyprus, Denmark, Estonia, France, Lithuania, the Netherlands, Poland, Portugal, Spain). In these cases, it is generally (but not always[253]) well established that the additional obligations shall only apply to non-EU/EEA incorporated companies. For example, the Netherlands continue to impose additional disclosure obligations and certain rules concerning the liability of directors on so-called pseudo-foreign companies, defined as companies that have most or all of their business operations in the Netherlands and lack a 'real connection' with the country of incorporation. This law, the Act on Foreign Law Business Corporations, was challenged before the Court of Justice in *Inspire Art* and has since been amended to limit the scope of application of several parts of the act to non-EU/EEA companies.[254] A similar law can be found in Poland.[255]

2. Another outreach mechanism in the narrow sense that can be found in some Member States is the extension of liability provisions of the forum to branch managers of foreign companies. For example, according to Belgian law, negligence in the administration of the branch can lead to liability of those who are responsible for the management of the branch under Belgian company law.[256] Other countries extending responsibilities under domestic

with the company could rely on the domestic law in claiming that the corporate organ acted with authority.

[250] See the text of Art. 13 Rome I Regulation, stipulating that incapacity cannot be invoked in dealings with a third party acting in good faith if the contract is 'concluded between persons who are in the same country'.

[251] Directive 2009/101/EC (formerly the First Company Law Directive), Art. 10(1), does not require the Member States to abolish the *ultra vires* doctrine, but it restricts the doctrine to bad faith; acts are binding on the company even if they are outside the company's objects, unless the company proves that the third party knew or must have known that the act was *ultra vires*.

[252] Polish Act on Private International Law, Art. 18. For a discussion see the Polish country report, Section 3.1.

[253] Cyprus country report, Sections 4.3, 4.6; German country report, Section 3.3, Lithuania country report, Section 3.3, Polish country report, Section 3.3

[254] Netherlands country report, Section 3.2.

[255] Polish law generally requires that a branch is established by a foreign entrepreneur, i.e. an entity actually conducting business activity abroad, which is not always the case of pseudo-foreign companies, see Polish country report, Section 3.3.

[256] Belgian Corporate Code, Art. 59.

company law to branch managers include Cyprus, Denmark, Lithuania and the Netherlands.[257]

3. As far as outreach statutes in the wider sense are concerned, a commonly observed example is the directors' disqualification regime. For example, the UK rules on directors' disqualification[258] apply to the directors of 'any company which may be wound up under […] the Insolvency Act'.[259] Because of the wide interpretation of the English courts' jurisdiction to wind up a foreign company, which essentially only requires a 'sufficient connection' with the UK,[260] the connecting factor is considerably broader than that of private international company law, and the law consequently also captures non-UK companies, including those from other EU Member States.[261] Several Member States contain comparable rules that have been interpreted to have some extraterritorial effect (e.g., Belgium, Germany, and Ireland).[262]

4. From a conflicts-of-law point of view, this result is consistent. Directors' disqualification is a mechanism of administrative law. Its international reach is not determined pursuant to private international company law rules, but the principle of territoriality.[263] The safeguarding of public interests lies at its heart, rather than the legitimate expectations of parties to a private transaction.[264] Nevertheless, the question arises whether the application of such laws to foreign-incorporated companies is compatible with the right of establishment. Some German courts have addressed this question.[265] They argue that it constitutes abuse if a German national who is prohibited from serving as director of limited companies under national law forms an English company and is validly appointed as director pursuant to English law. Consequently, in such a situation the director is not entitled to invoke the Treaty freedoms. Even if the situation was considered to fall within the scope of the Treaty, German courts consider the application of the German rules on the eligibility of company directors to foreign companies to be justified because of overriding reasons in the public interest, notably fairness and trust in commercial transactions.[266]

5. It may be useful to systematise the various approaches found in the Member States along three dimensions: the type of laws that are declared immediately applicable (paragraph 6), the required connecting factor (paragraph 6), and the conceptualisation of the host state's intervening measure (paragraph 6).

[257] See e.g. the Lithuanian Civil Code, which provides that if a foreign company conducts business in Lithuania, 'the civil liability of the persons acting on behalf of and in the interests of [the company] shall be governed by the law of the Republic of Lithuania', Art. 1.22(1) Civil Code.
[258] Company Directors Disqualification Act 1986, c. 46.
[259] Ibid, s 22(2).
[260] A 'sufficient connection' with the UK, which is the main requirement for a just and equitable winding-up pursuant to Insolvency Act 1986, s 221(5)(c), may result from the location of assets within the jurisdiction, the reasonable possibility that a winding-up order will benefit those who apply for the order, and the court's jurisdiction over persons interested in the distribution of the company's assets, See IF Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford University Press, 2nd edn, 2005), 3.44-3.45.
[261] See also BGH NZG 2007, 592, for a similar approach under German law, and German Commercial Code, s 13e(3), sentence 2, as amended by Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) [Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse], Law of 23 October 2008, BGBl. I, 2026, art 3(3)(b).
[262] The German law on the registration of branches provides since 2008 that the eligibility requirements of the companies acts apply to 'the legal representatives of the company with regard to the branch' (ss. 13e(3)), 13f(5), 13g(5) Commercial Code [HGB]).
[263] BGH, decision of 7 May 2007, II ZB 7/06, para 23.
[264] See e.g. PJ McConnaughay, 'Reviving the Public Law Taboo in International Conflict of Laws' (1999) 35 *Stanford Journal of International Law* 255.
[265] See, e.g., BGH NZG 2007, 592.
[266] Ibid. at paras 13-24.

6. The most likely issues that have been identified as having immediate applicability in spite of a foreign *lex societatis* are the following (roughly in order from the more specific to the more general):

   - Rules regarding corporate names[267]
   - Disqualification of directors and eligibility requirements for being a company director[268]
   - Disclosure obligations imposed on branches of foreign companies that go beyond the Eleventh Company Law Directive[269]
   - Liability of branch managers pursuant to the directors' duties of the host state[270]
   - Liability of directors of foreign companies pursuant to the directors' duties of the host state, irrespective of their function as manager of a branch in the host state[271]
   - General application of the company law of the host state[272]

7. The required intensity of connection with the host state's territory is characterised by a similarly large variation across Member States. We can distinguish between the following connecting factors (roughly in order from the more tenuous to the less tenuous connection):

   - Assets in the host state[273]
   - Business activity of some significance/subject to corporate tax in the host state[274]
   - Branch in the host state[275]
   - Real seat in the host state[276]

8. Finally, while some uncertainty exists as to how the application of the host state's law can be conceptualised, the following rationales can be identified in the Member States:

   - Use of the host state's (negative) *ordre public*[277]

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[267] See Section 4.2 below.
[268] See the example above at para 3.
[269] See the example above at para 1.
[270] See the example above at para 2.
[271] In the Netherlands, if a foreign company that is subject to corporate tax in the Netherlands becomes insolvent, Dutch rules on liability of directors (Arts. 2:138, 149 Civil Code) apply, Art. 10:121 Civil Code. Furthermore, in both Cyprus and the Netherlands, a director who causes or contributes to the company's insolvency is liable pursuant to domestic law. Importantly, the liability provisions do not apply as part of the country's insolvency law and hence do not depend on the location of the company's COMI in Cyprus or the Netherlands, but they apply when the company 'carries on business' within the state's territory (Cyprus) or is subject to corporate tax (Netherlands).
[272] See Section 3.2, para 3 above.
[273] As discussed, this is the requirement of UK law for the application of the domestic directors' disqualification regime, see para 3 above.
[274] Cyprus and the Netherlands for the liability of directors who cause or contribute to the company's insolvency, n 271 above.
[275] Liability of branch managers pursuant to domestic directors' duties, para 2 above.
[276] Blanket application of the company law of Croatia, France, and Portugal, Section 3.2, para 3 above.

- Use of overriding mandatory provisions ('laws of immediate application', '*lois d'application immédiate*', '*lois de police*' or '*Eingriffsnormen*'),[278] which are held not to constitute a restriction of the Treaty[279] or to be justified under the *Gebhard*-conditions[280]

- Classification of the question not as company law, but as another legal area for purposes of private international law[281]

- Deviation from the general connecting factor (incorporation theory) in favour of the real seat[282]

4. Scope of the *lex societatis*

The discussion in Section 3 above has shown that in spite of a move towards the incorporation theory in the EU, largely precipitated by the right of establishment jurisprudence of the Court of Justice, considerable differences remain between Member States as regards the formulation of the relevant connecting factor(s) and possible interventions by the *lex fori* in a foreign *lex societatis* by means of outreach statutes. An additional source of potential legal uncertainty stems from the fact that even where it is possible to determine the connecting factor in an unambiguous way, the boundaries of the *lex societatis* may not be well defined. This question is known as the problem of classification or characterisation in private international law.[283] Regulatory strategies and the underlying conflicts that they address need to be classified for purposes of private international law in order to identify the law that is applicable to the conflict. In our area, the question turns primarily on which issues are to be classified as 'company law' – a term currently not autonomously interpreted in the EU and, hence, not necessarily understood in the same way in all Member States (this would, of course, change with the adoption of a harmonising measure in this area)[284] – and which issues fall within the scope of 'neighbouring' legal areas, notably insolvency law, tort law, contract law, and securities regulation, including takeover law.

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[277] Use of the negative *ordre public* in company law is rare. Courts in the UK have invoked the *ordre public* to prohibit arrangements permitted pursuant to the law of incorporation that were considered to be equivalent to a fraudulent transfer, Adams v National Bank of Greece [1961] AC 255. Somewhat comparable to the negative *ordre public* (but probably with a lower threshold) is the Danish 'doctrine of circumvention', which was used in a number of company law cases, including *Centros*. These points will be discussed further in Section 5.2 below.

[278] Such provisions are discussed in more detail in Section 5.2. below.

[279] For example, BGH NJW 2007, 1529 (*Einfamilienhaus*), para 10 (regarding the creation of a false legal appearance), see para 4 above. See to this effect now also Case C-594/14 *Simona Kornhaas v Thomas Dithmar*, nyr, para 28, where the CJEU held that a provision of German law imposing liability on directors of a (pseudo) foreign company '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, … from the time when it must be considered, … to be insolvent … [Such a] provision … does not, therefore, affect freedom of establishment.'

[280] For example, OLG Frankfurt, FGPrax 2088, 165, 166; OLG München, NZG 2007, 824, 825 (regarding corporate names).

[281] For example, liability of the directors in the vicinity of insolvency may be classified as insolvency law (see Section 4.4 below) and liability for creating the false appearance of a domestic company or a business association with unlimited liability contracting with the third party as *culpa in contrahendo* (see Section 4.5 below). See also n 271 above for examples.

[282] See Section 3.2, para 3 above.

[283] See, for example, the discussion by E Rabel, *The Conflict of Laws, vol 1* (Ann Arbor, University of Michigan Law School, 2nd edn, 1958) 49-50.

[284] An autonomous interpretation should in principle exist in several neighbouring areas of company law, where the relevant connecting factors have been laid down in EU legislation, notably Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6; Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40; and Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

According to well-established private international law doctrine, classification does not necessarily follow the categories of a country's internal law, but develops along functional lines. While rules of private international law often use terminology stemming from the substantive (domestic) law, and the internal legal categories may therefore be a useful starting point, the interpretation of both types of law does not necessarily run in parallel.[285] This gives rise to two problems with potentially detrimental effects on corporate mobility. First, Member States may classify regulatory strategies that are functionally substitutable differently because the strategies draw on different legal concepts in the two states. If the relevant connecting factors are not identical (and do not happen to lead to the application of the same legal system in the case at issue), the lack of a uniform classification has the consequence that market actors may be subject to overlapping regulatory requirements or the applicable legal regime exhibits gaps. Two areas that are functionally particularly closely intertwined and yet generally do not use the same connecting factors are company law and insolvency law. For most purposes, intra-EU situations will be governed by the incorporation state's company law and by the insolvency law of the state where the company's centre of main interest is located. At the same time, it is plausible to assume that some Member States focus predominantly on legal strategies commonly classified as insolvency law, and others on strategies to be classified as company law in order to protect creditors.[286] Thus, the combination of diverging connecting factors *and* diverging strategies of substantive law to address the same underlying problem will lead to overregulation if the company's registered office is located in the state that focuses on company law mechanisms and the COMI in the state focussing on insolvency law mechanisms, and to regulatory gaps in the reverse case.[287]

Second, even if conflict rules are harmonised and connecting factors aligned, Member States may disagree about the interpretation of the connecting factors and, consequently, attribute a different international scope of application to the respective legal areas. For example, pursuant to the Insolvency Regulation as interpreted by the Court of Justice, insolvency law also governs 'actions which derive directly from [insolvency] proceedings and which are closely connected to them.'[288] The understanding of what qualifies as a closely connected action is important in determining the reach of the Insolvency Regulation and, thus, indirectly also the scope of the *lex societatis*. If Member States disagree about the interpretation, functionally comparable legal mechanisms may again be classified differently for purposes of private international law, at least until the Court of Justice has settled all controversial questions.

In this section, we will analyse these issues as follows. We first give an overview of the scope of the *lex societatis* as defined by the private international law statutes or case law in the Member States (section 4.1) and then examine in more detail to what extent questions of formation (section 4.2) and corporate governance (section 4.3) are covered by the *lex societatis*. Several boundary questions exist where the classification as company law is not self-evident and Member States may rationally pursue different approaches, for example the consequences of the promoters acting on behalf of the company before registration is completed or the position of directors who exceed their authority. Sections 4.5 and 4.6 are concerned with the most important adjacent legal areas:

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[285] Gerner-Beuerle and Schuster, n 201 above, 318-323.
[286] C Gerner-Beuerle, P Paech, and EP Schuster, *Study on Directors' Duties and Liabilities*, prepared for the European Commission DG MARKT, December 2012, pp. 236-237, 240-242.
[287] For a detailed discussion of this problem with examples see Gerner-Beuerle and Schuster, n 201 above, 323-328.
[288] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767, para 21.

insolvency law and rules governing non-contractual (or quasi-contractual) obligations.

Finally, it could be argued that the right of establishment case law of the Court of Justice, by giving companies broad discretion as to the law under which they decide to incorporate, has created incentives for Member States to define the *lex societatis* more narrowly. This is due to the fact that conflict rules governing different areas of law relevant to companies are subject to varying connecting factors, not all of which can be chosen with as little cost as the *lex societatis*. Any connecting factor that is based on a broad assessment of economic facts, for example the centre of main interest under the Insolvency Regulation, is comparatively difficult to manipulate (although manipulation is, of course, not impossible), while being conceptually closer to the real seat theory than the incorporation theory. Thus, Member States that were forced to alter their traditional approaches to determining the *lex societatis* in light of the Court's jurisprudence might feel inclined to reformulate or recodify regulatory strategies so as to bring them within the ambit of a connecting factor that reflects their initial policy choices better than the incorporation doctrine. We term this strategy 're-classification' of substantive company law and explore in section 4.7 whether such re-classification has taken place in the Member States in reaction to the Court's decisions in *Centros* and *Überseering*.

4.1 General approach

Given that EU law has harmonised company law only in a fragmentary way, it is not surprising that there is no common understanding of the reach of the *lex societatis* at the European level. Several harmonising EU law measures use the registered office as the connecting factor and thus effectively bring the relevant measure within the scope of the *lex societatis,*[289] but vast areas of what is traditionally referred to as company law remain regulated exclusively by the Member States. Nevertheless, it can be expected that the *lex societatis* will commonly comprise at least (1) issues regarding the company's formation; (2) internal management matters, especially the relationship between the shareholders, management, and the company; and (3) voluntary dissolution. Table 4.1.1 describes the scope of the *lex societatis* in the Member States in general terms and assesses whether the *lex societatis* also governs issues going beyond the relationship between the shareholders, management, and the company. Two important questions in this context, the involvement of other stakeholders in the governance of the company, notably employees, and the protection of creditors, will be addressed in more detail in other sections.[290] Here, we give an overview of the topics covered by the *lex societatis* and highlight problematic boundary issues.

Two questions that give rise to classification problems deserve particular attention. First, while it is uncontroversial that the duties owed by directors and shareholders (if any) to the company or other shareholders are part of company law, both as far as their internal legal characterisation and their classification for purposes of private international law is concerned, the enforcement of breaches of these duties or actions for annulment of resolutions of the general meeting involve matters of procedural and possibly administrative law.[291] Thus, the distinction between the *lex societatis* and the *lex fori* is likely to be an issue when rules on burden of proof, reimbursement and costs, power of attorney, and others are discussed.

[289] See, e.g., Directive 2004/25/EC on takeover bids, Arts 4(2), 5(3), 12(2).
[290] See Section 4.3, Table 4.3, column (5), and Section 4.4.
[291] See, for example, the classification of the Dutch inquiry procedure, text to note 297 below.

Second, some legal systems provide for a separate body of rules on groups of companies (such as the German *Konzernrecht*), whereas others determine on a case-by-case basis whether particular legal concepts apply to the group context and how they should be modified in order to take account of the interests and incentives at play in corporate groups (for example, concepts of piercing the corporate veil to establish responsibility of the parent for the debts of a thinly capitalised subsidiary). Where the constituent companies of a corporate group are incorporated under different jurisdictions, legal systems have essentially three possibilities: They may apply their group law (or functionally equivalent legal mechanisms) to groups if the parent is subject to their law, or if the operating companies are sufficiently closely connected with their territory, or they pursue an intermediate solution that treats the group companies as separate entities and assesses for each relevant legal mechanism independently whether and to which members of the group the mechanism applies. These questions are addressed in Table 4.1.2.

4.1.1 Overview of national laws

Table 4.1.1. Scope of the lex societatis

Country	General description of the scope	Issues going beyond the relationship between the shareholders, management, and the company governed by the *lex societatis*
Austria	No explicit legal rule; prevailing view in the literature suggests that formation, legal capacity, capital requirements and maintenance rules, internal governance structure, and the rights, duties, and liability of members and directors are all part of the *lex societatis*. Applicability of labour law principles to contracts with board members also governed by the *lex societatis*, but substantive labour law governed by the jurisdiction in which tasks are carried out.	- According to some commentators, a bona fide third party contracting with the company may rely on Austrian law regarding the scope of the authority of directors where the *lex societatis* is more restrictive than Austrian law for comparable business associations. - Claims of third parties against board members arising from a violation of disclosure rules are governed by the *lex societatis*.
Belgium	The *lex societatis* governs: (i) the existence and legal nature of the legal entity; (ii) the firm or the company name; (iii) the establishment, the dissolution and the liquidation; (iv) the legal capacity of the legal person; (v) the composition, powers and functioning of its organs; (vi) the internal relationship among partners or members, as well as the relationships between the corporation and its shareholders or members; (vii) the acquisition and loss of the status of shareholder or member; (viii) the rights and obligations attached to the profit-sharing certificates or	Certain relationships between the company and third parties are governed by the *lex societatis*, see the column left

	shares and the exercise thereof, (ix) the liability for breach of the company law or the statutes; and (x) the extent to which the corporation is liable towards third parties for payment of debts incurred by the company's organs, Art. 111 PIL Code	
Bulgaria	The PILC (article 58) provides for a non-exhaustive list of topics that are governed by the *lex societatis*: a) the establishment, the legal nature, and the form of legal organisation; b) the name or the corporate designation; c) the legal personality and the system of management; d) the composition, competence and functioning of the bodies; e) the representation; f) the acquisition and loss of membership, as well as the rights and duties thereto incidental; g) the liability for obligations; h) the consequences of violations of the law or of the basic instrument; i) the transformation and dissolution.	Creditor protection measures and procedures: Rules on capital formation (such as minimum capital requirements or rules on pay-out of dividends and interest) and the protection of creditors in specific corporate operations (such as capital reductions, mergers or demergers). Bulgarian company law provides for special rules on corporate bonds and on bondholders' powers (articles 205-214 CA). The bondholders' meeting is a corporate body and Bulgarian rules governing this body and its powers fall within the *lex societatis*, at least with regard to Bulgarian companies, regardless of the bondholders' nationality. *Lex societatis* determines the rights of bondholders and their relation to the rights of the members.
Croatia	According to academic commentary, the scope of the applicable law includes: (a) formation of the company, (b) capacity of the legal entity, (c) rights and duties of the organs of the company, (d) organisation and internal relationships within the company and (e) dissolution of the company, including the effects of its liquidation.	Croatian company law also provides that a shareholder of the company is personally liable for the company's debts if he reduces assets of the company, to his own benefit or the benefit of another person, although he knew or had to know that the company is in no position to settle its debts (piercing the corporate veil doctrine, which is considered to be part of company law for purposes of determining the applicable law)
Cyprus	Though there is not a list of topics covered by the *lex societatis*, the scope is very broad; case law refers to a company's 'formation, status (as a legally-recognised entity), its operation and a broad range of actions and activities' as being governed by the *lex societatis*. The Supreme Court of Cyprus also refers to English textbooks referring to *lex societatis* as covering the capacity of companies to sue and be sued, dissolution and liquidation.	It follows from case law (*National Bank of Greece v. Metlis*, *Adams v. National Bank of Greece S.A*) that apart from issues regarding formation, internal management and voluntary dissolution, *lex societatis* potentially covers all issues regulated by Cap.113, since all such issues naturally 'concern companies'. Thus, mergers, the registration of charges and mortgages over immovable property and liquidation by creditors or the court may also be covered. Also, the Cyprus Supreme Court ruled that the concept of the derivative action falls within the ambit of substantive company law and hence a power of attorney is not needed (as required under civil procedure rules).
Czech Republic	Scope of the *lex societatis* under s. 30(1) PIL Act: (i) Legal personality and legal capacity of	-

	an entity other than a natural person; (ii) a trading name or a name; (iii) internal relations of such an entity; (iv) the relations between such an entity and its partners or members; (v) mutual relations of its partners or members; (vi) a responsibility of its partners or members for liabilities of such an entity; (vii) a person responsible for acting on behalf of such an entity; (viii) winding up.	
Denmark	- Not clearly defined by statute or case law - Literature: all areas of the companies act, including questions regarding the formation of the company, legal capacity, capital requirements and maintenance rules, internal governance structure, and the rights, duties, liability of members and directors and voluntary dissolution.	Employee representation is regulated by the Danish Companies Act and is thus likely to fall within the scope of the *lex societatis*.
Estonia	§ 15 PILA: in particular: the legal nature of the company; foundation and winding up; legal capacity; name or business name; corproate bodies; internal relations; liability for the debts of the company; legal representation	-
Finland	Broadly the same areas that are covered by the CA, including rules on the company's accounts	-
France	Formation, internal management matters, and voluntary dissolution (no statutory regulation, addressed by case law and in the literature)	Any aspect relating to the company's functioning is part of the *lex societatis*, including the relationship between the company and third parties, i.e. the power of the directors to contract in the name of the company
Germany	No legal definition; the literature suggests that formation, legal capacity, capital requirements and maintenance rules, internal governance structure, and the rights, duties, and liability of members and directors are part of the *lex societatis*, financial reporting requirements, most likely also procedural rules on the annulment of decisions of the GM and derivative actions	The protection of third parties that rely on the validity of acts of corporate organs follows general principles of conflict of laws. Thus, it has been argued that the party contracting with the company may generally rely on the local law in claiming that the corporate organ acted with authority, at least if the persons are located in the same country.[292]
Greece	Case law and theory specify which topics fall within the scope of *lex societatis*; these are at least (i) issues regarding the company's incorporation, (ii) internal	-

[292] BGH NJW 1965, 487 (analogy to Art. 12 EGBGB [Introductory Act to the Civil Code]).

	management matters, and (iii) voluntary dissolution.	
Hungary	Scope of the *lex societatis* according to ss. 18(1), 26(2) and 64(1) Decree on private international law as interpreted by case law: (i) formation; (ii) legal capacity, capacity to sue and be sued; (iii) company law operation (internal organisation, meetings, duties, liabilities and powers of company bodies etc.); (iv) mergers, de-mergers, national conversions; (v) winding-up; (vi) rights and duties of shareholders; (vii) liability of members (shareholders) towards third parties; (viii) liability of directors towards the company and shareholders; (ix) liability of directors towards third parties; (x) rights and obligations based on bonds issued by the company to the public; (xi) rights and obligations based on shares issued by the company.	- Liability of members (shareholders) towards third parties - Liability of directors towards third parties
Ireland	Formation, dissolution, and internal management (related to previous concept of domicile)	-
Italy	Non-exhaustive list of topics that are governed by the *lex societatis*: a) legal nature of the entity; b) name of the company; c) formation of the company, liquidation and conversion into another type of company; d) legal capacity; e) powers and internal rules of companies' bodies; f) rules on attribution; g) mechanisms to sell and purchase shares in the company, rights and duties of shareholders; h) liability for the company's debts; i) violations of law or of the company's constitution (Art. 25(2) PIL Act)	Italian company law also governs the following topics: - Rules on capital formation (such as minimum capital requirements or concealed distributions) - Rules protecting creditors against specific risky transactions (capital reductions, mergers or demergers) - Directors' liability towards creditors (Art. 2394 Civil Code) - Rules on corporate bonds and on bondholders' powers (including approval of debt restructuring)
Latvia	The *lex societatis* applies at least to the legal nature, capacity of a company to act, internal relations, including those among founders, foundation and winding-up, mergers, etc.	-
Lithuania	Art. 1.20(1) of the Civil Code: - legal nature of the company, i.e. its legal form and status; - foundation, reorganisation, liquidation; - the name of the company; - the system and competence of the bodies of the company; - the company's civil liability;	-

	- the power to represent the company; - the legal effects of the violation of laws or incorporation documents	
Luxembourg	No codified rules, but some case law holding that the following issues are part of the *lex societatis*: - The functioning of the company, including the definition of the powers of its directors; [293] - The power of a director to enter into a security agreement on a behalf of the company;[294] - The power of a director to act on behalf of the company in judicial proceedings[295] For other issues, it can be assumed that French case law would be followed	See left
Malta	Maltese courts generally classify a claim in accordance with the private international law of England and Wales, i.e. covering formation, capacity, internal affairs, derivative action	Stakeholder-regarding duties of directors arise in circumstances where insolvency appears imminent, but not clear whether these would be classified as company law for purposes of private international law
Netherlands	- The *lex societatis* governs: (i) consequences of the legal personality of the company; (ii) internal organisation; (iii) competence of the organs; (iv) liability of directors and officers to the company; (v) liability of founders, partners, shareholders, directors, and officers for acts binding the company; and (vi) dissolution, Art. 10:119 CC - The list is not exhaustive; it has been argued that it can be extended to the validity of a voting agreement, dispute resolution (Arts. 2:336-343 CC), squeeze out of shareholders, and rules on annual accounts (duty to prepare, applicable accounting standards, whether the accounts need to be audited[296])	- Inquiry procedure (Arts. 2:344-359 CC): *lex societatis*; foreign companies, including pseudo-foreign companies, are not subject to the regime[297] (but see Table 4.2 on groups) - Proxy voting: controversial whether all aspects, including the relationship between the shareholder and the proxy holder, are part of the *lex societatis*, or the latter is contractual (hence, Rome I applies) - Enforcement of contractual or tortious claims of the company: Rome I/II apply[298] - Unclear which conflict rules apply if misrepresentations in the annual accounts and reports cause damage to third parties
Poland	List of items governed by the *lex societatis*: (a) formation, merger, division, transformation or dissolution of the company; (b)	It is unclear whether shareholder agreements are governed by the *lex societatis* or the *lex contractus.*

[293] Court of appeal of Luxembourg, 22 November 1995, case no 16944; Court of appeal of Luxembourg, 26 May 2004, case no 27478.
[294] Court of appeal of Luxembourg, 22 November 1995, case no 16944.
[295] Court of appeal of Luxembourg, 26 May 2004, case no 27478.
[296] Rb Rotterdam 21 May 2008, JOR 2008/285 (Plaid Enterprises Inc.).
[297] Hoge Raad 26 June 2010, *NJ* 2010, 370, *JOR* 2010/226 (note G. Van Solinge), LJN BM0710 (e-Traction).
[298] See Poot vs. ABP, Hoge Raad 2 December 1994, NJ 1995/288 (holding that shareholders of Poot could not bring a derivative action to enforce a claim of Poot against ABP).

	business name; (c) legal capacity; (d) competence and rules of functioning of corporate organs as well as appointment and dismissal of their members; (e) rules of representation; (f) acquisition and loss of the status as shareholder as well the rights and obligations connected therewith; (h) shareholder's liability for the company's obligations (veil piercing); (i) consequences of the breach by a person representing the company of the law or the articles	
Portugal	- Non-exhaustive list of items governed by the *lex societatis*: capacity of the legal person; the creation, functioning and competence of its bodies; the manners in which the position of member is gained and lost; liability of the company, its organs and officeholders towards third parties; transformation and dissolution (Art. 33(2) Civil Code) - Representation of a company by their statutory bodies is also governed by the *lex societatis* (Art. 38 Civil Code)	-
Romania	Lex societatis governs a non-exhaustive set of matters relating to the creation, functioning and dissolution/winding-up of a company. More specifically, it includes a) the capacity; b) the acquisition and loss of the position of shareholder; c) the rights and duties deriving from the shareholder status; d) the designation, powers and functioning of the management of the company; e) representation of the company through her organs; f) the liability of the legal person and of her organs toward third parties; g) the modification of constitutive acts; h) the dissolution and winding up of the legal person	-
Slovakia	Formation, pre-corporation, internal structure, voluntary dissolution based on s. 56 of the Commercial Code and following	-
Slovenia	The *lex societatis* governs: i) the formation of the company ii) internal management matters and iii) voluntary dissolution.	-
Spain	- *Lex societatis* applies to (not exhaustive): the legal capacity, incorporation, representation,	-

	functioning, transformation, dissolution and closure of the company (Art. 9(11) Civil Code); - Other issues: formation, internal management, external relationships	
Sweden	*Lex societatis* governs the formation of the company, formation of the company, the articles of association, shares, share register, share certificates, the shareholders' meeting, the company's management (board of directors, managing director, etc.), audit, general and special examination, share capital increases including issuances of new shares and other equity-securities, profit dividends and other value transfers, capital reductions, financial assistance, mergers and demergers, voluntary and involuntary liquidation/dissolution, the company's name, and board members' liability in damages	-
United Kingdom	Existence or dissolution of a corporation, its capacity to enter into transactions, and all matters concerning its constitution, Dicey, Rules 174 and 175 (e.g. incorporation, dissolution, amalgamation, division, appointment of directors, directors' duties, piercing the corporate veil, derivative actions brought by shareholders, power of a company to create a floating charge or to borrow money for speculative purposes (*Haugesund*), authority of the company's general agent)	If a foreign *lex societatis* gives rights to employees to participate in the corporate structure, for example by way of representation on corporate organs, these rights will be recognised in the UK

Table 4.1.2. Groups of companies

Country	Separate body of group law?	Applicability of provisions addressing 'group issues' to foreign-incorporated parent?	Applicability of provisions addressing 'group issues' to foreign-incorporated subsidiary?
Austria	Yes	Generally governed by parent's *lex societatis*, but veil piercing applies on the basis of the subsidiary's *lex societatis*	See left
Belgium	No	Belgium ignores groups of companies, unless it can be proven, on the basis of the factual circumstances, that the principal establishment of	See left

		a foreign (resp. Belgian) subsidiary coincides with the principal establishment of its Belgian (resp. foreign) parent company[299]	
Bulgaria	No (apart from rules regulating, e.g., transactions with persons who control the public company or hold a qualified 25% stake of the votes (article 114(1) and (2) LPOS, article 114a LPOS)	The consolidated annual financial statement as per the accounting and auditing regulations creates a clear picture of the property and financial status and of the state of the income of the group of companies as a whole. Article 118a LPOS stipulates: 'Any person, who or which controls a public company, as well as any other person, who or which, by means of the influence thereof on a public company has procured any members of the management bodies or supervisory bodies of the said company or a managerial agent of the said company to act or to refrain from acting against the interest of the company, shall incur solidary (joint and several) liability for the detriment inflicted on the company'. This person could also be a legal person.	Bulgarian law does not recognise the concept of piercing the corporate veil
Croatia	Yes	Group law applies to a foreign holding company which owns a subsidiary incorporated in Croatia (because the goal of the law is to protect minority shareholders and creditors of subsidiaries)	Group law does not apply to a Croatian holding company which owns a subsidiary incorporated under foreign law
Cyprus	No; but Cap.113 contains certain provisions specifically referring to groups.	Article 148, Cap.113 provides for the filing of consolidated financial statements for the group, for the reports attached to the financial statements by the directors in relation to the status and affairs of the group, the power of the Council of Ministers to issue regulations on group accounts etc.	There is case law emphasising that members of a group of companies remain independent legal persons with separate rights and liabilities. Hence, piercing the corporate veil is highly improbable.
Czech Republic	No	General private international law principles apply	General private international law principles apply
Denmark	Limited number of provisions on groups	Generally not (the definition of parent company in s. 5(20) CA is interpreted as referring only to Danish parents)	Some rules on subsidiaries include foreign subsidiaries
Estonia	No	General rules of conflict of	General rules of conflict of

[299] On this analysis, see n 212.

		laws apply	laws apply
Finland	No	No information	No information
France	No	No information	No information
Germany	Yes	Mechanisms that concern exclusively the position of the parent, for example whether the general meeting of the parent is required to approve an enterprise agreement, are governed by the parent's incorporation law.	For mechanisms that protect the interests of the subsidiary, the registered office of the subsidiary, not the holding company, is the relevant connecting factor[300]
Greece	No	he applicable law is based on *lex societatis* of each company	The applicable law is based on lex societatis of each company. However, there are some exceptions: eg, Art 17 para. 2 of Law 2190/1920 on the acquisition of shares of parent company by a foreign-incorporated subsidiary contains a special private international rule: in this case, the substantive rules of the parent company are applicable.
Hungary	Yes; 'recognised group' (s 3:49-3:61 Civil Code if 'control contract') and 'de facto group' (s. 3:62 Civil Code)	If the group is considered as a single legal person, then the *lex societatis* of the group applies ('recognised groups' as defined in the left column are not a separate legal person), otherwise the relationship among the members of the group is classified as contractual; on the other hand, the relationship between the holding company and the subsidiaries of the group falls within the *lex societatis*	See left
Ireland	No	General rules of conflict of laws apply	General rules of conflict of laws apply
Italy	Yes	It is still debated which choice-of-law rule applies to liability actions against holding companies; uncertain whether these rules also apply to foreign holding companies if the subsidiary is an Italian company. No case law is reported.	See left
Latvia	Yes, based on German model	Group law does not address the issue of applicable law	See left
Lithuania	No	General rules of conflict of laws apply	General rules of conflict of laws apply
Luxembourg	No (but	General rules of conflict of	General rules of conflict of

[300] BGHJ NZG 2005, 214, 215.

	courts would apply the French Rozenblum doctrine)	laws apply	laws apply
Malta	Concept of groups recognised for tax, financial reporting purposes	No case law	No
Netherlands	No	- Generally no; all group companies are treated as separated entities - Structure regime: Dutch company is partially exempted if the majority of the parent's employees work outside the NL, Art. 2:155 CC - Inquiry procedure: whether the procedure can be started in a Dutch subsidiary of a foreign parent company depends on the facts and circumstances of the case[301]	- Generally no - Structure regime: Dutch parent is exempted if it restricts itself to the management of dependent enterprises and the majority of employees of the group work outside the NL, Art. 2:153(b), (c) CC - Inquiry procedure: an inquiry of a Dutch parent can include the assessment of the policy of the subsidiaries, including foreign subsidiaries, if considered useful by the inquirer[302]
Poland	No	-	-
Portugal	Yes (provisions on 'affiliated companies' article 481 Companies Act).	These provisions only apply to 'affiliated companies' governed by Portuguese law (according to general PIL criterions) and having their seat in Portugal (this is however a substantive rule limiting the application of certain provisions) (art. 481(2) Companies Act).	See left
Romania	No	Article 2580 (2) NCC imposes the application of the law of the parent company, encompassing issues regarding the creation and dissolution of the branch or the operation of the branch (including the powers of representation and the responsibility of the mother company for the acts of the branch).	Article 2580 NCC applies the law of the state where the subsidiary's headquarters are located regardless of the law applicable to the parent. The law of the state where the subsidiary is located typically covers general issues concerning the establishment, operation and dissolution of the subsidiary, but also the specific issue of the

[301] Hoge Raad 11 April 2014, ECLI:NL:HR:2014:905 (Slotervaartziekenhuis). Compare also Hoge Raad 29 March 2013, JOR 2013/166 (Chinese Workers) (allowing the inquiry procedure in the case of the shareholder of a Hong Kong parent controlling a Dutch operating company) and Hoge Raad 8 April 2011, NJ 2011, 338, JOR 2011/178 (TESN) (denying the right in the case of a primary beneficiary of a trust in the parent company controlling a Dutch private company).
[302] Hoge Raad 13 May 2005, *NJ* 2005, 298, *JOR* 2005/147 (note J. Jitta), LJN AT2829.

			relationship between the parent company and other (minority) shareholders of the subsidiary.
Slovakia	No	Each company in a corporate group treated as a separate entity governed by its *lex societatis*. The only exception is the regulation of the subordinated claims in the insolvency proceedings s. 95 of the Act on Bankruptcy.	Each company in a corporate group treated as a separate entity governed by its *lex societatis.* The only exception is the regulation of the subordinated claims in the insolvency proceedings s. 95 of the Act on Bankruptcy.
Slovenia	Yes	No, the Slovene courts address liability of the controlling company as part of company law and consequently use the seat of the company as the connecting factor, as governed by Article 17 ZMZPP. Likewise, piercing of the corporate veil is governed by the *lex societatis* pursuant to Art. 17 ZMZPP	See left
Spain	No	Unclear, some authors argue that each company of the group is governed by its *lex societatis*, while other are of the opinion that the law applicable to the dependant company should be decisive and that this law should also govern the liability of the parent for the debts of the subsidiary	See left
Sweden	No	There might be some scope for liability on the part of *directors* of a foreign parent company of a Swedish undercapitalised subsidiary pursuant to principles developed in case law regarding the *piercing of the corporate veil* in certain exceptional, narrowly defined circumstances	No
United Kingdom	No	Where piercing the veil applies, a foreign parent of a UK subsidiary can be held liable under principles of UK law.	No

4.1.2 Discussion

1. Member States agree on a core area of company law issues that are considered to fall within the scope of the *lex societatis*. This core area comprises typically the formation and dissolution of the company, the corporate name, legal capacity,

capital structure, rights and obligations of members, and internal management matters. The latter include the composition and competences of the corporate organs, duties of the directors, potential liability of the members for the debts of the company, rules on distributions, and conditions for bringing a derivative action.[303] The list shows that, while the focus of the *lex societatis* is on internal affairs of the company, it is not possible to draw a clear dividing line between internal and external matters.[304] The position of the company's creditors is a function of several concepts that are governed by the *lex societatis*, as traditionally understood, notably capital requirements of the incorporation law, restrictions on distributions to the shareholders, and strategies to pierce the corporate veil, as well as legal mechanisms that fall within the domain of contract law in the case of voluntary creditors, tort law in the case of involuntary creditors (see section 4.5), and insolvency law (see section 4.4).

2. We do not identify any substantial differences in how the scope of the *lex societatis* is defined between incorporation theory states and real seat states (or states that have only recently, under the impression of the case law of the Court of Justice, begun to move towards relying on the registered seat as the main connecting factor). At the margin, some Member States seem to advocate a broader definition of the scope of the *lex societatis* than others (with Cyprus, Denmark, and Finland, for example, at one end of the spectrum, given that the *lex societatis* is held to cover potentially all issues regulated in these countries' substantive company laws,[305] and countries that provide for an enumeration of specifically defined issues in their private international laws, such as the Czech Republic or Estonia, at the other end). However, since case law addressing boundary issues is relatively rare, it is difficult to assess whether these differences in formulation and regulatory technique are of practical significance. It should also be noted that many boundary questions are determined by legal terms that are contained in European legislation, notably the Insolvency Regulation and the Rome I and II Regulations, and that these terms accordingly have to be interpreted autonomously.

3. The following paragraphs give an overview of a number of boundary issues that are either not explicitly mentioned as falling within the scope of the *lex societatis* in the Member States, or where we have identified a certain degree of legal uncertainty as regards their classification for purposes of private international law: matters regarding the enforcement of breaches of company law, corporate group law, financial reporting requirements, and the liability of directors and members of the company directly to third parties. We will deal with them in turn.

4. The enforcement of breaches of company law, either by the company itself or by (minority) shareholders who act on behalf of the company to enforce breaches of duties owed to the company (derivative actions) or who challenge actions taken by other corporate organs, notably the general meeting, is a matter of procedural law. Nevertheless, in those Member States where the issue has been addressed (notably, Cyprus, Denmark, France, Germany, Malta and the United Kingdom), courts and commentators usually agree that questions of enforcement, insofar as they do not concern general issues of procedure, but the standing of those who seek to enforce claims or allocate the litigation risk between the company and the

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[303] See also the exception in Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 1(2)(f).

[304] The distinction between internal and external matters has been a concern of private international company law for a long time. For a summary of the different approaches see S Rammeloo, *Corporations in Private International Law* (Oxford University Press, 2001), 20-23.

[305] Cyprus country report, Section 4.1; Danish country report, Section 4.1; Finnish country report, Section 4.1.

shareholder, have a bearing on the position of the shareholder and affect the value of the shareholding at least indirectly.[306] For this reason, it is argued in the above Member States that these questions fall within the ambit of substantive company law and are governed, consequently, by the *lex societatis*.

5. In most Member States, clear conflict of laws rules concerning corporate groups do not exist. This is the case, unsurprisingly, in states that do not have a codified group law, but it also holds for states that have adopted such a law (Austria, Croatia, Germany, Hungary, Italy, Latvia, Portugal and Slovenia). However, there is relatively widespread agreement that group companies are, in principle, to be treated as separated legal persons in private international law, which, accordingly, are governed by their own *lex societatis*. In addition, legal mechanisms designed to protect minority shareholders and creditors of the controlled undertaking (i.e. typically the subsidiary) tend to be governed by the *lex societatis* of the subsidiary.

6. According to the clear majority of Member States, the *lex societatis* also governs financial reporting requirements. In some Member States, it has been suggested that this already follows from the fact that the EU accounting directives have largely harmonised the relevant rules and the imposition of further requirements by the host Member State would therefore go beyond what is necessary to protect creditors and other interested parties.[307] However, some authors argue that those parts of accounting law that are not harmonised, for example in Germany the principles of proper accounting pursuant to the Commercial Code,[308] are to be classified as public law, given that they protect public interests.[309] If this view were accepted, the consequence would be that certain branch establishments of foreign, including EU-incorporated, companies in Germany were bound by German accounting principles, which raises concerns with regard to Directive 89/666 (so-called Eleventh Company Law Directive).[310]

7. Finally, the classification of legal mechanisms designed to hold directors and members of the company liable for the company's debts is controversial in the Member States. The liability of the directors straddles questions of company law, insolvency law and tort law. It raises complex questions of regulatory design and classification that will be discussed in more detail in Section 4.3.2 below. The liability of members for the debts of the company (piercing the corporate veil) is classified as company law in the majority of Member States ((Bulgaria, Estonia, Croatia, Germany, Greece, Italy, Poland, Portugal, Romania and the UK). However, there is a certain degree of legal uncertainty, and in some Member States (Czech Republic, the Netherlands, Spain) it is suggested that a classification as tort law is in some circumstances more appropriate. This question will also be discussed in more detail below (Section 4.5.2).

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[306] This has been addressed most directly in the English cases *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 W.L.R. 1269, 1284; *Base Metal Trading Ltd v Shamurin* [2005] 1 W.L.R. 1157, 1175.

[307] For example, H Eidenmüller, *Ausländische Kapitalgesellschaften im deutschen Recht* (Munich: Beck 2004), § 5, paras 110-111.

[308] HGB, s. 238 (Grundsätze ordnungsmäßiger Buchführung).

[309] For example, H Merkt in A Baumbach and KJ Hopt (eds), *Handelsgesetzbuch* (Munich: Beck, 36th edn 2014), § 238, para 9.

[310] One argument is that for companies with their real seat in Germany 'the law of the Member State by which the company is governed' within the meaning of art 3 Directive 89/666/EEC, ie the Member State according to whose laws the accounting documents have to be drawn up, is Germany, see P Kindler, in *Münchener Kommentar zum BGB* (Munich: CH Beck, 6th edn, 2015), 'Internationales Handels- und Gesellschaftsrecht', paras 273-279 (arguing that the question of the applicable law has been left open by the accounting directives and the right of establishment case law). For further references see also H Altmeppen and A Ego, in *Münchener Kommentar zum Aktiengesetz* (Munich: CH Beck, 3rd edn, 2012), 'Europäische Niederlassungsfreiheit', paras 490-491.

4.2 Incorporation and formalities in particular

It is uncontroversial that the process of incorporation of companies as such, notably the filing and disclosure requirements as well as minimum requirements as to the company's capital structure and governance architecture, are governed by the *lex societatis*. However, Member States may provide that before the company has been registered, but after the memorandum or articles of association have been drawn up (and notarised, if applicable), the company may already come into being as a legal entity (sometimes called 'pre-corporation') capable of entering into transactions, acquiring rights and incurring liabilities. It therefore depends on the Member States' substantive company law to what extent rules of corporate law already apply at this stage, or the relationship between the promoters, the company under formation, and third parties are predominantly contractual in nature. For the same reason, the treatment of pre-incorporation obligations entered into with a view to establishing the company, while partly harmonised,[311] differs between the Member States. These differences may be reflected in a different understanding of when these questions are part of the *lex societatis* (see Table 4.3, column (2)).

Two other problems arise commonly when companies are incorporated under one legal system, but the company's founders, shareholders or managers are located in another Member State. Some of the formalities for incorporation may be fulfilled abroad, and it may be problematic whether the state of incorporation accepts the foreign act as satisfying the domestic requirements. Column (3) of Table 4.3 reports whether Member States allow notarial or other formalities to be fulfilled by forms accepted in other jurisdictions. In addition, host Member States may object to the use of a company's name even if the company has been validly incorporated with that name in another Member State because of concerns that the name is misleading in domestic business dealings. Thus, as an exception to the general connecting factor that determines the *lex societatis*, Member States may refer to the law at the place of business in order to determine whether the use of the company's name is permissible (see column (4)).

4.2.1 Overview of national laws

Table 4.2. Formation

Country	Pre-corporation and pre-incorporation contracts	Formalities	Company name
Austria	Pre-incorporation company has limited legal capacity; members and acting persons are personally liable pending successful incorporation.	- The formal validity of a legal act is determined pursuant to the law applicable to the legal relationship forming the subject matter of the legal act or alternatively the law of the country where the act is performed (s 8 PIL Act) - The formal	Generally follows *lex societatis*, subject to ordre public exception and 'fair trading' legislation

[311] Art. 8 Directive 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, OJ L 258/11 (formerly First Company Law Directive).

		requirements can be satisfied outside the country of the applicable law if the act as performed pursuant to the foreign law is substitutable for that under the applicable law	
Belgium	Until the memorandum of association has been deposited, the company has no legal personality. A Belgian pre-incorporated company cannot enter into contracts or be a party to legal proceedings. However, Belgian law provides that a party can act in the name and on behalf of the company to be incorporated, and this party is then generally personally liable for his/her commitments, Art. 60 BCC	For companies limited by shares, the memorandum of establishment must be notarised. Only a notary with an office in Belgium can provide this notarisation, Art. 66 BCC	The firm or company name is governed by the *lex societatis*, Art. 111, 2° PIL Code. According to substantive company law, Belgian companies can file a lawsuit if another company uses a name that is identical or so similar that it leads to confusion, Art. 65 BCC It follows from Art. 111 PIL Code that if a foreign (resp. Belgian) company makes use of a similar name as a Belgian (resp. foreign) company, the Belgian company cannot claim protection according to Belgian law
Bulgaria	Under article 69 CA, acts of the founders carried out in the name of a company prior to its registration shall give rise to rights and obligations for the persons that made them. The *lex societatis* also governs liabilities for debts incurred before a company is registered in the public register. If a foreign jurisdiction provides that a legal person takes the form of a *de facto* partnership or a company 'in the process of formation' before registration proceedings are completed, it is recognised in Bulgaria	Formalities follow the *lex societatis*. Formal requirements can be satisfied outside the country of the applicable law if the act as performed pursuant to foreign law is substitutable for that under the applicable law.	The *lex societatis* does not cover the protection of business' names, which is governed by the law applicable to tort actions.

	and rules of that foreign jurisdiction apply.		
Croatia	As under German law, Croatian company law provides that a pre-incorporation company is formed in the period before registration; since a pre-incorporation company is lacking its own legal personality, founders and company managers are jointly and severally liable with all of their personal assets for all obligations undertaken in the name of the company until the company is fully incorporated. Private international law: *lex societatis* (unless activities are not carried out in the name of the company).	Notarial formalities can be undertaken in another jurisdiction under condition of reciprocity (Art. 11(1) Public Notaries Act). The reciprocity requirement is not applicable to EU registered companies or companies registered in a WTO member country. Nevertheless, a required document notarised in another country (e.g. statement of the founders that they adopt the company's articles of association) must contain the particulars required by Croatian company law.	-
Cyprus	Article 15A Law of Companies provides that '[a]ny contract signed before the incorporation of the company by persons who signed the articles of association is temporary and not binding on the Company until the date of the incorporation. After that date, the contract becomes binding on the company.' In the event that the company is not incorporated, Art. 15A(2) provides that the contract is binding only upon the persons who signed it. A company cannot hold immovable property prior to its incorporation, Art. 16(1).	No notarial requirements. Completion and submission of standardised forms (such as HE2 and HE3 forms). Articles of Association and Memorandum of Association are not standardised since they are prepared by the lawyer according to objectives of the company) with the Companies Register. In addition, a document titled *declaration of compliance* must be provided to the Registrar of Companies and this document constitutes evidence of compliance with the legal requirements.	Article 18, Law of Companies states that no company can be registered with an 'undesirable' name. Case law clarifies that an undesirable name is a name that is the same as or 'too' similar (suggesting a striking or overbearing similarity) to the name of an existing company.[312] Regarding foreign companies, Article 354E(2) states that their name must not be confusingly similar to the name of another company in Cyprus.
Czech	Acting on behalf of the	A Czech company	Part of the *lex*

[312] See also the decision in *Cyprus Supply* Company, where it was decided that the name '"*Cyprus Supply Company" is a general name and that names generally giving the impression that the company has higher turnover than what actually has, are misleading and as such undesirable*'.

Republic	company between its 'formation' (memorandum of association) and its 'incorporation' (registration): (a) persons acting on behalf of the company are jointly and severally obliged; (b) after the incorporation, the company can assume the effects and liability of these actions (s. 127 Civil Code). Private international law: *lex societatis*	cannot be formed by a notarial deed drawn up by a foreign notary.	*societatis.* Non-EEA Companies: Czech provisions on names are overriding mandatory provisions and apply also to foreign companies.
Denmark	If the memorandum of association is signed prior to registration, the company will be treated as a company under formation, which lacks legal personality, but is treated as a business association which, with some limitations, can acquire rights or undertake obligations (s. 41(1) CA) Anyone who undertakes obligations on behalf of the limited liability company before registration is jointly and severally liable for the obligations (s. 41(3) CA) Private international law treatment: unclear, but the traditional understanding is that liability towards third parties follows the *lex loci delicti.*	The formal requirements cannot be fulfilled by forms accepted in other jurisdictions	Issues related to the name of the company are governed by the *lex societatis*, but if the use of a company name in Denmark constitutes an infringement of a third party's IP rights, Danish law may apply See also Table 3.2 for the name of branches
Estonia	Substantive law: no 'pre-company'. Private international law: uncertain whether this issue is to be characterised according to the *lex fori* or the *lex causae*; although under Estonian law there would be no legal person yet, some Estonian judges may apply the *lex causae*.	Certification by a notary may be substituted by certification of the signatures on the petition by an official of a foreign state who has the right to attest the identity of the undersigned, or an 'apostille'.	Branch of a foreign company shall consist of the words 'Eesti filiaal' [Estonian branch]
Finland	A company becomes a legal person when it is registered in the trade	-	-

	register. Contractual liabilities arising between the founding of the company and its registration will pass on to the company upon registration. Private international law: no statutory provision, no case law		
France	Substantive law: non-registered company are not treated as legal entities. Private international law: unclear (no statutory provision, no case law).	-	No specific rule
Germany	Substantive law: an unregulated pre-incorporation company comes (with legal capacity) into existence after conclusion of the memorandum of association, but before full incorporation; in addition to the pre-incorporation company, members and managers are liable for obligations entered into on behalf of the company Private international law: if the pre-incorporation company is to be registered in Germany, the above rules apply (*lex societatis*); if a company is validly incorporated under another legal system, liability cannot be	- The formal validity of a legal act is determined pursuant to the law applicable to the legal relationship forming the subject matter of the legal act or alternatively the law of the country where the act is performed (Art. 11(1) EGBGB)[313] - The formal requirements can be satisfied outside the country of the applicable law if the act as performed pursuant to the foreign law is substitutable for that under the applicable law	Governed by the *lex societatis*, but some courts have held that the branch of a foreign company can only be registered in Germany if the company's name (if this name is also used for the branch) complies with the rules on permissible names in the German Commercial (s. 18 HGB); these rules are considered to be imperative requirements in the general interest and hence justified under *Gebhard*

[313] The alternative connecting factors have been held by the courts to apply to acts of the founders, corporate organs, and shareholders, such as the drawing up of the memorandum of incorporation, amendments of the articles, conclusion of enterprise agreements, or transfer of shares in a limited company, see BayObLG NJW 1978, 500; OLG Düsseldorf, NZG 2011, 388; OLG Frankfurt, WM 1981, 946; OLG München, BB 1998, 119.

	imposed on directors who act in Germany on behalf of the foreign company.		
Greece	Private international law: *lex societatis.* See, also, Art 7d of Law 2190/1920 regulating liability for acts during the incorporation stage: persons who have acted in the name of the company under formation are liable for these acts jointly and severally. However, only the company is liable for the acts which were made expressly in its name during the formation stage, provided the company, within three months from acquiring legal personality, has undertaken the obligations arising from these acts.	Notarial or other formalities cannot be fulfilled by forms accepted in another jurisdiction.	Several provisions on company names do not apply to foreign companies.[314]
Hungary	Substantive law: between the conclusion of the articles of association and its genuine registration the company operates as a pre-corporation (S. 3:101(1) Civil Code). Private international law: applicable law is the law of the state where the company seeks registration (*lex societatis*)[315]	- Formal requirements for incorporating a new entity are governed by the *lex societatis*. - The shareholders' signatures can be legalised abroad (e.g. by a foreign public notary or other authority) and a Hungarian attorney may countersign. - Legalisations made in jurisdiction that have signed the Hague Convention 1961 require an 'apostille' to be used	Company names are governed by the *lex societatis,* while Hungarian law governs names of Hungarian branches of foreign companies.

[314] According to Art 2 para. 1(a) of Law 2190/1920, the articles of association shall contain provisions concerning the name of the company. According to Art 5 of Law 2190/1920: (1) a company limited by shares is named after the type of business it engages in; (2) the company name many include, besides the above, the name and surname of the founder or other individual, or the name of a commercial company; (3) the company name must in any case include the words company limited by shares (…); (6) for the company's international transactions, the company name may be presented in a foreign language in accurate translation or in the Latin alphabet. Art. 2 of Law 3190/1955 specifies the composition of the name of companies with limited liability: (1) The name of a company with limited liability is composed either of the name of one or more of its partners, or is defined by the scope of its business activities; (2) the words company with limited liability must be contained in the company name.

[315] See *Fővárosi Ítélőtábla* (Court of Appeal of Budapest) 5.Pf.21.267/2006/12: an agreement made between a Delaware company before its registration and another person did not exist, because Delaware law (*lex societatis*) did not accept 'pre-corporations'.

		in Hungary; Hungary however has also signed bilateral treaties with other jurisdictions dispensing with the requirement of legalisation and 'apostille' (e.g. Cyprus, Italy, Poland).	
Ireland	Substantive law: 'any contract or other transaction purporting to be entered into by a company prior to its formation, or by any person on behalf of the company prior to its formation, may be ratified by the company after its formation.' (s. 45(1) 2014 Act). Pribvate international law: unclear (no special conflict of laws rules).	Any document delivered to the Registrar must be in Irish or English, but a translation of the document may be delivered in any official language of the EU (there are no requirements for notarial certification in Ireland).	Requirements concerning the company's name follow the applicable company law.
Italy	Substantive law: directors are liable for debts incurred before registration, together with either the sole shareholder, or those shareholders who have authorised or decided on the transaction. After its registration, a company is only liable if it has explicitly approved a specific transaction. Private international law: *lex societatis*; if a foreign jurisdiction accepts that a legal entity exists as a *de facto* partnership or as a company 'in the process of formation' before registration proceedings are completed, this entity is recognised in Italy and rules of that foreign jurisdiction apply.	Italian notaries can accept foreign documents, provided that these documents have been either 'legalised' in an Italian embassy or consular office, or are drafted in 'apostille form', if the country under whose law the document is formed has signed the Hague Convention 1961.	- The *lex societatis* governs any issues arising in connection with the choice of a company's name (e.g. whether the shareholders' names should be included or not). - The law of the country of incorporation, however, may distinguish the business name from the scope of the *lex societatis*, in which case these issues are normally governed by the law applicable to tort actions.
Latvia	Substantive law: no entity before registration Private international law: internal pre-registration issues or disputes between the	Valid foreign notarisation recognised provided that it is comparable to the applicable national procedure; but Latvian	Company names are governed by the *lex societatis.* Detailed rules on the necessity for distinctiveness, particular restrictions on involving certain

	founders and a third person are classified according to general PIL rules	translation required. Documents certified by a notary public in any EEA country and in Swiss Confederation are recognised to be valid in Latvia even without an 'apostille' or 'legalisation'. For notarised documents from outside the EEA an apostille or legalisation is required.	elements in a firm name etc. are provided in Articles 26-33 of the Commercial Law. For the branch of a foreign company both a new name and the name of a foreign merchant may be used; in the latter case mandatory local rules apply (eg, regarding distinctiveness)
Lithuania	Substantive law: no entity before registration. Private international law: unclear	Notarial documents only by Lithuanian trained notary; but certification of authenticity by a foreign notary, court or other competent institution usually accepted by authorities if translated	Name of company must not be misleading irrespective of the applicable *lex societatis*
Luxembourg	Substantive law: companies receive legal personality as soon as the notarial deed is signed. Private international law: no judiciary decision on conflict of law issues.	No case law	A company's name must be different from any other entity's name
Malta	A company only comes into existence once the incorporation documents have been duly registered and a certificate of registration has been issued; before this time, liability is treated as contractual/non-contractual	No notarial or similar formalities	No requirements concerning the name of a foreign company; this is a matter for the *lex societatis*
Netherlands	Substantive law: no entity before registration (but parties acting in the name of the not yet fully established company are personally liable, Arts. 2:93, 203 CC). Private international law: *lex contractus* (pre-incorporation agreements to establish a company are governed by Rome I)	Unclear whether fulfilling formalities in front of a foreign notary public would satisfy the Dutch requirements for notarisation	The name is part of the *lex societatis*. Company names, including those of foreign companies, cannot be registered if a previously registered entity has an identical or closely similar name. Difficulties related to the registration of the name of a foreign company are not common.

Poland	Substantive law: a 'pre-corporation' exists upon conclusion of the articles of association before registration (Commercial Act); the pre-corporation itself, persons acting on its behalf and all shareholders (up to their contribution) are jointly and severally liable for any obligations entered into on behalf of the company (both contractual and tort liability). Private international law: *lex societatis* (real seat or envisaged seat); but if only a preliminary agreement concerning the establishment of a company exists and no organisational unit has been formed: *lex contractus*	Notarial deed. It is debated (and still uncertain) whether such a notarial deed has to be drawn up by a Polish notary or can be drawn up by an equivalent foreign notary.	The business name falls within the *lex societatis*. The *lex societatis* however does not cover the protection of a business name as well claims for exclusivity and unfair competition rules.
Portugal	Substantive law: between the signing of the articles of association and its registration, companies have no legal personality (but founders may be held liable). Private international law: *lex societatis*	The articles of association can be drawn up abroad, provided the legal form required by Art. 7 CSC is respected (Art. 7(1): '[T]he signatures of the parties thereto must be verified by a witness present at the signing' and only in some limited circumstances shall the intervention of a notary be required).	Portuguese companies: names are governed by Portuguese Law (a certificate of admissibility of firm/name or corporate denomination, issued by the Registo Nacional de Pessoas Coletivas). Branches of foreign companies: no need for a certificate of admissibility (unless the branch name is different from the name of the company); but the word 'Sucursal' has to be added to the name of the foreign company
Romania	Substantive law: Art. 205(3) states that a company may contract with other parties from the moment the proper registration documents have been drafted (yet it is still not registered) but only if the actions	Documents may be issued under the law of a different jurisdiction, provided that they fulfil certain requirements of admissibility in front of Romanian authorities (usually	The Romanian Trade Registry can refuse the registration of a name if it considers this warranted or if the name is currently used by another company

	or acts concluded are necessary for the registration of the company The founders and directors are liable to the creditors if they exceed the limitations mentioned above.	‘apostille’ under Hague Convention and authorised translation)	
Slovakia	As a general rule, the pre-incorporation company has limited legal capacity; members and acting persons are personally liable pending successful incorporation and approval by the highest body of the company – s. 64 of the Commercial Code. Substantive law: the legal entity does not come into existence with full legal capacity before registration Private international law: *lex societatis* (a legal entity that is not yet registered but that is treated for some purposes as a legal entity under its home state law the Slovak legal system will grant this entity the same legal capacity as the law under which this company is being created, *societas nasciturus*)	A company limited by shares cannot be formed by a notarial deed drawn up by a foreign notary.	The company name is governed by the lex societatis s. 8 of the Commercial Code and following. The Commercial Register shall refuse the entry of the company name only if it is identical with already registered company name.
Slovenia	Substantive law: prior to registration, the relationships between company members shall be subject to partnership law. Where the company members acquire any rights by acting on behalf of the company prior to its legal registration, they shall transfer such rights to the company following its legal registration. Private international law: *lex contractus*	Companies Act does not clarify whether notarial acts can be drafted by foreign notaries. No case law in the context of company law. Judiciary decisions on property issues: foreign notaries can also verify signatures. Appellate Court in Koper: discrimination against notaries of other EU Member States would violate the freedom to provide services.	Rules on corporate name: Slovenian law. The Companies Act explicitly prohibits the inclusion of the names or symbols of foreign countries or international organisations.

Spain	Pre-contractual period (before the conclusion of the company contract) is governed by the *lex contractus*.	In general: the *lex societatis* applies Under Spanish law: public document formed in front of a notary; documents formed by foreign notaries are also accepted, provided that these documents are considered public documents, they are translated into Spanish, and the commercial register controls their 'legality' (Arts. 5, 18 Regulation on Commercial Register)	Questions related to a company's 'commercial name' are governed by the *lex loci protectionis* (Article 10 (4) Civil Code).
Sweden	Substantive law: there is no Swedish concept equivalent to a so-called pre-corporation. However, according to Chapter 2 of the Companies Act, if representatives of the company under formation enter into a contract or otherwise perform legal acts on behalf of the to-be company before registration, they are jointly and severally liable for such acts. Upon registration, the company becomes contractually bound by such acts provided that they are agreed upon by all founders or clearly stated in the memorandum. Private international law: *lex societatis*	Documents equivalent to those foreseen under Swedish rules are not accepted.	The name of the company is regulated by the *lex societatis*. However, when the use of a company name constitutes an infringement of a third party's intellectual property rights, it is not governed by the *lex societatis*.
United Kingdom	Substantive law: a company comes into existence upon, and not before, the completion of its registration; a contract by or on behalf of a company before registration has effect as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly (s. 51 CA) Private international	In the UK, preparations for registration are usually carried out by local lawyers, and no notarial or similar formalities are required As regards incorporations abroad, UK private international law refers the requirements for incorporation to the *lex societatis*, and	Regulated in ss. 1044-1059 CA 2006 and the Overseas Companies Regulations 2009 (SI 2009/1801) Incorporation in the EEA: certain particulars need to be delivered to the UK registrar, including the company's name; all names are acceptable, unless this infringes the UK rules on permitted

	law: s. 51 CA applies both where the company is intended to be formed by registration in the UK and also where it was intended to be incorporated outside the UK However, in view of the possibility of a contrary agreement admitted by s. 51, it seems probable that s. 51 is not of universal application, but operates as part of the *lex contractus*, and thus is limited to cases where the pre-incorporation contract is governed, usually pursuant to Rome I, by the law of a part of the UK	this includes any notarial or other formalities	characters Incorporation outside the EEA: the restrictions which apply to companies incorporated in the UK apply (prohibition of offensive or misleading names)

4.2.2 Discussion

1. The first issue to be addressed is how liabilities arising before a company is registered in a commercial register, or contracts signed on behalf of a company before registration, are treated. From a substantive law point of view, Directive 2009/101 (so-called First Company Law Directive) provides that, if action has been carried out in the name of a company before its registration, 'the persons who acted shall, without limit, be jointly and severally liable therefor'[316] unless the company assumes the obligations arising from such action. Despite minimum harmonisation in this matter, some Member States maintain that a separate legal entity exists even before the company's formal incorporation, either in the form of a *de facto partnership* or as a company in the process of formation (Austria, Croatia, Denmark, Germany, Hungary, and Poland).

2. As far as the classification of pre-incorporation actions and related liability claims is concerned, courts will generally apply domestic substantive company law to actions carried out in the name of a company that seeks to incorporate as a domestic company. For instance, a German court would apply domestic rules on *Vorgesellschaften* to companies that seek to be register as German companies. The classification of actions carried out on behalf of companies that seek to incorporate under the law of a foreign jurisdiction is less clear. Most jurisdictions treat these matters as part of the *lex societatis* (Belgium, Croatia, Czech Republic, Germany, Greece, Hungary, Italy, probably Portugal, Slovakia, and Sweden) and, therefore, apply the law of the country in which the company seeks registration. As a consequence, if a 'pre-incorporation entity' exists pursuant to the jurisdiction in which a company seeks registration, domestic courts should recognise its existence and determine the responsibility of persons acting on behalf of the pre-incorporation entity according to that jurisdiction. It should be noted that the treatment under private international law does not seem to correspond to the respective substantive law solutions. On the one hand, Croatia, Germany,

[316] Directive 2009/101/EC, Art. 8.

Hungary and Poland acknowledge that a legal entity exists before registration, and hence these jurisdictions characterise liabilities arising before incorporation as part of the *lex societatis*. On the other hand, in spite of the fact that companies only come into existence as legal entities upon registration in Belgium, Bulgaria, the Czech Republic, Estonia, Greece, Italy, Latvia, Portugal, Slovakia and Sweden, actions undertaken on their behalf before incorporation are characterised as company law.

If the country in which the company seeks registration considers that a legal entity exists before that moment, these issues are governed by its rules concerning companies or partnerships. In other Member States, however, these issues are characterised as contract law, and hence they are governed by the *lex contractus* (Slovenia, Spain and the UK).

3. The second question is whether formalities may be fulfilled abroad and according to the law of another jurisdiction when a new company seeks to incorporate under the law of a jurisdiction that requires specific formalities, such as notarisation. This situation is likely to occur when the founding shareholders seek to make use of their freedom of establishment by availing themselves of a legal system different from that of the Member State where they are domiciled. In this regard, Member States seem to be divided on the question whether notarisation requirements or other formalities can be satisfied abroad. Several Member States accept certain documents certified by a foreign notary public or by a public body (Austria, Bulgaria, Croatia, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, Portugal, Spain, Sweden and Romania); some of these countries have signed the Hague Convention of 1961 on the 'apostille' form that replaces the official 'legalisation' of foreign acts (Estonia, Hungary, Italy, Romania).[317] Other Member States, however, do not accept formalities fulfilled abroad (Belgium, Czech Republic, Denmark, and Greece). In yet other countries, the legal situation is unclear (Luxembourg, Slovenia and Poland). Finally, common law countries do not require notarisation of documents for the incorporation of a new company (Cyprus, Ireland and the UK) and the problem accordingly does not arise in these Member States.

4. The last issue to be discussed in this context is the law applicable to rules on a company's name. Several jurisdictions distinguish between rules on the choice of a company's name and rules on business names and unfair competition, which are part of tort law and governed by the *lex loci delicti* (Bulgaria, Italy, Poland and Spain). The majority of Member States, on the other hand, treat the choice of a company's name as part of the *lex societatis* (Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia and the UK). However, in spite of a classification as company law, most of these jurisdictions impose certain requirements regarding the use of corporate names on foreign companies operating within their territory to ensure that the name under which the company trades is generally permissible and does not give rise to a misleading impression because it resembles the name of an existing domestic company. The limitations on the use of corporate names are either derived from the domestic *ordre public* (Austria), mandatory overriding provisions (Cyprus, Estonia, Germany, Lithuania, Luxembourg, and the Netherlands).

[317] Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) of 5 October 1961.

4.3 The board of directors in particular

This section analyses where precisely the line between 'internal management matters' and external affairs of the company is drawn. Typically, 'internal management matters' comprise the composition and rights of a company's organs, duties of the directors, potential liability of the members for debts of the company, rules on distributions, and rights of the members to bring a derivative action for directors' liability. These issues are commonly seen as an integral part of the *lex societatis* (see Table 4.3, column (2)). However, Member States may decide to supplement the rules of a foreign *lex societatis* where interests of third parties or wider societal interests are at play, and the situation can, accordingly, be regarded as going beyond the purely internal affairs of the company. This may be the case where (1) the company's legal representatives act beyond their powers, which gives rise to legal consequences that may be characterised conceptually as either company or contract law (column (3)); (2) the directors of companies incorporated in another Member State engage in conduct that satisfies certain liability rules of the host state's company law (column (4)); or (3) the host state considers the representation of stakeholder groups on the board of directors or board diversity according to predefined criteria as essential for the achievement of certain social goals (column (5)). Examples of the latter type of regulatory intervention are employee co-determination rules and gender quotas.

4.3.1 Overview of national laws

Table 4.3. Board of directors

Country	Definition of internal management matters	Ultra vires and acting without authority	Liability of directors of foreign companies	Board composition, in particular co-determination and gender quotas
Austria	Composition of the board of directors, appointment and removal of directors, the role and competences of the board(s) and other corporate organs, as well as the authority of directors to act on behalf of the company	Unclear, but according to some commentators protection of third parties that rely on the validity of acts of corporate organs, based on s 49 PIL Act	Liability for culpa in contrahendo	One third employee representation on the supervisory board; prevailing view that employee participation is governed solely by the *lex societatis.*
Belgium	Composition, powers and functioning of the corporate organs, Art. 111, 5° PIL Code	- Powers of the corporate organs are part of the *lex societatis* - If agents do not act in the name and on behalf of the company, the consequences are determined by agency law conflict rules - If the organ would have had competence to act according to the law of the country where the representation took place and the third party did not know, and should not have known of the lack of competence, the company cannot rely on the organ's incompetence[318]	Persons who are responsible for the governance of the branch of a foreign company are liable to third parties in the same way as board members of a Belgian company, Art. 59 BCC[319]	- No employee participation, but Belgian law on the employees' council is applicable regardless of the 'nationality' of the company. Branches of companies that employ on average more than 100 employees, must establish an employees' council. - Belgian gender rules regarding the composition of the board of the directors of stock exchange listed companies (at least one third of board members must be of the underrepresented gender[320]) are only applicable to companies governed by Belgian law
Bulgaria	According to article 58, point 4 of the PILC, 'the composition, competence and functioning of the bodies' fall within the *lex societatis*. Consequently, rules related to the formation, number of members and majority requirements	If the company is a public company, any transaction concluded in violation of rules regarding prior authorisation of major transactions affecting its assets and/or its indebtedness by the general meeting of the shareholders or by the managing body respectively, shall be	Directors of foreign companies are subject to criminal liability, see Table 7.	Under Bulgarian company law, employees do not enjoy any special rights to appoint members of the supervisory board or of the board of directors. Pursuant to article 220(3) CA, where a company has more than 50 employees, they shall be represented in the general meeting

[318] Art. 111, § 2 PIL Code.
[319] See also Table 3.2.
[320] Art. 518bis, § 1 BCC.

	regarding a company's management board, respectively board of directors are included in the *lex societatis*, as well as requirements in order to be elected as directors.	null and void (article 114(11) LPOS).		by one person with a consultative vote. No special conflict rules.
Croatia	Internal management relates to issues concerning the company's internal structure, appointment and removal of directors, rights and duties of shareholders, validity of the company's internal acts and decisions with external consequences, competences of the company's organs	No special conflict of laws rules mentioned	No special conflict of laws rules mentioned	At least one employee representative on the board; employee participation rights are part of the *lex societatis.*
Cyprus	Internal management matters of a company can be said to be those regulated by Part IV of Cap.113 ('Management and Administration'), e.g. register of members, restrictions on commencement of business, annual return, meetings of members, financial statements, inspection, distribution of dividends, profits and assets, directors' duties, arrangements and reconstructions, mergers and divisions	Art. 33A, Cap.113: the company is bound towards third parties, even if the contract is *ultra vires* the objects of the company, unless the company can prove that the third party knew or ought to have known that the act or transaction was *ultra vires*	- For a director of an overseas company to be held liable under Cyprus law, there has to be a connection with Cyprus, e.g. because the overseas company sought to establish a branch in Cyprus triggering the application of Arts. 347-354, which impose certain obligations on the overseas company and provide that directors can be held liable under Cyprus corporate law (Art. 353). Directors of an overseas company can also be held liable for: - inaccurate statements in a prospectus (Art. 360) - the debts of the company in the case of fraudulent trading (Art. 202ZJ)[321]	No employee participation at board level; no special conflict rules.
Czech Republic	Composition and powers of the board of directors, instructions by the general meeting to the board of directors, obligations	*Lex societatis.*	No special conflict of laws rules mentioned	No specific requirements regarding co-determination or gender quotas, no special conflict rules.

[321] By virtue of Art. 202ZJ(7), a company for the purposes of this provision is any entity that can be wound up in accordance with Cap.113. Since, in accordance with Article 362, an overseas company that carries on or has carried on business in Cyprus can be wound up in accordance with Cap.113, Art. 202ZJ applies to overseas companies.

	and rights, appointment and removal of directors, duties and liability of directors.			
Denmark	- No case law - The general understanding is that 'internal management matters' comprise composition and rights of a company's organs, including the general meeting, duties of the directors, potential liability of the members of the company management, rules on distributions, and rights of the members to bring a derivative action for directors' liability	Authority of directors to act on behalf of the company: *lex societatis*, provided that the director acts in the capacity as director; if a director enters into a transaction in another capacity, e.g. as employee, the transaction falls outside the scope of the *lex societatis* Acting without authority: *lex societatis* (for the substantive rules see s. 136 CA)	Liability of the directors exist to the company, shareholders, and third parties, s. 361(1) CA Liability to the company or shareholders for breach of duty: *lex societatis*, not applicable to directors of foreign companies Liability to third parties, e.g. creditors: the prevailing opinion in the literature argues that the *lex loci delicti* should apply, but unclear (no authoritative case law)	Rules on employee co-determination are an integrated part of the rules on board composition (s. 140 CA[322]) and hence governed by the *lex societatis.* In particular: in limited liability companies which have employed an average of at least 35 employees for the preceding three years employees are entitled to elect representatives in the company's board of directors (or supervisory board), corresponding to half of other members (CA section 140(1)). Gender quotas: also considered a matter for the company's internal governance structure and thus to be determined according to the *lex societatis*
Estonia	See general definition in Table 4.1 above	No special conflict of laws rules mentioned	No special conflict of laws rules mentioned	No employee participation at board level, no special conflict rules
Finland	No definition	Capacity/authority are governed by the *lex societatis*	No liability under Finnish law	No employee participation at board level, no special conflict rules
France	Composition and rights of a company's organs,[323] duties of the directors, potential liability of the members for debts of the company, rules on distributions, and rights of the members to bring a derivative action for directors' liability	Acting without authority: part of *lex societatis*[324]	No liability under French company law (see also Table 4.6: liability of directors is characterised as company law, even if it is towards third parties, hence the *lex societatis* applies) Criminal offence of *abus de biens sociaux* applied to directors of foreign incorporated companies	In companies with at least 5,000 employees and certain listed companies, one or two directors are elected by the employees; governed by the *lex societatis*, no overriding provisions regarding co-determination or gender quotas

[322] In limited liability companies that have employed an average of at least 35 employees for the preceding three years, the employees are entitled to elect representatives to the company's board of director's (or supervisory board), corresponding to half the number of the other management members.
[323] Civ., 17 October 1972, Soc. Royal Dutch, Rev. soc. 1974, p. 127.
[324] Cass. com., 21 December 1987, Revue des sociétés. 1988, p. 398 ; 9 April1991, Revue des sociétés 1991, p. 746; 9 March 1993, Revue des sociétés 1993, p. 584.

			with their real seat or most of their activity in France[325]	
Germany	Composition of the board of directors, appointment and removal of directors, the role and competences of the board(s) and other corporate organs, as well as the authority of directors to act on behalf of the company	See Table 4.1 (protection of third parties that rely on the validity of acts of corporate organs under Art. 12 EGBGB)	Directors of foreign companies were held liable where they acted on behalf of the company without making sufficiently clear that a legal person with limited liability should be contracting party (notably by failing to use the addition 'ltd.' after the company name); German law was found to be applicable because liability was not based on the position of the director as a corporate organ, but the creation of the false legal appearance that a person with unlimited liability would be party to the contract (connecting factor: the place where the false legal appearance was created and had an effect on third parties)[326]	It is now generally accepted that employee co-determination is part of the *lex societatis*, but some commentators propose to determine the applicable law not on the basis of the registered office, but the real seat, qualify the German co-determination regime as overriding mandatory provisions, or invoke the German ordre public. The two most important 'codetermination' statutes provide: - Companies with more than 2000 employees: employees appoint half of the members of the supervisory board; the chairman, who has a second vote in case of a tie, is elected by the shareholder representatives (MitbG 1976); - Companies with more than 500 (and less than 2000) employees: employees appoint 1/3 of the members of the supervisory board (Drittelbeteiligungsgesetz 2004).
Greece	Internal management matters comprise the lawful and minimum content of the articles of association as well as their amendment, the position of shareholders and ownership issues over the shares, the composition and rights of the company's organs, decision-making process of organs, quorum, who has the right to be a	Lex societatis applies to a situation where directors contract beyond their powers to act on behalf of the company.	Directors of companies incorporated in another Member State but having their real seat in Greece are considered to be managers of a de facto general partnership. Foreign companies registered abroad but having their real seat in Greece are null and are treated as de facto general partnerships. These managers will be treated under the new law of partnerships (Law 4072/2012).	No employee participation at board level, no special confluct rules

[325] Cass. crim., 31 January 2007, *Nadhmi Auchi, Patrick Chamarre, André Guelfi, Jean Hamon et autres;* 10 March 2010, F-D, n°09-82.453, Rev. Soc. 2007.369, comment B. Bouloc ; 25 June 2014, n° 13-84445, Revue des sociétés 2015, p. 50, note M. Menjucq.

[326] BGH NJW 2007, 1529 (*Einfamilienhaus*); OLG Rostock, GmbHR 2010, 1349. Liability in these cases is based on an analogy to Civil Code, s. 179, a provision of agency law that provides for the liability of an agent who acts without authority, BGH NJW 1996, 2645.

	member of the organs, meetings, nullity of decisions taken by the organs, duties of directors, potential liability of directors.		Moreover, shareholders (who could also be directors) of companies incorporated in another Member State but having their real seat in Greece are considered to be partners (and also managers) of a de facto general partnership – with personal liability.	
Hungary	Status and powers of the board of directors Duties and liabilities of directors towards the company Direct liability of the directors towards third parties is *lex societatis* if the claim is expressly dealt with (also) by a specific provision of Hungarian company law (directors may simultaneously be liable under company law and tort law) - The *lex societatis* probably also governs the liability of directors towards creditors in case of liquidation, when directors did not consider the creditors' interests in the vicinity of insolvency (s. 3:118 Civil Code).	*Lex societatis*, provided that it is a settled case law that when the managing director, by breaching the articles of association, makes an agreement on behalf of the company without the previous approval of the meeting, the agreement is still valid between the company and the good faith third party, because the lack of the meeting's approval is only an internal matter of the company, which may well imply the liability of the manager towards the company, but it has no effect on the agreement made by him/her.	No liability pursuant to Hungarian company law.	One third of members of supervisory board must be employee representatives, provided that the company has more than 200 employees; no special conflict rules.
Ireland	No precise definition under conflict of laws rules.	No special conflict of laws rules mentioned.	No special conflict of laws rules mentioned.	No employee participation at board level, no special conflict rules.
Italy	Formation, powers and functioning rules of companies' bodies' and rules on attribution (Art. 25 PIL Act).	Lack of authority: *Lex societatis.*	See above groups of companies.	The following rules apply only to Italian companies listed on a EU regulated market: - Election of minority directors - 'Independency' requirements - Gender quotas (Article 147-ter Italian Consolidated Finance Act 1998) - 'No frustration rule' when facing a takeover attempt (Article 104 Italian Consolidated Finance Act 1998).

Latvia	Internal matters comprise issues where a third party is not involved, eg, composition of a company`s organs, duties of directors, liability of a director towards a company or its shareholders, rules on distributions etc; but not further agreements with directors	No special conflict of laws rules mentioned	No special conflict of laws rules mentioned	No employee participation at board level, no special conflict rules.
Lithuania	Composition and the rights of a company's organs, the duties of the directors, the potential liability of the members for debts of the company, rules on distri-butions, and rights of the members to bring a derivative action for directors' liability.	Annulment or invalidity of a transaction entered into by the representative of a foreign company in excess of their competence (ultra vires) cannot be invoked if Lithuanian law does not provide for any restrictions on that person's or organ's powers of representation, unless 'the other party knew or, taking into account its position and the relationship with the other party, should have known of such restrictions	If a foreign company operates its business in Lithuania, civil liability of persons acting on behalf and in the interest of such companies governed by Lithuanian law. The literature suggests that this rule should also apply to cases where representatives act on behalf of the company in Lithuania only episodically.	No employee participation at board level, no special conflict rules.
Luxembourg	Distinction between 'internal management matters' and external affairs of the company is similar to the one in the UK	No special conflict of laws rules mentioned	Possibly courts would hold directors of foreign companies liable for abuse of corporate assets following French case law, but no decisions	One-third employee representation required for PLCs having at least 1,000 employees, classified as labour law.
Malta	Internal affairs include the method of appointment, formation and rights and obligations of the board of directors; generally similar to UK law	*Lex societatis* insofar as the company may validate an ultra vires act; if the company does not validate the act, the company itself would not appear to be a relevant factor and obligations would be governed by the law of contract or non-contractual obligations	No liability pursuant to Maltese company law	- Employee participation has only been used in companies established by the state; no mandatory rules concerning gender-balance. - *Lex societatis* applies.
Netherlands	Defined as the 'arrangements, structure, and organisation of the company';[327] covers all corporate organs, i.e. general meeting of shareholders, board of directors and supervisory	Each director has the authority to represent the company, Art. Arts. 2:130, 240 CC Statutory limitations on the organ's powers are governed by the *lex societatis*	Four cases: i) If a foreign company that is subject to corporate tax in the NL becomes insolvent, Dutch rules on liability of directors (Arts. 2:138, 149 CC) apply, Art. 10:121 CC	No employee participation at board level; works council (companies with more than 50 employees only): Conflict rules applicable to companies do not apply; Dutch law is always applicable to a works

[327] Kamerstukken II 2009/10, 32 137, nr. 3, p. 69.

	board (membership, composition, appointment, removal, quorum, calling of, validity of decisions, duties, competences, etc.)	If the limitation is unknown in the country where the company has been represented and the third party could not be expected to be aware of it, the company cannot rely on the limitation, Art. 10:12 CC The liability of agents acting without authority is determined by agency law conflict rules (which will most likely lead to the application of the *lex societatis*); the validity of the legal act is part of the *lex societatis*[328]	ii) Companies subject to the Act on foreign law business corporations: directors are liable to third parties if the financial accounts or reports are misleading; 'de facto' directors are qualified as directors if they perform 'acts of administration', (Arts. 2:249, 260, 261 CC) iii) The director's behaviour is careless to third parties (liability for a tortuous act; governed by Rome II) iv) If there is identification of the director with the company[329] 2) Not subject to Dutch law: liability of the directors of a foreign company that acts as director of a Dutch company[330]	council located in the NL
Poland	Composition and powers of the board of directors, instructions by the general meeting to the board, obligations and rights, appointment and removal of directors, duties and liability of directors (article 17(3)(9) PIL Act).	Lack of authority: *Lex societatis* (article 17(3)(9) PIL Act).	'Highly unrealistic'. No case law.	No employee participation at board level, no special conflict rules
Portugal	Composition and powers of the board of directors, instructions by the general meeting to the board of directors (and in general powers of companies' bodies), obligations and rights, appointment and removal of directors, duties and liability of directors (art. 33(2) Civil code).	Lack of authority: *Lex societatis* (art. 33(2) Civil code). Protection of third parties that rely on the validity of acts of corporate organs: a party contracting with a foreign company in Portugal may rely on Portuguese substantive law in claiming that the corporate organ of a foreign company acted with authority, as long as that party was ignorant (in good faith) of the lack of	No special conflict of laws rules mentioned	No employee participation at board level, no special conflict rules

[328] Hoge Raad 25 juni 2010, NJ 2010/370; JOR 2010/226 (e-Traction).
[329] For an overview of cases accepting and rejecting identification, see P. Vlas, *Rechtspersonen*, Antwerpen, Maklu, 2009, nr. 324.
[330] According to Art. 2:11 CC, each director of the legal entity that acts as director of a legal entity is individually liable. The Hoge Raad held that the directors of a Dutch company are subject to Dutch law, but not the directors of the foreign legal entity that acts as director, Hoge Raad 18 maart 2011, NJ 2011, 132; JOR 2011/144 (note G. van Solinge); Ondernemingsrecht 2011/71 (note B. Assink), LJN BP1408 (D Group/Schreurs q.q.).

		authority of the corporate organ according to the foreign company's personal law (Art. 28 Civil Code).		
Romania	Internal management matters refer to the structure of the board (one-tier or two-tier), the composition of the board of directors, appointment and removal of directors, the role and competences of the board(s) and other corporate organs, as well as the authority of directors to act on behalf of the company.	If directors would enter a transaction beyond their given powers, the creditors would see their contract protected through the provisions of art. 55 LS by which the company is bound by any bargaining contracted by a director beyond his powers provided that the third party did not know of said limitation.	No special conflict of laws rules mentioned	No employee participation at board level, no special conflict rules
Slovakia	Composition of the board of directors, appointment and removal of directors, the role and competences of the board(s) and other corporate organs, as well as the authority of directors to act on behalf of the company- Internal management matters: of the mechanism of how the company decides internally about the management - Also covered by the lex societatis: breach of directors' duties	Lex Societatis – s. 13 subsection 3 and 4 of the Commercial Code.	Persons who are responsible for the governance of the branch of a foreign company can be removed by court decision under s. 13a of the Commercial Code.	One third of supervisory board members in companies with more than 50 employees must be employee representatives; no special conflict rules.
Slovenia	No definition	Substantive company law rules stipulate that in the performance of their tasks, executive directors shall comply with the guidelines and the restrictions imposed by the general meeting, the board of directors, the articles of association and the rules of procedure of executive directors.	Slovene company law does not contain any special rules on liability of directors of companies incorporated in another Member State.	At least one-third employee representation required in Slovene companies having not less than 50 employees; no special conflict rules.
Spain	Structure and corporate organs of the company, the composition of the board of directors as well as their appointment and removal, and the liability of directors for	- Organic representation of directors: *lex societatis.* - Voluntary representation: national law of the country where the company uses the power of representation (Article 10 (11) of the	No special conflict of laws rules mentioned	No employee participation at board level, no special conflict rules

	breaches of their duties, regardless of their contractual or tortious character	Civil Code). - Capacity of the company: *lex societatis*		
Sweden	The *lex societatis* determines the structure and composition of the board, appointment and removal of directors, the role and competences of the board and other corporate organs etc.	Chapter 8 of the Companies Act contains provisions regulating the implications of the board acting beyond its power to represent the company. The consequences of other persons acting on behalf of the company are not regulated by the Companies Act but by general principles of contract law.	Directors of companies incorporated in another Member State cannot be held liable under the Companies Act or any equivalent company law rules or principles. Directors of a non-Swedish company, just as directors of Swedish companies, may of course be subject to criminal sanctions (and tortious liability in connection with criminal acts) for crimes committed in Sweden and administrative sanctions on individuals under rules implementing various EU Directives.	According to Chapter 8 of the Companies Act, a minimum of half of the board members of a Swedish limited company must reside within the EU/EEA. An EU/EEA residency requirement also applies to the managing director, and at least one of the persons authorised to sign for the company must be an EU/EEA resident. Rules regarding the composition of the board, including rules on employee representation or gender quotas, would in Sweden be determined by the *lex societatis*.
United Kingdom	- Composition and powers of the company organs, duties of directors arising under company law - Other duties under contract or tort law are governed by Rome I + II	No doctrine of ultra vires (s. 39 CA 2006) Lack of authority (s. 40): applicable to companies incorporated in the UK (follows from s. 1 CA 2006), i.e. they operate as part of the *lex societatis* and apply notwithstanding a foreign *lex contractus*; it is likely that where the company is incorporated abroad, such issues will be subjected to the *lex societatis*	No special conflict of laws rules mentioned	Governed by the *lex societatis*, no overriding provisions regarding co-determination or gender quotas, no employee representation according to substantive law

4.3.2 Discussion

1. While not all Member States provide for a definition of 'internal management matters', the basic contours of such matters, and their treatment as part of the *lex societatis*, is largely consistent across the EU (some Member States define the term rather broadly,[331] but this seems to reflect interpretations from the academic literature, rather than definitions introduced by the legislator or the courts). As a common denominator, internal management matters comprise the composition and powers of the corporate organs, directors' duties and liability, and the relationship between the general meeting and the board(s). Member States also largely agree that the rights of members to bring a derivative action are part of the *lex societatis* (see, in particular, Denmark, France, and the UK).

2. It is also generally accepted that the representation of employees on the board of directors or requirements to introduce gender quotas are governed by the *lex societatis* (see Austria, Croatia, Belgium, Denmark, France, Germany, Sweden, and the UK), even though such rules pursue somewhat broader societal goals than the investor-focused body of core company law. In some countries, commentators indeed suggest that these matters should be left to the country where the company's main operations or real seat are located in order to achieve a close alignment between the applicable law and the social preferences of the society (as exemplified by the policy choices of the local legislator) that is most clearly impacted by the company's operations.[332] However, there does not seem to be any instance where such suggestions have been litigated successfully, and it is doubtful that overriding requirements of employee participation could be justified under the *Gebhard* conditions developed by the Court of Justice.

3. The most controversial of the issues discussed here is the extension of the reach of certain liability provisions of the forum's company law to directors of foreign companies that operate within the territory of the forum. In this regard, we observe substantial differences between the Member States. These differences can be conceptualised as follows.

4. In some Member States, the issue does not seem to have been discussed widely, and the general approach is not to subject directors of foreign companies to domestic liability provisions stemming from company law.[333]

5. A second group of countries focuses on the activities of branches of foreign companies and holds branch managers responsible under domestic rules on directors' duties and liability for mistakes made in the course of operating the branch (Belgium, Cyprus, Denmark, Lithuania, and the Netherlands[334]). It is not entirely clear how the application of these provisions to foreign companies is justified in private international law terms, but most convincingly they can be seen as outreach statutes or overriding mandatory provisions.

[331] For example, the Cyprus report qualifies reconstructions, mergers and divisions as internal management matters. In Denmark and France, rules on distributions are included in the list of internal management matters, although they should probably be seen as a part of the company's capital maintenance regime, and hence capital structure.

[332] See, e.g., German country report, Section 4.3.

[333] Directors are, of course, subject to criminal liability, since such laws will generally apply to criminal offences committed within the territory of the forum. In addition, liability may be imposed based on provisions that follow other connecting factors, such as tort law. These will be analysed in Section 4.5 below. Here, we are primarily interested in liability according to what will typically be considered company law mechanisms.

[334] In the Netherlands, liability of directors of foreign companies for certain acts derives from the Act on foreign law business operations. These parts of the act are not applicable to EU-incorporated companies, see Dutch country report, Section 3.2.

6. Third, a number of Member States report that directors of foreign companies can be held liable under domestic (company) law in specific situations irrespective of their involvement in branch operations. This class of situations can be termed *liability by virtue of classification*, because the respective liability provisions are typically invoked not because they are seen as overriding mandatory requirements, but because they are classified as falling outside the scope of the *lex societatis*, notwithstanding their regulation in the Member State's substantive company law. However, there is significant legal uncertainty and inconsistency in the EU when directors may be found liable pursuant to the forum's law in spite of a foreign *lex societatis*. We have identified the following cases where liability has been discussed: (1) fraudulent trading (Cyprus) and comparable mechanisms imposing liability in case the director caused or contributed to the company's insolvency (the Netherlands); (2) liability to third parties (not the company or shareholders) for breach of directors' duties (among others, Belgium, Bulgaria, Denmark, the Netherlands); and (3) creation of the false legal appearance that a person with unlimited liability (e.g., a partnership or natural person) would be party to the contract between the company and a third part (Germany, and, similarly, in Austria).

7. We would expect the first case to be classified as insolvency law if the legal mechanism can be seen as an action deriving directly from insolvency proceedings and being closely connected to them.[335] In this case, the national liability provisions can be applied to companies with their centre of main interest (COMI) in the forum state.[336] However, the two Member States discussed here (Cyprus and the Netherlands) do not rely on the COMI as connecting factor, but apply their national liability provisions when the company 'carries on business' within the state's territory (Cyprus) or is subject to corporate tax (Netherlands). These connecting factors are related, but will generally be wider than the COMI.

8. Member States do not agree how the second case, liability to third parties for breach of directors' duties, should be classified. In Denmark, some views in the literature suggest a classification as tort law, hence leading to a bisection of the liability regime if the company is incorporated abroad and the director commits acts in Denmark that give rise to liability under Danish law. In a number of other states, for example Bulgaria and the Netherlands, directors may be sued, in appropriate circumstances, both for breach of directors' duties[337] and under tort law.[338] It is then unclear whether the situation should be characterised as company law or tort law, since the director commits a tortious act in the capacity as a director.[339] In general, the classification seems to be to some extent a function of the idiosyncrasies of the national law on directors' duties and liability. Compare the above legal systems, for example, with France, where directors' duties are owed to the company, shareholders, and third parties.[340] As a consequence of this formulation of the substantive law, liability is always seen as part of the *lex societatis*, notwithstanding the type of claimant. The demarcation between the *lex societatis* and the *lex loci delicti* will be explored further in section 4.5 below.

9. The treatment of the third case, creation of a false legal appearance, is relatively clear. Liability in such a case is generally considered to derive from quasi-contract and not company law, since it is not based on the position of the director as a corporate organ or

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[335] This criterion has been established by the CJEU in the context of interpreting Art. 4(2) Insolvency Regulation, see Section 4.4 below.
[336] Insolvency Regulation, Arts. 3(1), 4(1).
[337] Dutch Civil Code, Art. 2:9.
[338] Dutch Civil Code, Art. 6:162. An example for an act giving rise to liability under tort law is the decision of the Hoge Raad 6 October 1989, NJ 1990/286NJ 1990/286 (*Beklamel*). In this case, a company had incurred additional obligations at a time when the director knew, or reasonably should have known that the company would not be able to meet the obligations and the company's assets would not be sufficient to satisfy all claims of creditors.
[339] Dutch country report, Section 4.3.
[340] For example French Commercial Code, Art. L225-251 (public companies).

the violation of company law duties, but on quasi-contractual duties that apply more generally. Courts have held that the relevant connecting factor is the place where the false legal appearance was created and had an effect on third parties.[341] However, it should be noted that if liability according to these principles were used as a method to require disclosures that go beyond Directive 89/666 (so-called Eleventh Company Law Directive), holding directors of foreign companies liable would be in conflict with EU law, irrespective of the applicable connecting factors.[342]

10. Finally, an outlier is Greece, where it has been reported that directors of foreign companies could be found personally liable if the company's real seat is located in Greece.[343] Directors of companies incorporated in another Member State but having their real seat in Greece are considered to be managers of a de facto general partnership. Foreign companies registered abroad but having their real seat in Greece are null and are treated as de facto general partnerships. Moreover, shareholders (who could also be directors) of companies incorporated in another Member State but having their real seat in Greece are considered to be partners (and also managers) of a de facto general partnership with personal liability This approach is likely a function of the real seat theory, which is still formally applied in Greece.[344] If, as discussed in the Greek literature, the real seat theory were to be modified or entirely disregarded in cases involving EU-incorporated companies, a logical consequence would be a corresponding limitation of the scope of application of the liability rules. As the law stands, it is difficult to justify the blanket extension of liability provisions to directors of foreign companies with their real seat in Greece under Gebhard.

4.4 Distinction between the lex societatis and the lex concursus (the law applicable to insolvency proceedings)

The general delimitation of private international company and insolvency law is fairly clear. The Insolvency Regulation provides that the *lex concursus* shall determine the conditions for the opening of insolvency proceedings, their conduct and closure, and further lists a number of questions falling within the scope of international insolvency law.[345] These questions are mostly concerned with the operation and effects of the insolvency proceedings themselves, so that the problem of an overlap with company law mechanisms usually does not arise. However, it has for some time been controversial in some Member States how to classify legal mechanisms intended to protect creditors before the company is actually insolvent, in particular regarding acts in the vicinity of insolvency that jeopardise the creditors' interests or aggravate the company's insolvency. Such mechanisms can be found both in the companies acts and the insolvency codes of the Member States, and it has been questioned whether their classification for purposes of private international law should follow their substantive (internal) legal regulation.

From the perspective of the EU Insolvency Regulation, the question commonly turns on the interpretation of the term 'actions which derive directly from [insolvency] proceedings and which are closely connected to them'.[346] The Court of Justice has held that the courts that have international jurisdiction pursuant to Article 3(1) to open insolvency proceedings also have jurisdiction to hear such closely linked actions.[347] Likewise, the Court has clarified that the scope of Article 3(1) of the Insolvency

[341] See the references in n 326 above.
[342] This point seems to have been ignored by the German Federal Court of Justice (BGH), which argued that imposing liability on the acting director was permissible because the liability rules 'did not fall within the scope of the *lex societatis* and, hence, did not concern the right of establishment', see BGH NJW 2007, 1529 (*Ein-familienhaus*), para 10 (own translation).
[343] Greek country report, Section 4.3.
[344] See Table 3.1 above.
[345] Insolvency Regulation, art. 4(2).
[346] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767, para 21.
[347] Ibid., now codified in Regulation (EU) 2015/848, art. 6(1).

Regulation and the bankruptcy exception of the Judgments Regulation[348] are mutually exclusive and exhaustive.[349] Given that the legislator intended the Judgments Regulation to have a broad scope of application, encompassing all civil and commercial matters except certain well-defined issues,[350] it follows that the scope of the Insolvency Regulation is to be interpreted narrowly.[351] This much is generally not disputed in the EU, since it is universally acknowledged that Articles 3 and 4 of the Insolvency Regulation have to be interpreted autonomously. Some commentators have argued that the case law of the Court of Justice did not have a bearing on the international scope of substantive insolvency law, since the Court had, until 2015, only addressed jurisdictional questions and the protection of creditors demanded a wide interpretation of Article 4 Insolvency Regulation (now Article 7 Regulation (EU) 2015/848).[352] This question has probably become moot after *Kornhaas*, decided in December 2015.[353] *Kornhaas* dealt with a reference from the German Federal Court of Justice regarding the classification of the liability of managers of a private limited company for payments made after the company becomes cash flow insolvent or over-indebted.[354] The Court referred to its prior holding in *H*,[355] a case concerning the same provision of German law, where it had held that a national court that has international jurisdiction to open insolvency proceedings pursuant to Art. 3 Insolvency Regulation has jurisdiction to rule on such an action. The Court of Justice concluded from this holding that the German provision had to be qualified as insolvency law not only for purposes of international jurisdiction, but that it was also 'covered by the law applicable to insolvency proceedings and their effects, within the meaning of Article 4(1)' of the Insolvency Regulation.[356]

Examples for ambivalent and often controversially debated cases are the shift of directors' duties to creditors in the vicinity of insolvency;[357] the duty to recapitalise the company; liability of directors for failure to protect the assets of the company when the company nears insolvency or after cash-flow insolvency or over-indebtedness, such as wrongful trading,[358] failure to file for the opening of insolvency proceedings,[359] and *action en responsabilité pour insufissance d'actif* (liability for insufficiency of assets);[360] liability for causing the company's insolvency;[361] re-characterisation of shareholder loans given, or not called in, when the company nears insolvency;[362] and avoidance actions.[363]

[348] Now Regulation (EU) No 1215/2012, art. 1(2)(b).
[349] They 'must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum', Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB*, nyr, para 21.
[350] Regulation (EU) No 1215/2012, recital 10.
[351] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, para 25.
[352] Kindler, n 310 above, at para 664.
[353] Case C-594/14 *Simona Kornhaas v Thomas Dithmar*, nyr.
[354] Now s. 64, sentence 1 Limited Liability Companies Act (GmbHG). The reference was made by BGH, decision of 2 Dec. 2014, II ZR 119/14.
[355] Case C‑295/13 *H v H.K.*, nyr.
[356] *Kornhaas*, para 17. The Court further explained that 'Article 4(2) of Regulation No 1346/2000 provides, in particular, that the lex fori concursus determines the 'conditions for the opening' of the insolvency proceedings. In order to ensure the effectiveness of that provision, it must be interpreted as meaning that, first, the preconditions for the opening of insolvency proceedings, second, the rules which designate the persons who are obliged to request the opening of those proceedings and, third, the consequences of an infringement of that obligation fall within its scope.' Ibid. para 19.
[357] For example, this is the case in the UK, see *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. For a discussion see, e.g., PL Davies, 'Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency' (2006) 7 *European Business Organization Law Review* 301.
[358] UK: Section 214 Insolvency Act 1986; *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57, para 42.
[359] Germany: LG Kiel [District Court Kiel, Germany], NZG 2006, 672 (classifying the duty to file and ensuing liability pursuant to the German Civil Code, s 823(2), and the Stock Corporation Act, s 93(2), as insolvency law, and applying the provisions to an English limited company with COMI in Germany).
[360] Art L.651-2 of the French Commercial Code. See *Gourdain v Nadler* (Case 133/78) [1979] ECR 733.
[361] Case C-295/13 *H v H.K.*, nyr. The Court held that courts of the Member State where insolvency proceedings have been opened have jurisdiction to hear actions based on s. 92(2) German Stock Corporation Act and s. 64 German Limited Liability Companies Act (liability of directors who make payments that must lead to the insol-

Table 4.5 assesses how national courts interpret 'actions deriving directly from insolvency proceedings' and other relevant European concepts of insolvency law, and summarises how national courts treat the above ambivalent cases.

4.4.1 Overview of national laws

Table 4.4. Lex societatis and lex concursus

Country	***Interpretation of European concepts 'actions deriving directly from insolvency proceedings'***	***Ambivalent cases***
Austria	Austrian courts follow the interpretation by the ECJ	Duty to file for the opening of insolvency proceedings and liability for failure to file Liability of directors who make payments to creditors (or impair the assets of the company in other ways) at a time when the company is cash-flow insolvent or over-indebted, but before insolvency proceedings have been opened, - Re-characterisation of shareholder loans as equity - Liability for causing the company's insolvency (*Existenzvernichtung*)
Belgium	Not relevant since no demarcation problems exist in Belgium (see right)	- COMI and principal establishment are generally interpreted in the same way, therefore Belgian courts will apply insolvency and company law concurrently, hence no demarcation issues and no case law - Scholars have argued that liability of the board for serious mistakes which resulted in the insolvency of the company should be considered as part of the *lex concursus* instead of the *lex societatis* - Liability of directors for not calling a GM in case of considerable loss of capital is part of

vency of the company and that would not have been made by a prudent businessman) if these actions are brought by the liquidator. It should be noted that this judgment concerns only the interpretation of Article 3(1) EU Insolvency Regulation, not the applicable law (but see also our discussion above, text to notes 353-356). In addition, the Court of Justice acknowledged that the obligations at issue were owed to the company and that the claim could also be enforced outside the context of insolvency proceedings. Where the claim is brought by the liquidator, it 'clearly derogates from the common rules of civil and commercial law, specifically because of the insolvency of the debtor company', and is therefore an action deriving directly from insolvency proceedings (ibid. para 23). Compare this case with Case C-147/12, *ÖFAB v Frank Koot*, nyr. *ÖFAB* dealt with a Swedish law providing 'that the members of the board of directors may be liable for the debts of the company where they fail to complete certain formalities to monitor the company's financial situation which no longer has sufficient funds' (ibid. para 8). The Court held that personal liability of the directors where they had allowed the company to continue to trade at a time when it should have been put into liquidation did not constitute a closely connected action, because the action was not 'the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors' (para 25). Rather, it could be (and was in this case) pursued by the company's creditors outside insolvency proceedings. It was, therefore, classified as tort law, ibid. para 42.

[362] BGH [German Federal Court of Justice], judgment of 21 July 2011, IX ZR 185/10 (holding that the re-characterisation of shareholder loans as equity in the vicinity of insolvency should be classified as insolvency law, even though the doctrine originated in capital maintenance law (analogy to German Limited Liability Companies Act, ss 30, 31, version in force until 31 October 2008, now codified in the German Insolvency Code, ss 39, 135)).

[363] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767 (holding that avoidance actions that could only be brought by 'the liquidator … in the event of insolvency with the sole purpose of protecting the interests of the general body of creditors' fell within the international jurisdiction of the courts of the country where the insolvency proceedings were opened). However, the Insolvency Regulation stipulates that the *lex concursus* does not govern the material preconditions for avoidance insofar as the act that is challenged is subject to the law of another Member State and cannot be set aside pursuant to the law of that state, Arts. 4(2)(m), 13 (now Regulation (EU) 2015/848, arts 7(2)(m), 16).

		substantive company law and will probably be characterised accordingly for purposes of PIL - Liability for not filing for the opening of insolvency proceedings is part of substantive insolvency law and will probably be characterised accordingly for purposes of PIL
Bulgaria	No case law, but it is suggested that 'closely connected actions' include avoidance and 'claw-back' actions	'Failure to file for the opening of bankruptcy proceedings' (Art. 627 CA): contained in the Companies Act, but relevant connecting factor is the COMI.
Croatia	No case law	- Director's duty to file for the opening of insolvency proceedings is regulated by both company law and insolvency law (Arts. 251(2), 431.c Companies Act and Art. 110 Insolvency Act). Since the idea behind such rules is the protection of creditors, it is more likely that this duty will be considered as part of insolvency law for the purposes of determining the applicable law. - Rules on loans substituting capital are only provided by company law and as such it is questionable whether they form a part of the *lex societatis* or insolvency law. This is because such rules can be characterised as both capital maintenance rules and insolvency rules aimed at protecting the company's creditors.
Cyprus	Courts can wind up an overseas company if it conducts or has conducted business in Cyprus (Art. 362, Cap. 113). This provision does not seem to be in line with the concept of COMI in the EIR	See left
Czech Republic	Czech insolvency law applies to: liability for damage caused by the insolvency petition being filed too late or not at all; debtors' liability to creditors for a breach of obligations during the 'moratorium' period; damages against the insolvency petitioner; liability for breaches of the due care obligation in disposing of the estate; invalidity of legal acts	Certain provisions of the Business Corporation Act related to directors' duties and liabilities, to be applied after the company enters into an insolvency proceeding: - Claw back of considerations received in the 2 years before the decision on insolvency; - Disqualification; - Wrongful trading (liability of directors if they should have known of imminent insolvency)
Denmark	- EIR does not apply - General rule: the *lex concursus* determines the conditions for the opening of insolvency proceedings, their conduct and closure (i.e. issues concerned with the operation and effects of the insolvency proceedings themselves)	1) *Lex concursus*: - Competence *of creditors* to file for opening of insolvency proceedings - Avoidance actions 2) *Lex societatis*: - Competence to file for opening of insolvency proceedings *on behalf of the company* - Liability of directors for acts in the vicinity of insolvency, e.g. aggravating the insolvency[364]

[364] UfR1989.812H (Danish Supreme Court).

Estonia	No case law	No case law
Finland	No case law	No case law
France	French courts follow the interpretation by the Court of Justice	1) *Lex concursus*: - *action en responsabilité pour insuffisance d'actif* (liability for insufficiency of assets)[365] - *action en interdiction de gérer* (prohibition of managing a company)[366] 2) Ambivalent case law on the interpretation of Art. 2(4)(h) EIR (lodging of claims): in one decision, the Cour de Cassation held that the *lex concursus* determines whether the delegation given to a company officer to lodge a claim on behalf of the company is valid;[367] in a second decision the court added that the determination of the capacity of the company's organ to delegate to an officer the power to lodge a claim is ruled by the *lex societatis*[368]
Germany	German courts follow the interpretation by the Court of Justice	1) *Lex concursus*: - Duty to file for the opening of insolvency proceedings and liability for failure to file (s. 15a InsO)[369] (but some commentators suggest a characterisation as company law) - Liability of directors who make payments to creditors (or impair the assets of the company in other ways) at a time when the company is cash-flow insolvent or over-indebted, but before insolvency proceedings have been opened, or if they make payments to shareholders that must lead to the insolvency of the company (ss. 92(2) AktG, 64 GmbHG)[370] - Re-characterisation of shareholder loans as equity (since 2008 ss. 39(1), no. 5, 135 InsO)[371] - Avoidance actions (s. 129 InsO)[372] (2) Ambivalent cases - Liability for causing the company's insolvency (*Existenzvernichtung*)[373]
Greece	No case law; matters governed by internal Greek insolvency law are seen as belonging to the *lex concursus*	No rule similar to wrongful trading in English company law or to '*action en comblement du passif*' in French law; however Art. 98 of the Greek Bankruptcy Code introduces civil liability of managers of corporations. This rule

[365] T. com. Nanterre, 3ème ch., 24 October 2013, n° 2011F04794, Revue des procédures collectives 1/2014, comm. 12, obs. M. Menjucq (opening of secondary proceedings sufficient to apply the lex fori).
[366] Cass. com. 22 January 2013, n° 11-17.968, Rev. Proc. coll., 2/2013, n° 30, obs. Th. Mastrullo; Dalloz 2013, p. 755, note R. Dammann et A. Rapp (COMI used as connecting factor).
[367] Cass. Com., 15 December 2009, n° 08-14949.
[368] Cass. Com., 22 June 2010, n° 09-65481.
[369] LG Kiel, NZG 2006, 672 (overturning the opinion of the district court, which characterised the duty to file and liability for failure to file as company law, see AG Bad Segeberg, NZG 2005, 762); Explanatory memorandum accompanying the proposal for a Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse (MoMiG), Bundestags-Drucksache 16/6140, p. 55.
[370] Kammergericht Berlin, NZG 2010, 71.
[371] BGHZ 190, 364; AG Hamburg, NZI 2009, 131.
[372] The Insolvency Code contains an explicit conflict of laws provision in s. 339 InsO. See also Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767, dealing with international jurisdiction for avoidance actions under German law.
[373] Prior to *Überseering*, and hence prior to the abolishment of the real seat theory in Germany, characterised as company law, see BGHZ 78, 318, 334. Now the characterisation is controversial in the literature; the courts have not yet decided the question.

		is part of the *lex concursus*.
Hungary	The *lex societatis* generally applies to insolvency issues, unless special legal norms (e.g. the Insolvency Regulation) refer to another law. The distinction between *lex societatis* and the *lex concursus* has not yet been an issue in Hungary.	- Liability of majority shareholders and directors for 'wrongful trading': those actions derive directly from the insolvency proceedings, because they require that insolvency proceedings have been opened - But in practice no case where these rules were applied to foreign companies with COMI in Hungary
Ireland	No case law	It is argued that provisions such as: fraudulent and reckless trading; unfair preference; duty to contribute for misapplied company money or property; misfeasance or other breaches of duty or trust in relation to the company, which fall within Part 11 (Winding Up) of the 2014 Act, are part of the *lex concursus*
Italy	Italian law governs any actions deriving from insolvency proceedings opened in Italy, including avoidance and 'claw-back' actions.	- Directors' duties and liability in the vicinity of insolvency: *lex societatis* - Veil piercing and liability of shareholders: *lex societatis* - Subordination of shareholder loans and avoidance: probably *lex societatis* (no case law so far)
Latvia	Insolvency Law refers to the 'permanent economic activity' in Latvia as the decisive connecting factor for the *lex concursus*	Liability towards the company for failure to file for the opening of insolvency proceedings stems from company law; classification unclear
Lithuania	No relevant case law or legal literature that would discuss this issue	No case law
Luxembourg	No case law	No case law, no discussion in the literature
Malta	Case law is rare	Case law is rare, legal uncertainty persists how the *lex societatis* and *lex concursus* should be delimited
Netherlands	Dutch courts follow the interpretation by the Court of Justice[374]	Liability of the directors for having caused or contributed to the insolvency of the company, Art. 10:121 CC: Dutch law applies if the company is subject to corporate tax and has been declared bankrupt in the NL;[375] thus, not identical with COMI, but considered to be part of the *lex concursus*
Poland	Discussed in the literature, but no publicly available case law	1) Duty to file for bankruptcy within 2 weeks from actual insolvency (Art. 21 Bankruptcy Act): liability for non-compliance is of uncertain characterisation 2) Directors of limited liability companies are jointly and severally liable vis-à-vis unpaid creditors if they do not prove (i) that an application for bankruptcy was filed or that arrangement proceedings with creditors were commenced within an appropriate time; (ii) that it is not due to their fault that the

[374] Hof Amsterdam 3 November 2009, JOR 2010/244 (Groet/Conrads q.q.); Rb. Dordrecht 3 February 2010, JOR 2010/90 (Mr. Gilhuis q.q./X).

[375] Rechtbank Breda 25 March 2009, RON 2009, 44, LJN BH 9042; Rechtbank Dordrecht 3 February 2010, JOR 2010/90, LJN BL2214.

		petition for bankruptcy was not filed or that arrangement proceedings with creditors were not commenced; (iii) or that the creditor did not suffer any damage despite the fact that the petition for bankruptcy was not filed or that the arrangement proceedings with creditors were not commenced (article 299 Commercial Companies Code): uncertain private international law characterisation
Portugal	No case law	Directors' duty to file for insolvency is characterised as insolvency law
Romania	No case law	Liability of administrators for insolvency-related issues: the literature suggests that they should be classified as insolvency law; therefore, Arts. 169-173 Insolvency Law no. 85/20014 apply only if l*ex concursus* is Romanian law
Slovakia	Limited case law suggests that Slovak courts would follow the interpretation by the Court of Justice	- Duty to file for the opening of insolvency proceedings and liability for failure to file Liability of directors, - Re-classification of shareholder loans as equity, s. 67d of the Commercial Code - Shift of duties from shareholders to creditors not regulated. - In the case that the company's COMI is located in the Slovak Republic but the company is incorporated abroad and insolvency proceedings are opened in the Slovak Republic, the Slovak Act on Bankruptcy is applicable, but presumably not the provisions of the Commercial Code on companies in crisis, as these are considered to be separate concepts.
Slovenia	- Both the courts and legal scholarship argue for a broad interpretation: any action filed during insolvency proceedings and having an effect on the bankruptcy estate are qualified as 'closely connected actions' - For example, actions that can be filed outside of insolvency proceedings and that are not a direct result of these proceedings, such as an action to enforce a lien/title, or an action for recovery of claims resulting from operations before bankruptcy, are considered to be 'connected with the insolvency proceedings'	Failure to file for the opening of insolvency proceedings: As this is a question that falls within the ambit of insolvency law, the applicable law is the law of the country where the company has its COMI. However, company law provisions may also be of relevance to determining the directors' liability, and these provisions will be governed by the *lex societatis*.
Spain	Limited number of decisions; legal situation unclear	*Lex concursus* governs the liability of directors for the debts of the company where they have caused or aggravated the company's insolvency or failed to file for the opening of insolvency proceedings pursuant to Arts. 164(1), 172 and 172*bis* Spanish Insolvency Act of 2003.
Sweden	Case law is rare	- No domestic case law by upper courts

		addressing any particular problems in this regard - Directors' liability for not taking action in the case when less than half of the registered share capital is left is considered to fall within the ambit of company law, not insolvency law
United Kingdom	- General rule: whether the claim made in the proceedings is based on insolvency law, or is based on ordinary law - Brussels I is interpreted following the relevant decisions of the Court of Justice (German Graphics etc.)	1) Disqualification of directors of insolvent companies under UK law, even if the company is incorporated abroad, where insolvency proceedings have been opened in the UK[376] 2) *lex concursus*: - Wrongful trading[377] - Insolvency Regulation applied where the claim is not based on insolvency law, but arises from the activities of the liquidator, e.g. claims in contract or tort made by a creditor against a liquidator based on statements made by the liquidator in negotiations between the liquidator and the creditor concerning the admission and priority of the creditor's underlying claim (but the decision addressed judicial jurisdiction, rather than the reach of the *lex concursus*)[378] 3) Brussels I: - Action brought by a creditor against the insolvent debtor to determine the amount owing under their contract[379] - Actions to recover property belonging to the debtor or enforce a debt owing to the debtor[380] - An insolvent company brought an action against its former directors and professional advisors for conspiracy to defraud and breaches of fiduciary duty, since the claims were based on ordinary law and the foreign insolvency proceedings were purely collateral[381]

4.4.2 Discussion

1. In most Member States, there is little or no case law explicitly addressing the question of how 'closely connected actions' should be interpreted. Where case law exists, our findings indicate that national courts generally follow the interpretation of the Court of Justice[382] faithfully. In larger Member States, notably France and Germany, case law illustrates that national courts are familiar with the relevant issues and prepared to make references to the Court of Justice if the legal situation is uncertain. However, the compatibility of national law with EU law seems to be in doubt in Cyprus. According to the relevant legislation, an overseas company that 'carries on business' in Cyprus can be

[376] Re Seagull Manufacturing (No 2) [1994] Ch 91.
[377] Re Howard Holdings [1998] BCC 549 (Chadwick J); Oakley v Ultra Vehicle Design Ltd [2005] EWHC 872 (Ch) (Lloyd LJ) at para 42.
[378] Polymer Vision v Van Dooren [2011] EWHC 2951 (Comm).
[379] UBS v Omni Holding [2000] 1 WLR 916; Gibraltar Residential Properties Ltd v Gibralcon 2004 SA [2010] EWHC 2595 (TCC).
[380] Re Leyland DAF Ltd [1994] 2 BCLC 106 (CA); Re Hayward [1997] Ch 45 (Rattee J); QRS v Frandsen [1999] 3 All ER 289 (CA); Oakley v Ultra Vehicle Design Ltd [2005] EWHC 872 (Lloyd LJ); Byers v Yacht Bull Corp [2010] EWHC 133 (Ch).
[381] Grupo Torras v Al-Sabah [1995] 1 Lloyd's Rep 374.
[382] See the references in notes 224, 228, 230-248 above.

wound up under Cypriot law.[383] It has been argued that this connecting factor goes beyond the concept of COMI in the Insolvency Regulation and should either be amended to exclude EU-incorporated companies or be interpreted narrowly by the courts. This has not yet been addressed in reported case law and the issue remains unsettled. A similar problem may exist in Latvia, where the relevant connecting factor of the *lex concursus* is defined as 'permanent economic activity' in the country.

2. In spite of several preliminary reference rulings by the Court of Justice (which, however, deal—with one exception—with questions of jurisdiction and not the applicable law[384]), the demarcation between the *lex societatis* and the *lex concursus* remains uncertain in many Member States. Questions that have been discussed concern in particular the liability of directors for management mistakes or other actions that cause or aggravate the insolvency of the company, their liability for failure to file for the opening of insolvency proceedings, and the re-characterisation of shareholder loans as equity capital. We examine these issues in the following paragraphs.

3. The duty to file for the opening of insolvency proceedings if the company is insolvent (and ensuing liability if directors fail to do so, as well as comparable institutions such as wrongful trading) is laid down in the national company legislation in some Member States (Bulgaria, Czech Republic, Germany until 2008, Italy, Latvia, the Netherlands), and in insolvency law in others (Belgium, France, Germany since 2008, Greece, Ireland, Romania, the UK). In spite of these differences in the Member States' internal laws, the duty to file and liability for failure to file are classified as insolvency law for purposes of private international law in the majority of Member States (Belgium, Bulgaria, France, Germany, Greece, Hungary, Ireland, the Netherlands, Portugal, Romania, and the UK). However, the legal situation is by no means consistent across the EU. In several Member States, the classification is controversial or uncertain (Latvia, Lithuania, Poland, Slovakia, Spain), and in some it has been suggested in the literature, or decided by the courts,[385] that liability of the directors should be governed by the *lex societatis* (Czech Republic, Denmark, Italy).

4. This is not simply a problem of the correct (autonomous) interpretation of the criteria laid down by European law to distinguish between the *lex concursus* and other legal areas, in particular the term 'closely connected actions'. Rather, the diverging views in the Member States seem to be a function of the inherent limitations of the European legal concepts, which are not sufficiently responsive to differences in the Member States' substantive laws. The operation of the Czech 'wrongful trading' mechanism illustrates this point. Pursuant to Czech law, a member or former member of the company's governing body is personally liable for the debts of the company if the member knew, or should have known, that the company was facing an imminent threat of bankruptcy and, in breach of the duty of care, failed to take all necessary steps to prevent the bankruptcy.[386] Given that not only the insolvency administrator, but also the company's creditors have standing to bring a lawsuit, and liability is determined outside of insolvency proceedings, it is convincing to conclude that the conditions for actions deriving directly from insolvency proceedings are not, or at least not always, satisfied. The Court of Justice has held that an action is 'closely connected' if it concerns 'the exclusive prerogative of the liquidator'[387] and was 'actually brought in the context of

[383] Section 362 Cyprus Companies Law, Cap. 113, which provides: 'Where a company incorporated outside the Republic or which has been carrying on business in the Republic, ceases to carry on business in the Republic, it may be wound up by the Court under the provisions of this Law, notwithstanding that it has been dissolved or otherwise ceases to exist as a company under or by virtue of the Laws of the country under which it was incorporated.'
[384] Case C-594/14 *Kornhaas*, n 353 above.
[385] Denmark, see n 364 above.
[386] Section 68 Czech Business Corporation Act. See the discussion in the Czech country report, Section 4.4.
[387] Case C-147/12, *ÖFAB v Frank Koot*, nyr, para 25. See also n 361 above.

insolvency proceedings'.[388] Thus, depending on the precise formulation of the Member States' internal laws, functionally equivalent mechanisms may fall either within or outside the scope of the Insolvency Regulation.

5. The legal situation is equally unclear with regard to the re-characterisation of shareholder loans as equity capital in the vicinity of insolvency. In the Member States where this problem has been regulated or discussed, we find a classification both as company law (Italy, Poland) and insolvency law (Germany since 2008), and in some Member States the classification is ambivalent (Austria, Croatia).

4.5 Distinction between the lex societatis and the international scope of non-contractual obligations

The law applicable to non-contractual obligations has been unified in the EU by the Rome II Regulation.[389] Company law may overlap in particular with two types of non-contractual obligations: tort law and *culpa in contrahendo*.[390] The connecting factor in tort law is the place where the damage occurs, thus leading to the application of the *lex damni*,[391] unless the parties involved in the tort have their habitual residence in the same country or the tort is 'manifestly more closely connected' with another country.[392] *Culpa in contrahendo* is defined as 'a non-contractual obligation arising out of dealings prior to the conclusion of a contract' and is governed by the law that applies, or would have applied, to the contract.[393] Alternatively, if that law cannot be determined, the connecting factors of tort law apply.[394]

The Rome II Regulation contains a provision to distinguish matters falling within the scope of the Regulation from issues to be governed by private international company law, in particular matters of internal organisation and liability of officers and members.[395] While the Rome II Regulation therefore confirms that certain questions of core company law, such as liability for breach of directors' duties, are governed by the *lex societatis*,[396] this is less clear where the legal mechanism is not directly connected to the company's internal governance structure or the position of the defendant as director or member. An example for the latter case is liability pursuant to principles of piercing the corporate veil.[397]

The situation is complicated by the use of broadly phrased, open-ended tort-law provisions in many Member States that are susceptible to being utilised in a variety of situations closely related to processes within corporations and affecting corporate stakeholders.[398] Of great practical relevance is, for example, the reliance on tort law to impose liability on directors for incorrect corporate disclosures.[399] In other situations, however, the dissemination of incorrect information to investors and shareholders may

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[388] Case C‑295/13 *H v H.K.*, nyr, paras 20, 25.
[389] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
[390] Rome II Regulation, art 12.
[391] Rome II Regulation, art 4(1).
[392] Art 4(2), (3).
[393] Art 12(1).
[394] Art 12(2).
[395] Art 1(2)(d).
[396] See, for example, GP Calliess, *Rome Regulations: Commentary on the European Rules on the Conflict of Laws* (Alphen aan den Rijn, Wolters Kluwer, 2011), Article 1 Rome II, para 51.
[397] Ibid, para 52 (arguing that piercing the corporate veil should be classified as 'a general problem of (tort) law' and should, therefore, be covered by Rome II).
[398] Such open-ended tort law provisions are particularly common in legal systems belonging to the French legal tradition, see Arts. 1382, 1383 of the French Civil Code.
[399] For an example from France, see Cass. com., 22 November 2005 (*Sté Eurodirect marketing c/ Pfeiffer*), *RTD com.* 2006, p. 445.

be held to constitute a breach of pre-contractual duties (*culpa in contrahendo*)[400] or of directors' duties under company law.[401] Tort law has also been used to hold directors liable for acts that harm creditors.[402] Further issues falling within the scope of typical corporate activities, but that may not be characterised as company law for purposes of private international law, include aspects of takeover law (going beyond Art. 4(2)(e) of the Takeover Directive, which points to the law of the Member State of the 'registered office') and the position of the statutory auditor.

Table 4.5 assess how company law and non-contractual obligations are distinguished for purposes of private international law, listing the ambivalent cases that have been discussed or litigated in the Member States.

4.5.1 Overview of national laws

Table 4.5. Lex societatis and non-contractual obligations

Country	Tort	Quasi-contract	Other cases
Austria	Capacity governed by *lex societatis* If the tortious act constitutes a breach of company law: governed by the *lex societatis*	Liability for culpa in contrahendo based on *lex loci delicti*	Incorrect disclosures to the capital markets: according to some commentators tort law
Belgium	If the tortious act constitutes a breach of company law or the articles of association or it is related to the bankruptcy of the company, it is governed by the *lex societatis* or the *lex concursus.* Example: the board of directors of a foreign company enters into a contractual relationship in Belgium, of which it is aware or cannot reasonably be considered not to be aware that the company will never be able to perform	-	-
Bulgaria	Certain liabilities may be classified as tort law with the consequence that the conflict rule for tort actions applies. Directors may be liable in tort for any losses caused by negligent	-	No special conflict-of-laws rule applicable to the liability of directors under securities regulation for mistakes in the prospectuses and other disclosures to the market

[400] For example in Germany: BGHZ 71, 284; 72, 382 (dealing with incorrect statements by directors and other others to induce investors to invest in a mutual fund or another investment vehicle). More generally see J Cartwright and M Hesselink (eds), *Precontractual Liability In European Private Law* (Cambridge: Cambridge University Press, 2008) [conclusions available on SSRN: http://ssrn.com/abstract=1309150].
[401] UK: *Peskin v Anderson* [2001] 1 BCLC 372.
[402] For example, liability pursuant to German Civil Code, s 823(2), was held to be triggered where the director violated various duties of a criminal and insolvency law nature, including, the failure to file for the opening of insolvency proceedings, see Z 126, 181.

	decisions that directly damaged third parties, including individual shareholders		
Croatia	Directors and shareholders of a foreign company can be held liable for tortious acts that occur in Croatia Piercing the corporate veil, although non-contractual in nature, is determined pursuant to the *lex societatis*	-	Prospectus liability rules apply if the public offering is undertaken in Croatia or the securities are admitted to trading on a regulated market in Croatia. The Croatian regulator is generally competent to supervise a takeover of a foreign offeree company if the offeree's shares are admitted to trading only on a regulated market in Croatia
Cyprus	Article 43 (liability for incorrect statements in the prospectus) and Article 169F (duties of directors in the case of a significant loss of capital of a public company) provide for the imposition of liability to pay compensation to aggrieved parties for any damage suffered as a result of the breach and in this respect, they concern tort law. However, given that this liability arises from corporate law (specifically, the aforementioned two relevant provisions), it is unlikely that it will be classified as tort law.		In relation to the duties of trust, care and diligence that directors owe to the company, these are not provided for in Cap.113 but have their roots in English common law; they are widely accepted to be part of corporate law.
Czech Republic	Anyone who is able to influence the company in any way (except members of the board of directors) shall be liable towards the creditors of the company for the payment of the debts, which cannot be partially or fully paid to them as a result of his or her influence; classified as a civil wrong (tort law) Reflective loss: where a shareholder or director	-	

	causes a loss to the company and at the same time to another member of the corporation in the value of his participation, the characterisation is uncertain		
Denmark	No clear demarcation; it is most likely that the act of a director, manager or shareholder will be caught by the *lex societatis* if it concerns the exercise of corporate powers or the preservation of the company's capital as these issues are regulated in the CA	No discussion in Denmark on the demarcation between company law and culpa in contrahendo for purposes of private international law	-
Estonia	In problematic cases, judges would probably apply the *lex fori* approach (ie apply the Estonian distinction between tort and company law, being regulated in different parts of law)	No information in private international law about classification of culpa in contrahendo	No separate conflict of laws norm under securities regulation for mistakes in disclosures
Finland	No case law	-	-
France	Liability of directors to third parties is characterised as company law, not tort law[403]	-	-
Germany	*Lex loci delicti* governs the capacity of the company to commit tortious acts *Lex loci delicti* according to the prevailing view generally not engaged if the act concerns the exercise of corporate powers or jeopardises the preservation of the company's capital (but some commentators argue that liability for failure to file for the opening of insolvency proceedings and for causing the insolvency of the company is tort law)	Directors of foreign companies are liable where they act on behalf of the company without making sufficiently clear that a legal person with limited liability should be contracting party (liability for creating the false legal appearance that a person with unlimited liability would be party to the contract, see Table 4.4) Claims of post-duty creditors that have suffered a loss because of violation of the duty to file: according to some commentators to be characterised as quasi-contract; no case	Incorrect disclosures to the capital markets: according to some commentators tort law; others propose an autonomous classification that relies on the market place where the securities are traded and that has been affected by the disclosure as relevant connecting factor Interpretation of 'seat' in the Takeover Directive (Art. 4(2)(e)) for purposes of determining the law applicable to internal matters of the target: registered office (as in the English version)

[403] Cass. civ. 1ère, 1st July 1997 (*Africatour*), Bulletin Joly des sociétés 1997, p. 1062, note M. Menjucq (the only decision of the French Cour de cassation on these matters; holding that Senegalese law applied to the liability of directors of a Sengalese company to third parties).

		law	according to the prevailing view in the literature; no case law
Greece	Shareholders are able to bring a direct claim against directors under tort law in certain cases even if the claim is for breach of directors' duties or provisions of the companies act; in this case, the claim would be dealt with under the *lex delicti* and not the *lex societatis.* The *lex societatis* applies to piercing the corporate veil	-	-
Hungary	Liability issues that are not specifically dealt with by the Hungarian legislator from a company law perspective are classified as tort law; but no case law dealing with the issue	-	-
Ireland	Civil liability for misstatements in the prospectus or practcies amounting to market abuse is governed by the *lex societatis* insofar as the obligation is laid down in Irish company law; if it is laid down in securities regulation the liability will be classified as tort law	General principles of contract law will apply to the formation and performance of contracts between shareholders or between the company and third parties Irish Courts tend to find in the pre-contract stage that a duty to negotiate a contract is unenforceable	Takeover Directive was implemented into Irish law by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006; this implementation does not specify how company and securities law are to be distinguished
Italy	Directors are liable in tort for any losses caused by negligent decisions that *directly* damage third parties and individual shareholders (art. 2395 Civil Code)	-	-
Latvia	Acts committed by directors or shareholders and harming creditors are classified as tort law in Latvia; thus the *lex loci damni* applies in these cases	-	No case law regarding the classification of misstatements to the market or breaches of other capital market laws
Lithuania	In problematic cases, judges would probably apply the *lex fori* approach (ie apply the	Lithuanian internal law establishes duties for the parties in pre-contractual relations to	No separate conflict of laws rules for breaches of securities regulation or mistakes in

	Lithuanian distinction between tort and company law accoridng to the regulation of the question in the internal law)	act in accordance with good faith, but it is not clear how these duties should be classified	disclosures to the market, no case law Not clear how 'seat' in the Takeover Directive is to be interpreted
Luxembourg	No case law, no discussion in the literature	No case law, no discussion in the literature	-
Malta	Very little guidance in the case law; where the claim appears to fall within the general scope of company law as defined by Maltese law, Maltese courts are likely to apply the *lex societatis*	No consideration of the classification of culpa in contrahendo in the case law	No consideration of the classification of prospectus liability and other breaches of securities regulation in the case law
Netherlands	Directors of foreign companies can be held liable for tortious acts under Dutch law (see Table 4.4) But unclear whether a situation where directors commit a tortious act in their capacity as director and are sued both for breach of directors' duties (Art. 2:9 CC) and deceit/wrongful act should be characterised as tort or company law[404]	Contract law: see the reference of the Hoge Raad mentioned before, dealing with the distinction between company and contract law for purposes of jurisdiction (but not applicable law)[405]	Unclear which conflict rules apply if misrepresentations in the annual accounts and reports cause damage to third parties (see also Table 4.1)
Poland	No case law; scholars suggest that the Rome II Regulation applies to any liability resulting from an act or omission of the company that constitutes a breach of	Culpa in contrahendo*:* no case law and limited scholarly authority (who characterise it as non-contractual obligation)	-

[404] Reference by the Hoge Raad to the CJEU, Case C-47/14 *Holterman Ferho Exploitatie BV V Spies von Büllesheim*, nyr. The Court was asked to interpret both Art. 5(1)(a) of Regulation No 44/2001, stipulating that a person may be sued 'in matters relating to a contract, in the courts for the place of performance of the obligation in question', and Art. 5(3), allowing persons to be sued 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'. As regards the first question, the Court held that 'the action brought by the company against its former manager on the basis of the alleged breach of his obligation to perform his duties properly under company law may legitimately be considered to come within the concept of "matters relating to contract" for the purposes of Article 5(1) of Regulation No 44/2001' (Case C-47/14, para. 54). As far as the second question was concerned, the Court pointed out that Art. 5(1)(a) and (3) were mutually exhaustive in liability actions: 'It is settled case-law that Article 5(3) of Regulation No 44/2001 applies to all actions which seek to establish the liability of a defendant and do not concern "matters relating to a contract" within the meaning of Article 5(1) of the regulation' (ibid., para. 68). Given that the Court interpreted 'matters relating to a contract' as comprising not only the employment or service contract concluded between the director and the company, but generally the legal relationship between them (ibid., para. 69), liability claims based on breach of duty were held not to fall within the scope of Art. 5(3) Regulation No 44/2001: Where 'a company sues its former manager on the basis of allegedly wrongful conduct, Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that that action is a matter relating to tort or delict where the conduct complained of may *not* be considered to be a breach of the manager's obligations under company law' (ibid., para. 79—emphasis added).
[405] Above note 404.

	the common tort law provisions applicable to all persons and entities (e.g. rules on unfair competition), while the *lex societatis* governs liability in connection with any tortious acts or omissions that constitute a breach of company law Shareholders' liability for the company's obligations (veil piercing) falls within the scope of the *lex societatis* (Art. 17(3) PIL Act)		
Portugal	The various provisions of the Portuguese CSC establishing liability of directors/managers to the company itself (Art. 72), the company's creditors (Art. 78), individual shareholders, or even third parties (Art. 79) all fall within the scope of the *lex societatis.*	-	Liability of shareholders for exercising undue influence over the company's organs (Art. 83(4) CSC): probably *lex societatis*, but some authors suggest a classification as tort law Art. 84 CSC (liability of sole owner for the debts of the company in bankruptcy) and other cases of veil piercing: probably *lex societatis*
Romania	Tort law: liability of directors who violate their duties in regard to the statement they must fill out verifying the legal requirements of their appointment (Art. 36 (2) let. f LSC) (because in this case the director does not act in the capacity of a corporate body) Liability of the company and its bodies to third parties: Art. 2581 lit. f NCC states that such liability is governed by the law applicable to the legal person (includes piercing the veil)	-	In general the law at the place of the regulated market (*lex mercatus*) will apply to breaches of securities regulation
Slovakia	*Lex societatis* if the director breaches duties that are stipulated in the Commercial Code Breach of duties prescribed under other laws: *lex concursus* or *lex loci delict*	Scholars discuss whether culpa in contrahendo shall be classified as a contractual or non-contractual liability, no case law	-

Slovenia	The companies act provides for liability of directors both to the company for breach of duty and to shareholders for a loss other than that suffered as a result of the damage caused to the company; both are classified as *lex societatis*	No available case law dealing with culpa in contrahendo in relation to certain corporate law issues	-
Spain	Veil piercing: law of the country where the company is active Directors' liability towards third parties: tort law	When a foreign company acts as if it was a 'national' company: legal consequences classified as non-contractual and thus governed by the law of the market where the company is active	The law of the country where the company's securities are traded (*lex mercatus*) applies in relation to issues such as the prospectus and transparency regime or market abuse and takeover bid rules
Sweden	Demarcation between company law and tort law for purposes of private international law has not been clarified in Swedish law; no case law by upper courts addressing this issue	-	There are no special rules in Sweden applicable in the context of takeovers (going beyond Article 4(2)(e) of the Takeovers Directive, which refers to the law of the Member State of the 'registered office')
United Kingdom	False statements in prospectuses: characterised as tort law, hence Rome II applies	Auditor liability: excluded from Rome II (Art. 1(2)(d)), but governed by Rome I in the case of a contractual claim of the company against its auditors Claim in tort against the auditor: usually governed by the law applicable to the contract to carry out the auditing (law with the closest connection pursuant to s. 12 of the Private International Law (Miscellaneous Provisions) Act 1995 in the case of a claim by the company or a member, or Art. 4(3) Rome II in the case of some other claimant)[406]	Takeovers: chapter 1 of Part 28 CA 2006, dealing with the Takeover Panel, extends to foreign companies with securities admitted to trading in the UK (s. 943(6)); chapters 2 and 3 on impediments to takeovers and squeeze-out and sell-out are limited to cases where the offeree company is incorporated in the UK (s. 991(1)); (hence, corresponding to Art. 4 Takeover Directive)

[406] Johnson v Coventry Churchill International [1992] 3 All ER 14.

4.5.2 Discussion

1. The boundary region between the *lex societatis* and the *lex loci delicti* is probably the least well established area of delimitation. In most Member States, very little information is available on the criteria that may be employed to determine whether an act that is related to the operations of the company, but that goes beyond the internal relationships of the corporate organs among each other, falls within the scope of the *lex societatis* or the *lex loci delicti*. The problem is further complicated by the fact that – as opposed to the demarcation of the *lex societatis* and *lex concursus* – little guidance in the form of case law by the Court of Justice is available, and the internal law of the Member States that is of relevance in this context straddles various legal areas, ranging from company law to tort, quasi-contract, and securities regulation. It is therefore not surprising that the Member States where these issues are discussed in any detail do not agree on a common approach to determining the demarcation between company law and non-contractual obligations.

2. The question becomes relevant in particular in the following cases: (1) liability of directors for a tortious act that constitutes simultaneously a breach of directors' duties or other provisions of corporate law, in particular if the act causes a loss directly to shareholders, creditors, or other third parties; (2) liability of shareholders for the debts of the company (piercing the corporate veil); and (3) liability of either shareholders or directors for breach of capital markets laws, for example misstatements in an offering prospectus or breaches of market abuse law.

3. In order to distinguish between acts committed by a director that lead to liability under company law and acts that are governed by tort law, different suggestions have been advanced in the Member States. Probably the majority of Member States consider an act to be part of the *lex societatis* (although case law seems to be rare) if it constitutes a breach of directors' duties, company law or the articles of association (Austria, Belgium, and Poland), or more generally when it concerns matters regulated in the companies legislation, as opposed to other areas of substantive law (Estonia, Lithuania, Malta, Portugal, Slovakia, as well as probably Cyprus and Slovenia). This approach, therefore, is based on a demarcation for purposes of private international law that follows the division that the legislator has drawn in the Member State's internal law, which necessarily varies from state to state. In other countries, it is proposed that the *lex societatis* governs a situation if the act concerns the exercise of corporate power, the preservation of the company's assets, or acting in a corporate capacity (Denmark, Germany, and Romania). A third approach distinguishes between decisions that directly damage third parties (including the shareholders and creditors), in which case the *lex loci delicti* applies, and decisions that cause a loss to the company and only indirectly a (reflective) loss to shareholders or other parties, in which case the *lex societatis* applies (Bulgaria, Italy, Spain). Finally, in some Member States the legal situation is simply unclear (Czech Republic, Finland, France, Luxembourg, Netherlands,[407] and Sweden).[408]

4. Piercing the corporate veil is classified as company law in the majority of Member States (Bulgaria, Estonia, Croatia, Germany, Greece, Italy, Poland, Portugal, Romania and the UK). However, this view is not universal in the EU. For example, in the Czech Republic, the liability of persons who use their influence over the company in a way that results in damage to the company's creditors,[409] a legal mechanism comparable to common law veil piercing, is seen as falling within the scope of the *lex loci delicti*.[410] In the Netherlands, if the controlling shareholder influences the management of the subsidiary,

[407] See already the discussion notes 337-339 above.
[408] It should be emphasised, however, that the legal situation does not seem to be well in any of the Member States that have been analysed.
[409] Czech Business Corporations Act, s. 71(3).
[410] Czech country report, Section 4.5.

it is required to take the interests of the creditors of the controlled company into account. Where the shareholder knows or should have known that the third party acted upon the behaviour of the controlling shareholder, veil piercing is based on the rules of tort law.[411] In Spain, piercing the corporate veil is governed by the law of the country where the company is active, thus potentially leading to a wide international application of the Spanish liability provisions.[412]

5. Finally, liability for breach of capital markets laws is generally considered not to be part of the *lex societatis*, although we can again observe considerable uncertainty in some Member States (see, for example, Cyprus). The majority of Member States classify liability for breach of securities regulation as tort law, while others emphasise that the classification depends on the character of the respective liability provision as part of internal company law or securities regulation (Ireland), and some commentators propose an autonomous classification that relies on the market place where the securities are traded and that has been affected by the disclosure as the relevant connecting factor.[413]

6. In a decision dealing with international jurisdiction pursuant to the Brussels Regulation, *Kolassa v Barclays Bank*,[414] the Court of Justice has made some important observations that are of relevance to the present context. The Court held that prospectus liability claims, as well as damages claims for 'breaches of other legal information obligations towards investors'[415] concern 'matters relating to tort, delict or quasi-delict'.[416] While the connecting factor for jurisdiction ('place where the harmful event occurred'[417]) is different from the connecting factor to determine the applicable law pursuant to the Rome II Regulation ('the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred', i.e. leading to an application of the *lex loci damni*[418]), a determination of the applicable law that is informed by the interpretation of the Court would be in line with the majority opinion in the Member States, as discussed above.

7. Other issues related to non-contractual obligations receive even less attention in the Member States. The concept of culpa in contrahendo or breach of quasi-contractual duties is known most Member States, but it has been used in the context of company law only in a few countries, usually to hold persons liable that create the false impression that foreign company is trading as a domestic undertaking or that a person without limited liability shall be party to the contract (Germany, Spain). In these countries, it has been proposed that the responsibility of the person creating the false impression should be governed by the law at the place where the impression was created and had an effect on third parties.[419]

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411 See for an analysis K Vandekerckhove, *Piercing the Corporate Veil* (Kluwer, Alphen aan den Rijn, 2007) 33-38.
412 Spanish country report, Section 4.5.
413 H Eidenmüller, *Ausländische Kapitalgesellschaften im deutschen Recht* (Munich: Beck 2004), § 4, para 36; S Grundmann, 'Deutsches Anlegerschutzrecht in internationalen Sachverhalten' (1990) 54 RabelsZ 283-322; KJ Hopt, *Die Verantwortlichkeit der Banken bei Emissionen* (Munich: Beck 1991), para 238.
414 Case C-375/13, nyr.
415 Ibid. para 44.
416 Brussels Regulation, Art. 5(3) (now Art. 7(2) Brussels Regulation Recast).
417 The Court of Justice interprets the 'place where the harmful event occurred' as covering 'both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places', Case C-360/12 *Coty Germany v First Note Perfumes*, nyr, para 46. In the case of the dissemination of incorrect information to the market, the harmful event takes place not necessarily where the investors who has suffered a loss is domiciled, but where 'the decisions regarding the arrangements for the investments … and the contents of the relevant prospectuses were taken … or [where the incorrect] prospectuses were originally drafted and distributed', *Kolassa*, n 414 above, para 53.
418 Rome II Regulation, Art. 4(1).
419 See already our discussion in Section 4.3.2, para 9.

4.6 Re-classification of company law

'Re-classification' of company law refers to the reformulation or restructuring of a legal mechanism of substantive company law so as to bring it within the ambit of a different connecting factor, which will typically result in the application of the *lex fori*, without changing the functional character of the mechanism. We distinguish between e*xpress legislative re-classification* and *re-classification for purposes of private international law only*. Under 'express legislative re-classification' we understand cases where a policy-maker replaces an existing legal instrument with another, functionally identical or similar instrument, the old instrument having been classified as company law for purposes of private international law and the new instrument not being so classified, or *vice versa*. For purposes of this study, it is particularly relevant to explore whether such re-classification has taken place after, and hence potentially as a reaction to, the decisions of the Court of Justice in the cases *Centros* and *Überseering*.

The second type, re-classification for purposes of private international law, refers to the different classification of the legal mechanism without changing the structure of the rule or its location in the Member State's internal law. Thus, here the different operation of the mechanism is a function of changes in its *interpretation*, possibly by making use of the well-accepted principle in private international law that classification does not need to follow the categories of the substantive (internal) law.[420] Again, we are primarily interested in re-classifications that have occurred as a reaction to the right of establishment jurisprudence of the Court of Justice and that seek to provide for the continued application of parts of the *lex fori* to foreign-incorporated companies.

In this context, it is useful to analyse not only how boundaries between the *lex societatis* and other legal areas have shifted, but more generally to what extent the use of functional substitutes alters the rules to which companies are effectively subject, irrespective of the determination of the *lex societatis*. Functional substitutes are mechanisms that may be drafted as part of company law in one legal system and in another as part of, say, insolvency law or tort law, but that perform the same function in protecting the relevant interests.[421] It is important to understand the substitutability of legal mechanisms in harmonising aspects of private international law, since the harmonised connecting factor(s) will only be effective if they do not lead to dissociation of functionally complementary institutions.[422]

[420] See text to notes 283-285 above.

[421] For example, the problem of ensuring that directors (and shareholders) do not engage in inefficient risk-taking in the vicinity of insolvency may be addressed through company law instruments, such as the requirement to recapitalise or liquidate the company if the company's assets fall below a certain threshold (and ensuing liability if the directors do not comply with this duty), or through requiring the directors to act in the interest of creditors, rather than shareholders, in the vicinity of insolvency. Alternatively, the same objective may be achieved by relying on insolvency law strategies, such as wrongful trading or the duty to file for the opening of insolvency proceedings. See Gerner-Beuerle, Paech, and Schuster, n 286 above, pp. 235-237, 240-242.

[422] On this problem, see text to notes 285-287 above.

4.6.1 Overview of national laws

Table 4.6. Re-classification

Country	Express legislative re-classification after Centros	Re-classification for private international law purposes after Centros	Functional substitutes
Austria	No reclassification	No reclassification	-
Belgium	- Reclassification not necessary because of continued application of the real seat theory - The Belgian Centre for Company Law advocates the abolishment of the real seat theory and suggests that (i) the liability of the board for serious mistake which resulted in insolvency and (ii) the liability of the founders for the insufficient financing of the company should be transferred to insolvency legislation in order to be applicable in the insolvency of foreign companies operating in Belgium	See left	-
Bulgaria	No reclassification	No reclassification	-
Croatia	No reclassification	No reclassification	-
Cyprus	No reclassification	It may be assumed that those provisions falling under Part V, Cap.113 titled 'Winding Up' will be interpreted as insolvency law for PIL purposes	-
Czech Republic	No reclassification	No reclassification	-
Denmark	No reclassification	No reclassification	-
Estonia	No reclassification	No, but distinction between company and insolvency law according to EU law requirements mentioned	-
Finland	No reclassification	No reclassification	-
France	No reclassification	No reclassification	-
Germany	- Duty to file for the opening of insolvency proceedings and rules on equity-replacing shareholder loans moved from the Stock	The literature suggests in different cases a characterisation as tort or insolvency law to apply German creditor protection rules to foreign	The mechanisms in the left column are functionally

	Corporation Act and the Limited Liability Companies Act to the Insolvency Code in 2008[423] - In addition, provisions imposing personal liability on directors who make payments in the vicinity of insolvency in the companies acts were changed to 'make it easier to classify [the rules] as insolvency law and apply [them] pursuant to Articles 3(1), 4(1) and (2), sentence 1 of the EU Insolvency Regulation'[424]	companies, see Tables 4.5, 4.6	substitutes of e.g. the French action en responsabilité pour insufissance d'actif or English wrongful trading
Greece	No reclassification	No reclassification	-
Hungary	See Table 2 above: some legal changes after *Cartesio*, but no reclassification for present purposes	No reclassification	-
Ireland	No reclassification	No reclassification	-
Italy	No reclassification	No reclassification	Directors' criminal liability for actions undertaken in the vicinity of insolvency (i.e. *bancarotta semplice* and *bancarotta fraudolenta*).
Latvia	No reclassification	No reclassification	-
Lithuania	No – but report mentions that requirement to have at least one Lithuanian representative was dropped for EU/EEA companies in 2009	No reclassification	-
Luxembourg	No reclassification	No reclassification	-
Malta	No reclassification	No reclassification	-
Netherlands	- International application of the Act on foreign business corporations limited after *Inspire Art* (see Table 3.2) - A draft law of 2014 proposes to move the rules	No reclassification	-

[423] See Bundestags-Drucksache 16/6140, p. 55, for the motivation of the legislator (pointing out that it was important to extend the relevant provisions to 'foreign companies that have their real seat and operations in Germany' in order to avoid 'regulatory gaps').
[424] Bundestags-Drucksache 16/6140, p. 47 (also pointing out the wide international scope of the rules was necessary to compensate for 'partly low formation requirements of foreign companies that are not subject to the strict insolvency law of their home state jurisdiction if they operate in Germany').

	on liability of directors for the insolvency of the company from Book 2 CC (company law) to insolvency law		
Poland	No express reclassification after *Centros* (there are however certain questions integral to company law that are treated in other areas of law – typically insolvency law rules – but these rules have not been changed after Centros)	No express reclassification after *Centros.*	Directors' duties to file for insolvency and liability for not having filed timely: insolvency law.
Portugal	No reclassification	No reclassification	-
Romania	No reclassification	No reclassification	Directors' duties and issues related to the representation of the company are informed by general principles of civil and contract law regarding the mandate (Arts. 2013-2038 NCC) or the company contract (Arts. 1913-1918 NCC).
Slovakia	No reclassification	No reclassification	-
Slovenia	No reclassification	No reclassification	-
Spain	No reclassification	No reclassification	-
Sweden	No reclassification	No reclassification	-
United Kingdom	No reclassification	No reclassification, courts follow the case law of the Court of Justice and are likely to adopt similar approaches, for example to the definition of claims deriving from insolvency proceedings, where the Insolvency Regulation does not apply	-

4.6.2 Discussion

1. Re-classification of legal strategies that were initially classified as company law in response to the case law of the Court of Justice could only be observed in one country: Germany.[425] A prime example of express legislative re-classification in this jurisdiction is the liability for failure to file for the opening of insolvency proceedings, which used to be regulated in the German companies legislation and was moved to the Insolvency Code in 2008.[426] The legislator was explicit in acknowledging that the changes served the purpose of ensuring that the *lex fori* continued to apply to companies whose centre of main interest was located in Germany.[427] Similarly, German law characterised shareholder loans under certain conditions as equity capital, with the consequence that repayment of the loan was subject to the restrictions of capital maintenance law.[428] The law now provides for an insolvency solution: all loans advanced by a shareholder to the company, not just equity replacement loans, are subordinated to the claims of other creditors.[429]

2. Given that such express legislative re-classification (or indeed implicit re-classification for purposes of private international law) does not seem to have occurred in any other jurisdiction, it can be concluded that the *Centros*-line of case law of the Court of Justice did not trigger any widespread 'flight' from the *lex societatis* to other areas of conflict of laws. Even in Germany, the legislator's re-classification activities concern individual legal strategies that had already been at the boundary of the *lex societatis* and the *lex concursus*. There was no comprehensive attempt to bring areas of company law within the domain of insolvency law in order to take advantage of the real-seat-like connecting factor under the Insolvency Regulation. Furthermore, the legal reforms in Germany are consistent with generally accepted principles informing the determination of the *lex concursus* and the delimitation of the two legal areas. Therefore, express legislative or implicit re-classification does not seem to give rise to major concerns.

[425] A draft law is under consideration in the Netherlands that would move the rules of liability of directors for the insolvency of the company, which are currently in Book 2 Dutch Civil Code (company law) to insolvency law, see Dutch country report, Section 4.6. However, it is still unclear whether the proposal will eventually result in new legislation. In addition, arguably, the law would simply clarify the legal situation and provide for a solution in line with that in the majority of other Member States, see Section 4.4.2 above.
[426] The duty to file is now laid down in s 15a of the Insolvency Code, inserted by *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* of 23 October 2008 (*MoMiG*), BGBl. I, p. 2026. Liability arises under s 15a in conjunction with the Civil Code, s 823(2), see Z 126, 181.
[427] Bundestags-Drucksache 16/6140, p. 55.
[428] Leading case was Z 90, 381 (BuM).
[429] Insolvency Code, s 39(1) No 5, as amended by MoMiG (n 426 above).

5. Mechanisms to protect public interests (*ordre public*)

Member States pursue different strategies to protect the 'public interest' – areas of great importance the national economy (for example, the interests of creditors, minority shareholders, consumers, employees, or the integrity of commerce and trade) – against the activities of foreign companies on their territory. They may invoke the concept of *ordre public*,[430] which is recognised both at the European level [431] and the national level [432] as a mechanism that allows countries to disregard the otherwise applicable *lex causae*, either partially or completely, because the *effect* of the operation of such foreign law in the concrete case[433] cannot be reconciled with fundamental principles of domestic law, notably human rights or 'some prevalent conception of good morals'.[434] This is the traditional (negative) function of the *ordre public*, which is commonly more relevant in morally sensitive areas such as family law, rather than in commercial law.

More broadly understood, and more pertinent to the problems analysed here, *ordre public* is sometimes used in a positive way to justify the application of a domestic rule that is ascribed a certain public interest function.[435] In this case, it is less evident that fundamental principles of the forum are engaged and are in need of protection against the effects of foreign law. Rather, the application of the domestic rule is a function of a policy decision by the forum to recognise an exception to the normal operation of the relevant rules of the conflict of laws when a case falls within the scope of the respective provision. Such rules are typically referred to as 'overriding mandatory provisions' [436] (French: '*Lois d'application immédiate*' or '*lois de police*'; German: '*Eingriffsnormen*'). They can be distinguished from internal mandatory norms that cannot be derogated from by contract in that they incorporate an implicit or express rule of private international law determining the international reach of the substantive content of the provision.[437] Importantly, given that they seek to achieve specific, clearly defined policy objectives, they are often construed less restrictively than the general (negative) *ordre public*. [438]

The disapplication of foreign law on *ordre public* grounds creates obvious problems for legal certainty.[439] Table 5 provides an overview of the use by Member States of the concept of *ordre public*, both in its negative and positive function, to disapply a foreign *lex societatis* under certain circumstances. Where this is the case, two related questions arise.

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[430] Typically referred to as public policy in English legal terminology.
[431] See, e.g., Art 26 Insolvency Regulation; Art 21 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I); Art 26 Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II).
[432] See, e.g., for Germany: Art 6 Introductory Act to the Civil Code.
[433] In exceptional cases, the law as such may be held to be contrary to fundamental principles of the forum, see, for example, Oppenheimer v Cattermole [1976] A.C. 249.
[434] *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19, para 17 (quoting *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202).
[435] The positive function of the *ordre public* is notably accepted by jurisdictions in the French and German legal tradition, see e.g. Art 6 French Civil Code, but less so by common law jurisdictions.
[436] See, for example, Art 9 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).
[437] This distinction is also reflected in the formulation of unified conflicts rules at the European level, see the Rome I Regulation, recital 37.
[438] In a way, the Treaty provides an alternative to Member States acting unilaterally by invoking *ordre public* – namely harmonisation; see Art 50(2)(g) TFEU; see also W Schön, 'The Mobility of Companies in Europe and the Organizational Freedom of Company Founders' (2006) 3 *European Company and Financial Law Review* 122, 128.
[439] See e.g. A Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 *Journal of Private International Law* 201.

First, it is necessary to determine which type of connection with the territory of the *lex fori* triggers the application of national rules or the disapplication of foreign rules on *ordre public* grounds. Second, the application of the host state's law to foreign companies potentially constitutes a restriction of the right of establishment, which accordingly needs to be justified. If the state relies on the negative *ordre public*, the reasons given for invoking it will often be congruent with the grounds for justification under Article 52 TFEU, although this may differ depending on how extensively Member States interpret *ordre public*. Justification is generally more problematic when *ordre public* is invoked in its positive function. Provided that the relevant provisions of the host state apply to all companies operating in that state's territory, the extension of the *lex fori* to foreign companies can in principle be justified by imperative requirements in the public interest outside the scope of Article 52 TFEU. However, the test, which follows the criteria set out by the Court of Justice in its *Gebhard* decision, is relatively demanding.[440] For example, if a Member State was to advance considerations of creditor protection, the state had to overcome a high argumentative threshold. Generally, the Court's response that potential creditors were 'put on sufficient notice'[441] would leave little scope for Member States to restrict the activities of foreign companies.

This section also explores whether such arguments have been advanced in the Member States to justify overriding mandatory provisions of the forum's company law (or another legal area) and whether they are considered to withstand scrutiny under the Treaty.

[440] Case C-55/94, *Reinhard Gebhard contro Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, according to which national measures restricting EU freedoms must 'fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it' (para 37).
[441] See, for example, *Inspire Art*, para 135.

5.1 Overview of national laws

Table 5. Ordre public

Country	Definition of the negative ordre public	Examples in company law	Positive ordre public
Austria	s 6 of the Austrian PIL Act: a 'provision of foreign law shall not be applied where its application would lead to a result which is incompatible with the fundamental principles of the Austrian legal order. Where necessary, the relevant provision of Austrian law shall be applied'	According to Austrian case law, disapplication of foreign law on *ordre public* grounds would only occur in exceptional circumstances. No specific case law regarding company law.	- Some commentators argue that Austrian employee participation rules should be regarded as overriding mandatory provisions (*Eingriffsnormen*), but the prevailing view is to apply the *lex societatis* even for companies having their real seat in Austria (i.e. companies incorporated in an EU/EEA Member State - Some commentators also suggest that rules on capital maintenance and re-characterisation of shareholder loans are to be viewed as overriding mandatory provisions
Belgium	Principles that are essential for the moral, political, and economic order of Belgium[442]	Public order must be strictly interpreted; consequently, it is unlikely that the ordre public will be applied in company law, given the far-reaching liberalisation of company law nowadays[443]	- Some rules regulating the trade register or specific activities such as insurance are qualified as lois d'application immédiat (voorrangsregels) - General regulation in Art. 20 PIL Code
Bulgaria	According to article 45 PILC a provision of a foreign law shall not apply if the consequences of such application are manifestly incompatible with Bulgarian public policy. This shall be assessed by way of taking into account the extent of connection of the relationship with the Bulgarian legal order and the significance of the consequences of the application of the foreign law.	*Ordre public* has not been invoked in practice in the area of company law.	- In the realm of company law, Bulgarian overriding mandatory provisions are quite rare. Competition law, takeover and IPO regulation apply also to foreign companies, and legal scholars consider these rules as 'overriding mandatory provisions'. - Application of a *third country's* positive ordre public: Pursuant to article 46(2) PILC the court may have regard to the mandatory rules of another state with which the relationship has a close connection if the said rules, according to

[442] Cass. 18 June 2007, *Arr.Cass.* 2007, 1359, *Tijdschrift@ipr.be* 2007/2, 33.
[443] For an old case holding that the prohibition of the establishment of one-member limited liability companies was part of the ordre public, see Cass. 5 January 1911, *Pas.* 1911, I, 68.

			the law of the state that created them, must be applied notwithstanding what law has been determined as applicable by a conflict-of-laws rule of the Code.
Croatia	According to the Private International Law Act, foreign law shall not be applied if doing so would violate 'the basic principles of the social organisation laid down by the Constitution of the Republic of Croatia' (Art. 4).	Croatian courts have not yet refused to apply foreign company law on the basis of a violation of public policy under Article 4	-
Cyprus	No explicit statutory rule. According to case law: 'The doctrine of "public policy" should be applied only in clear cases, in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds'.[444]	The doctrine has not been applied in relation to companies or in the context of private international law for companies.	The legislative restrictions upon the acquiring of immovable property in Cyprus by foreigners would be considered as an internationally mandatory rule.
Czech Republic	Provisions of a foreign law, which are to be applied pursuant to the provisions of the Private International Law Act, shall not be applied if the effects of such application are manifestly incompatible with the public policy (*ordre public*) (Section 4 PIL Act).	No case law related to company law issues.	Overriding mandatory provisions of Czech law always apply, before the determination of the applicable law (Section 3 PIL Act). No applications so far to foreign companies.
Denmark	Not codified; literature: if the application of the *lex causae* would lead to a result which is obviously incompatible with the fundamental principles of Danish law	- No application of *ordre public*, but of the related 'doctrine of circumvention' (*fraude à la loi*) in several company law cases, notably *Centros*[445] - Based on the *Centros* decision of the Court of Justice, the literature argues that the application of the 'doctrine of circumvention' must be interpreted so as to respect EU law	No discussion of the possible positive function of *ordre public* in the literature nor any examples in case law.
Estonia	'Foreign law shall not apply if the result of such application would be in obvious conflict with the essential principles of	One case mentioned (on splitting up of companies)	Estonian Law is applied if the result of the application of foreign law 'would be in obvious conflict with the essential

[444] Glamor Development Ltd v Christodoulos Christodoulou [1984] 1 CLR 444.
[445] UfR2000.1079H.

	Estonian law (public order). In such an event Estonian law applies.'		principles of Estonian law (public order)'.
Finland	The concept of *ordre public* is recognised in principle, but no application / no case law in relation to companies.	No case law	No case law
France	No legal definition; *ordre public* is understood as an exceptional mechanism allowing the exclusion of a foreign law that contains provisions considered as unacceptable by French courts	The (negative) *ordre public* has never been used in practice in order not to apply parts of the *lex causae* governing companies incorporated in other Member States and pursuing business within the territory of France; the *Gebbard* criteria have not been discussed in the academic literature or by the courts in the context of company law	Particularly some laws in the social area are qualified as *lois d'application immédiate* (also called lois de police) and applied by French courts to companies incorporated in other countries French rules about worker representation applied to foreign companies with an establishment (not necessarily the real seat) with the minimum number of workers pursuant to the French overriding provisions[446] Director of a Swiss company who was working usually in France was required to be affiliated with the French social security system; connecting factor was not the real seat of the Swiss company but the place where the director usually exercised his job[447] Courts make no difference between EU and non-EU companies
Germany	Art. 6 EGBGB: a 'provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law'	No case law; the predominant view in the literature suggests a restricted use of the ordre public: there have to be imperative reasons of the public interest given that the application of the *lex fori* restricts a company's freedom of establishment	Company name: German courts take the view that the ordre public requires that the name of the company indicates its legal form, that there is no confusion with the name of other companies and no deception of the public[448] Some scholars argue that the rules on employee co-determination are overriding

[446] Cons. Etat, 23 June 1973, Syndicat général du personnel de la Compagnie des Wagons-lits, Rev. crit. DIP 1974, p. 344, concl. N. Questiaux. See also, Ph. Francescakis, 'Lois d'application immédiate et droit du travail', Rev. crit. DIP 1974, p. 273. Cass. soc., 19 March 1986, Rev. crit. DIP 1987, p. 554 ; 3 March 1988, JDI 1989, p. 78, note M.-A. Moreau-Bourlès ; Rev. crit. DIP 1989, p. 63, note G. Lyon-Caen.
[447] Cass. soc., 18 March 1999, CPAM Haute-Savoie et autre c/ SA Unic Mann et autres, Bull. Joly Sociétés 1999, p. 1205, note M. Menjucq.
[448] BayObLG NJW 1986, 3029; OLG München NZG 2007, 824; OLG Frankfurt, FGPrax 2088, 165.

			mandatory provisions (*Eingriffsnormen*); no case law - Some scholars also suggest that rules on legal capital, veil piercing and the business address are overriding mandatory provisions
Greece	Provisions of foreign law do not apply if its application conflicts with good morals (boni mores) and public order (ordre public).	No case law regarding company law rules.	Provision on negative ordre public may result in a positive dimension of the *ordre public*, as far as Greek law would be used to fill gaps resulting from the disapplication of foreign law.
Hungary	The application of foreign law shall be set aside when it would be incompatible with Hungarian *ordre public* (Nmjt s 7(1)). However, *ordre public* is not a well-defined term in Hungarian law and courts use heterogeneous criteria.	No application in company law matters.	The concept of 'overriding mandatory provisions' is not used by courts regarding company law matters (but is accepted in theory).
Ireland	Ireland's approach to *ordre public* is based on English law (but see subsequent column); see also UK, below	No explicit case law. The Irish Constitution could matter, as companies can have constitutional rights in Ireland, and enjoy, amongst other rights, protections for private property; in principle, then, application of the *lex societatis* could violate the constitutional rights of companies in a manner that violated Irish public policy, thus causing its exclusion.	No, public policy is not given a positive function to apply particular domestic rules rather than excluding foreign rules.
Italy	Italian courts must not apply foreign rules if their effects infringe a general principle of 'public order'. In this case, domestic courts should apply either (a) rules of a different jurisdictions, selected by other connecting factors that Italian private international law may provide for the same matter or (b) Italian law. (Article 16 Italian Private International Law Act).	No reported case law.	Italian private international law 'respects' the unity of the law of the country of incorporation and the application of overriding mandatory provisions is rare. Examples are: - duty to register in the Italian register for foreign companies having their administrative seat or its main object in Italy - disclosure requirements for secondary seats of foreign companies - takeover and IPO regulation

Latvia	The law of a foreign state is not applicable in Latvia if it is in conflict with the public order or moral ideals of Latvia, or mandatory or prohibitive norms of Latvian law.	Requirements as to the trading names of companies.	Application of a domestic rule that is ascribed a certain public interest function ('overriding mandatory provision') Applied in a case concerning the intersection between company law and labour law rules.[449]
Lithuania	'provisions of foreign law shall not be applied where their application would be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply'	No case law available	Yes, for mandatory rules considering the 'nature of these provisions, their purpose and the consequences of application or non-application thereof'; eg, applied in the area of employment law
Luxembourg	Borrowed from French law (see above)	No case law applying the *ordre public* to company law matters	The Luxembourg court of appeal has held that a statute of 18 May 1979 on employee representation[450] was a '*loi de police*' within the meaning of Art. 7 Rome Convention.[451] However, the case was not concerned with the issue of whether the relevant company should have established employee representatives, but determining the law governing the employment contract. The court suggested in obiter that it would apply the 1979 Statute to branches located in Luxembourg.
Malta	No statutory rules, but the concept of *ordre public* is generally recognised.	No case law concerning the invocation of the concept of *ordre public* in company law matters.	No case law.
Netherlands	*Ordre public* in company law: Art. 2:20 CC ('Where the activities of a legal person are contrary to public order, the District Court shall prohibit and dissolve that legal person upon the request of the Public Prosecution	On the basis of the *ordre public* of Art. 2:20, foreign companies can be prohibited to operate in the NL and assets located in the NL liquidated (Arts. 10:122, 123 CC) - Considered not to be in conflict with Art.	Generally not used to apply a domestic rule that is ascribed a certain public interest function Main exceptions: Act on foreign law business corporations; rules on employees'

[449] See the CJEU decision in the relevant case, C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.
[450] Loi du 18 mai 1979 portant réforme des délégations du personnel.
[451] Court of appeal of Luxembourg, 13 January 2010 (*Koelzsch*), *Pasicrise Luxembourgeoise* 35, p. 63. The case eventually resulted in a judgment of the European Court of Justice (Case C-29/10).

	Service'), but no clear definition of *ordre public*.	24(2) Brussels I-bis	councils located in the NL
Poland	General 'negative' *ordre public* clause: 'A foreign law shall not be applied, if its application would lead to results that are incompatible with the fundamental principles of the legal system of the Republic of Poland' (article 7 PIL Act).	No case law on company law matters.	Overriding mandatory provisions are generally applicable 'if it clearly results from their content or purpose that they should be applied to a given legal relationship irrespective of the law otherwise applicable' (art. 8(1) PIL Act); overriding mandatory provisions of third states could also be applied if there is a 'close connection' (art. 8(2) PIL Act). There is no case law and this topic is still debated. Examples suggested in the literature: directors' disqualification and notification duties of a dominant company towards the subsidiary
Portugal	General 'negative' *ordre public* clause: foreign law is not applicable whenever such application constitutes an offence to the fundamental principles of public policy of the Portuguese State (article 22 Civil Code). Applicable rule: in the first place should be found within the legal system deemed applicable according to choice of law rules, if not feasible Portuguese law applies (art. 22(2) Civil Code).	No case law in the field of company law.	'Norms of immediate application' (i.e.: overriding mandatory provisions). No case law in the field of company law.
Romania	*Ordre public* can lead to the disapplication of the foreign law normally designated, when this would manifestly contravene to fundamental norms and values of the forum legal order and would generate results incompatible with the fundamental principles of Romanian law or regarding the protection of human rights.	This might be the case when the proprietary rights of the shareholders of a foreign company with assets in Romania have been severely affected by unjust or discriminatory foreign nationalisations or expropriations.	No case law.
Slovakia	Principles of the social and state establishment of the Slovak Republic and	Despite its broad formulation, academics claim that *ordre public* should be	No case law.

	its legal system. These principles will mainly stem from the Constitution of the Slovak Republic.	interpreted and applied narrowly; no clear application in company law	
Slovenia	*Ordre public* does not include all mandatory provisions of domestic law, but only those imperative legal norms and moral rules, the violation of which would jeopardise the legal and moral integrity of the Slovene legal order.	As the Supreme Court held, it should be used only as a last resort, when its non-application would lead to unsustainable consequences for the domestic legal system. No existing court decision has used the (negative) *ordre public.*	No.
Spain	Yes, codified in Art. 12(3) of the Civil code.	No application in the area of company law so far.	This is debated in the literature in relation to co-determination rules; no case law.
Sweden	The application of a foreign provision would be manifestly incompatible with the very foundations of the Swedish legal system.	In practice, it is very rarely invoked by the Swedish courts and there are no reported cases relevant to the field of company law.	Theoretical question; no reported cases where this has been used in the field of company law.
United Kingdom	The application of a foreign substantive rule of the *lex causae* is excluded if it departs so radically from the concepts of fundamental justice accepted in the forum country that its application would be intolerably offensive to the judicial conscience there[452] In company law: no requirement that the company should be carrying on business within the UK	Amalgamation between two companies incorporated in the same country, with the law of the country of incorporation providing that the amalgamated company should succeed to all of the assets, but only to some of the liabilities, of the companies amalgamated (considered as equivalent to a fraudulent transfer)[453] - Requirement of the *lex societatis* that a company or its directors perform acts in another country which would infringe the criminal law of that country[454]	UK courts are able to derogate from the lex causae in order to assert an overriding interest in the application of their own substantive rules; but there is no existing No case law in which the UK courts have actually derogated in this way from a foreign lex societatis

[452] Cheni v Cheni [1965] P 85; Dicey, n 202, above, Rule 2.
[453] Adams v National Bank of Greece [1961] AC 255.
[454] Foster v Driscoll [1929] 1 KB 470 (CA); Regazzoni v Sethia [1958] AC 301; Royal Boskalis v Mountain [1999] QB 674 (CA); Ralli v Naviera [1920] 2 KB 287; but not dealing with corporate matters governed by the *lex societatis*.

5.2 Discussion

1. As is evident from Table 5 above, the laws of all Member States allow for, at least in principle, an *ordre public*-based disapplication of foreign law provisions where its application would entail consequences that cannot be reconciled with fundamental moral conceptions or policy choices of the *lex fori*. The prerequisites for dis-applying foreign law on *ordre public*-grounds are not always determined by statute, and where they are, the statutory definitions exhibit some variation across different Member States. The basic contours of the concept are, however, well established and largely comparable across the EU.

2. The results also indicate that Member States are generally very reluctant to invoke the negative *ordre public* in the field of company law. Case law is, with a few exceptions, non-existent, and commentators argue that it is unlikely that courts will rely on *ordre public* in the future to disapply rules of a foreign *lex societatis*. A notable exception to this pattern is Denmark, where a related concept, the 'doctrine of circumvention', has been used in a number of company law cases, including *Centros*. The doctrine of circumvention is considered to be less demanding than *ordre public* and hence can be appealed to more readily.[455] However, after the decision of the Court of Justice in *Centros*, it has been acknowledged in Denmark that the doctrine needs to be applied restrictively so as to be consistent with the requirements of EU law, in particular the *Gebhard* conditions.[456] Some case law can also be found in the UK, where courts have used the *ordre public*, for example, to prohibit arrangements permitted pursuant to the law of incorporation that were considered to be equivalent to a fraudulent transfer.[457]

3. The positive function of *ordre public* is more relevant for purposes of this study. Here, we can observe significant differences in the Member States, and a common understanding of what type of rules may be considered as overriding mandatory provisions, or what type of situation may warrant intervention on the part of the forum state, is not evident. Suggested applications of the positive *ordre public* range from employee co-determination and capital maintenance rules (according to views expressed in the Austrian, German and Spanish academic literature) to rules on company names (Germany),[458] directors' disqualification (Poland), labour law (Lithuania, Latvia), and laws regulating the social security system (France).[459] In areas that can be considered part of 'core' company law,[460] little case law exists. This may in part also be a consequence of the problems in enforcing mandatory overriding provisions in areas that concern the internal organisation of a company, such as for instance in relation to board structure and composition.

6. Reincorporations

Companies incorporated under the law of a given Member State may seek to subject themselves to another Member State's law without having to go through the process of liquidation in their original jurisdiction. This process is typically referred to as 'reincorporation'. This transaction, if allowed, normally requires companies to transfer their 'registered office' (or 'statutory seat' in jurisdictions that simply refer to the company's seat as indicated in the articles of association) and to be registered in the new country as a company governed by the law of this jurisdiction. As we shall see below, however, national rules are extremely diverse and reincorporation requirements vary widely across Member States. Furthermore, most Member States have traditionally

[455] Danish country report, Section 5.1.
[456] For references see ibid.
[457] See n 453 above.
[458] See n 448 above.
[459] See n 447 above.
[460] See also the discussion in Chapter V., Section 6. below.

restricted, prohibited or rendered excessively difficult such transactions. In part, the difficulties can be explained in political terms, as Member States' legislators often regard company law as a device for protecting a wide range of corporate constituencies rather than merely addressing the shareholder-director relationship. The new applicable company law may be less protective for creditors, for other stakeholders or for minority shareholders than the law of the country of origin – or, at least, the country of origin may consider this to be the case. Consequently, a reincorporation might be harmful for such 'weak constituencies', unless other legal mechanisms are in place for protecting them.[461] Moreover, whenever the legal rules protecting such constituencies differ, this may create the possibility for companies to exploit such differences opportunistically, even where the absolute level of protection is similar in the Member States concerned.

In the European Union, however, alternatives to reincorporations exist for companies that want to change the law applicable to them. First, most companies incorporated in an EU Member State can make use of cross-border mergers in order to achieve effects equivalent to a reincorporation. Such *de facto* reincorporations are typically implemented by incorporating a new 'shell' company (normally a subsidiary) in another Member State and then merging the holding company 'into' the newly formed foreign company. Cross-border mergers of this type can now be implemented under a common procedural framework,[462] which lead to a significant simplification of these transactions. However, cross-border mergers may still be burdensome and costly, depending on the legislation of Member States' involved and due to the absence of a 'fast-track- procedure',[463] mostly so when the only aim of a cross-border merger is relocating a company's registered office, without implementing a real integration between different companies.[464] The second option for an undertaking to achieve a change of applicable company law without liquidation is by using the vehicle of a European Company ('SE').[465] In this regard, it is worth recalling that the SE Regulation only provides a general regulatory umbrella, and that SEs are mainly governed by the legal framework for public companies in the Member State where their registered office is situated.[466] SEs can relocate their registered offices from one Member State to another, which also triggers a change in the applicable national rules.[467] SEs, however, are required to maintain their head office in the same Member State as that of registered office.[468] Additionally, SEs can only be incorporated by pre-existing public companies under specific circumstances, which are detailed in the SE Regulation and whose common denominator is the existence of a 'cross-border' connection.[469]

[461] See FM Mucciarelli, 'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU' (2012) *Tulane Journal of International and Comparative Law* 421, 454-458.
[462] Directive 2005/56/CE, of the Parliament and the Council, October 26th 2005, on cross-border mergers of limited liability companies (hereinafter, the 'Cross-border Merger Directive'), entered into force on December 16th 2007. See M Siems, 'The European Directive on Cross-Border Mergers: An International Model?' (2004-2005) 11 *Columbia Journal of European Law* 167.
[463] See Becht-Bruun & Lexidale, *Study on the Application of the Cross-Border Merger Directive* (2013), 36 and 112.
[464] The steps of cross-border mergers are: (a) the merging companies need to draw-up a draft terms of the merger and make it public - in the domestic business register or on company's website (Cross-Border Mergers Directive, Article 5 and Article 6(1)); (b) publication in the national gazette of the essential elements of the transaction (Cross-Border Mergers Directive, Article 6(2)); (c) the boards and an independent expert should draw-up respectively business and financial reports (Cross-Border Mergers Directive, Article 7 and Article 8); (d) the transaction should be approved by the shareholders meeting (Cross-Border Mergers Directive Article 9); (e) the documents relevant to the transaction should be submitted to judicial or notary authorities to scrutinise the legality of the transaction (Cross-Border Merger Directive, Article 10 and Article 11); (f) creditors' protection mechanisms need to be respected; (g) eventually, the merger is published in the register of the company resulting from the merger and taken out of the register(s) of the merging companies.
[465] Regulation of the Council 2157/2001/CE, October 8th 2001, on the statute of the European Company (hereinafter, the 'SE Regulation').
[466] SE Regulation, article 9(1).
[467] SE Regulation, article 8.
[468] SE Regulation, article 7.
[469] SE Regulation, article 2

The main question of cross-border reincorporations by way of relocation of registered office throughout the EU, therefore, remains unresolved. In particular, what was, and partially still is, unclear is whether the freedom of establishment requires Member States to allow domestic companies to reincorporate abroad (in the EU) and foreign companies incorporated in another Member State to incorporate as domestic companies without the need to liquidate. In recent years the Court of Justice has gradually clarified its case law in order to favour mobility, although the present situation is still partially ambiguous. The original position of the Court of Justice, at least according to a widespread view, allowed Member States to pose limits in the way to relocations abroad of a company's central management and to 'outbound reincorporations'. In the decision *Daily Mail*[470] the European Court of Justice addressed the limits placed by a Member State (the UK) to the relocation abroad of a domestic company's administrative seat and tax domicile. The ECJ held that such restriction was not a violation of the freedom of establishment. The Court based its opinion on a general assumption regarding the relation between a company and its state of incorporation, which seem to stretch far beyond tax law. In particular, it was maintained that '*unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning*'.[471] As a consequence, the ECJ concluded that the freedom of establishment '*cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State*.'[472] According to widespread opinion, in light of *Daily Mail,* Member States could place any limitations in the way of any 'moving out' of a domestic company. *Daily Mail,* however, also revealed several ambiguities. This decision, indeed, only addressed restrictions placed by a Member State against an outbound relocation of a company's tax residence, while it was not related to outbound reincorporations (which are, as we shall see hereunder, impossible from the standpoint of English law). In the same decision, additionally, the ECJ also added that the freedom of establishment '*also prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation*'.[473] The ECJ confirmed this statement in other decisions, maintaining that the freedom of establishment '*prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation*.'[474]

The Court of Justice partially clarified these issues in the more recent decisions rendered in the cases *Cartesio*[475] and *VALE.* The former decision was related to a Hungarian company that aimed at transferring its 'seat' to Italy, while keeping the Hungarian *lex societatis.* In *Cartesio,* the Court concluded that '*a MS has the power to define […] the connecting factor required'* for being incorporated under its law, and thus is capable of enjoying the right of establishment, and the criteria for continuing to maintain that status. That included the power *'not to permit a company governed by its law to retain that status if it intends to reorganise itself in another MS by […] moving its seat'* there, *'thereby breaking the connecting factor required under the national law of the MS of incorporation'*.[476] This statement, therefore, is in clear continuity with *Daily Mail*, which

[470] C-81/87 *The Queen* v. *H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1998] *ECR* 5483.
[471] *Daily Mail*, at 19.
[472] *Daily Mail*, at 24.
[473] *Daily Mail*, at 16.
[474] *Marks & Spencer*, at 31. See also C-264/96 *Imperial Chemical Industries plc (ICI)* v. *Kenneth Hall Colmer (HM Inspector of Taxes)* [1998] *ECR* I-4695; C-9/02 *Hughes de Lasteyrie du Saillant* v. *Ministère de l'Économie, des Finances et de l'Industrie* [2004] *ECR* I-2409; C-446/03 *Marks & Spencer plc* v. *David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.
[475] C- 210/06 *Cartesio Oktato es Szolgaltato bt* [2008] ECR I-9641.
[476] *Cartesio,* at 110.

maintained that companies are 'creatures of national law' and that Member States retain the power to impede cross-border transfer of own companies' headquarters or of any other material factors. Importantly, however, the Court also explains[477] that this Member State power does not include a power to impede a 'conversion' into a company governed by the law of a new Member State. Rather, there is a right under the freedom of establishment, as against the Member State of origin, to reincorporate a company abroad: *'far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so'*.[478] Outbound reincorporations, therefore, fall within the scope of the freedom of establishment and any restriction must be assessed under the *Gebhard* test. Against this backdrop, liquidating any companies that transfer abroad their registered office with the aim of reincorporating abroad is, according to the Court of Justice, neither a necessary nor a proportionate reaction. The statement was not necessary for deciding the case at hand and it might be questioned whether it is entirely binding or a mere *obiter dictum*. Furthermore, the ECJ also declared that a prohibition of outbound reincorporations is a violation of the freedom of establishment, unless it serves overriding requirements in the public interest. The *Cartesio* ruling, therefore, does not seem to provide for conclusive answers to the question of whether Member States must allow domestic companies to reincorporate abroad (or, at least, it may be debated whether this part of the *Cartesio* ruling is directly binding or not). In this regard, it is necessary to stress that a Polish court has recently submitted a request to the Court of Justice for a preliminary ruling which aims at clarifying whether Polish law, which makes outbound reincorporations without liquidation impossible in practice (as will be summarised hereunder), is compatible with freedom of establishment.[479]

Finally, in the decision rendered in the *VALE* case (in which an Italian private limited company sought to reincorporate under Hungarian law, but the Hungarian register refused to register the company as the 'universal successor' of the Italian company)[480], the Court of Justice argued that national law *'cannot escape all review in the light of articles 49 and 54'.*[481] The Court of Justice maintained that any national legislation '*which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of'* the freedom of establishment[482], with the consequence that Member States must provide 'the same possibility' for conversion to foreign EU companies as they provide to those governed by national law.[483] Any restrictions to inbound reincorporations must be justified by overriding reasons in the public interest and should be proportionate to the goals that the Member State aims at achieving ('Gebhard test'). In this regard, the Court of Justice also argued that if a Member State prohibits reincorporations in any circumstance, such operations would be prevented '*from being carried out even if the interests mentioned* […] *are not threatened'.* Consequently, a complete ban of reincorporations goes beyond what is necessary to protect those interests.[484] Member States thus must comply with the principles of 'Equivalence and Effectiveness', and the recording of the status of predecessor in law could not be denied to *VALE Costruzioni* if it was granted in domestic conversions.[485] The decision *VALE*, therefore, clarified[486] that restrictions to cross-border

[477] *Cartesio,* at 111–113.
[478] *Cartesio,* at 112.
[479] Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 22 February 2016, C-106/16, *Polbud v Wykonawstwo sp. z.o.o*.
[480] C-378/10 *VALE Építési kft.*, see also the description above, Chapter I.
[481] *VALE,* at 45,
[482] *VALE,* at 33,
[483] *VALE,* at 41.
[484] *VALE,* at 39.
[485] *VALE,* at 57.

reincorporations need to be justified against the Gebhard test and that a complete prohibition is neither a necessary nor a proportionate reaction, since minorities, creditors and employees might well be protected by applying rules on domestic conversions.

Nevertheless, a number of powerful obstacles still exist, and outbound reincorporations by way of transfer of registered office seem to be rarely used in practice (although data in this regard are sparse and unclear), unless both the country of origin and the country of arrival provide for clear regulations of these transactions and agree upon the prerequisites. Therefore, the question arises as to whether the most appropriate and desirable solution is introducing a harmonisation directive (originally envisaged as the 14th company law directive) that allows and regulates cross-border reincorporations throughout the European Union. The first detailed proposal for a directive, which was eventually not approved, was presented in 1997.[487] The 1997 proposal did not alter Member States' choice as to the primary connecting factors, be it the 'incorporation theory' or the 'real seat theory'.[488] Consequently, companies that sought to reincorporate out of a real seat country should have also relocated the connecting factor abroad, and companies that sought to reincorporate into a real seat country should have relocated the connecting factor onto their territory. According to the 1997 proposal, additionally, a project of reincorporation was to be published in the commercial register of the country of origin[489] and shareholders should approve this proposal with qualified majority.[490]

In 2002 a panel of corporate law specialists, entrusted by the EU Commission with the task of developing reform proposals for European company law (the 'high level group'), recommended liberalising reincorporations, as a way to increment both efficient allocation of resources and the quality of domestic laws.[491] Along this line, the Action Plan issued in 2003 by the Commission, aimed at modernising company law, maintained that the 14th directive was a priority for the EU.[492] This aim was confirmed by a consultation launched in 2004, the large majority of whose respondents supported the idea that 'the transfer of registered office should not entail the company being wound up in the home Member State'.[493]

A fully-fledged policy analysis conducted a few years later, however, revealed a much more complex scenario. This impact assessment, indeed, concluded that a harmonisation by way of regulation would be too rigid a mechanism and would not be proportionate to the planned goals. Therefore, according to this analysis the only options left on the table were either a harmonisation through directives, or leaving the present situation unaltered. In this regard, the assessment also argued that harmonisation by way of directive could be too onerous and not proportionate 'considering that the practical effect of the existing legislation on cross-border mobility (i.e. the cross-border merger directive) is not yet known and that the Community approach to the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future', with the consequence that 'it might be advisable to wait until the impacts of those developments

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[486] In this regard see FM Mucciarelli, 'Company 'emigration' and EC freedom of establishment: Daily Mail revisited' (2008) 9 *European Business Organization Law Review* 298 where the same interpretation was suggested with regard to the decision Daily Mail.

[487] Document XV/D2/6002/97-EN REV.2 (hereinafter the '1997 Proposal'). See RR Drury, 'Migrating companies' (1999) *European Law Review* 362.

[488] Article 3, 1997 Proposal of a 14th Directive.

[489] Article 4, 1997 Proposal of a 14th Directive.

[490] Article 6, 1997 Proposal of a 14th Directive

[491] High Level Group, *A modern regulatory framework for company law in Europe'* http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf, p. 101.

[492] Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, at 22 (COM(2003) 284 final).

[493] See the webpage: http://ec.europa.eu/yourvoice/results/transfer/index_en.htm

can be fully assessed and the need and scope for the EU action better defined.' [494] Therefore, the project of harmonising Member States' regimes on cross-border transfers of registered office was eventually put on hold.

A need for clarifying rules on cross-border reincorporations, however, still exists in business practice. Various resolutions and reports of the European Parliament, indeed, have requested the European Commission to present a new proposal for a directive on the cross border transfer of companies' registered offices. [495] Furthermore, a public consultation launched in 2012 on the future of European company law confirmed the interests of the respondents in a legislative initiative aimed at clarifying that European companies can transfer their registered office throughout the EU and reincorporate into another Member State without liquidating in the country of origin, and at regulating these cross-border reincorporations. [496] The 2012 Action Plan on company law and corporate governance [497] acknowledged that the issue of cross-border reincorporations is relevant, but that 'any future initiative in this matter needs to be underpinned by robust economic data and a thorough assessment of a practical and genuine need for and use made of European rules on transfer of seat.' Following this acknowledgement, in 2013 the European Commission launched a new public consultation on the transfer of companies' seat, which confirmed that in most Member States the rules on cross-border transfers of statutory seat (or registered office) are still unclear and that the Court of Justice's decisions rendered in the case *Cartesio* and *VALE* are not sufficient for clarifying all regulatory issues.[498]

In light of the efforts undertaken by the European Commission and by the European Parliament, aimed at understanding whether harmonisation is appropriate, the comparative analysis of this study assesses how Member States deal with the issues related to outbound and inbound reincorporations. In this regard, it is worth remembering that, in order to 'reincorporate' from one jurisdiction to another, a company should follow both private international law and substantive rules of the State of origin and the State of arrival, provided that these countries allow this transaction. In particular, the 'emigrating' company must comply with the rules and requirements on formation and registration of new companies imposed by the State of arrival, and should be eventually cancelled from the company register of the 'State of origin'. In this regard it is useful to distinguish the standpoint of the 'State of origin' ('outbound reincorporations') from the standpoint of 'State of arrival' ('inbound reincorporations'). Finally, for countries that follow the 'real seat theory' (in one of its versions) the question arises as to whether a foreign company by transferring the connecting factor onto the domestic territory should reincorporate according to domestic company law.

6.1 Outbound reincorporations

From the viewpoint of the State of incorporation (hereinafter also the 'State of origin') of a company that seeks to reincorporate under the law of another country, the most important issue is whether domestic private international law rules allow companies to change the applicable company law (the *lex societatis*) without previously liquidating. If

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[494] See Commission of the European Community, Impact assessment on the Directive on the cross-border transfer of registered office, Brussels, 12.12.2007 SEC(2007)

[495] See Resolution of the European Parliament of 25 October 2007 [P6_TA(2007)0491]; Resolution of the European Parliament of 10 March 2009 [P6_TA(2009)0086]; Resolution of the European Parliament of 2 February 2012 [P7_TA(2012)0019].

[496] See http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf

[497] Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies (Text with EEA relevance) Strasbourg, 12.12.2012 COM(2012) 740 final.

[498] See European Commission (DG Market), Feedback statement, Summary of responses to the public consultation on Cross-border transfers if registered offices of companies, September 2013.

this general question has a positive answer, we should inquire what substantive rules and which procedure a company should follow in order to reincorporate under the law of another country. Normally, as we shall see, reincorporations require a decision of the shareholders to transfer abroad the company's registered office or statutory seat. These concepts (statutory seats and registered office) are normally used interchangeably in this report, but we should be aware that they might refer to different concepts in different jurisdictions. In particular, the concept of 'registered office' derives from English law and refers to the place registered in the official company register; by contrast, the wording 'statutory seat' refers to a place mentioned in the articles of association, which almost invariably also coincides with the registration. Nevertheless, we cannot exclude, however curious such hypothesis might seem, that companies could be allowed to transfer their 'statutory seat' (by amending the corresponding clause in the articles of association) without transferring their registration in the State where the new statutory seat is situated. That a company might amend the clause of its articles of association indicating its 'statutory seat' without triggering a transfer of registration is a possibility that legal scholars have considered;[499] additionally, as we shall see hereunder, the comparative analysis reveals that there are cases where this dissociation is possible.

From a policy viewpoint, the issue of whether and under which conditions a jurisdiction shall allow voluntary outbound reincorporations is quite complex. In several Member States, indeed, company law rules, besides the agency problem arising between shareholders and directors and the 'horizontal' relation among shareholders, also address the relation between companies and their creditors and, in some jurisdictions, their employees. A widespread strategy for protecting creditors is based upon rules on capital formation and capital maintenance, and upon minimum capital requirements in public companies, but the intensity of creditor protection varies from Member States to Member States. Additionally, in several jurisdictions the level of creditor protection is higher in public companies than in private companies.[500] Furthermore, certain Member States include in the *lex societatis* rules on debentures and on the powers of debenture holders. Eventually, in some Member States employees have the right to appoint a certain number of directors or of members of the supervisory board ('codetermination'). In these circumstances, a reincorporation under the law of another jurisdiction would harm creditors or employees if the new jurisdiction is less protective than the country of origin (e.g.: when the law of country of arrival does not provide for codetermination mechanisms or when capital maintenance rules are weaker than those of the country of origin), unless the country of origin also considers these rules as overriding mandatory provisions to be applied to pseudo-foreign companies. The impact of reincorporations on creditors and other stakeholders also depends on the scope of company law in the country of origin. If rules protecting creditors and other stakeholders are included in the scope of company law, reincorporations might harm these stakeholders, if the country of arrival is not as 'protective' as the country of origin. By contrast, if the country of origin protects creditors and other stakeholders through non-'company law' rules, such as insolvency law or tort law, a reincorporation is likely to be less harmful for pre-existing stakeholders, who can continue relying upon the application of insolvency or tort law of the country of origin.[501] Regarding creditor protection, things are further complicated by the significant differences between the regulation of private and public companies that exist in several countries. Rules on creditor protection of public companies are partially harmonised at EU level, while virtually no such harmonisation has taken place in relation to private companies. Furthermore, in recent years a trend has emerged throughout the

[499] See, e.g., J Rickford, 'Current development in European law on restructuring of companies: An introduction' (2004) *European Business Law Review* 1229; H Eidenmüller, 'Mobilität und Restrukturierung von Unternehmen im Binnenmarkt' (2004) JZ, 32; S Lombardo, 'Libertà di stabilimento e mobilità delle società in Europa' (2005) *Nuova giur. civ. comm.* 372.
[500] See L Enriques and M Gelter, 'Regulatory competition in European company law and creditor protection' (2006) *European Business Organization Law Review* 417.
[501] Mucciarelli, supra note 461, at 458-461.

European Union to reduce or abolish minimum capital requirements and probably creditor protection mechanisms based on company law rules more generally, at least as far as private limited companies are concerned. Consequently, in some Member States significant differences have emerged in the level of protection afforded to creditors of private and public companies, respectively. The effects of a reincorporation may thus depend not only on the countries, but also on the national company types involved. Moreover, the powers and protections of minority shareholders vary from Member State to Member State. Where the law of the 'country of arrival' is less protective of minority shareholders than the 'country of origin', a cross-border reincorporation could therefore also harm this group of stakeholders. These are the main reasons why in several Member States reincorporations are restricted or not allowed by national law. In particular, a complete ban of reincorporations (in particular of outbound reincorporations) would be an effective (albeit drastic) strategy for protecting the acquired interests and expectations of pre-existing creditors or other stakeholders relying on application of the company law rules of the country of incorporation, and yet, such legislation is unlikely to be compatible with the Treaty, at least in relation to outbound reincorporations. Additionally, as we shall see hereunder, even when reincorporations are allowed, the State of incorporation may provide for specific legal mechanisms for protecting minority shareholders, creditors and other stakeholders, such as: (a) supermajority requirements for the approval of these decisions; (b) further safeguards aimed at protecting dissenting minority shareholders, such as the right to withdraw from the company; (c) special safeguards aimed at protecting creditors, such as the right to object to the reincorporation or to request a guarantee.

It is therefore important to also assess the procedural and technical aspects of reincorporations in the State of origin. Such technicalities and procedures have significant practical and theoretical implications. Companies cannot exist without being registered in an official commercial or company register and without being incorporated under the law of a specific jurisdiction. Companies, in other words, cannot exist 'outside' or independently of a jurisdiction of incorporation and, consequently, reincorporations require continuity of registrations across jurisdictions. Once a company – in accordance with the private international law rules of both jurisdictions involved – starts being governed by the law of the new jurisdiction, its articles of association will already need to have complied with the provisions of the new jurisdiction of incorporation.[502] Furthermore, it is the State of origin that governs the point in time when the domestic commercial register strikes off that company. In this context the question arises as to whether the 'emigrating company' should be cancelled only after it has been registered in the companies register of the destination country as a domestically incorporated company. Indeed, if a company was cancelled from the company register of the State of origin before being registered in the State of arrival, there would be a period of time during which that company would not be registered anywhere, and thus not exist. It goes without saying that this possibility would raise the risk of opportunistic decisions, as we shall see hereunder. All these issues, as we shall see in the comparative analysis, are still uncertain in most Member States of the EU.

[502] See T Luchsinger, *Die Niederlassungsfreiheit der Kapitalgesellschaften in der EG, den USA und der Schweiz,* (Freiburg, 1992) 21; FM Mucciarelli, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi* (Milan, 2010) 83.

6.1.1 Overview of national laws

Table 6.1. Voluntary outbound reincorporations

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
Austria	No explicit statutory route to outbound reincorporations, but after *Cartesio* and *VALE* it is generally acknowledged that reincorporations are permitted within the EU.	Unclear, but some scholars argue that the rules regarding cross-border mergers and the reincorporation of SEs should be applied by analogy.	Unclear, but according to some scholars the rules regarding the reincorporation of SEs can be applied by analogy.	Unclear whether re-incorporations, which are not provided for explicitly in statute, follow the same rules as cross-border mergers, particularly in relation to the preservation of employee participation.
Belgium	Yes (art. 112 PIL Code). A reincorporation requires a transfer of both the statutory seat and the real seat.	The possibility to reincorporate abroad without interruption of the legal personality is acknowledged in Art. 112 PIL Code. - The PIL Code does not provide for a specific procedure. - Practitioners suggest that the company must call a GM; the conversion must be approved and the articles of association amended with a 75% majority of voting shares and at least half of the share capital being present	Companies have to comply with the formalities of establishment in the country of immigration, after which the company can be delisted from the corporate register.	Considerable legal uncertainty of cross-border conversions as opposed to mergers because of the lack of an established legal framework
Bulgaria	Unclear. Relocation of the seat in another state is effective only if it has been carried out in accordance with the law of the affected states (Article 59 PILC). This is a general substantive rule that governs both inbound and outbound relocations	No substantive provisions. The effects of a relocation decision are still unclear and not explicitly regulated. Bulgarian law, in particular, does not clarify whether the company law of the country of the new statutory seat becomes, or may become, applicable, and whether the company should be canceled	-	Cross-border mergers are regulated in detail, following the relevant EU legislative provisions.

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
	of statutory seats. In practice an outbound reincorporation cannot be implemented due to lack of administrative and technical provisions.	from the Bulgarian register. Even in the field of tax law, the Corporate Income Tax Act ('CITA') does not provide for the tax treatment of outbound and/or inbound re-incorporation and transfer of seat of other types of entities, different from Societas Europaea and European Cooperative Society.		
Croatia	No (a transfer of registered office leads to liquidation; only exception: SE)	n.a.	n.a.	n.a.
Cyprus	Yes. Article 354A provides that *Sections 354B to 354I shall apply to all overseas companies, incorporated or registered pursuant to the laws of an approved country or jurisdiction, according to the laws of which these companies can still exist as legal entities under the legal regime of another approved country or jurisdiction.*	Some of the requirements listed in Article 354L are: - shareholders' special resolution according to the memorandum and articles of association. - a declaration which confirms the solvency of the company. - the absence of proceedings for the liquidation of the company. - the fact that the company has submitted all the fees and has completed all the proceedings relating to the company's business.	An application has to be presented before the Registrar so as to give his consent; This application shall be accompanied by a statement signed by at least two directors of the company duly authorised and it must include the name of the company that wishes to be registered in the approved country or jurisdiction, the place of the proposed registration of the company and the name and address of the competent authority in the approved country or jurisdiction and the suggested date of registration. Shareholders' special resolution of the company according to the memorandum and articles of association of the company, a declaration which confirms the	In contrast with the rules on re-incorporation procedure which is taken care of solely by the Companies Registrar, the legality of cross-border mergers is scrutinised by the District Court of the district where the registered office of the merging Cyprus companies is situated,

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
			solvency of the company, the absence of proceedings for the liquidation of the company, the fact that the company has submitted all the fees and has completed all the proceedings relating to the company's business. Creditors can object to the reincorporation, indicating sufficient reason. The Court may approve the reincorporation with an order, or on the basis of sufficient guarantees or can prohibit it. The Registrar shall consent to the continuation of the company under the legal regime of another country or jurisdiction.	
Czech Republic	Yes (S. 139 to 143 Civil Code, applicable to any jurisdiction, and S. 384f to 384p Transformations Act, applicable only regarding EU Member States). Czech companies can also transfer they statutory seat into another Member State without changing applicable company law provided the law of the Member State to which the seat is to be moved allows so. These companies are also cancelled from the Czech	Reincorporation into another Member State: procedure detailed in the Transformation Act (which corresponds to Article 8 SE Regulation). Company law steps: (i) the proposal should be published in the Commercial Gazette, (ii) decision of the general meeting to approve the transformation (supermajority of 3/4 three fourths of the attending shareholders), (iii) a notary certificate of the cross-border transformation. Creditor protection: creditors can demand that the company puts	Procedural steps: (i) application for the registration of the seat transfer in the foreign commercial register, (ii) foreign authority's decision on the registration of the transfer in the foreign commercial register, (iii) a notary issues a certificate for the registration of the seat transfer in the commercial register, (iv) filing for cancellation from the Czech register, (v) a court's decision of cancellation.	Same rules (Section 59 – 59zb Transformations Act) and Section 61 *et seq.* Transformations Act.

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
	register, provided that the country of arrival accepts this outcome.	up security for its unpaid debts. The company shall provide the notary with documents proving that all known debts have been satisfied or secured or that creditors have not exercised their rights to ask for a security. No agreement with creditors: a court shall determine type and amount of a security that the company should provide.		
Denmark	Yes. Allowed since 2012 for reincorporations within the EU/EEA (Ch. 16a CA)	General conditions: (a) the receiving country allows the transfer; (b) legislative protection of the Danish company's employees' co-determination in the receiving state. Procedure: (a) Transfer plan and a written statement that provides explanations and reasons for the plan for the transfer drafted by the BoD; (b) statement of evaluation experts that creditors are sufficiently protected after the transfer (unless shareholder unanimously decide not obtain this statement); (c) general meeting resolution (no earlier than four weeks after publication by the DBA) with a 2/3 majority. Creditor protection:	The transfer plan must be filed with the DBA no later than four weeks after it is signed by the central governing body. If creditors have a right to file their claims, this must be stated in the Agency's notification. Within 4 weeks after the resolution of seat transfer the company should apply for registration; DBA ensures that all actions and formalities that are necessary to implement the transfer have been taken or met and issues a certificate if statutory conditions are satisfied (general meeting decision, creditor protection, dissenting shareholder appraisal) When the DBA receives confirmation from the Member State to which the seat has been transferred that the transfer of the seat has been registered in their register, the company can	The law follows the rules on cross-border mergers closely

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
		(a) if the valuation experts conclude that the creditors will not be sufficiently protected after the transfer, or if no declaration has been made by a valuation expert on the creditors' position, creditors whose claims arose prior to the DBA's publication of the transfer may file their claims up to four weeks after the date of the publication. (b) no claims for which adequate security has been provided may be filed. Shareholder protection: dissenting shareholders may demand redemption of their shares.	be cancelled.	
Estonia	Unclear. No specific rule. No case law.	n.a.	n.a.	n.a.
Finland	Unclear, no rule	n.a.	n.a.	n.a.
France	Yes.	1) '*Sociétés en commandite simple*' and '*sociétés à responsabilité limitée*': unanimous vote to decide a change of 'nationality' (article L. 222-9 and L. 223-30 Commercial Code). Both EU and extra EU. 2) *Sociétés anonymes*: a) The Extraordinary shareholders' meeting can decide a change of nationality with a majority of two third of the shareholders present or	No regulation of the procedure to implement a reincorporation.	-

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
		represented, provided that a special treaty exists between France and the country where the seat is transferred to preserve the legal personality of the company. b) As there is no special treaty, the requirements of article L. 225-97 are never satisfied and the transfer of the seat of a '*société anonyme*' can be decided only with a unanimous vote of the shareholders.		
Germany	Traditionally not possible and no legal procedure, but after VALE it is acknowledged that reincorporations need to be permitted within the EU	Unclear. Probably, application of the German rules on national conversions by way of analogy (Transformation Act – *Umwandlungsgesetz*)	Unclear. Probably application of either the Transformation Act or the SE Regulation by way of analogy.	Greater legal certainty for cross-border mergers.
Greece	Yes	Companies limited by shares (real seat theory): - quorum 2/3 of capital at first call, 1/2 and 1/3 at subsequent calls; qualified majority 2/3 of votes cast. - minority shareholders: withdrawal right (act 2190/1920). Companies with limited liability(real seat theory) and private companies (incorporation theory): - unanimous decision (act 3190/1955 and act 4072/12).	For private companies: - Directors' report explaining consequences to members, creditors and employees. - Directors' report and a financial report registered in the General Commercial Registry for at least 2 months before the decision. - The General Commercial Registry can reject the application for seat transfer on grounds of public interest.	Specific statute (No 3777/2009) on cross-border mergers of limited liability companies. This statute follows the pattern of domestic mergers procedure and provisions for protecting creditors and shareholders. There is no case law or any other opinion stating that this procedure for cross-border mergers could apply by way of analogy to reincorporations.

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
Hungary	No	n.a.	n.a.	n.a.
Ireland	No	n.a.	n.a.	n.a.
Italy	Uncertain, but companies can relocate their statutory seat abroad. No explicit regulation of outbound reincorporations. In practice, certain corporate registrars (eg Milan) allow reincorporations and have regulated this proceeding. Case-law is uncertain (decision of the Supreme Court in the negative).	In order to transfer abroad a company's statutory seat: - the decision should be approved by the general meeting (quorum and qualified majority) - dissenting shareholders can withdraw from the company.	Not regulated at all. Gap-filling role of the commercial register. - Some local offices of the commercial register (eg Milan) require the company be registered in the country of arrival before it can be cancelled from the Italian register. - Other local offices cancel the company after the general meeting decides to transfer the seat abroad (see: Court of Justice decision *Interedil*)	Cross-border mergers are analytically regulated (company law requirements, shareholders and creditors' protection, registration and cancellation procedure), while reincorporations are still not regulated.
Latvia	No specific rule. Indirect reincorporation possible by establishing a new company abroad and merging with it.	n.a.	n.a.	n.a.
Lithuania	No. Any attempt of reincorporating abroad would trigger liquidation.	n.a.	n.a.	n.a.
Luxembourg	Yes.	Unanimity (art. 167-1(1) and art. 199 companies act)	Not regulated (risk that the company is cancelled before its registration in the new jurisdiction)	Cross-border mergers are regulated, while reincorporations are still not regulated.
Malta	Yes (Continuation of companies regulation 2002)	Reincorporations allowed only to 'approved countries' (EU, OECD countries, Jersey, Guernsey, Gibraltar, British Virgin Islands, Bahamas, Bermuda, Isle of Man,	- The company is cancelled after the Maltese register receives a copy of the instrument of continuation, issued by the relevant authority of the country	-

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
		Cayman Islands and Mauritius.) No provision for protecting minorities.	of arrival. - Creditor protection: creditors can object to the reincorporation, with the consequence that the Register must not allow the reincorporation. - Plc general meeting decision: quorum 51% of the capital; majority 75% nominal value of the shares represented. - Ltd shareholders' decision: majority 51% in the nominal value of the shares conferring voting right.	
Netherlands	No legal regulation, but some cross-border conversions occur in practice based on the ECJ case law, and a draft bill of 2014 provides for a legal framework	Procedure followed by practitioners: see draft bill hereunder, with respect to the protection of creditors, the approval by a supermajority of the shareholders and the intervention of the notary. Draft bill: The board of directors proposes the cross-border conversion; creditors have two months to oppose the proposal and require security for their claims; shareholders must approve the cross-border conversion with a two thirds majority; the conversion does not affect the existence of the company, all rights, duties and obligations remain unaffected; sell-out right of opposing minority shareholders; to protect	Draft bill: deed of notary; when the conversion is completed is determined by the receiving country	Since cross-border conversions are not (yet) regulated, companies generally make use of the cross-border merger regime to avoid legal uncertainty.

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
		the employees, the draft bill prohibits the cross-border conversion of a Dutch company with a 'structuurregime' unless an agreement has been reached about a scheme of codetermination as provided in the Act on the SE.		
Poland	Unclear, but most legal scholars maintain that outbound reincorporations are not allowed. There is, however, no case law. It is debated whether this provision applies to outbound transfers of statutory seat towards EEA countries (after *Cartesio* and *Vale*). Statutory law is controversial: on the one hand, art. 19(1) PIL Act maintains that transfers of seat within the EEA area does not result in loss of legal personality; on the other hand, a shareholders' resolution on relocation of the statutory seat is akin to a liquidation decision (art. 270(2) and 459(2) Commercial Company Act). This issue will probably be resolved by the Court of Justice in	It is still uncertain whether reincorporations are allowed, due to complete lack of any rule governing substantive and procedural steps (and uncertain PIL law). If we accept that outbound reincorporations to EEA countries are allowed, the rules on domestic conversions apply accordingly. The essential company law steps are: (i) plan of transformation (ii) shareholders' decision with supermajority (3/4 of votes cast representing ½ of the paid up capital).	It is still uncertain whether reincorporations are allowed, due to complete lack of any rule governing substantive and procedural steps (and uncertain PIL law). If we accept that outbound reincorporations to EEA countries are allowed, the procedural steps are: (i) registration in the foreign register (application *per analogiam* of rules on certificate of completion as for cross-border mergers); (ii) after the registration abroad: cancellation from the Polish register.	

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
	deciding on the application for a preliminary ruling in the case C-106/16, *Polbud v Wykonawstwo sp. z.o.o.*			
Portugal	Yes: '[t]he transfer of the registered office of the collective person to a place subject to a different legal system shall not extinguish its legal personality, if the laws of both offices agree to that.' (article 33(3) Civil Code). Consider that Portuguese companies can also transfer their real seat into another Member State while keeping the original applicable law, if the country of arrival accepts this outcome.	Company law matters for outbound reincorporations are regulated by the Companies Act (art. 3(2) to 3(5) Companies Act): (a) shareholders' approval by a qualified majority of 75% of the share capital; (b) right of shareholders who have not voted in favour of the decision of transfer to withdraw from the company.	-	-
Romania	No statutory rule. The most likely answer, based upon trade register practice, is a negative one. In 2014, a decision of the Brasov Court of Appeal (and the trade register) rejected a request of a Romanian company to reincorporate in the UK on the basis of two arguments: (a) Cartesio does not clarify	Decisions to relocate a company's statutory seat outside Romania should be decided by the general meeting with qualified majorities for SA or unanimity for Ltd. (art. 113 CL).	-	-

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
	the reincorporation proceeding and no specific rules have been implemented in Romania; (b) the company has not provided evidence of having completed all formalities in the UK.			
Slovakia	Relocation of the registered office of a Slovak company abroad is conditional upon existence of the regulation of such relocation in EU Law or in an international treaty. In absence of the relative legislation, outbound re-incorporation is influenced by the case law of *Cartesio* and *VALE*. Relocation of only 'real seat': the company is still considered to be a Slovak legal entity.	Change of the legal form shall be applied *per analogiam*.	The deletion of the company from the Commercial Register is considered the 'death' of the company, as stipulated in Section 68 Subsection 1 of the Commercial Code. Hence, ensuring a sound chronological order of firstly registering the company in the host state and only then deleting the company from the home state's Commercial Register will be beneficial to the protection of the continuity of the company, prevention of time travelling of the company and the protection of creditors. The above-mentioned view has been confirmed by the (scarce) case law of the Slovak courts.	The Commercial Code of the Slovak Republic stipulates (paragraph 69 part 2) that only companies with identical legal form can take part in a merger. The question arises of how this *'similarity of company legal form'* is to be assessed, as the Commercial Code does not clarify this issue. In this regard, it is widely accepted that the assessment should be conducted on a case-by-case basis.
Slovenia	No explicit statutory rule (with the exception of provisions on the SE). However, legal scholars maintain that such operations are allowed as a consequence of *Cartesio*			

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
	and *VALE* and that rules applicable to the SE should be applied by analogy.			
Spain	Yes (articles 92 – 103 Structural Modifications Act 'SMA' n. 3/2009).	- The company should not be under a liquidation or insolvency proceeding (art. 93(2) SMA) - Transfer project (drafted by directors) in a public document should be published in in the official Journal of the Commercial Register; - Approval of general meeting of shareholders with supermajority (private companies: 2/3 of capital; public companies: ½ of voting shares if 50% or more of voting capital attended the meeting, 2/3 of voting shares if only between 25% and 50% of shares with voting capital attended the meeting). - Withdrawal right of shareholders who didn't vote in favour of the decision; - The Commercial Register issues a certificate attesting that all formalities have been duly fulfilled.	- The reincorporation is considered as fulfilled and effective when the company is registered at the Registry of its new seat. - The foreign register should issue certificate of registration and deliver it to the Spanish commercial Registry. - The company can only be cancelled after such certificate is received by the Spanish register.	-
Sweden	Unclear. Swedish rules regarding the transfer of a company's seat into or out of Sweden and the impact of the ECJ rulings has yet to be tried by any courts.	-	-	-

Country	Are voluntary outbound reincorporations allowed?	Company law requirements for outbound reincorporations	Procedure to implement such decisions	Comparison with cross-border mergers
United Kingdom	No[503]	-	-	Similar results to a cross-border reincorporation can be achieved by a cross-border merger, or a sale of the business to a company incorporated for that purpose abroad

[503] Dicey, n 202, above, at para. 30-003; and *Re Irrigation Company of France Ltd* (1871) LR 6 Ch App 176.

6.1.2 Discussion

1. Member States follow different strategies regarding 'outbound reincorporations', ranging from complete prohibition to explicit and detailed regulations of these transactions. To understand Member States' regimes, however, we should consider the 'law in action', not just the 'law on the books'. If we look at Member States' regimes as they are in reality, we can see that, despite the most recent development of the case-law of the Court of Justice in the decisions *Cartesio* and *VALE,* several jurisdictions still prohibit or make impossible outbound reincorporations. These countries are: Croatia, Hungary, Ireland, Lithuania, Poland, Romania and the United Kingdom. As a matter of fact, companies incorporated in these countries cannot relocate their statutory seat or registered office abroad and reincorporate under the law of a different Member State without prior liquidation. In most jurisdictions, the impact of *Cartesio* and *VALE* has been scarcely debated or acknowledged, and only in Poland legal scholars seem to have debated this issue. Regarding Poland, it is worth stressing that statutory rules are not univocal: on the one hand, art. 19(1) PIL Act maintains that transfers of seat within the EEA area do not result in loss of legal personality; on the other hand, a shareholders' resolution on relocation of the statutory seat is treated akin to a liquidation decision (art. 270(2) and 459(2) Commercial Company Act). This issue will probably be resolved by the Court of Justice in deciding on the application for a preliminary ruling in the pending case C-106/16, *Polbud v Wykonawstwo sp. z.o.o,* which is related to a Polish company seeking to reincorporate in another Member State. It is interesting to note that, despite the decision in *Cartesio* being related to a Hungarian company seeking to relocate its headquarters to Italy, Hungarian companies still cannot, as a practical matter, reincorporate abroad, with little discussion of the direct applicability of the Court of Justice's interpretation of the Treaty in *Cartesio*. Finally, in 2014 a decision of the Romanian Court of Appeal of Brasov rejected a request for reincorporation to the UK on the basis of two arguments: (a) that case law of the Court of Justice (*Cartesio* in particular) does not provide any clear guideline regarding the proceeding for implementing reincorporations, and no specific rules have been issued in Romania; (b) the specific company that sought to reincorporate in the UK did not provide evidence that all formalities were actually fulfilled in the country of arrival.

2. Five Member States, namely Belgium, France, Greece, Luxembourg and Portugal, statutorily allow domestic companies to 'reincorporate' abroad, despite domestic legislation not fully regulating the procedural details of this transaction. Most of these countries follow the 'real seat theory', with the sole exception of France, which is to be classified as a mixed system. In order to reincorporate abroad, companies incorporated in jurisdictions following the real seat theory (Belgium, Luxembourg, Portugal and Greece regarding public companies) should transfer both their administrative seat and their statutory seat. However, despite statutory rules of these jurisdictions explicitly allow domestic companies to change *lex societatis* without the need to liquidate, the procedure to implement outbound reincorporations is not regulated; therefore, the risk arises that companies are cancelled from the register of the jurisdiction of origin before their registration in the commercial register of the new jurisdiction. France, Greece, Luxembourg and Portugal regulate the internal decisional procedure and the mechanism for protecting shareholders, while no special creditor protection mechanisms is foreseen. According to the Portuguese Companies Act, the general meeting of shareholders should approve a transfer of 'real seat' abroad with a quite high majority (75% of the share capital); additionally, dissenting or absent shareholders can withdraw from the company (but there is no provision for protecting creditors). French and Luxembourgish companies, by contrast, can change 'nationality' (that is to say reincorporate in another jurisdiction) only by unanimous decision, which makes these transactions almost impossible at least for widely held companies. It is worth mentioning, however, that in Luxembourg a reform project is under discussion, and is likely to be approved soon,

according to which a reincorporation will only require 2/3 of the votes cast. Greek companies limited by shares can reincorporate abroad by deciding with qualified majorities; additionally, a right to withdrawal from the company protects their shareholders. Greek private companies (which follow the 'incorporation theory') can also reincorporate abroad by unanimous decision.

3. Another group of States, by contrast, allow and clearly regulate reincorporations through detailed company law and procedural rules. These countries are: Cyprus, the Czech Republic, Denmark, Malta, and Spain. In all these countries, reincorporations require a decision of the shareholders to transfer abroad the registered office or the statutory seat. Most of these regimes provide for mechanisms aimed at protecting creditors and explicitly govern the procedure for implementing outbound reincorporations and for cancelling a domestic company from the local register avoiding that the company is cancelled before it is registered in the new jurisdiction (See the detailed procedure in Cyprus, Czech Republic, Denmark, Malta and Spain). Interestingly, the Cyprus regime also requires that the directors of 'emigrating companies' issue a 'solvency statement' in which they also declare that 'they are not aware of any circumstances that could negatively influence the solvency of the company within a period of three years.'

4. Several Member States do not explicitly mention and regulate reincorporations (Austria, Bulgaria, Estonia, Finland, Germany, Italy, Latvia, the Netherland, Slovenia and Sweden). Among these countries, Austria, Germany and the Netherlands seem to have a partially distinct position. In these countries, outbound reincorporations by way of transfer abroad of a company's statutory seat were traditionally prohibited. Nevertheless, Austrian, German and Dutch literature accepts that, in light of *Cartesio* and *VALE,* outbound reincorporations must be allowed as a matter of EU law, although its technicalities are still uncertain (in Germany, additionally, it is debated whether this transaction requires a transfer of both statutory and real seat into the Member State of arrival). This construction, however, has never been tested by any judicial decisions on outbound reincorporations. It is worth mentioning that in the Netherlands, although companies seem to prefer entering into cross-border mergers, reincorporations abroad are not infrequent and practitioners have developed a standardised procedure based upon the application, by way of analogy, of rules on cross-border mergers and internal conversions; furthermore, a draft bill is being discussed by the Dutch Parliament and is likely to be approved soon.

   It is interesting to compare Austria, Germany and the Netherlands, on the one hand, with the position of Italy on outbound reincorporations, on the other hand. On paper, Italian legislation seems to favour outbound reincorporations more that Austria, Germany and the Netherlands, since domestically incorporated companies are explicitly allowed to transfer abroad their 'statutory seat' (*sede legale*) by way of a decision of their general meetings amending the articles of association. Nevertheless, no statutory rule explicitly clarifies the private international law consequences of this decision of transferring abroad a company's statutory seat. Although legal scholars seem to consider reincorporations allowed, this issue is still debated, with the consequence that regulatory gaps are filled by commercial registers, notaries and courts, which creates the risk of inconsistent interpretations across the country. Legal scholars have debated the impact of *Cartesio* and *VALE,* arguing that, as a consequence of these decisions, reincorporations should be made feasible, but judicial decisions are still uncertain and contradictory.

   In other jurisdictions (Bulgaria, Estonia, Finland, Latvia, Slovenia and Sweden), it is not clear whether domestically incorporated companies can transfer their statutory seat abroad and, as a consequence, if they can reincorporate abroad. It is worth mentioning the position of Estonia, where reincorporations are not regulated at all and it still unclear whether this transaction is feasible; the national report, however, indicates that, as a matter of fact, Estonian companies might be cancelled from the local register when they relocate their registered office abroad. In Slovenia, despite the absence of any statutory rule in this respect, most academic scholars maintain that such transactions should be made possible as a consequence of the *Cartesio* and *VALE* rulings.

5. The question of whether private international law allows outbound reincorporation does not reflect the division between 'real seat theory' and 'incorporation theory'. Indeed, most real seat countries prohibit reincorporations (see the traditional position of Austrian and German case law until the decisions *Cartesio* and *VALE*), while other real seat jurisdictions allow these transactions (Belgium, Luxembourg and Portugal). By contrast, certain 'incorporation theory' countries, such as Ireland and the UK, clearly prohibit outbound reincorporations. Curiously, Cyprus and Malta, despite being based upon the UK model, allow and regulate reincorporations. In general, therefore, the possibility of reincorporating abroad is independent from the general private international law strategy that a certain jurisdiction adopts. The only difference is related to the prerequisites for reincorporating abroad, since real seat theory countries also require that domestic companies transfer both their statutory seat and their real seat into the new country of incorporation, while incorporation theory countries do not foresee such a requirement.

6. The main question is whether complete prohibitions of outbound reincorporations are compatible with the EU freedom of establishment, as interpreted by the Court of Justice in the cases *Cartesio* and *VALE*. The answer to this general question largely depends on whether the statement in the decision *Cartesio*, according to which Member States cannot hinder domestic companies to reincorporate abroad, has binding force or is a mere 'obiter dictum'. Under a comparative and merely descriptive standpoint, our findings seem to indicate that scholars and courts of Member States that still prohibit outbound reincorporations do not see *Cartesio* as a major problem (this is the case in Ireland, Estonia, Finland, Hungary, Latvia, Lithuania and Romania) or maintain that such issue can only be answered by a legislative reform (see the UK report). By contrast, as we have seen above, in two countries (Austria and Germany) that traditionally prohibited outbound reincorporations, legal scholars suggest that even without an explicit legislative reform such transactions should be made feasible in order to comply with the freedom of establishment as interpreted in the ECJ decision *Cartesio*. It is however still unclear how these transactions are to be implemented, and whether the commercial registers would actually cancel 'emigrating' companies and under which conditions.

7. From our findings emerge that the most significant problem is related to the proceeding for implementing a cross-border reincorporation (if allowed). In several Member States, indeed, this proceeding is not regulated at all, or is not sufficiently and neatly regulated. In particular, the question arises as to the moment when the local register should cancel the company and whether the local register should wait until the company is re-registered in the company register of the State of arrival as a local company. In several Member States this issue is not regulated, with the consequence that companies, after an official decision to transfer their statutory seat abroad, might be cancelled from the register of the country of origin without being registered yet in any other commercial register. The ECJ decision rendered in the case *Interedil* is a telling example of this problem.[504] In that case, an Italian company decided to transfer its statutory seat to London; the local register cancelled the company without checking whether the company was registered in the English register as a domestic company. Interedil, however, was only registered in the English Companies House as an 'overseas' company having a 'place of business' in England. Indeed, as we shall see hereunder, the English company register does not accept inbound reincorporations. As a consequence, Interedil was not registered anywhere as a domestic company: it was a UK company for the Italian

[504] C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-9915.

register and an Italian company from the standpoint of the English register. Some Member States, by contrast, decided to explicitly allow reincorporations and to precisely regulate these transactions (see: Cyprus, Czech Republic and Spain). In these countries, the proceedings and substantial requirements for reincorporating abroad are often similar to those foreseen in cross-border mergers. In particular, companies can be cancelled from the domestic register only after they have been registered under a foreign commercial register.

8. It is necessary to address the question of whether companies incorporated under the law of Member States can decide to transfer abroad their 'statutory seat' without changing applicable company law. This question seems contradictory, for the 'statutory seat' is normally the place where companies are also registered and coincides with the state of incorporation. Nevertheless, the comparative analysis has revealed that, as a matter of fact, companies incorporated in two member States (Czech Republic and Italy) can transfer abroad their statutory seat while keeping the original *lex societatis.* In particular, the Czech private international law regime[505] allows domestic companies to transfer their statutory seat abroad without triggering a change of company law; these companies, curiously, are cancelled from the Czech company register, despite them keeping the Czech *lex societatis*, with the consequence that such a transfer is only feasible if the country of arrival accepts that a domestically registered company is governed by a foreign law. In Italy, by contrast, the possibility of relocating the 'statutory seat' without changing applicable law is not mentioned anywhere in any legislative document or in judicial decisions; the comparative analysis has also revealed that local offices of the commercial register normally fill the gaps and loopholes of Italian law on the effects of any relocation abroad of a company's statutory seat. In particular, the local office of the commercial register of Milan (which is quite relevant for Italian business) accepts that local companies relocate their statutory seat to another EU Member State and that these companies, at the same time, can keep the Italian *lex societatis*; these companies, therefore, continue to be registered in the Milan office of the register, which 'fictively' considers the original 'statutory seat' as the actual seat for registration purposes. In practice, the transfer abroad of the statutory seat has no impact on the registration and the applicable law, it just has internal purposes, since the 'statutory seat' is the place where pre-meeting documents should be filed and is supposed to be also the place where general meetings will be held.

6.2 Voluntary inbound reincorporations

Cross-border reincorporations should also be analysed from the viewpoint of the country whose law the company seeks to adopt (the 'State of arrival'). The legal and policy issues that arise from that Member State's perspective often mirror those addressed by the 'State of origin' in outbound reincorporation. Thus, most Member States that allow outbound reincorporations also allow the inbound conversion of foreign companies into domestic ones. Few exceptions do however exist.

The preliminary question is whether private international law and/or substantive rules of the 'State of arrival' allow foreign companies to convert into domestic companies, without liquidating in the State of origin and by keeping continuity of their legal personality.

One approach is, of course, simply prohibiting 'inbound reincorporations'. In this case, when a foreign company decides to transfer its statutory seat or registered office into the domestic territory and to re-register in the domestic company register as a local company type, this decision would – at most – be regarded as the decision to register a new company, which is neither the 'same legal person' as the original company, nor its

[505] In connection with Transformations Act and Civil Code.

legal successor. Therefore, from the standpoint of the state of arrival, all debts and credits, and all contracts – including employment contracts – of the former company are not transferred to the newly registered company. Furthermore, shareholders would need to make contributions to the company capital, according to domestic substantive rules and proceedings. Alternatively, Member States that do not accept 'inbound reincorporations' might just register a domestic branch or establishment of a foreign company, despite its intention for re-registering under the new law. In both cases, if the 'emigrating company was cancelled from the register of the original State of incorporation, despite the 'State of arrival' did not accepts 'inbound reincorporations', that company would 'disappear' from any company registers in the EU without being officially liquidated, as we have already mentioned by analyzing 'outbound reincorporations'.

From an EU law standpoint, however, it is highly questionable whether a complete prohibition of 'inbound reincorporation' is in line with the freedom of establishment as interpreted by the Court of Justice in the cases *Cartesio* and *VALE*.

Member States could obviously decide to allow 'inbound reincorporations'. Since the state of origin is the jurisdiction in which the company is incorporated at the moment when the decision is taken, it is also normally competent to set company law requirements and proceedings (such as majorities for approving this decision). Nevertheless, we cannot exclude that the State of arrival also seeks to regulate substantive law issues. What the 'State of arrival' is certainly competent to regulate is the registration proceeding. In other words, the question arises of which procedural steps 'immigrating companies' should follow for registering in the company register as a continuation of an already existing company instead of a newly founded one.

6.2.1 Overview of national laws regarding voluntary inbound reincorporations

Table 6.2. Voluntary inbound reincorporations

Country	Are voluntary inbound reincorporations allowed?	Requirements for, and consequences of, inbound reincorporations	Procedure to register the foreign company in the company register
Austria	No explicit rule, but case law confirms that (after *Cartesio* and *VALE*) voluntary inbound reincorporations are possible.	Case law requires full compliance with Austrian company law rules, relocation of the real seat to Austria, and full compliance with foreign (home state) law.	Company has to provide evidence for permissibility of transaction under foreign law as well as full compliance with Austrian law.

Belgium	Yes (art. 112 PIL Code)	The possibility to reincorporate abroad without interruption of the legal personality is acknowledged in Art. 112 PIL Code, but the PIL Code does not provide for a specific procedure Practitioners suggest a procedure similar to outbound reincorporation (see Table 6.1); the company should be registered after all formalities in the country of origin have been complied with.	See left.
Bulgaria	No (lack of any regulation on how to implement reincorporations). The Commercial register will not record in the registered status of the company that it is a successor of the foreign company. Impossible to make effective use of the EU rights to re-incorporate by way of an inbound transfer of seat.		
Croatia	No	n.a.	n.a.
Cyprus	Yes (for EEA and non-EEA companies). Statutory condition: the memorandum of the overseas company should allow such transaction. (Art. 354B)	Some of the accompanying documents under Article 354C) are: - a copy of a revised <u>memorandum of the company</u> that satisfies the requirements for the incorporation of the company according to Cap.113 (these are mainly formalities that would not hinder corporate mobility) - <u>the resolution which authorises the company to be registered in Cyprus</u>, - a <u>list of the directors</u> of the overseas company and of the secretary of the company.	The Registrar shall file the related documents temporarily and certify that the company is temporarily registered as continuing in Cyprus. According to Article 354G, the temporarily registered company must submit evidence of its removal from the company register of the country of its initial incorporation within 6 months from the issuance of the temporary certificate and in this case, the (final) certificate of continuation will be issued.

Czech Republic	Yes (S. 138, 142 and 143 Civil Code, applicable to any jurisdiction, and S. 384a to 384e Transformations Act, applicable only regarding EU Member States).	Primarily company law rules of the country of origin. Furthermore, some provisions of Transformations Act.	Competence of the notary who issues the certificate for registration in the commercial register (Sections 59z and 384d Transformations Act): the notary attests the compliance with the requirements for registration in the Czech register and that he or she has seen the instrument issued by the competent authority of the country of origin.
Denmark	Allowed since 2012 for reincorporations within the EU/EEA (Ch. 16a CA)	The law follows the rules on cross-border mergers closely; s 318a(2) makes the reservation that a transfer of seat can only be decided if the country of origin allows the transfer	The competent authority in the Member State of origin should issue a statement that that all conditions are satisfied and that the foreign registration authority accepts to register the transfer of the seat to Denmark. The DBA registers the transfer of the seat after having received the certificate and notifies the competent authority in the former home state as soon as possible that the transfer has been registered. Registration cannot take place before the company complies with the Danish Companies Act. The reincorporation comes into force on the day of the registration by the DBA.
Estonia	No	n.a.	n.a.
Finland	No	n.a.	n.a.
France	Unclear. Lack of any statutory rule. Certain French registrars accept the registration of EU-companies that seek to reincorporate under French law, in order to comply with the decisions Cartesio and VALE of the Court of Justice.	n.a.	n.a.

Germany	Traditionally not possible and no legal procedure, but after VALE it is acknowledged that reincorporations need to be permitted within the EU.	Analogy to the German rules on transformation of the legal form (Transformation Act – *Umwandlungsgesetz*);[506] unclear whether the isolated inbound transfer of the statutory seat, without transfer of the real seat, needs to be accepted	Unclear, probably analogy to the Transformation Act
Greece	Unclear. Lack of statutory rules. Legal scholars maintain that inbound reincorporations are allowed.	The articles of association should be amended in compliance with Greek company law. Establishment of the connecting factors of Greek private international law (real seat) onto the Greek territory.	Registration rules and formalities of Greek company law.
Hungary	Yes, under specific conditions set by the Hungarian Supreme Court (in the VALE case). No other case of inbound reincorporations other than VALE.	The former company should be cancelled from the original register At least one member of the predecessor company has to become a member in the re-incorporated company, and at least a part of the assets of the genuine company has to become a part of the assets of the new company.[507]	
Ireland	No	n.a.	n.a.
Italy	Unclear. The question depends on how the private international law criterion is interpreted. Law in action seems to be in favour of inbound reincorporations.	The incoming company should respect Italian substantial and procedural rules.	The incoming company should file for registration, provided that it respects Italian substantial rules.
Latvia	No specific rule. Indirect reincorporation possible through merger with existing company.	n.a.	n.a.
Lithuania	No	n.a.	n.a.
Luxembourg	Yes	The incoming company should hold a general meeting in Luxembourg.	

[506] OLG Nürnberg, DStR 2014, 812.
[507] This condition was not met by Hungary in *VALE*.

Malta	Yes (Continuation of companies regulation 2002).	Reincorporations allowed only to 'approved counties' (EU, OECD countries, Jersey, Guernsey, Gibraltar, British Virgin Islands, Bahamas, Bermuda, Isle of Man, Cayman Islands and Mauritius.) Documents to be filed with the register: - resolution or equivalent document authorising the company to be continued in Malta; - a copy of the revised constitutive documents of the foreign company - certificate of good standing or equivalent document to the satisfaction of the Registrar of Companies - a declaration signed by at least two directors of the company providing certain essential information - list of the directors and company secretary of the foreign company - any other documents required by the registrar to prove that the request is permitted under the law of the foreign jurisdiction and that stakeholders in the company have not objected to the reincorporation.	Upon finalisation of these formalities: provisional certificate of registration is issued to the company; within six months from its issuance the company is to provide the registrar with documentary evidence that it has ceased to be registered in the foreign jurisdiction, whereupon the registrar shall issue a certificate of continuation.
Netherlands	No legal regulation, but a draft bill of 2014 provides for a legal framework	See Table 6.1	Notary deed required, the company comes into existence on the day following the date of the deed
Poland	Allowed according to most of legal scholars (but no explicit provision and case law)	No procedure for inbound-re-incorporations. Suggested by the legal doctrine: company law rules of the country of origin. The company should fulfil Polish legal requirements for the selected type of company.	Polish law governs application to the registry court. The day of registration is the day of successful reincorporation under Polish law.

Portugal	Yes Foreign companies can reincorporate as Portuguese companies (article 33(3) Civil Code and article 3(2) – (5) Companies Act). Foreign companies can also transfer their real seat into Portugal while retaining their original applicable law.	Requirements: transfer of registered office to Portugal.	The Portuguese Commercial Register should verify that the company adapted its articles of association to Portuguese Law before such reincorporation. No obligation on Commercial Register Officials to notify/communicate the foreign register that the company has been reincorporated/registered in Portugal as a Portuguese Company.
Romania	Unclear. On paper, inbound reincorporations should not be allowed. However, in practice it happens that the trade register accepts to register foreign companies reincorporating as Romanian entities. Among legal scholars, this issue is still debated; scholars who suggest that inbound reincorporations should be feasible base this solution on the *VALE* decision.		- Formalities in the country of origin; - Fulfilling formalities before the Trade Registry in order to incorporate as a Romanian company; - Application filed with the Trade Register - Approval of the reincorporation and publication in the Register.

Slovakia	Yes (conditional upon EU law and the provisions of international treaties). No legislation: Slovak courts follow the Cartesio and VALE rulings. Therefore, if the Slovak Republic is in the position of a host state it cannot reject an inbound re-incorporation as these kinds of transformations are allowed for national companies.	A foreign company should: - comply with Slovak law; - convert into a type of Slovak company; - fulfil the requirements for the creation of this company form The company limited by shares established under the legal system of one of the Member States will convert into the company limited by shares regulated by the Slovak law in the process of conversion. The problem of *'similarity of the company legal form'* will arise in this situation. However, the company is free to opt for any stipulated legal form of company as it is allowed for the domestic companies.	Incorporation of a company limited by shares: incorporation documents in the form of a notarial deed on a legal act.
Slovenia	No explicit rule. Legal scholarship maintains that such operations should be allowed, as a consequence of the *Cartesio* and *VALE* rulings, and that rules on conversion should be applied by analogy.	-	-
Spain	Yes: art. 94 SMA.	1) Non EEA companies and any company (including EEA companies) when the country of origin allows domestic companies to keep the legal personality after a transfer of company's seat: report from independent expert stating that the net value of assets is at least equal to the minimum capital requirements 2) EEA companies: transfer of statutory seat, registration in the company register under Spanish law. Foreign companies are not explicitly obliged to cancel and the Spanish register does not inquire.	- Registration into the Spanish register as a Spanish company.

Sweden	Unclear. No Swedish rules regarding the transfer of a company's seat into or out of Sweden and the impact of the ECJ rulings has yet to be tried by the courts.	-	-
United Kingdom	No[508]	n.a.	n.a.

6.2.2 Discussion

1. Our findings indicate that (as a matter of positive law or 'law in action') several Member States have not adopted legislation and a reincorporation of foreign companies as domestic companies of these jurisdictions is either impossible or extremely difficult without prior liquidation. These countries, additionally, do not distinguish EEA from non-EEA companies (Bulgaria, Croatia, Estonia, Ireland, Latvia, Lithuania and the UK). This policy option normally mirrors the ban of 'outbound reincorporations' in the same country and is either based upon general private international law criteria (Ireland and the UK) or upon lack of regulation (Bulgaria). Such regimes are likely to be in breach of the freedom of establishment, as interpreted in the decision *VALE*, regarding foreign companies incorporated in the EU or the EEA. Nevertheless, in a comparative work we should simply acknowledge that in these countries the 'law in action' is that foreign companies cannot reincorporate into these Member States as a domestic type of company.

2. Other countries, by contrast have explicitly allowed and regulated 'inbound reincorporations' in the same legislative instrument that regulates 'outbound reincorporations' (Cyprus, Czech Republic, Denmark, Malta, Portugal and Spain). 'Inbound reincorporations' are feasible only if the country of origin allows domestic companies to reincorporate abroad and if the 'immigrating' company has respected substantive and private international law provisions of that country. In theory, therefore, commercial registers should register the company only if it has complied with substantive and private international rules of both the country of origin and the country of arrival. In some jurisdictions, a notary statement (Czech Republic), a statement of the competent authority (Denmark) or a specific declaration of the immigrating companies (Cyprus) must be attached to the filing with the local register attesting that the relocation complies with the law of the country of origin.[509] Under Spanish legislation, in order to protect creditors of the incoming company, an independent expert should state that the net value of assets is at least equal to the Spanish minimum capital requirements (this provision is applicable to both EEA and non EEA countries). Another issue that needs to be addressed in proceedings for inbound reincorporations is the cancellation from the commercial register of the country of origin. As we have seen above regarding outbound reincorporations, according to both the SE Regulation and the Cross-Border Merger Regulation the 'emigrating' company can be canceled from the original register only after its registration in the country of arrival. In this timespan, therefore, that company is registered in two registers at the same time. Under the

[508] Dicey, n 202, above, at para. 30-003; and *Re Irrigation Company of France Ltd* (1871) LR 6 Ch App 176.
[509] The notary attests to the satisfaction of the requirements of Czech law for registration in the commercial register and to having seen the instrument issued by the competent authority of the country of origin, proving compliance with the requirements of that law for the cross-border conversion of the legal form.

viewpoint of the state of arrival, the question arises as to whether a domestic authority should send a statement of registration to the commercial register of the country of departure and whether it should check that the company is being actually canceled from the register of the original country. Cypriot, Maltese and Danish regimes deal with these issues. In Cyprus and Malta, an 'immigrating company' is registered only temporarily, and is required to submit evidence of its removal from the companies register of origin within 6 months; only after this submission can the (final) certificate of continuation be issued. In Denmark, the local register (DBA) should send a statement, attesting that the company was registered as a Danish company.

3. In several other Member States where this operation is still not regulated, legal scholars and/or judicial decisions maintains that inbound reincorporations should be allowed (Austria, Italy, France, Germany, Greece, Hungary, Luxembourg, Poland and Slovenia). In some cases, this opinion is merely based upon judicial decisions of the Court of Justice in the cases *Cartesio* and *VALE*. In these countries, however, it is uncertain which proceeding is to be followed for incorporating a foreign company into the domestic company register (see: Austria, Italy, France, Germany, Greece, Luxembourg). For instance, in Germany this issue was only decided by one judicial decision, which maintained that rules on national conversions should be applied by way of analogy. In France, despite the lack of statutory regulation of inbound reincorporations, there is anecdotal evidence that certain registrars accept the registration of companies from other Member States that seek to reincorporate under French law, in order to comply with the decisions *Cartesio* and *VALE* of the Court of Justice. In Hungary, where 'outbound reincorporations' are still in practice impossible (see above), inbound reincorporations are considered feasible by applying the *ratio decidendi* of the *VALE* decision (which was related to a company that sought to reincorporate in Hungary). Similarly, in Poland legal scholars hold that inbound reincorporations should be made possible after the *VALE* decision, whereas, as we have seen above, legal scholars are divided regarding outbound reincorporations, which are likely not to be feasible. It is interesting to note, therefore, that both in Hungary and Poland the *VALE* decision is held directly applicable, whereas the position in relation to the statement in *Cartesio,* according to which outbound reincorporations must also be allowed, is much less clear. In Slovenia, finally, where there is no case law, legal scholars maintain that inbound reincorporations should be allowed as a consequence of *Cartesio* and *VALE*.

4. Finally, in other Member States inbound reincorporations are not regulated and it is still uncertain whether a foreign company could convert into a type of company of one of these jurisdictions without prior liquidation (Finland, Romania, Sweden). Romanian legislation, in particular, does not mention inbound reincorporations, and a court of appeal decision from 2008 held that these transactions were not allowed; however, as a matter of fact the feasibility of this operation is a much more controversial issue and several legal scholars argue that EU and EEA companies should be placed in a position of reincorporating under Romanian law without liquidating, as a consequence of the *VALE* decision, but this issue is still debated.

6.3 Involuntary change of law

When a foreign company transfers its central administration, its place of business, a relevant premise or its activity into the territory of another Member State, that state may require the company to convert into a domestic company (and thus re-register with the domestic companies register). The host state may also simply determine the status of the company merely according to its own company law provisions, which is the natural consequence of a company having established a relevant connecting factor in that state. These reactions, of course, will be triggered only where the 'State of arrival' applies a private international law criterion based upon the physical presence of assets, premises or activities to establish the *lex societatis* (i.e. applies a version of the 'real seat theory'). These countries might react in different ways to a foreign company that transfers some physical elements, amounting to a relevant 'connecting factors' for private international law purposes, to their territory.

A first possible reaction is requiring this company to reincorporate as a domestic type of company, by filing for registration and complying with domestic company law rules. In this case, the foreign company formally 'converts' itself into a domestic one, and maintains its nature as 'corporation', with the consequence that its shareholders continue enjoying limited liability. It goes without saying that this is only possible if the jurisdiction of origin accepts outbound reincorporations.

The second possible reaction to inbound transfers of physical elements (the 'real seat') into the domestic territory is treating incoming companies as being governed by domestic law. The application of domestic law, however, will regularly lead to no longer regarding the incoming company as an autonomous legal entity, since companies only come into existence once registered in the way prescribed by the applicable law. In some jurisdictions, courts thus treat such foreign companies as *de facto* partnerships, which can come into existence without a requirement of prior registration. Obviously, such reaction presupposes that substantive law of the country of arrival provides for the 'de facto' formation of non-incorporated entities, which are 'partnerships' in English legal conceptualisation or personal and non-personified companies in other legal systems (such as in France, Germany, Italy of Spain, for instance).[510] The conversion of the original registered company into a domestic partnership implies that, under the standpoint of the country of arrival, members of that company are likely to be liable for the company's debts, regardless of whether that partnership is still registered in the country of origin as own company with limited liability. In practice, in these cases two companies would exist: the original incorporated company, which is still registered and existing in the country of incorporation, and the *de facto* partnership in the country in the new real seat. This outcome would reveal a blatant disagreement between the two countries, and yet this is a quite logical and straightforward application of merely national private international law criteria.

The country of arrival could also adopt a third strategy, namely considering the incoming company simply a non-existing entity. This is a straightforward application of the real seat theory: since the company has its 'real seat' on the domestic territory, domestic company law applies, and since that company did not comply with domestic rules on companies' registration, it cannot be considered as an existing entity.

It goes without saying that these outcomes (reincorporations, conversion into a de facto partnerships or non-existence) are not in line with the freedom of establishment, as interpreted by ECJ in particular in the case *Überseering* and *Inspire Art*. Nevertheless, we shall see that some Member State still apply similar solutions to 'inbound' mobility of a foreign company's real seat, with the consequence that the whole debate and all solutions, even those in compliance with EU law, are to be assessed against the backdrop of these alternative solutions.

By contrast, countries that follow a pure 'incorporation theory' do not require foreign companies to reincorporate under domestic law when they transfer onto the domestic territory a physical premise, even if no factual connection is maintained with the state of incorporation. However, certain incorporation theory countries apply domestic rules to foreign companies having their 'real seat' or other physical elements on the domestic territory, as we shall see in the next pages. Such provisions are likely to constitute restrictions of the freedom of establishment, and given their general nature are unlikely

[510] N Foster, 'Company Law Theory in Comparative Perspective: England and France', (2000) 48 *American Journal of Comparative Law* 573.

to fulfil the strict requirements for justification as applied by the Court of Justice. As a consequence, these rules may not be applicable to EU or EEA companies, although their existence in national law can give rise to significant legal uncertainty.

6.3.1 Overview of national laws

Table 6.3. Involuntary change of law / duty to re-incorporate

Country	Would a foreign company that transfers some physical elements onto the territory have to reincorporate under your law, or would it be called into question?
Austria	EU/EEA Companies: since *Überseering*, the *lex societatis* of companies from other EU Member States is unaffected by a relocation of the real seat (provided the Member State of incorporation does not require the maintenance of the headquarter in that jurisdiction's territory) Companies from non-EU/EEA countries would be treated as civil law partnerships (*'GbR'*); while essentially maintaining their legal capacity, shareholders lose limited liability
Belgium	No distinction between EU/EEA companies and non-EU/EEA companies. If a company transfers its principal establishment to Belgium, it loses its status as a company of the country where it was established and will be subject to Belgian law If Belgian courts notice that a foreign company has transferred its seat to Belgium without simultaneously transferring its statutory seat, there is a risk that the company would be considered as a Belgian partnership with (VOF/SNC) or without legal personality (Maatschap/la société de droit commun) Transfer of the principal establishment from Belgium to another country: the Belgian company may either continue to be subject to Belgian law (in case of renvoi), or convert into a type of a company of the country of immigration (if the latter country allows the conversion of the company), or lose its legal personality (if the country of immigration does not allow the conversion).
Bulgaria	No (incorporation theory country).
Croatia	No (incorporation theory country).
Cyprus	No (incorporation theory country).
Czech Republic	No (incorporation theory country).
Denmark	The transfer of the real seat into Denmark will not lead to a change in the applicable law (both for EU and non-EU companies)
Estonia	No distinction between EU/EEA companies and non-EU/EEA companies. Companies managed or having their main activities in Estonia are governed by Estonian law (see Table 3.1, above), hence these companies are required to 'reincorporate' and their existence would be otherwise called into question.
Finland	No (incorporation theory country)
France	No. In principle the transfer to France of a company's seat might lead to the application of French law, but not to a duty to reincorporate. In particular: when the real seat diverges from the statutory seat, third parties can invoke the application of the law of the country where the real seat is situated (no case law however).
Germany	EU/EEA companies: since *Überseering* these companies are treated as validly incorporated under foreign law even if they move their headquarters to Germany; their German business is then registered as a branch of this foreign company Companies from non-EU/EEA countries: foreign companies are treated as partnerships or sole traders.[511]

[511] BGHZ 178, 192 (*Trabrennbahn*).

Greece	Yes (real seat theory) regarding public companies. Foreign companies moving their 'real seat' onto the Greek territory without reincorporating as Greek companies: these companies are often regarded as de facto Greek partnership. Greek case law has not had the chance to examine the compatibility of these approaches with the Court of Justice case law.
Hungary	No (incorporation theory country)
Ireland	No (incorporation theory country)
Italy	EU/EEA companies: no application of Italian rules (incorporation theory country) Non-EU/EEA companies that have their principal place of business of central administration in Italy: application of Italian rules.
Latvia	Yes. Transfer of the 'real seat' into the territory of Latvia would lead to the application of the Latvian domestic company law. It remains an open question whether the right to decide on 'legal capacity' comprises the right to decide on the 'legal form and status' of the company concerned.
Lithuania	In general, Lithuania follows the incorporation theory, hence there should be no duty to reincorporate (art. 1.19(1) civil code). However, Lithuanian rules on civil capacity apply to foreign companies having a 'subdivision' on the Lithuanian territory (art. 1.19(3) civil code). The criterion of the country of incorporation applies to determine rules on legal nature, foundation, reorganisation and liquidation of a legal entity (art. 1.20 civil code).
Luxembourg	Uncertain. Non-EU companies are likely treated as *de facto* partnerships or an SNC. Case law only for non-EU insolvent companies.
Malta	No (incorporation theory)
Netherlands	No duty to reincorporate as the NL applies the incorporation theory, but the question arises of whether the company should be considered as a 'pseudo'-foreign company subject to the requirements of the Act on foreign business corporations
Poland	EU/EEA companies: no change of applicable law, as it is firmly established that real seat-based PIL rules do not apply to such companies. Non-EU/EEA companies: the answer depends on the choice of law criterion that will prevail, since statutory rules are unclear and need interpretation, and no case law exists: (a) incorporation theory: no involuntary change of law (b) real seat theory: mandatory change of applicable company law when a company transfers its 'real seat' onto the Polish territory.
Portugal	No (despite its general classification as 'real seat country')
Romania	No
Slovakia	No (incorporation theory country)
Slovenia	No (incorporation theory country)
Spain	EU/EEA companies: no involuntary change. Non-EU/EEA companies: mandatory reincorporation in Spain; failure to do so leads to the company being considered a Spanish partnership (art. 9 Companies Act).
Sweden	No (incorporation theory country)
United Kingdom	No (incorporation theory country)

6.3.2 Discussion

1. Table 6.3 shows that several Member States apply domestic company law rules to foreign companies when they establish a relevant link with that Member State's territory (usually their central administration or main management office). This is the case for Austria, Belgium, Estonia, Germany, Greece, Latvia and Spain. This approach is incompatible with EU law if the foreign company is registered in an EU or EEA jurisdiction, and indeed several national reports clearly indicate that this approach does not apply to such companies. Nevertheless, as a matter of fact, some Member States still do not explicitly distinguish between companies incorporated in a EU/EEA and companies from other companies in their domestic law. This is the case in Belgium, Denmark, Estonia, Greece and Latvia. However, in most of these countries case law has not yet explicitly addressed this issue. As a consequence of case law of the Court of Justice, it is to be assumed that, if explicitly requested, courts from these countries would recognise the continued application of the foreign *lex societatis* to EU companies. In other countries that traditionally follow, or followed, the 'real seat theory' it is clear that the duty to reincorporate does not apply to foreign EU or EEA companies. In Austria, Germany and Spain, for instance, EU companies can transfer their real seat onto the domestic territory without triggering any duties to reincorporate as a consequence of case law of the Court of Justice. By contrast, foreign non-EU companies transferring their 'real seat' onto the domestic territory are treated as domestic partnerships (in Spain, the 'immigrating' company can however decide to reincorporate as a Spanish company). In Poland, the position in relation to third-country (non-EU/EEA) companies is somewhat uncertain, and there may be a requirement for such companies to reincorporate under Polish law, if they transfer a physical element to Poland.

2. In all countries that apply the domestic *lex societatis* to foreign companies having a relevant physical element on the domestic territory, the question arises as to the consequences of non-compliance with this duty. As we have seen above, two alternative reactions are possible: considering the incoming company as not existing or considering this company as an unincorporated business association or *de facto* partnership. The traditional position of German and Austrian case law was that immigrating companies were not incorporated according to the 'right' law (i.e. domestic rules), hence being non-existent as legal entities. This rigid position has however changed following the *Überseering* decision, and now foreign companies incorporated in a third country are also treated as *de facto* partnerships when they relocate their real seat onto the German or Austrian territory. Similar solutions are followed by Belgium and Spain, but these countries accept that the 'incoming company' may reincorporate as a domestic company. In other countries, by contrast, incoming companies risk being not recognised as legal entities, unless they reincorporate as a domestic entity; this may be the case in Estonia and Latvia and Greece; the position of these countries, however, is still partially unclear. In Greece, such foreign companies are characterised as domestic partnerships (de facto general partnerships).

3. Other Member States follow mixed solutions, by not requiring foreign companies to reincorporate as domestic entities when they transfer physical elements onto the domestic territory, while only applying selected domestic company law rules to those companies. This is the case in France, Italy and probably Lithuania. Regarding France, when a foreign company transfers its 'real seat' onto the French territory, third parties can invoke the application of French law, but case law is scarce or non-existent. On paper, however, this rule applies to both EEA and non-EEA companies. The Italian solution is applying Italian law to foreign companies having their main business head office on the domestic territory. It is however unclear what portion of Italian law is to be applied to foreign companies; furthermore, it is widely acknowledged that these rules do not apply to EU companies. The Lithuanian position is also peculiar: in general, Lithuania follows the incorporation theory, but Lithuanian rules on 'civil capacity' apply to foreign

companies having a 'subdivision' on the Lithuanian territory; the concept of 'subdivision' is interpreted in a quite broad way, and includes any foreign companies carrying out their business or other main activity in Lithuania, or having their head office in Lithuania.

4. All other Member States do not require foreign companies to reincorporate as a domestic entity when they relocate their real seat onto the domestic territory. In most cases this is a straightforward consequence of the incorporation theory. It is worth mentioning the position of Portugal, which is on paper a 'real seat country'. Nevertheless, in practice courts and the commercial register do not require foreign companies transferring their administrative seat, or any other physical presence, onto their territory to reincorporate under Portuguese law.

7. Other areas of law

The internal affairs of companies are also influenced by criminal and tax law rules, whose international scope is often not limited to domestically incorporated companies.

a) Criminal law

In several Member States, company directors face criminal charges for actions or decisions taken in their capacity as directors. Such criminal offences vary from state to state, according to domestic policy goals and values. What is relevant for a comparative analysis of private international company law issues is that certain criminal offences might be functional substitutes for director duties and liability aimed at protecting a company's assets, and might even represent the backbone of directors' liability in insolvency proceedings. Regarding these criminal liabilities, the question arises as to whether they only apply to directors and other corporate officers of domestic companies, or they also address directors and officers of foreign companies that are active on, or are somehow connected with, the domestic territory. As we shall see when the results of the comparative analysis are discussed, in most jurisdictions the general international scope of criminal liability is based on the place where the criminal act was perpetrated or the place where damage was incurred. By applying this logic, the consequence would be that these criminal sanctions also apply to directors of foreign companies, when these companies are 'active' on the domestic territory or when the damaged persons are resident on the domestic territory ('effects test'). However, when criminal liability is triggered by the violation of directors' duties, some jurisdictions might limit its application to domestic companies only, regardless of the place where the criminal act was perpetrated or its effects were produced. It goes without saying that the scope of a criminal sanction also depends on the interests that a legal system aims at protecting. When the goal is to reinforce directors' duties vis-à-vis the company or its creditors, it seems consistent that the scope is limited to domestic companies only. By contrast, when the goal of a criminal statute is to protect investors or general interests, including those of potential creditors and other stakeholders, such statutes should also apply to foreign companies when the criminal act is perpetrated on the domestic territory or when it produces effects on the domestic territory and on local stakeholders.

b) Tax law

Regarding tax law, it is necessary to stress that the concept of a company's 'tax residence' varies from jurisdiction to jurisdiction and is usually constructed autonomously from criterions for establishing the applicable company law, so that most jurisdictions refer to a qualified relation with a state's territory and its economic life, such as a company's central administration or the management of its day-by-day business. It is also worth stressing, however, that some countries (see hereunder) always consider domestically incorporated companies being resident on the domestic territory for tax purposes. Member States, furthermore, often consider any 'relocation' of the tax residence of domestically incorporated companies as a liquidation for tax purposes and tax all unrealised profits ('exit tax').[512] Exit taxes may be politically understandable strategies from the viewpoint of the State of origin, but they limit corporate mobility throughout the EU and may infringe the EU freedom of establishment, as highlighted by the Court of Justice in *National Grid Indus*.

7.1 Overview of national laws

Table 7: Relevance of other areas of law

Country	Criminal sanctions for breach of company law	Tax rules that potentially impede 'corporate mobility'
Austria	Austrian criminal law generally applicable if the relevant act is committed in Austria, subject however to the substantive requirements of the *lex societatis* where violation of a company law duty forms part of the offence	Austrian tax rules have broadly been brought in line with *National Grid Indus*, i.e. no immediate taxation of unrealised profits upon migration to a EU Member State.
Belgium	Unclear	Exit taxation of capital gains applies if assets are transferred abroad. Compatibility with National Grid Indus questionable since no provision is made for delaying payment of the exit tax.
Bulgaria	Directors face criminal liabilities if within 30 days following suspension of payments they have failed to request the court to initiate insolvency proceedings (article 227b(2) of the Penal Code ('PC')). Directors who have committed or have authorised the commission of the acts specified in para 1 of article 227e PC, namely a trader, who: 1) has not conducted his business with the care of a good trader or has entered into risky transactions that are not within the scope of his/her usual business, 2) has incurred personal, family or other expenses apparently untypical of and not related to the scope of business and incongruous with his/her property status, 3) has failed to set up, or has set up an incorrect annual accounting statement and a balance sheet though under the obligation to do so, and as a consequence has been forced into insolvency and this has caused damages to his/her creditors, shall be punished for imprudent bankruptcy by imprisonment for up to two years, whereas the court may additionally rule deprivation of rights under Article 37(1), sub-paragraphs	No exit taxation

[512] See eg AP Dourado, 'Tax Mobility in the European Union: Present and Future Trends', in A.P. Dourado (ed.) *Movement of Persons and Tax Mobility in the EU: Changing Winds* (Amsterdam 2013) at 3-25, and P Pistone 'EC Law and Tax Residence of Companies' in G Maisto (ed.) *Residence of Companies under Tax Treaties and EC Law* (Amsterdam 2009) at 183.

	6 and 7 (article 227e(3) PC). Under certain circumstances these provisions may apply to directors of foreign companies also.	
Croatia	General principle: territoriality (Croatian law only applies to offenses committed on the domestic territory). Criminal offenses provided in the Croatian companies act and related to directors' duties: these offenses only apply to Croatian companies (provided that they are committed on the Croatian territory). Specific criminal offenses apply to foreign companies also (eg: when directors do not register a branch in Croatia). Criminal offenses provided in the Criminal Code: if committed on the Croatian territory these offenses also apply to foreign companies.	Non-resident companies should pay taxes in Croatia when they establish a 'business unit' in Croatia.
Cyprus	There are several provisions in Cap.113 that impose criminal liability against directors because of a breach of duties imposed by Cap.113. There are also additional laws that establish criminal liability against the company and its directors, for instance, the criminal offense of false and misleading statements in Article 41 of the Cyprus Securities and Exchange Commission's Law (2009) and the offense of false and misleading statements in supplying information for legal purposes in Article 189 of Securities and Cyprus Stock Exchange Law (1993). The relevant issues are not governed by the *lex societatis* but by the law of the place where the offense has been committed.	Tax residence is in Cyprus when 'management and control' are exercised in Cyprus. No exit taxation.
Czech Republic	Criminal offenses of companies' directors or members of other bodies (chapter 5 of the Criminal Code) eg: breach of the duty to administer another's property, harm done to a creditor, preference transfers, intentional bankruptcy, breach of duties in bankruptcy and insolvency proceedings. Territoriality principle: Czech criminal offenses apply to crimes committed on the territory of the Czech Republic (i.e. a director acts in the Czech Republic or acts abroad but the consequence of such crime was about to occur in the Czech Republic). Personality principle: Czech criminal offenses apply to acts committed abroad by a citizen of the Czech Republic.	If a company is being transformed under the Transformations Act, when the extent to which its tax liability passes to its legal successor is not sufficiently evident, the tax administrator shall determine the legal succession regarding tax liabilities. No exit taxation.

Denmark	Breaches of the CA can lead to criminal sanctions (Ch. 23 CA); however, these provisions seem to be tied to duties established in the CA and cannot be applied to foreign companies Directors of non-Danish companies may be subject to criminal sanctions, as well as directors of Danish companies, for crimes committed in Denmark.	Exit taxes apply to hidden reserves of assets that cease to be subject to Danish corporation tax The Corporation Tax Act was amended in 2014 as a reaction to National Grid Indus; payment of exit taxes may now be deferred for up to seven years if the company's tax residence is transferred to an EU/EEA Member State
Estonia	Criminal sanctions, also applicable to directors of foreign companies.	No rules that would impede 'corporate mobility'; Estonia is said to have a very simple and rather liberal tax regime
Finland	No information	No information
France	The criminal offense '*abus de biens sociaux*' (abuse of the company's assets) (Articles L. 241-3 and 242-6 of the Commercial Code) applies to directors of foreign companies (EU and non EU companies), provided that the company has activities in the France territory (Cass. crim., 25 June 2014, n° 13-84445).	1) A company transfers its statutory seat or its real seat from France to a non-EU country: it should pay taxes on hidden reserves of the assets that cease to be subject to French corporation tax. 2) Relocation within the EU: any transfer that reduces the assets of the company leads to taxation, but the payment may be deferred for up to five years on an interest-free basis. 3) Inbound reincorporation: assets are taxed (except EU companies).
Germany	German criminal law applicable if the relevant act is committed in Germany[513] Criminal sanctions for bankruptcy offences applied to English limited companies based in Germany[514]	If a company transfers the statutory seat or the headquarters out of the EU/EEA, it is obliged to pay taxes on the hidden reserves of assets which cease to be subject to German corporation tax; payment of the taxes may be deferred for up to five years on an interest-free basis Criticised by some commentators for not being in line with National Grid Indus
Greece	Territorial principle: Greek criminal offenses apply to crimes committed on Greek territory. Personality principle: Greek criminal offenses apply to acts committed Crimes committed by foreigners abroad: Greek criminal law on felony or misdemeanour applies, if the act is directed against Greek citizens and is punishable under the laws of the country where it was committed (…). Greek criminal law applies to criminal offenses committed in Greece or abroad by directors or other persons involved in foreign companies.	No exit taxation.
Hungary	The Criminal Code applies for criminal offenses committed (i) in Hungary, (ii) abroad by Hungarian citizens, or (iii) abroad by foreign citizens to the	When a Hungarian company transfers it central management abroad: for tax purposes this is a transfer of tax residence and is considered as a

[513] BGH, NStZ 2010, 632 (holding that the criminal offence of a breach of trust, s. 266 Criminal Code, can be based on the breach of duties under UK company law).
[514] AG Stuttgart wistra 2008, 226.

	detriment of Hungarian natural or legal persons (e.g. companies).	liquidation (art. 16(7) Act on corporate taxation 1996). This rule has not been change after *National Grid Indus.* If the Hungarian company keeps a branch in Hungary after the relocation of its administrative centre, the branch should be re-registered as a new undertaking. If the Hungarian company keeps a branch in Hungary after the relocation of its administrative centre, the branch should be re-registered as a new undertaking.
Ireland	Directors' criminal liabilities mainly apply to directors of Irish companies, regardless of their residence, while directors of foreign companies face a limited exposure to criminal liability in specific cases.	Exit tax in Ireland since 1997; but following *National Grid Indus* provision in Finance (No.2) Act 2013 allowing for the deferral of an exit tax charge arising on the migration of the tax residence by a company from Ireland to another EU/EEA member state
Italy	Criminal offences included in the Italian Civil Code and in the Consolidated Financial Act apply to only Italian companies. Other criminal offences are included in the Insolvency Act: these offences apply only when an insolvency proceeding is open under Italian insolvency law (i.e.: also to foreign companies whose COMI or whose ‘principal seat’ is in Italy).	Exit tax (art. 166 Consolidated Fiscal Act, amended in 2014 after *National Grid*). Any transfer abroad of an Italian company’s fiscal residence is considered a ‘taxable transaction’ of all company’s assets (including goodwill). This corporate income tax is levied on unrealised gains, calculated as the difference between the book value of transferred assets and the market value. After the 2012 reform, if an Italian company transfers its fiscal residence to another Member State of the EU or of the EEA (provided that the State of arrival has agreed with Italy to provide fiscal assistance, similarly to EU Directive 2010/24) payment of the *exit tax* can be deferred or can be paid in several instalments.
Latvia	A foreign company can be penalised for actions committed in Latvia with regard to the violation of work safety or illegal employment.	Report outlines various criteria for tax residence; tax law is a potential limitation for seat transfers
Lithuania	Lithuanian prosecutors and courts would most likely follow the general territoriality principle of criminal law.	No rules that would impede ‘corporate mobility’; Lithuania said to have a very simple and rather liberal tax regime.
Luxembourg	Abuse of corporate assets (abus de biens sociaux) (article 171-1 of the 1915 Companies Act): applicable to foreign companies having their real seat in Luxembourg. In practice, this was only applied to non-EU companies.	A reincorporation is considered a dissolution for tax purposes.
Malta	Courts may order investigations of the affairs of a foreign company when it appears that: (i) the company’s affairs are being conducted with a view to defrauding creditors or in a manner that could be unfairly prejudicial to members; (ii) that proposed or actual acts or omissions of the company are unfairly prejudicial or that the	Where shareholders of companies are not resident in Malta, they are entitled to claim refunds on tax paid in respect of profits made by the company from ‘foreign income’. Relevant connecting factors for corporate taxation are not only the residence and domicile of the company, but also the residence of shareholders and the place in which profitable activity occurs.

	company was formed for a fraudulent or unlawful purpose; (iii) that persons involved in the establishment or management of the company have been party to fraudulent or prejudicial activity related to the company; or (iv) that members have not been provided with all the information that they might reasonably expect of the company.	
Netherlands	Dutch criminal law is applicable when a person commits a criminal offense in the Netherlands, as well as when a person commits a criminal offense against a Dutch citizen.	Exit taxation of capital gains applies The law was changed after National Grid Indus; payment of the exit tax can now be delayed if the company provides sufficient security; since a number of administrative requirements apply, as well as a guarantee and an interest charge, it can be debated whether the new rules are in compliance with the Treaty
Poland	No specific rules on the application of Polish criminal rules to directors of foreign companies active in Poland. Therefore, general rules on the scope of criminal law apply: (1) its application is based on the principle of territoriality; (2) criminal law is also applicable to Polish citizens who committed a criminal offense abroad; (3) Polish criminal provisions are applicable to foreigners committing an offence under the Polish law, the given offence is criminalised in both relevant countries and the perpetrator is present on the territory of Poland (articles 109 – 111 Polish Criminal Code).	Any entity having its seat within the Polish territory or any entity whose management board operates in Poland is considered a tax resident subject to the tax liability calculated on the basis of their entire income. Tax neutrality provisions for cross-border mergers have been implemented. Polish tax law does not entail any exit tax on unrealised capital gains at the moment of tax residency change.
Portugal	International scope of criminal offenses: this applies when the criminal act is committed in Portugal or to act committed by directors of companies having their seat in Portugal, even if their action has taken place abroad. Relevant criminal provisions for company law purposes: (a) acts prejudicial to creditors' interests (fraudulent insolvency); (b) frustration of creditors (directors make companies' assets disappear); (c) negligent insolvency; (d) wrongful trading in the vicinity of insolvency.	Tax law remains at least a source of potential limitation for outbound transfers of seat of Portuguese companies. The Portuguese Corporation Tax Code was substantially changed in 2014, through *Lei n. 2/2014*, of the 16 January, in order to comply with Court of Justice decision C/38/10 [2012].
Romania	Criminal offenses aiming at avoiding significant damages to creditors (eg: untrue information in prospectuses, reports and communications at the moment of the formation of the company, done in bad faith).	No exit taxation.

	Criminal offenses that ensure compliance with company law: only applicable to Romanian companies.	
Slovakia	Criminal offenses of companies' directors or members of other bodies (chapter 4 and 5 of the Criminal Code) e.g.: breach of the duty to administer another's property, harm done to a creditor, intentional and fraudulent bankruptcy. Territoriality principle: Slovak criminal offenses apply to crimes committed on the territory of the Slovak Republic. Personality principle: Slovak criminal offenses apply to acts committed abroad by a citizen of the Slovak Republic.	Companies registered in the Slovak Commercial Code and companies having their real seat on the Slovak Republic will fall under the applicability of the Act on Direct Taxation.
Slovenia	Criminal Provisions are in part 9 of the Companies Act, in the Criminal Code (Art. 240 governing the abuse of trust in business activity and Art. 228 governing business fraud) and in the Liability of Legal Persons for Criminal Offences Act. No case law related to criminal sanctions committed by directors of foreign companies.	A company shall be treated as a resident either if its registered office is located in Slovenia or if its place of effective management is located in Slovenia. Exit taxation. No compliance with National Grid Indus.
Spain	Criminal offenses committed on the Spanish territory can be brought to trial according to Spanish criminal law ('territoriality principle': art. 23(1) Organic Law of Judicial Powers); under certain conditions, Spanish courts can also hear cases on criminal offenses committed outside Spain ('personality principle': art 23(2) Organic Law of Judicial Powers).	Companies with residence in Spain are taxed according to Spanish tax rules (art. 7(1)(a) act 27/2014). Companies are considered as Spanish tax resident when (a) incorporated in Spain or (b) when the effective direction is in Spain (art. 8(1)(a) act 27/2014). No exit taxation.
Sweden	Directors of a non-Swedish company may be subject to criminal sanctions for crimes committed in Sweden.	Non-resident companies are subject to tax in Sweden only insofar as they derive income subject to Swedish source country taxation, which include, for example, business income effectively connected with immovable property or a permanent establishment in Sweden. Exit taxation, which was however in compliance with Court of Justice decision *National Grid Indus*, since deferral was already foreseen.
United Kingdom	Offences under the Companies Act 2006 in general only apply to companies incorporated in the UK	Tax residence: companies incorporated in the UK and companies whose central management and control is exercised therein. A company which is resident in the UK by virtue only of central management and control can become non-resident for fiscal purposes by moving its central management and control abroad, with

		effect from the end of its current accounting period, and without incurring any exit charge.

7.2 Discussion

1. The international scope of directors' criminal responsibility is intricately, and sometimes incoherently, regulated in the Member States. From the national reports, significant differences emerge, but also certain patterns and commonalities. In general, it is useful to distinguish criminal offences related to the violation of domestic directors' duties and ensuring the enforcement of company law rules and standards, which are often included in the same statutory materials that govern domestic companies (either the domestic civil code or specific companies or commercial acts), from criminal offences aimed at protecting general interests, interests of actual or potential creditors, or the interest of the market at large. The latter are most likely to be applicable to foreign companies if the conduct is perpetrated on the domestic territory. For instance: criminal offences related to a company's insolvency could apply to foreign insolvent companies having their COMI on the domestic territory (this is the case in Italy); criminal offences aimed at protecting labour also apply to foreign companies active on the domestic territory (this is the case in Latvia). The scope of criminal liability intended to ensure the enforcement of company law rules is a much more controversial field. In some Member States, these criminal offences apply only to directors of domestic companies (Croatia, Denmark, Italy, Romania and the UK). National reports of several other Member States, however, indicate that such criminal statutes also apply to foreign companies having some connection with the domestic territory, or when the crime is committed on the domestic territory (Austria, Bulgaria, Cyprus, Estonia, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Spain and Sweden). National reports reveal that following connecting factors are applied: (a) the fact that the crime is committed on the domestic territory (see: Austria, Croatia, Cyprus, Germany, Denmark, the Netherlands, Poland, Portugal, Spain and Sweden); and (b) the fact that the company has activities or its 'seat' on the domestic territory (France and Portugal).

2. Regarding exit taxes, a comparative assessment of national reports reveals a rather complex scenario. Some national reports maintain that in their jurisdiction no exit taxation is levied (Bulgaria, Cyprus, Croatia, Czech Republic, Estonia, Greece, Lithuania, Poland, Romania, Spain, the UK). In most Member States, however, domestic companies relocating their tax residence abroad are taxed as though they were wound-up. Several judicial decisions of the Court of Justice have addressed national tax rules that restricted freedom of establishment; recently, in *National Grid Indus*, the Court of Justice held that exit taxes restrict freedom of establishment and may infringe EU law if the relocation of the tax residence triggers an immediate taxation of all unrealised profits (whereas it may be in line with the company's Treaty rights if payment of the taxes is postponed). As a consequence of this decision, several of the Member States providing exit taxes have limited the scope of these rules to relocations outside the EU or have deferred the payment of unrealised profits to at least five years (Austria, Denmark, France, Ireland, Italy, the Netherlands, Portugal). In Sweden, exit tax rules already allowed a deferral and are in compliance with the case law of the Court of Justice. In other countries, however, it is more problematic whether the national regime on exit taxes complies with the case law of the Court of Justice, and some commentators argue that the conditions imposed by the Court in *National Grid Indus* are not satisfied (Belgium, Germany, Hungary, Latvia, Luxembourg and Slovenia).

8. Jurisdiction

According to the Brussels I Regulation Recast, in proceedings relating to 'the validity of the constitution, the nullity or the dissolution of companies' or to 'the validity of the decisions of their organs', the courts of the Member State where the company has its 'seat' have exclusive jurisdiction.[515] The Brussels I Regulation Recast, however, does not provide for a uniform concept of 'seat'. On the contrary, national courts should interpret the word 'seat' in accordance with their own private international law rules.[516] When this definition is interpreted as 'statutory seat' (or 'registered office'), courts are competent to hear cases on the matters mentioned in article 24(2) Brussels I Regulation Recast only when the defendant is a domestically incorporated company, while they are not competent if the company is incorporated abroad. By contrast, when a Member State interprets the term 'seat' as 'real seat' (or a similar concept related to the location of the company's centre of activities), their courts are obviously competent to hear cases when the defendant has its 'real seat' on the domestic territory, even if the company is incorporated in another state. Therefore, the jurisdiction criteria are likely to diverge across the EU and both positive and negative conflicts of jurisdictions may arise. Since courts should employ their own rules of private international law, the concept of 'seat' is likely to mirror the main conflict-of-laws criterion employed in a given Member State; consequently, we can predict that 'real seat countries' will interpret the term 'seat' as 'real seat', while 'incorporation theory' countries would interpret it as 'registered office'. At the same time, the opposite might also be true: the interpretation of the concept of 'seat' for jurisdiction purposes reveals a certain attitude of a given Member State and might shed light on ambiguities as to its main private international law logic.

8.1 Overview of national laws

Table 8. Jurisdiction

Country	Interpretation of 'seat' requirement in Brussels I-Regulation Recast by national courts	Main connecting factor
Austria	EU companies: registered office. Companies from third countries: real seat.	EU companies: incorporation theory Non EU companies: real seat theory
Belgium	Either principal establishment or registered office.	Real seat theory
Bulgaria	Registered office	Incorporation theory
Croatia	Registered office	Incorporation theory
Cyprus	Registered office	Incorporation theory
Czech Republic	Registered office	Incorporation theory
Denmark	Probably registered office. No case law.	Incorporation theory
Estonia	Unclear. No case law nor literature available	Incorporation theory
Finland	Registered office.	Incorporation theory
France	Real seat. No case law.	Debated
Germany	EU companies: registered office Companies from third countries: real seat	EU companies: incorporation theory Non EU companies: real seat theory
Greece	Real seat. Unclear. No case law.	Real seat theory as a general rule. Incorporation theory for private companies.
Hungary	In case of doubt: seat is the place of	Incorporation theory

[515] Art. 24 (2), first sentence, Brussels I Regulation Recast (Art 22 (2) of the 'old' Brussels I Regulation).
[516] Art. 24 (2), second sentence, Brussels I Regulation Recast (Art 22 (2) of the 'old' Brussels I Regulation).

	management. No case law.	
Ireland	Unclear. No case law. No practical problems or conflicts.	Incorporation theory
Italy	The jurisdiction in which companies are located and undertake their business (just one decision: *Corte di Cassazione* 2005).	Incorporation theory
Latvia	Probably registered office. No case law.	Debated
Lithuania	Probably registered office. No case law.	Incorporation theory
Luxembourg	Unclear. No case law.	Real seat theory.
Malta	(a) Companies incorporated in Malta, *or* (b) companies deemed to be resident by virtue of the situation of their central management or control.	Incorporation theory
Netherlands	Registered office. In case of negative conflict, Dutch courts accept jurisdiction.	Incorporation theory
Poland	The seat of the managing bodies. No case law	Debated
Portugal	Unclear. No case law	Real seat theory, but debated
Romania	Registered office	Incorporation theory
Slovakia	Registered office	Incorporation theory
Slovenia	Registered office	Incorporation theory
Spain	Domicile determined by the law under which a company s constituted or recognised, nor by its articles of association or funding regulations. In all other cases: the place in which its legal representation is established or in which its main functions are carried out.	Debated (predominant opinion: incorporation theory)
Sweden	Registered office	Incorporation theory
United Kingdom	The seat of a company is defined by paragraph 10 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001/3929 as being in the UK if either: (a) it was incorporated under the law of a part of the United Kingdom; or (b) its central management and control is exercised in the UK.	Incorporation theory

8.2 Discussion

1. Surprisingly, several national reports indicate that domestic courts have never addressed the concept of 'seat' under the Brussels I Regulation (this is the case in Denmark, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland and Portugal). The most striking result of this overview, therefore, is that the content of the law in several jurisdictions is simply uncertain. In other words, should a conflict emerge regarding 'the validity of the constitution, the nullity or the dissolution of companies' or 'the validity of the decisions of their organs', it is unpredictable whether domestic courts of these countries will declare themselves as competent or not. In this regard we should distinguish three scenarios. The first scenario refers to companies that are incorporated in one of the aforementioned countries and have their real seat on its territory; in these circumstances, domestic courts of the country of incorporation are certainly competent, since that company would comply with both possible concepts of 'seat'. The second

scenario refers to foreign companies having their 'real seat' on the domestic territory; in this case, it is uncertain whether domestic courts of these countries will accept competence or not. Finally, when a domestic company has its real seat abroad, it is uncertain whether courts of these jurisdictions will be held competent or not, although it seems unlikely that a domestic court will refuse competence regarding domestically incorporated companies (but we have no evidence of this conclusion from the national reports).

2. In other Member States, the word 'seat' under article 24(2) of the Brussels I Regulation is interpreted as 'real seat' or 'administrative office' (or a similar concept related to the location of the company's centre of activities), with the consequence that domestic courts of these states are competent to hear cases related to companies incorporated in other States and having their 'real seat' (or s similar concept) on the domestic territory. This is the case in Belgium, France, Italy, Poland and Spain. In Italy, however, only one decision has been published on the concept of 'seat', which was interpreted as the place where companies undertake their business activities (hence, probably this result is not entirely reliable and the interpretation seems to be still quite uncertain).

3. In other countries, by contrast, the concept of 'seat' under article 24(2) of the Brussels I Regulation is interpreted as a company's registered office, with the consequence that domestic courts would be competent to hear cases related to domestic companies even though these entities have their 'real seat' or their central administration abroad. This is the case in: Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Ireland, Latvia, Romania, Slovakia, Slovenia and Sweden. Interestingly, the Austrian and German regimes distinguish EU companies from non-EU companies: regarding the former, the concept of 'seat' is the registered office, while for the latter 'seat' is interpreted as the place of their central administration. This solution aims at avoiding negative and positive conflicts of jurisdiction in the EU (but its effectiveness is questionable as long as there is no uniformity in the interpretation of the concept of 'seat').

4. In the UK, Malta and Belgium, two alternative criteria apply: a company can be sued in domestic courts either (a) when it is a domestically incorporated company, or (b) when its central management and control is exercised from the domestic territory (this is the case in the UK and Malta) or its principal establishment is on the domestic territory (Belgium). These are 'catch-all' criteria that expand the competence of domestic courts to include both domestic companies having their 'real seat' abroad and foreign companies with their 'central management and control' on the domestic territory. The risk of these criteria is that positive conflicts of jurisdiction might arise in relation to foreign companies whose country of incorporation follows the 'statutory seat' concept.

5. In comparative terms, the most interesting question is whether the interpretation of the concept of 'seat' under article 24(2) of the Brussels I Regulation Recast actually mirrors the general private international law criterion for company law matters. Article 24(2) Brussels I Regulation Recast stipulates that this term should be interpreted according to the private international law criteria of each Member State; therefore, we would expect that there should be a perfect symmetry between the jurisdiction criterion and the main conflict of law connecting factor. The comparative analysis only partially confirms this hypothesis. In most countries that clearly follow the 'incorporation theory', the concept of 'seat' is actually interpreted as the registered office (Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Slovenia, Sweden and the UK); in the UK and Malta, however, courts may also be competent to hear cases when the defendant has its central management or control on the domestic territory. The only partial exception among pure 'incorporation theory countries' is Ireland, in which courts have never properly defined the concept of 'seat' under article 24(2) of the Brussels I Regulation and regard the location of a company's 'seat' as a self-evident element. Additionally, Austria and Germany, which follow the incorporation

theory for EEA companies and the real seat theories for other companies, interpret the concept of 'seat' for jurisdictional purposes in a similar vein: as the company's registered office when the company is incorporated in the EU or in the EEA, and the 'real seat' in other cases. In most of these jurisdictions, however, there is no case law and the interpretation draws on analysis by scholars. Italy is in a quite peculiar position: although it follows the 'incorporation theory', the concept of seat seems to be interpreted as 'real seat', but this conclusion is quite uncertain as just one decision is published on the matter. Particularly interesting are those countries whose national reports have revealed that the content of the main conflict of law criterion is contentious, debated or unclear: France, Poland and Spain. In these countries, legal scholars predominantly seem to be in favour of the 'incorporation theory', but it is undeniable that the features of the private international law mechanisms are still debated. Interestingly, in these three countries the concept of 'seat' under article 24(2) Brussels I Regulation Recast is interpreted with reference to fact-based criteria, such as the 'real seat' or the actual management of the company, even for companies incorporated abroad. Regarding the Member States that still largely follow the 'real seat theory' (Belgium, Greece and Portugal), the results are not unequivocal: while in Greece and Portugal the interpretation of the concept of 'seat' under Brussels I is uncertain and there is no case law on the matter, in Belgium the answer is based on a double criterion, as it can mean either the registered office or the principal establishment (similarly to the UK and Malta). Greece seems to define 'seat' as real seat, according to its general private international law approach.

9. Critical reflections

As discussed above, the Court of Justice, starting with the decision rendered in the case *Centros* in 1999, has continuously clarified the scope of companies' freedom of establishment. Nevertheless, Member States' private international law regimes may not be in line with these continuous developments of case law of the Court of Justice and, consequently, with the freedom of establishment. Such a tension between EU law and national law is not surprising, and is to be considered a normal scenario in 'multi-layer' legal systems like the European Union. In this scenario, the question arises whether national courts, scholars and legislators are aware of these discrepancies and aim at addressing them. Therefore, we have asked to national reporters to assess whether conflicts between domestic rules and EU law exist and whether policy makers intend to reform (or have already reformed) the present legal situation.

Additionally, the proper functioning of the freedom of establishment may be impeded by administrative practices of notaries, commercial registers or courts, not only by legislation. Such obstacles to a correct application of EU law are not always visible and cannot be repealed by simply amending statutory rules. Furthermore, if the national commercial register is decentralised, different courts and local offices of the commercial register may follow inconsistent practices and interpretations of domestic rules, especially if these rules are somehow ambiguous. These inconsistencies may themselves represent restrictions on the freedom of establishment.

9.1 Overview of national responses

Table 9: Critical reflections

Country	Compatibility of the national framework with EU law	Reforms, or plans for reforming, the legal situation.	Do differences in interpretation and application exist among different courts and registrars?	Law firms or other advisory firms that promote incorporation in another jurisdiction
Austria	Largely in line with EU law. There is broad agreement among commentators that the rules of Austrian company law, including capital maintenance rules and employee co-determination, do not apply to foreign companies incorporated in other Member States. There is some uncertainty and debate as to the application of rules at the boundary between company and insolvency law to foreign companies, limited however to areas not yet addressed in the relevant Court of Justice jurisprudence.	No current plans	Some differences are likely, but regular case law from the Austrian Supreme Court leads to fairly consistent practice overall.	No
Belgium	Requirement to have the real seat of a company established under Belgian law in Belgium is seen as being in line with the case law It is controversial whether the real seat theory can be applied to companies validly incorporated abroad, and it is generally acknowledged that rules of Belgian substantive company law applied to foreign companies need to	Proposal of the Belgian Centre for Corporate Law to amend the Belgian PIL Code: to adopt the incorporation theory and introduce a procedure for the cross border transfer of the seat, based on the procedure for the transfer of the seat of the SE Submitted to the Ministry of Justice in June 2015; it can be expected that the Minister will prepare a bill based upon the	No	-

	meet the *Gebhard* test	proposals		
Bulgaria	Even if Article 3(1) of the PILC declares the supremacy of the norms of international conventions and other international instruments, including European instruments over the PILC, the systematic negligence of inbound/outbound re-incorporations impedes corporate mobility. However, this has not yet been judicially tested on national courts.	-	-	-
Croatia	Incorporation theory country: no violation of EU freedom of establishment, at least in general. Art. 17(2) PILA provides for the application of company law of the country where a company's real seat is located, if different from the country of incorporation, when the former considers that company as a domestic company. This situation is probably rare, but this could be a violation of EU freedom of establishment.	A reform of private international law is being prepared. Art. 17(2) PILA is likely to be abolished.	Inconsistencies could arise.	-
Cyprus	Article 362 Cap 113 is highly problematic, see 3.2 and 4.4	-	No significant inconsistencies.	Focus Business Services (http://www.fbscyprus.com/?pageid=1).
Czech Republic	Yes (despite uncertainties on cross border transfer of seats, connected to non-EEA	-	-	-

	transfers).			
Denmark	Discussions in the literature focus on the Danish rules on branches of foreign companies, cross-border groups and tax issues; neither of these issues have been tried in court	Interpretation of registered office as the place from where the company was actually managed changed by the Danish Commerce and Companies Appeals Board in 2008; now it is sufficient that the company's management or a (genuine) representative of the management can be contacted at the registered office (but not clear what authority such a representative must have)	No	Certain law firms and other advisory firms actively assist companies in incorporation in another jurisdiction, but these services seem to be promoted only on a small scale
Estonia	Presumably yes	Since 1 December 2014 digital ID-cards are issued to non-residents, eg for the benefit of foreign entrepreneurs who own or plan to start a company in Estonia (easy registration)	Presumably not	Some cases recently when Estonian companies relocated to Norway before opening insolvency procedures due to the more favourable insolvency regime there
Finland	In line with EU law.	-	No known differences in interpretation and application of the relevant rules.	-
France	Third parties can choose the application of the law of the statutory seat and law of the real seat of a company. Therefore, companies incorporated in another Member State, but having its real seat in France territory, may be submitted to French company law: this solution does not comply with the *Inspire Art* decision.	No intention of the French Legislator to reform the legal situation.	Consistent interpretation throughout the country	Yes.

Germany	There are some discussions about the compatibility of specific issues with EU law (e.g. rules on the name of companies), but apart from these issues it is largely accepted that German law, including central regulatory elements of the German corporate economy, such as strict capital maintenance rules and employee co-determination, do not apply to companies incorporated in other EU states - Not clear whether the Gebhard criteria are always applied as strictly in the German jurisprudence as in ECJ case law.	A draft law codifying the private international law of companies had been prepared in Germany,[517] but it is currently not being pursued	Differences in application of the law are likely since commercial registers are decentralised in Germany	A number of advisory firms promote services for incorporation of a UK Limited to German businesses, e.g., http://www.easy-limited.de/; https://go-ahead.de/; http://www.limited-kaufen.com
Greece	Greek law managed to adjust the real seat theory to the requirements of the findings of the Court of Justice. Lack of special provisions on cross-border conversions might be problematic after *Cartesio* and *Vale*.	No	No	There are some quite large law firms in Greece offering consultation to those companies wishing to transfer their seat abroad or wishing to transfer their registered office to Greece. The financial crisis put pressure on Greek companies and many of them transferred their seat abroad (esp. in Bulgaria and Cyprus).
Hungary	No proceeding for inbound conversions.	-	-	-

517 Referentenentwurf, 'Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen', available at http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/int_gesr/int_gesr-index.htm.

	Exit tax.			
Ireland	Presumably yes	No	Presumably not	A large number of international companies invite companies to set up offshore companies or to relocate existing businesses overseas and many websites promise a quick company formation in Panama, the British Virgin Islands etc. However, Irish law firms or other advisory firms generally do not actively promote incorporation in another jurisdiction. On the contrary, the emphasis tends to be on encouraging international companies to relocate to Ireland to take advantage of favourable tax treatment, an English speaking educated workforce, membership of the EU etc.
Italy	Transparency and registration requirements of secondary seats: unclear to what extent these rules are applicable to EEA companies. The lack of any regulation on cross-border reincorporations is probably at odds with ECJ case law (*Cartesio*) and creates the risk of abuses.	No current plan	Different registrars follow different interpretations on cross border reincorporations.	At these websites exist: - www.italianlimited.it (which targets Italian undertakings seeking to incorporate a company in the UK, Malta, Ireland, or Cyprus) - www.italiancompanyformations.com (promoting the incorporation of Italian companies)
Latvia	Unclear / no major challenges yet	No	Limited number of cross-border company law related issues	Not aware of advisory firms; law firms deal with tax and regulatory benefits

Lithuania	Yes due to incorporation theory	No	Possible but little experience	Some but to benefit from a perceived better tax environment, rather than to the reincorporation of existing Lithuanian companies abroad
Luxembourg	-	No reform plan	-	No
Malta	Compliance with EU law. However, there are areas that would benefit from greater clarity (e.g. the border between the *lex societatis* and the *lex concursus*)	-	-	-
Netherlands	Application of parts of the Act on foreign business corporations to EEA companies (see Table 3): considered not in breach with EU-law as these rules are pivotal to combating fraud	Proposal of a bill for an appropriate procedure for outbound and inbound transfers of seat, 2014: addresses the transfer of the statutory seat of a Dutch public or private limited liability company to another EU or EEA country, as well the transfer of the seat of foreign companies to the Netherlands[518]	-	-
Poland	1) The main connecting factor is still unclear; 2) Lack of regulation on reincorporations.	New Private International Law Act 2011, article 19 (1): 'The transfer of the seat within the EEA does not result in the loss of legal personality.'	No broad interest in using foreign entities to do business in Poland. Opalski (2014) mentions that there are *thousands* of Polish companies whose board members are resident abroad and whose 'real seat' is abroad.	-
Portugal	Despite the wording of article 3(1) Companies Act, in practice there is no incompatibility with EU law.	-	No	No

[518] The proposal can be found at https://www.internetconsultatie.nl/grensoverschrijdende_omzetting (no English translation available).

	Regime on 'affiliated companies' (art. 481 Companies Act) may raise doubts regarding its compatibility with EU law.			
Slovakia	Not any major inconsistency with EU law.	-	There are some inconsistencies among courts regarding the question of re-incorporations.	-
Slovenia	The potential conflicts of the Slovene rules with the requirements of EU law are primarily noticeable in the field of outwards corporate mobility.	The legislator/policy maker currently does not intend to reform this legal situation.	No	No
Spain	Art. 9(2) Companies Act is not applicable to EEA companies (but the legislators do not aim at amending it).	No	No	-
Sweden	No substantial conflict between Swedish law and the requirements of EU law.	-	No	No
United Kingdom	The prohibition of inbound and outbound reincorporations is likely to be a violation of EU freedom of establishment, as interpreted by Court of Justice in the cases *Cartesio* and *VALE*.	No plan to address this issue (which needs a legislative reform).	No	Yes

9.2 Discussion

1. Our findings (table 9) reveal the following potential incompatibilities of Member States legislation with EU law: (a) some countries block the 'arrival' of foreign companies into the domestic territory, mostly because they still adhere to some form of the 'real seat theory'; (b) some countries apply domestic rules to branches or activities of foreign companies; (c) in some countries, reincorporations are not regulated or there is uncertainty as to whether they are allowed and as to how they should be implemented; (d) in some States inbound and outbound reincorporations are not possible, which might be considered as a violation of the freedom of establishment (see: Bulgaria, Ireland, Slovenia and the UK); (e) in some Member States exit taxes may not be in compliance with the conditions developed by the Court of Justice in *National Grid Indus* and other case law. In the Netherlands, specific domestic rules also apply to foreign companies incorporated in EEA countries, but these provisions are considered in line with case law of the Court of Justice as they aim at combatting fraud and, therefore, are argued to pass the 'Gebhard test'.

2. Most national legislators have either intervened, or seem to have the intention to intervene, in order to resolve these discrepancies. It is interesting to note, however, that the French legislator does not have any plan of amending domestic law, although this is, in some respects, at odds with the Court's decision in *Inspire Art*; furthermore, there is no plan to adopt legislation allowing inbound and outbound reincorporations into and from the UK. Most national reports are either silent on the question whether an inconsistent interpretation of domestic rules across courts or commercial registers risks undermining a correct application of freedom of establishment, or they maintain that the practices of notaries and local registers are consistent throughout the country. The only exceptions are Austria, Croatia, Germany and Italy, whose reports mention the possibility of inconsistent interpretations and applications. In this respect, it is worth mentioning the German and Italian reports, which argue that a reason for potentially diverging interpretations and practices throughout the country is the decentralised structure of the commercial register.

3. Finally, the question arises whether law firms or other advisory companies actively promote incorporations in another jurisdiction. Legal advisors, indeed, could be possible drivers of 'regulatory competition' among Member States. Some national reports (Denmark, France, Germany, Ireland, Italy and Lithuania) indicate that such law firms or advisors are active in the market, helping domestic companies to 'emigrate' or foreign undertakings to incorporate companies under domestic law.[519]

10. Conclusions

The comparative analysis reveals certain common patterns across Member States, but also a number of relevant uncertainties and regulatory gaps in domestic legislations. Such uncertainties and gaps can be found across the European Union. To a certain extent, these problems seem to be more pronounced in the Member States that joined the EU recently, probably due to a lack of relevant judicial decisions; however, the comparative analysis also reveals that in several 'old' Member States, private international law regimes are unclear, at least in some respects, and may not entirely comply with the freedom of establishment.

In addition, long-run trajectories also play a (limited) role. While Member States can no longer be divided along the traditional lines of 'real seat theory' and 'incorporation theory', this classification is still helpful in explaining some distinctive elements of national law. The distinction between 'real seat' countries and 'incorporation theory

[519] See also the empirical survey, Chapter III, Section 3.3.

countries' cannot predict how a given jurisdiction will react when facing a variety of situations regarding companies with an 'international' or 'cross-border' connection. Nevertheless, this divide may be useful to capture a jurisdiction's attitude towards foreign companies: while formerly 'incorporation theory countries' recognise the existence of foreign companies without further questioning where any physical elements, such as the administrative seat or the real seat, are located, and generally do not apply any part of their domestic company law (or only isolated provisions in selective situations) to such companies, jurisdictions that used to follow the 'real seat theory' tend to be more readily prepared to apply certain domestic rules to foreign or pseudo-foreign companies. Additionally, the comparative analysis has revealed that several Member States continue to combine the incorporation theory with elements of the real seat theory, often differentiating between the intra-EU scenario and the relationship to third countries. What emerges is also that in several Member States, conflict of laws rules applicable to companies are unclear and, for intra-EU cases, the compatibility of national regimes with the case law of the Court of Justice on freedom of establishment is problematic.

This chapter has also explored the question of how the rules of private international law are related to national substantive rules on companies. Since companies are 'creatures of national law', [520] each jurisdiction establishes under which conditions domestic companies can be incorporated. Such requirements are part of substantive company law, not of conflict of laws, and yet the connection between these areas is evident. Formerly real seat jurisdictions tend to require that domestically incorporated companies keep the relevant connecting factor within the domestic territory, whereas incorporation theory countries normally do not require the presence of any physical elements in the domestic territory in order to incorporate a new company. The comparative analysis, however, has also revealed that Member States may follow intermediate solutions, and that in some Member States codified rules are controversial, or even disregarded, in practice, by the commercial register.

Additionally, Member States do not provide for a uniform interpretation of the boundaries between the *lex societatis* and other areas of law (*lex concursus*, *lex contractus* and *lex delicti*) for conflict of laws purposes. In some Member States, directors' duties and liability in the vicinity of insolvency (such as the British 'wrongful trading' regime) are characterised as 'insolvency law rules' and, therefore, fall within the *lex concursus,* with the consequence that these rules also apply to foreign companies having their centre of main interests (COMI) in the domestic territory (according to the conflict of law criteria set by the Insolvency Regulation). Such solution seems to be coherent with the Court's case law, according to which the Member State of a debtor's COMI has jurisdiction to hear actions that 'derive directly from the bankruptcy or winding-up and [are] closely connected with the [insolvency] proceedings'. [521] The Insolvency Regulation Recast of 2015, additionally, stipulates that 'the Member States within the territory of which insolvency proceedings have been opened […] shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them'. [522] In other Member States, however, the classification of liability for breach of duties in the vicinity of insolvency – or other functionally equivalent legal strategies that aim at protecting creditors in the 'twilight zone' when insolvency approaches – is controversial and it has been suggested that such mechanisms fall within the scope of the *lex societatis.* Similarly, the liability of the shareholders for the company's debts ('veil piercing') is classified in Member States as either an action in tort or an action based on company law.

[520] *Daily Mail,* at 19.
[521] C-133/78, *Gourdain v. Nadler* [1979] R-I 733, at 4.
[522] Art. 110(1) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

Another significant problem that emerges from the national reports is that in several Member States conflict of laws rules applicable to companies are still uncertain and underdeveloped. In many Member States, several issues that are crucial for a correct application of freedom of establishment are simply not regulated and therefore unclear. For instance, in many Member States it is unclear whether domestic companies can reincorporate under the law of other Member States without prior liquidation, and whether foreign companies can reincorporate as a domestic company. This lack of clarity whether cross-border reincorporations are allowed often goes hand in hand with a lack of regulation of the procedure and technicalities (for example, when a company should be cancelled from the domestic register) to be followed to implement such transactions.

Regarding cross-border reincorporations, additionally, national reports have shown that several Member States simply prohibit or make impossible this transaction, despite the fact that most recent decisions of the Court of Justice seem to hold that the freedom of establishment of the Treaty grants companies incorporated in a Member State a right to convert into company types of another Member State, at least to the extent that domestic companies can convert into another type of company.[523] In this regard, the lack of uniformity among Member States also reveals that the case law of the Court of Justice is, at least in this respect, not sufficient to create a uniform interpretation and application of freedom of establishment throughout the EU.[524]

Furthermore, in most countries there is very little case law interpreting the conflict of laws and jurisdictional rules and addressing problematic boundary issues identified in the reports, thus creating a significant degree of legal uncertainty for companies operating in more than one Member State. For instance, several reports state that no judicial decision has been rendered regarding the definition of 'seat' under the Brussels I Regulation, which is the jurisdictional criterion for 'core' company law issues. In summary, the laws of the Member States seem to reveal a striking lack of uniformity and legal certainty as to several crucial aspects. It can be assumed that both the lack of uniformity and legal uncertainty are obstacles to market integration and corporate mobility in the EU, limiting the possibility of companies to make effective use of the freedom of establishment. Furthermore, lack of clarity and uniformity may give rise to opportunistic behaviour on the part of shareholders at the expenses of creditors and other stakeholders.

[523] *VALE,* at 41.
[524] See the results of the empirical survey, Chapter III, Section 3.2.

V. NORMATIVE ANALYSIS

1. Introduction

The call for tender of this report indicates that the study should 'suggest possible solutions to the problem, including a possible harmonisation of conflict-of-law rules at EU level in the area of company law'. This is supposed to cover all relevant topics of this area, such as the 'connecting factor, the scope of the *lex societatis* and possible exceptions to it, overriding mandatory provisions and *renvoi*', as well as the possible need for differentiations between 'intra-EU cases and for cases involving companies from third countries'. In addition, the call for tender asks the report to take into account the relationship to other areas of law. This means giving consideration to existing laws of private international law and jurisdiction such 'Brussels I, Insolvency, Rome I and Rome II Regulations'. It is also essential to discuss related topics of substantive law, in particular for the effectiveness of any rules concerning the change of the *lex societatis*.

The subsequent text will explain the reasons in favour and against possible solutions, taking into account the statistical, empirical and comparative findings of this study. It will also provide specific recommendations to the main issues at stake. In some instances, those will be definitive ones, while in other instances the report will present options in order of preference.

The corresponding structure of this chapter is as follows: Section 2 will, at a general level, discuss the question about a possible harmonisation of conflict of laws rules applicable to companies. Section 3 will turn to the scope of such harmonisation in terms of entities and jurisdictions covered. Sections 4 to 10 will then follow the structure of the comparative analysis; thus, they will analyse the residence requirement of substantive company law, the general private international law approach, the scope of the *lex societatis*, the mechanisms to protect public interests, reincorporations, the relevance of other areas of law and jurisdiction in terms of the possible content of harmonised provisions. Section 11 concludes.

2. Harmonisation of conflict of laws rules applicable to companies: general considerations

2.1 The need for common rules in this area of law

The question of whether the EU should harmonise conflicts of laws rules applicable to companies is an element of a more general question, namely the power allocation in a 'multi-layer' system. In this regard, the preliminary question is whether full harmonisation of the substantive rules of company law at EU level would make it less relevant to harmonise rules of private international law. Such harmonisation of substantive law would to a large extent[1] remove legal uncertainty in the area, which is mainly a consequence of differences between national company law regimes. It may also be justified as a way to reduce the 'transaction costs' that may arise from the diversity of company laws.[2] However, despite the emergence of European forms of company (e.g.

[1] Harmonisation would not completely solve the issue of the law applicable to companies, since companies, as creatures of national law, would still need to derive their status (and existence) from one legal system, even if the content of the rules were identical in all respects.

[2] Transaction costs are a frequent reason cited in favour of harmonised rules. Cf, e.g., U Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) 94, 219; K Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *American Journal of Comparative Law* 97.

SE, a proposal for SUP) and ongoing harmonisation measures,[3] it is not realistic to expect a fully uniform company law throughout all Member States.[4]

Given this persistence of diversity of company laws, conflict of laws rules will therefore continue to play a crucial role. <u>This study supports the idea of common EU conflict of laws rules applicable to companies.</u> This follows from the main findings of this study.

2.1.1 Statistical data collection and empirical survey

The analysis of the statistical data[5] examined how far, in the EU, companies operate in some form in Member States different from the Member State in which they have been incorporated. It was found that, to some extent, such corporate mobility is already a reality. Based on data from all Member States, we identified the UK as the most popular target destination for private companies, but foreign incorporations also take place in other Member States, with Estonia, Romania and Slovakia being popular target destinations. However, we also established that decisions about domestic or foreign incorporations are not merely a result of differences in substantive company law. The regression analysis found that countries that have a clear-cut version of the 'incorporation theory' under private international law benefit in this market for incorporations, as compared to countries that have retained elements of the 'real seat theory'. We also identified a negative effect of differences in the conflict of laws rules applicable to companies. These findings have important policy implications. They show that the case law of the ECJ (now CJEU) has not made differences in the conflicts of laws rules applicable to companies obsolete.[6] The significance of the variables of conflict of laws rules also indicate that EU harmonisation could have a positive effect in this area of law.

The empirical survey[7] dealt with the practical problems created by the legal uncertainty for companies caused by the current situation stemming from the potential for conflicts of laws in a context where the substantive laws of the Member States have not been fully harmonised. The main finding of the survey was that there are significant practical obstacles to corporate mobility in the EU. In particular, it is notable that many of the respondents of the countries that have retained an element of the 'real seat theory' report various practical obstacles. There is also a strong positive correlation between respondents who are sceptical about their domestic law and who support EU harmonisation of conflict of laws rules. Furthermore, the analysis of group differences shows that there is still a divide between the 'old' and 'new' Member States as respondents from the latter countries are more likely to indicate lack of familiarity with the relevant procedures and to report practical problems in their dealings with domestic courts and commercial registers.

2.1.2 Comparative analysis

The comparative analysis[8] identified core differences among Member States' conflict of laws rules applicable to companies. Thus, the case law of the Court of Justice has not yet led to convergence between those rules. This lack of convergence also raises the risk of 'forum shopping', since it can sometimes be justifiable to leave claimants the choice

[3] See http://ec.europa.eu/justice/civil/company-law/index_en.htm
[4] It may also be possible to refer to the value of legal diversity. See, e.g., S Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440.
[5] See Chapter II, above.
[6] See also Section 2.2, below.
[7] See Chapter III, above.
[8] See Chapter IV, above.

between courts from different countries.[9] Furthermore, in some instances, we found that the EU requirements following the freedom of establishment have been sufficiently implemented by the domestic law-makers.

More specifically, the comparative analysis showed how in some core topics harmonisation of conflict of laws rules would be beneficial. The following four examples can illustrate this point. First, the conflict of laws rules of some Member States do not unambiguously refer to the state of incorporation and some also provide secondary connecting factors that deviate from this principle. Thus, in order to increase legal certainty and predictability, it is advisable to provide for harmonised rules that clarify the scope of primary and secondary connecting factors as far as the freedom of establishment is applicable.

Second, the comparative analysis found that some host states seek to extend the international reach of their laws by providing for exceptional connecting factors or qualifying certain rules as overriding mandatory provisions. This raises questions as to the conformity of such connecting factors and rules with the Court of Justice's right of establishment jurisprudence. In principle, the answer may be derived in each individual case by applying the Court's *Gebhard* conditions. However, the comparative analysis shows that EU law is applied inconsistently in the Member States: thus, a harmonising instrument that provides for a clear delineation of acceptable overriding requirements is advisable for this legal issue.[10]

Third, the delimitation of the international scope of company law from other legal areas was found to be problematic in several respects. Although in some areas of law, notably insolvency, contract and tort law, whose connecting factors are laid down in instruments of EU law, it is not always clear how these factors are applied. Thus, this requires either clarifications of the meaning of the connecting factors in the existing instruments or in a new instrument that regulates the conflict of law rules applicable to companies.[11] In addition, a problem arises where legal mechanisms that perform a similar function but use different legal techniques are classified differently in the Member States: thus, here, the risk of regulatory gaps or the cumulative application of conflicting substantive laws[12] justifies EU harmonisation of the relevant connecting factors.

Fourth, the viability of reincorporations is highly dependent on the cross-jurisdictional compatibility of both procedural and substantive company law rules, as well as on the exact operation of the private international law mechanisms concerned. The comparative analysis identified such incompatibilities. In addition, it showed that harmonisation needs to consider the effect reincorporations have on the application of legal rules aimed at protecting non-shareholder constituencies, including national employee participation practices.

2.2 The form of common EU rules

Although the case law of the Court of Justice has had an impact on some core questions of conflicts of laws as applicable to companies, it is clear that it is not feasible to leave it to the Court to design common EU rules in this area of law. The Court does not seek to create a set of common rules of private international law and, on its own, it cannot

[9] See also M Siems, 'Führen alle Wege aus dem Dschungel nach Rom? - Möglichkeiten und Grenzen der Vereinheitlichung des internationalen Privatrechts' (2003/2004) GPR 66 at 67-68 (on the general discussion why it would not be justified only to provide exclusive jurisdiction).
[10] For details see Sections 5 and 7, below.
[11] For details see Section 6, below.
[12] See also C Gerner-Beuerle and EP Schuster, 'The Costs of Separation: Conflicts in Company and Insolvency Law in Europe' (2014) 14 *Journal of Corporate Law Studies* 287.

provide sufficient legal certainty in this complex field (e.g., as to the precise scope of the *lex societatis*).

Another suggestion may be to provide non-binding common standards that national law makers may, but do not have to, adopt. This approach could refer to some parallel developments, for example, the EU recommendations in the field of corporate governance,[13] the draft for a European Model Companies Act,[14] and – in the US – the Model Business Corporation Act of the American Bar Association and the Restatement of Conflict of Law of the American Law Institute.[15] However, in the present case, such non-binding standards would not be sufficient: due to their voluntariness, they can only lead to partial convergence. It is also one of the aims of common rules of conflict of laws applicable to companies to provide legal certainty for businesses as they operate across borders. Thus, a mere convergence that would allow national deviations in core aspects of this area would not be sufficient. <u>Binding uniform rules are therefore needed</u>.[16]

The question about the choice between a directive and/or a regulation has to start with the relevant legal bases for harmonising questions of corporate mobility. On the one hand, according to Article 50 of the TFEU, harmonisation by means of directives is possible ‘in order to attain freedom of establishment as regards a particular activity’. On the other hand, according to Article 81(1),(2)(c) the EU can, for the purposes of ‘judicial cooperation in civil matters having cross-border implications (…) adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring (…) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction’.

<u>This study suggests that for the conflicts of laws rules applicable to companies a regulation should be enacted, which may be called ‘Rome V’ Regulation for the Harmonisation of the Law Applicable to Companies</u>. This approach is in line with the existing (and forthcoming) ‘Rome regulations’ on other matters of private international law. It also has the natural advantage that regulations create EU-wide conceptual uniformity since all Member States and their courts need to apply and interpret the same legal definitions and rules. While there are some instances where topics should be left to the discretion of the Member States, this does not mean that a regulation is unsuitable. Rather, as with other regulations,[17] it is possible to explicitly provide that these issues can be left to the Member States, for example, in order to protect local interests (see also the next section).

<u>In addition, it is recommended that a new directive should address issues of substantive law, notably companies’ reincorporations</u>. Such a combined use of a regulation and a directive for related topics is not unusual.[18] The use of a directive (and not a regulation) for issues of substantive law follows not only from the aforementioned provisions of the TFEU, but is also due to substantive considerations: for example, such a directive would cover the topic of seat transfers which includes many questions of creditor and shareholder protection that Member States need to implement in a way that can accommodate the structure and substance of their domestic company laws.[19] A positive

[13] See http://ec.europa.eu/justice/civil/company-law/corporate-governance/index_en.htm
[14] http://law.au.dk/en/research/projects/european-model-company-act-emca/
[15] See https://apps.americanbar.org/dch/committee.cfm?com=CL270000 and https://www.ali.org/publications/show/conflict-laws/
[16] See also Siems, supra note 9, at 70 (for compliance with principle of subsidiary as common rules cannot be provided by the Member States); more generally also TS Ulen, ‘Economic and Public-Choice Forces in Federal-ism’ (1997/98) 6 *George Mason Law Review* 921, 928 (‘If the cost and benefits of an action, whether public or private, stray across jurisdictional lines, then the highest level of government that can fully internalize the costs and benefits of the action ought to take responsibility’).
[17] E.g., Council Regulation 2157/2001 on the Statute for a European company (SE) [2001] O.J. L294/1.
[18] For example, the directives/regulations on the European company (SE) and market abuse.
[19] Similar to the Cross-Border Merger Directive, though it may be justified to provide higher levels of European harmonisation. See further Section 8, below.

side effect of using a directive based on the EU competence for harmonisation in order to attain freedom of establishment is that these rules would also apply to the three Member States (UK, Ireland and Denmark) that do not fully take part in EU matters of judicial cooperation.[20]

Finally, for the relationship with EU directives and regulations that address other topics that have a linkage to those of this study, our recommendations are as follows: ideally, these instruments should be amended in order to clarify their relationship to the new conflict of law rules applicable to companies and the corresponding substantive harmonisation. For example, this could concern the Insolvency Regulation and the Cross-Border Merger Directive, respectively.[21]

In the medium/long term, it is suggested that a new regulation on conflict of law rules applicable to companies and all existing (and forthcoming) 'Rome regulations' should be merged into one regulation. Such a consolidated regulation ('European Code of Private International Law')[22] can best clarify ambiguities about the relationship between the *lex societatis*, the *lex contractus*, the *lex delicti* etc. and may therefore foster the 'unity of the legal order'.[23] It can also address the common themes (*ordre public*, *renvoi* etc) that will also be addressed in the analysis of this chapter.

2.3 Relevant considerations for substance of new legal instrument

The recommendations of this chapter will take into account the statistical, empirical and comparative findings of this study. In addition, it is helpful to identify the main general considerations relevant for the substance of a future legal instrument harmonising the conflict of laws rules applicable to companies.

2.3.1 The relevant interests

A number of key dichotomies can be identified that are relevant for the normative analysis of the topics of this report. To start with, in private international law, a general distinction can be made between *an approach that aims to identify in a neutral and certain way the closest relationship vs. the view that questions of private international law are about social, economic and political policy choices*. For the present report this is relevant since, on the one hand, the general aim to have a common approach to the *lex societatis* may be based on the first position.[24] On the other hand, an economic and political evaluation of the conflict of laws rules is frequently discussed in the present field,[25] where it has also been argued that the 'the ancient Savignian private international law concept of ascertaining the closest relationship can no longer be used to regulated international company law relationships'.[26] Indeed, experience from the

[20] See also Section 3.2.2, below.
[21] For further discussion see Sections 6 and 8 below.
[22] See Siems, supra note 9 ('Europäisches Gesetzbuch für internationales Privatrecht'); G Rühl and J von Hein, 'Towards a European Code on Private International Law?' (2015) 79 RabelsZ 701; XE Kramer, 'Current Gaps and Future Perspectives in European Private International Law: Towards a Code on Private International Law?', Briefing Note European Parliament (2012), available at http://ssrn.com/abstract=2200977; M Czepelak, 'Would we like to have a European Code of Private International Law?' (2010) *European Review of Private Law* 705.
[23] See, e.g., M Baldus, *Die Einheit der Rechtsordnung: Bedeutungen einer juristischen Formel in Rechtstheorie, Zivil- und Staatsrechtswissenschaft des 19. und 20. Jahrhunderts* (Berlin: Duncker & Humblot 1995). But see also A Fischer-Lescano and G Teubner, 'Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.
[24] In substance, it may also be suggested that a straightforward application of this approach referring to the most connected country may lead to extend the 'real seat theory' to the whole EU. See discussion in Section 5, below.
[25] Cf. J Borg-Barthet, *The Governing Law of Companies in EU Law* 30-47 (Oxford: Hart 2012).
[26] S Rammeloo, *Corporations in Private International Law* 315 (Oxford: OUP 2001). For the role of Savigny's approach to private international law in Europe see also G Van Calster, *European Private International Law* 4 (Oxford: Hart 2013).

discussions in the EU since the case law in *Centros* shows that the selection of the right conflict-of-law criterion is regarded as something not neutral for the interests involved but as a matter of economic and political choice.

As far as those rules are not neutral, the next dichotomy is between *an approach that regards the principle of party autonomy as the main guidance vs. the view that local interests should play a key role*. It can be argued in favour of the first view that it is in line with the idea of the EU as a common market.[27] But questions about the applicable law may also consider the local interests of Member States. For instance, a clause permitting the adoption of overriding mandatory provisions may be formulated in an open-ended way to reflect the particularities of each Member State's political, social, and economic structure. Another example is the protection of the creditors of companies: legal certainty on the applicable law only protects 'adjusting' creditors who are able to protect their interests by themselves. However, this is not the case for non-sophisticated or involuntary creditors ('nonadjusting creditors'), whose protection requires a political mediation. Limited liability, in other words, creates negative externalities, which may be better governed by the territorial body comprehending the locality of those creditors.[28]

The general dichotomy between efficiency vs. justice can, in the case of companies, be presented as *the view of company law as merely solving principal-agent problems between directors and shareholders vs. a broader stakeholder position*.[29] This can also impact on the corresponding conflict of laws rules. For fields of law where issues of public policy play a key role, it is rightly said that 'private international law is [..] closely interwoven with substantive law'.[30] For example, it matters how the dividing line between conflict of rules for companies and other areas of law is drawn. It can also be relevant for situations where a company relocates from one Member State to another one in order to evade rules of stakeholder protection in the former country, such as employee co-determination rules.[31]

A final dichotomy is between *intra-jurisdictional and inter-jurisdictional efficiency*.[32] An allocation is efficient in intra-jurisdictional sense when it minimises the costs paid by the constituencies of a specific jurisdiction in order to maximise public utility. In other words, intra-jurisdictional efficiency takes into account only expenditures and utility within a specific jurisdiction. By contrast, inter-jurisdictional efficiency means that, among a number of interacting jurisdictions the aim is to minimise the cost of all constituencies in all jurisdictions in order to maximise their collective demand of goods. It follows that the question about identifying the 'most efficient' conflict of law rules needs to consider that efficiency considerations can lead to different results depending on whether they are based on the positions of the constituencies at the level of the Member States or the EU as whole.

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[27] R Michaels, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006) 2 *Journal of Private International Law* 195. See also C Behme, 'The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies' (2016) 13 *European Company and Financial Law Review* 31; Rammeloo, ibid, at 9 ('recognition theories'). Related is the reference to party autonomy as discussed in Borg-Barthet, supra note 25, at 13-48, 73-103

[28] For this point see also FM Mucciarelli, 'Optimal Allocation of Law-Making Power Over Bankruptcy Law in "Federal" and "Quasi-Federal" Legal Systems is There a Case for Harmonizing or Unifying Bankruptcy Law in the E.U.?' NYU Law and Economics Research Paper No. 11-28 (2011), available at http://ssrn.com/abstract=1921374.

[29] See M Siems and D Cabrelli (eds), *Comparative Company Law: A Case-Based Approach* (Oxford: Hart 2013) (ibid 6-7 for a summary of the former position, as well as the subsequent case scenarios); M Siems, *Convergence in Shareholder Law* 175-8 (Cambridge: CUP 2008) (for a summary of stakeholder approaches).

[30] XE Kramer, 'European Private International Law: The Way Forward: In-depth analysis', European Parliament (JURI Committee 2014), available at http://ssrn.com/abstract=2502232, at p 22.

[31] See, e.g., M Gelter, 'Tilting the Balance between Capital and Labor – The Effects of Regulatory Arbitrage in European Corporate Law on Employees' (2010) 33 *Fordham International Law Journal* 792.

[32] RP Inman and DL Rubinfield, 'Federalism' in *Encyclopedia of Law and Economics* (1999) available at http://encyclo.findlaw.com/9700book.pdf, at pp 661, 668.

2.3.2 Existing laws and proposals

It is clear that any harmonising instrument in the present field needs to consider the freedom of establishment of the TFEU as interpreted by Court of Justice.[33] With respect to the regulations and directives that already harmonise aspects of conflict of laws, it was already mentioned that a new regulation has to take into account these existing EU laws in order to provide a consistent legal framework. The current secondary EU laws can also be relevant as far as they address general issues of private international law and may therefore be models for conflict of law rules in the area of company law.

The necessary choices for harmonised conflict of laws rules can benefit from the comparative analysis of this study. In addition, the subsequent recommendations will specifically take into account the Member States that have codified, to some extent at least, the conflict of law rules applicable to companies namely: Belgium, Bulgaria, Czech Republic, Estonia, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, and Spain. In addition, a number of proposals for codifications provide helpful suggestions: the Proposal by the European Group for Private International Law (GEDIP) from 2015, the proposal from the 'Sonnenberger Group' from 2007 and the (now somewhat dated) international proposals from 1968, 1965 and 1956.[34]

The relevance of the rules from the Member States requires further explanations, as in the comparative law literature the use of information about different legal systems for normative purposes is controversial. For example, the mere fact that a majority of jurisdictions follows a particular legal model does not mean that this model is better than that of the minority. It has also been said that 'the comparatist is not seeking to be judgmental about legal systems in the sense of whether he believes them to be 'better' or 'worse' than any other given system',[35] and that making policy recommendations for other countries may lead to the accusation that one is applying one's own values in considering what is best for others.[36]

However, the majority of comparatists support the idea of 'applied comparative law'.[37] For example, Konrad Zweigert and Hein Kötz hold 'that the comparatist is in the best position to follow his comparative researches with a critical evaluation', and add that 'if he does not, no one else will do it'.[38] This should not be based on a schematic approach, such as the most frequent model, the lowest common denominator or the politically least contentious one. Rather, it requires a careful analysis of the pros and cons of the respective legal systems. It is also important to consider how legal systems operate in practice and how any legal differences are interrelated with social, economic and political factors.

In the present case, the following will carefully consider to what extent the solutions of the 28 Member States may be regarded as 'just' being different, or whether one or the other solution may be 'better' or 'worse'. This will also take into account that many topics of conflict of laws in the area of company law are linked: for example, the

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[33] For a summary of the case law see Chapter I, above.

[34] GEDIP, 'Regulation x on the Law Applicable to Companies and Other Bodies', 3rd draft 2015, available at www.gedip-egpil.eu/reunionstravail/gedip-reunions-25.htm#1; HJ Sonnenberger (ed.), *Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts* (Tübingen: Mohr Siebeck 2007) (proposal by the German expert group on private international law); Draft Convention on the Mutual Recognition of Companies and Bodies Corporate, 1968, available at http://aei.pitt.edu/5610/1/5610.pdf; Proposal by the Institute of International Law 1965, www.justitiaetpace.org/idiE/resolutionsE/1965_var_02_en.pdf; Hague Convention concerning the recognition of the legal personality of foreign companies, associations and institutions, available 1956, https://www.hcch.net/en/instruments/conventions/full-text/?cid=36 (not ratified by any of its signatories).

[35] P De Cruz, *Comparative Law in a Changing World* 224 (3rd edn, London: Routledge Cavendish, 2007).

[36] M Bogdan, *Comparative Law* 79 (Stockholm: Kluwer, 1994).

[37] See M Siems, *Comparative Law* 22-3 (Cambridge: CUP 2014).

[38] K Zweigert and H Kötz, *An Introduction to Comparative Law* 47 (Oxford: Clarendon, 3rd edn. 1998).

question about the relevant connecting factor may impact on the extent to which overriding mandatory provisions are used in a particular jurisdiction. We will also consider whether certain private international law solutions show complementarity with other elements or characteristics of the legal system: for instance, Member States providing for employee participation in their company laws may be more likely to restrict outbound reincorporations.

3. Scope: entities and jurisdictions covered by EU instrument

3.1 The entities covered by a possible harmonisation

The current study is concerned with companies, but it is worth mentioning that the codified domestic laws, as well as the Sonnenberger and GEDIP proposals, typically include further entities. For example, the Belgian, Bulgarian, Estonian, Lithuanian, Polish and Romanian codifications of conflict of law rules applicable to companies include to all legal persons.[39] In addition, Bulgarian and Polish laws also refer to unincorporated bodies, and the Italian and Czech rules apply to any entities.[40]

The Sonnenberger proposal is similar to the first position referring to 'companies, including cooperative societies, associations, foundations and other legal persons governed by civil or commercial law', while the GEDIP proposal is potentially wider in referring to 'companies and other bodies, corporate or unincorporated (…) in civil and commercial matters'.[41] Apparently, both of those proposals are also influenced by the way the art. 54(2) of the TFEU phrases the scope of the freedom of establishment of companies as it is said to apply to '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.'

But researchers have also expressed scepticism about the wording of this provision: for example, comparing different language versions of art 54(2), there is some ambiguity in the inclusion or exclusion of partnerships and non-profit entities.[42] In particular, it can be suggested that the words 'other legal persons' are puzzling, because in most countries not all partnerships are legal persons. Uniquely in Scotland even ordinary partnerships are regarded as legal persons; in France the same is the case for most partnerships except SEPs. The reverse is true in England: in general, partnerships are not legal persons, however, there is an exception for LLPs. Finally, the German situation is peculiar because partnerships are never legal persons, however, most partnerships with the exception of 'silent partnerships' have 'legal capacity'.[43] This divergence of terms and concepts shows that it would not be satisfactory simply to refer to 'legal persons' for a common provision of the Member States.

As far as a possible 'Rome V Regulation' for the Harmonisation of the Law Applicable to Companies is concerned, it also needs to be noted that the basis of this regulation would

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[39] Code of Private International Law (Belgium), Art. 110; Code of Private International Law (Bulgaria), Art. 56(1); Act on Private International Law (Estonia), § 14(1); Civil Code (Lithuania), Art. 1.19; Act on Private International Law (Poland), Art. 17; Civil Code (Romania), Art. 2.580.
[40] Code of Private International Law (Bulgaria), Art. 57; Act on Private International Law (Poland), Art. 21; Act on Private International Law (Czech Republic), § 30(1); Private International Law Reform 1995 (Italy) Art. 25.
[41] Sonnenberger proposal, art 1(2); GEDIP proposal, Art. 1(1).
[42] MM Siems, 'Regulatory Competition in Partnership Law' (2009) 58 *International and Comparative Law Quarterly* 767 at 793 (with reference to *Cartesio* as it dealt with a Hungarian limited partnership); S Lombardo, 'Some Reflections on Freedom of Establishment of Non-profit Entities in the European Union', (2013) 14 *European Business Organization Law Review* 225.
[43] For references see Siems, ibid.

be the EU competence for harmonisation in matters of civil cooperation, not freedom of establishment.[44] Thus, here, a broader definition as in art 54(2) can be provided.

This report suggests phrasing the scope of a Rome V Regulation as referring to 'all business entities with separate legal capacity constituted under civil or commercial law'.

This definition would therefore include all companies, including European forms of company,[45] and all other legal persons constituted under civil or commercial law (such as cooperatives) as those always have legal capacity. In addition, it would cover other business entities as far as those have legal capacity. It will therefore include some partnerships while it would not cover 'silent partnerships' or other forms of profit sharing where it may be more appropriate to apply the *lex contractus*.[46] The main rationale for this approach is that all entities that have legal capacity can, for example, enter into contracts, own property, sue and be sued in their own name: thus, regardless of whether it is a company or another type of business entity, the same issues are relevant as regards the subject matter of a forthcoming Rome V Regulation.

3.2 Interlocal laws in Member States

EU private international law rules often recognise that in some Member States (notably in the UK) there may be different legal systems within that Member State. For example, the Rome I and II Regulations contain virtually same text about 'States with more than one legal system':

> 1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation. 2. A Member State where different territorial units have their own rules of law in respect of contractual obligations [in Rome I – in Rome II: non-contractual obligations] shall not be required to apply this Regulation to conflicts solely between the laws of such units.[47]

For conflict of rules applicable to companies, Article 12 of GEDIP suggests a phrase similar to the first sentence of Rome I and II. This is plausible, although it may also be noted that for company law there are hardly any interlocal differences in the Member States. Even in the UK, where Scots law has distinctive features in other areas of law,[48] the UK report of this study notes that 'the differences between the internal laws of the three parts of the United Kingdom in respect of corporate matters are small, and rarely give rise to conflict problems.'[49] Nevertheless, despite the near-identity of the rules, the existence of distinct legal systems within a Member State can have real-life consequences. For example, an English-registered company cannot re-register in Scotland and vice versa,[50] even though companies registered in both jurisdictions can of course reincorporate in another Member State.

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[44] See Section 2.2, above

[45] Such as the SE, the SCE and a SUP (a legal form for single-member private limited liability companies put forward in the Commission 2014 proposal and currently being negotiated by the co-legislators).

[46] It would also not cover trusts as those are governed by a different area of law, see also Section 10, below.

[47] Rome I Regulation, Art. 22; Rome II Regulation, Art. 25. Rome III Regulation, Art. 14 provides more extensive rules also dealing with the way the 'habitual residence' of natural persons is to be understood.

[48] For actual and potential differences see, e.g., D Carr 'English Influences on the Historical Development of Fiduciary Duties in Scottish Law' (2014) *Edinburgh Law Review* 29; D Cabrelli 'Statutory Derivative Proceedings: The View from the Inner House' (2010) 14 *Edinburgh Law Review* 116; D Cabrelli 'Statutory Derivative Proceedings in Scotland: A Procedural Impasse?' (2009) *Edinburgh Law Review* 511.

[49] See country report UK, Section 1.

[50] See e.g. *Re Baby Moon (UK) Ltd (1985) 1 BCC 99298*. See also G Morse (ed), *Palmer's Company Law* (Sweet & Maxwell, looseleaf 2013) para 2.507.

This report suggests phrasing this issue in the same way as in the Rome I and II Regulations. Using exactly the same wording is helpful for reasons of consistency. Adding the second sentence is also appropriate as the UK may indeed want to decide that the slight company law differences between Scotland and the other parts of the UK do not need to be solved in the same way as a forthcoming Rome V Regulation.

3.3 The UK, Ireland, Denmark and the EEA countries

According to Protocols No 21 and No 22 to the TFEU, Denmark, the United Kingdom, and Ireland do not participate in measures adopted pursuant to Title V of Part Three of the TFEU.[51] Any legislative measure regarding the law applicable to companies will be based, at least in part, on Art 81 TFEU,[52] and would thus fall within the area affected by these Protocols. Before assessing the desirability and viability of any harmonising legislation in the area of the laws applicable to companies, the implications of these Protocols must therefore be examined.

The operation of Protocols No 21 and No 22 differ somewhat for Ireland and the United Kingdom on the one hand, and Denmark on the other: Ireland and the United Kingdom have the option to, effectively, 'opt-in' in relation to any measure pursuant to Art 81 TFEU. Thus, both Ireland and the United Kingdom may decide to participate in the adoption and application of measures covered by Protocol 21 by notifying the President of the Council in writing, within three months after a relevant proposal for legislation has been presented to the Council.[53] However, even if the United Kingdom and/or Ireland decide to participate in a legislative measure covered by Protocol 21, the Council may still adopt such a measure without the participation of the United Kingdom and/or Ireland provided it cannot otherwise be adopted.[54] Denmark, on the other hand, does not currently[55] participate in Union legislation covered by Title V of Part Three of the TFEU.[56] Any legislative measure regarding the law applicable to companies would thus have no immediate effect in relation to Denmark. However, the Union and Denmark could, as has happened in related areas,[57] negotiate agreements extending the applicability of legislative measures taken in the present area to Denmark.[58]

3.3.1 The UK and Ireland in particular

As discussed in the statistical analysis of this report,[59] companies registered in and formed in accordance with the laws of the United Kingdom account for a large proportion of economic activity by companies registered in a Member State other than the Member State of its central administration; we also find a significant level of such activity in relation to Ireland. It follows, in our view, that EU legislation seeking to address effectively and comprehensively the conflict of laws and jurisdictional questions arising in relation to 'foreign' companies would ultimately need to apply to companies formed in the UK and Ireland.

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[51] See Protocol (No 21) to the Treaty on the Functioning of the European Union, Art. 1 (United Kingdom and Ireland); Protocol (No 22) to the Treaty on the Functioning of the European Union, Art. 1 (Denmark).
[52] See Section 2.2, above
[53] See Art. 3(1) of Protocol No 21.
[54] See Art. 3(2) of Protocol No 21.
[55] Denmark has the right to adopt an 'opt-in system' substantially similar to Protocol No 21; see Art. 8 of Protocol No 22 and Annex to Protocol No 22. Given the results of the recent referendum on this matter, it seems unlikely that Denmark will make use of this right in the near future.
[56] See Arts. 1 and 2 of Protocol No 22.
[57] See e.g. in relation to the Brussels Regulation Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[58] See also Rühl and von Hein, supra note 22, at 733.
[59] See Chapter II, above.

In this respect it is worth highlighting that, according to our understanding, EU law would not prevent Member States other than Denmark, the United Kingdom, and/or Ireland from adopting legislation that fully applies to companies registered in any or all of these three jurisdictions as long as any such measure does not bind or otherwise affect the rights or competences of the three Member States concerned. The efficacy of such a measure will, however, in part depend on its content, as compared to the conflict of laws rules applicable in Denmark, the United Kingdom, and/or Ireland.[60]

The legislative measures recommended in this Report would, as described below, for the most part be broadly similar to the conflict of laws approach applicable in the United Kingdom and Ireland. As a consequence, we would not ultimately regard a participation in the recommended legislative measures by the United Kingdom, and Ireland as indispensable, although such participation would no doubt be highly desirable.

This assessment assumes, however, that the remaining Member States would be willing to agree on harmonising legislation that would in some cases affect their competences in relation to companies from the non-participating Member States, even though no strict 'reciprocity' is provided for. This is of course largely a political question, and we do not express an opinion on this point.

3.3.2 Denmark and the EEA countries

As already mentioned, a bilateral treaty between Denmark and the EU could provide similar rules to those proposed in this report. In addition, the Treaty provisions of the freedom of establishment apply in Denmark: thus, as far as the harmonisation of conflict of laws rules considers these provisions and the corresponding case law of the Court of Justice, the Danish situation would in practice be similar to the one in other Member States.

The Danish situation would be virtually the same as the situation of the EEA countries Iceland, Liechtenstein and Norway. The EEA Agreement includes provisions on the freedom of establishment (arts 31 to 35) which mirror those of the TFEU, and, while the EEA countries do not take part in matters of civil cooperation, bilateral agreements can provide similar rules.

In the Rome I and II Regulations, there are only brief clarifications to the non-inclusion of Denmark.[61] <u>A similar statement may be made in a future Rome V Regulation on matters of conflict of company laws</u>. It is beyond the scope of this report to assess whether, in case no political agreement can be reached, the EU procedure of 'enhanced cooperation', with the non-inclusion of more Member States, should be considered.[62]

3.4 The relationship to countries outside the EU ('third countries')

Any harmonisation of related matters of substantive company law (including seat transfers) would be based on the EU competence for harmonisation in order to attain freedom of establishment.[63] Thus, like the current directives on matters of EU company law, these rules would not apply to companies from third countries.

The situation is different for conflict of laws rules. Since the Lisbon Treaty, the EU can in principle also enact instruments that address the relationship to third countries. Xandra Kramer provides the following summary:

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[60] I.e. depending on any opt-ins by the United Kingdom and/or Ireland, and any intergovernmental agreements reached with Denmark.
[61] Rome I Regulation, rec. 46; Rome II, Art. 1(4).
[62] Akin to the Rome III Regulation (currently applied in 16 Member States).
[63] See Section 2.2, above

> 'It is noteworthy that the proper functioning of the internal market is still mentioned in Article 81(2) TFEU, but no longer seems to be a strict requirement for the purpose of private international law measures, as is evidenced by the addition of the word "particularly". Within the context of negotiations on specific existing instruments, in particular the Rome II Regulation, the international market requirement under Article 65 EC was debated in view of the "universal" territorial scope of this instrument (expanding to non-EU torts, parties, and laws). However, eventually it was not regarded an obstacle'.[64]

It can be also seen that both Rome I and II state that 'any law specified by this Regulation shall be applied whether or not it is the law of a Member State'.[65] For matters of conflict of company laws, GEDIP suggests a corresponding universal rule, namely that 'unless provided otherwise, any law specified by this Regulation shall be applied whether or not it is the law of a Member State'.[66]

By contrast, the 1968 draft convention only included companies 'established in accordance with the law of a Contracting State' – and, in addition, gave contracting states the option not to apply the convention to companies that had 'no genuine link with the economy' of one of the territories of one of the contracting states.[67] As far as the EU does not want to provide a universal rule, it could also limit its scope in the same way article 54(1) of the TFEU does in the context of the freedom of establishment, namely 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'.

The universalist position by GEDIP can be related to a 'Savignian' idea of private international law, according to which it is possible to establish which law is applicable to any legal issue or situation in a neutral way.[68] In the literature, Eva-Maria Kieninger even considers the extension to third countries as a main reason for an EU codification of conflicts of law rules applicable to companies, arguing that the case law of the Court of Justice – interpreting the freedom of establishment of the Treaty – can 'only' address intra-EU cases.[69] In addition, she argues that any lack of such international uniformity would also extend to the European level since a company incorporated in a third country that has its principal place of business in the EU might be categorised differently in different Member States.[70]

Yet, accepting a company as established under the law of a non-EU country[71] can have wide-reaching implications for the protection of shareholders, other stakeholders and society at large. The following solutions could be envisaged:

(i) To *exclude* third countries from the scope of a future Rome V Regulation completely. This may be politically opportune if Member States are unwilling to include companies from third countries at all in the regulation. This option would entail a dual regime, which also exists in other norms of EU law and some

[64] Kramer, supra note 23, at 7 (footnotes omitted).
[65] Rome I Regulation, Art. 2; Rome II Regulation, Art. 3
[66] GEDIP proposal, Art. 2.
[67] 1968 draft convention, Arts. 1 and 3.
[68] See Section 2.3.1, above.
[69] E-M Kieninger, 'The Law Applicable to Corporations in the EC' (2009) 73 RabelsZ 607 at 618-9.
[70] Ibid at 624.
[71] The same would apply to the choice of a non-state law such as the EMCA (see supra note 14). Note that the choice of non-state laws is even excluded in Art. 3 of the Rome I Regulation as the applicable contract law.

Member States,[72] even though we recognise that conflict of law rules are usually universal (e.g., in the Rome I and Rome II Regulations, as noted above).

(ii) To enable Member States to *opt into* the Regulation for the relationship to all third countries (which, in practice, may in the first instance be used by the traditional incorporation theory countries) or – at their own choice – just to certain third countries. This would have the advantage that, as far as Member States opt in, it would provide the legal certainty that a common set of private international law rules typically envisages. These rules could also be interpreted by the CJEU who – of course – if appropriate may well differentiate between the relationship to other Member State and third countries (as it is possible for the Rome I and II Regulations, for example, in terms of *ordre public*). However, this option would be contrary to the general goal of uniformity in EU private international law.

(iii) The future Rome V Regulation shall also apply to companies from third countries, which are to be recognised as such by any Member States. However, Member States can *opt out* from the provisions of the connecting factor with regard to companies incorporated in all or specific third countries. With this approach, it can then also be determined at a later review of the regulation how far Member States make use of this opt-out and whether there is any need for change or adjustment. The political compromise of an opt-out is also a common adjustment in EU law in general (as well as EU company law more specifically[73]). However, again this option would be contrary to the general goal of uniformity in EU private international law.

(iv) The future Rome V Regulation shall also apply to companies from third countries. However, Member States can make use of *overriding mandatory rules* and other mechanisms to protect the public interest in a wider set of scenarios than in relation to EU/EEA-incorporated companies.

(v) Another suggestion would be to introduce an explicit *process for accepting* companies from third countries for purposes of conflict of company laws, similar to the equivalence decisions in other areas of EU harmonisation such as accounting law.[74] In particular this may be a feasible solution as far as it concerns the company laws of other OECD countries as well as countries which whom the EU has agreed on free trade agreements.[75]

<u>The authors of this report agree that each of the approaches has its advantages and disadvantages. In our view, options (i) and (ii) may have a strategic advantage. Options (iii) to (v) would effectively extend EU-mandated choice of law – and possible regulatory arbitrage – to third countries, subject to the necessary safeguards. Whereas the Treaty allows for harmonisation of substantive company law rules where necessary, neither the Member States nor the EU will have control over third-country company law rules or</u>

[72] See Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141/19 (Insolvency Regulation Recast), recital 25 (centre of the debtor's main interests needs to be located in the EU); Comparative Analysis, Chapter IV, Section 3.1 (e.g. for Germany).
[73] See, e.g., Art. 12 of the Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids. On the design of such optional arrangements, see e.g. PL Davies, E Schuster, and E van de Walle de Ghelcke, 'The takeover directive as a protectionist tool?' in: U Bernitz and WG Ringe (eds.) *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford: Oxford University Press 2010), 105.
[74] See http://ec.europa.eu/finance/accounting/third_countries/index_en.htm
[75] For the impact of free trade agreements on corporate mobility of companies from third countries, see KE Sørensen, 'Free Movement of Companies under the New EU Free Trade Agreements', (2016) *European Company Law* 46.

practices; sufficient protection through overriding mandatory rules would therefore need to be ensured.

In addition, the EU can now engage with third countries through the Hague process.[76] Thus, in the medium/long term the aim may be to develop a new convention that provides more widely for internationally uniform conflict of laws rules applicable to companies.[77] However, this should not speak against a Rome V Regulation as it may well be a 'stepping stone' towards such international rules.

With respect to international conventions concluded by Member States, the virtually identical provisions in Rome I and II provide that those Regulations take precedence over such conventions as far as they concern matters governed by those Regulations.[78] If a future Rome V Regulation were to address third countries, it is recommended that it phrases this issue in the same way as the Rome I and II Regulations.

4. The residence requirement of substantive company law

4.1 Overview

EU law as it currently stands allows Member States to use one of at least two regulatory techniques to ensure that companies incorporated under their laws maintain a (meaningful)[79] connection to their territory:

First, a Member State's conflict of laws rules may use the 'real seat' of a company, however defined, as the main connecting factor determining the law that is applicable to it. This approach has effectively been declared incompatible with the Treaty when applied to foreign-incorporated companies.[80] The Court of Justice has stated explicitly that 'a Member State [is] 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.'[81] As will be shown below, this private international law approach would in principle also be available on a multilateral basis if adopted across the Union, although we do not believe it would be advisable to adopt this approach in a future Rome V Regulation.[82]

Second, Member States can require companies formed under their laws to keep a connection to their territory through rules of substantive company law. As discussed, such rules are preliminary matters' that determine whether a company is entitled to rely on the Treaty freedom and hence belong to the 'reserved area' where the Member States' legislative activity is not subjected to scrutiny under the Treaty, at least where the Member State of incorporation uses one of the criteria of Art 54 TFEU to define the relevant requirement.[83] From the perspective of primary EU law, these requirements for *domestically incorporated* companies fall into what we refer to as the 'reserved area'. For simplicity, we will continue in this part to refer to all forms of these requirements as '*effective* residence requirements', although in many cases the relevant requirement is not strictly speaking one of 'residence' in the technical sense. Approximately half of the Member States currently combine conflict of laws rules based on the incorporation

[76] See generally J-J Kuipers, *EU Law and Private International Law* 16-18 (Leiden: Martinus Nijhoff 2012).
[77] For the previous draft convention see supra note 34.
[78] Rome I, Art. 25; Rome II, Art. 28. Similar GEPID proposal, Art. 14.
[79] i.e. going beyond a mere postal address.
[80] See Case C-208/00 *Überseering* [2002] ECR I-9919, which is still the only case directly addressing this issue.
[81] See *Cartesio*, para 107. See also *Überseering*, para 70.
[82] See below, Section 5.1.
[83] See *Cartesio* and *Daily Mail*; see also the discussion in the Comparative Analysis, Chapter IV, Section 2.1. above.

doctrine with substantive company law rules[84] which effectively enable companies that only have a 'letterbox' in the country of incorporation.[85] Companies incorporated in these jurisdictions can thus, in principle, be used for any legal activity anywhere in the Union, irrespective of the location of the company's headquarters or decision-making centre, provided it satisfies the minimal requirement of maintaining a postal address in the Member State of incorporation. The company laws of these Member States can thus be seen as being generally available from a *choice of law* perspective.

The remaining Member States, on the other hand, currently require, or at least *may* require,[86] companies formed under their company laws to establish and maintain some form of physical presence in that Member States. The level of activity required[87] differs significantly across jurisdictions, and the comparative analysis highlights that some legal uncertainty in that respect exist in several Member States.[88]

4.2 Potential drivers for national policy decisions

Since we are only concerned here with residence requirements applied to domestic companies,[89] the policy reasons for adopting such rules are (presumably) different from the typical rationales for private international law rules based on the real seat theory.[90] Where a country had traditionally applied a real seat theory-based approach to determining the *lex societatis*, however, the imposition of an effective residence requirement in its substantive company law would not have changed the position of domestic companies;[91] thus, effective real seat requirements may in some cases be historic[92] remnants of that approach.

Whereas real seat theory-based private international law rules seek to extend the reach of domestic company laws to all business entities with certain significant connections to a jurisdiction's economy, the effective residence requirements at issue here merely prevent the use of a Member State's company forms for wholly 'external' purposes, i.e. for business entities wholly or predominantly connected to another country's territory.

Several policy rationales may in theory underlie the decision to adopt effective residence requirements for domestically incorporated companies. A Member State may, for instance, be concerned about its ability to effectively enforce compliance with its internal company law rules in relation to entities with little or no factual connection to its territory, especially where the decision-makers, including shareholders and directors, operate outside their jurisdiction and no or few assets are located in the Member State of incorporation. Connected to this, a national legislator may be of the opinion that its domestic company forms have built up 'reputational capital', for instance because businesses adopting that legal form are perceived by the market (rightly or wrongly) as well-governed, more likely to comply with disclosure obligations, or generally as being subject to a set of rules protective of third parties contracting with it.[93] Given the

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[84] Note that the substantive company law nature of these rules is not always clear; see ibid.
[85] See Comparative Analysis, Chapter IV, Section 2 above. For the ambiguous phrase 'letterbox companies' see also the Statistical data collection, Chapter II, Section 2.1 above.
[86] The legal position is unclear in a number of Member States; see ibid.
[87] As well as the level and consistency of enforcement regarding these requirements.
[88] See Comparative Analysis, Chapter IV at Section 2 above.
[89] i.e. companies incorporated under the laws of the Member State setting that requirement.
[90] On these, see Section 5 below.
[91] The substantive law requirement would, in these cases, simply reiterate what private international law required.
[92] Given that most countries now use a version of the incorporation theory as the main way to determine the law applicable to (foreign) companies, which of course is required by the Treaty for EU-incorporated companies.
[93] See also WG Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10 *European Company and Financial Law Review* 230, 260 (describing the reputational problems connected to using foreign-incorporated letterbox companies to conduct business in Germany).

possible difficulties in enforcing rules against pseudo-foreign companies, and taking into account the interplay between company law, insolvency law, and other rules,[94] the use of national company forms for businesses with no connection to the Member State of incorporation may thus be regarded as a risk to the 'brand value' of that type of business entity. Finally, Member States could conclude that incurring monitoring, enforcement, infrastructure, and litigation costs[95] in relation to companies incorporated under their laws, but with little or no relevance to the national economy,[96] is not justified by the benefits such incorporations may bring to that Member State.

In short, some Member States may well take the view that their participation in what can be seen as a European market for company incorporations does not on balance lie in their national interest. This will perhaps be particularly true for Member States that are for various reasons[97] unlikely to obtain a large share of the incorporation 'market', as there will often be returns to scale in relation to the infrastructure-like costs associated with company incorporations.

4.3 Policy options

We see a number of policy options for addressing what we have labelled effective residence requirements:

- First, effective residence requirements could be harmonised across all Member States. In this case, a number of options exist for the content of any harmonising legislation.

- Second, given that the residence requirements at issue, where they exist, form part of the substantive internal company laws rather than the private international law rules of the Member States, the issue could simply be left outside the scope of a future European instrument.

We will address the above policy choices in case of a harmonisation, as well as the option to leave this topic outside the scope of a harmonisation, in turn.

A future European instrument harmonising conflict-of-law rules could harmonise effective residence requirements originating from substantive company law in a number of different ways. For instance:

- it could require that all Member States sever any mandatory links between companies incorporated under their laws and their national economies.

- it could simply codify the *status quo* based on the case law of the Court of Justice.

- it could define a specific residence requirement, or a number of residence requirements, that Member States are permitted to apply to nationally

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[94] See e.g. Gerner-Beuerle and Schuster, supra note 12, at 318-319; K Schmidt, 'Grounds for Insolvency and Liability for Delays in Filing for Insolvency Proceedings' in M Lutter (ed), *Legal Capital in Europe* (De Gruyter 2006) 144, 147. See also the discussion in Section 6.3 below.
[95] Many shareholder disputes, for instance, would end up in national courts, and depending on the fees levied by the national judicial system, some of the associated costs will often be borne by the state. Similarly, monitoring compliance with disclosure rules, and taking enforcement action in case of breaches, will also typically create costs for the Member State in question.
[96] Apart, of course, from creating demand for certain professional services (lawyers, accountants, etc). See e.g. J Armour, 'Who should make corporate law? EC legislation versus regulatory competition' (2005) 58 *Current Legal Problems* 369.
[97] Reasons could include a national language spoken by few foreigners, the perceived degree of efficiency and reliability of the national legal system, tax law, and of course the content of the internal company law.

incorporated companies, leaving open to Member States, however, not to impose any residence requirements.

- it could adopt the approach used in the SE Regulation[98] and thus require all EU incorporated companies to maintain their headquarters[99] in the territory of the Member State of incorporation.

The first policy option described above would supplement our position on the private international law approach of a future Rome V Regulation,[100] where we recommend harmonising the relevant rules along the lines of the incorporation doctrine. Combined with that private international law rule, this first option would in effect render all Member State company forms available for entrepreneurs anywhere across the EU.[101] It is unclear, however, whether such a legal framework would add real value to corporate mobility or the single market more generally. It seems unlikely that entrepreneurs would choose to organise their businesses under company law rules of a Member State that does not provide for such use of its entities unless and until required to do so by EU law. At the same time, it is not implausible that, under their own domestic company law, some Member States do not want to enable incorporation of companies that these countries regard as fictitious because they merely have a letterbox in the incorporation country.[102]

The second option, i.e. codifying the *status quo* based on the case law of the Court of Justice in *Daily Mail* and *Cartesio*, would in effect only create a 'safe harbour' for Member States to use one of the criteria mentioned in Article 54[103] ('central administration' and 'principal place of business') – as a basis for effective residence requirements in their national law.[104] If a possible EU instrument were to take this approach, it would only add value if it contained a precise definition of these terms. However, as any such definition would in effect be dependent on the Court's interpretation of the identical terms in the Treaty, little would be added in terms of legal certainty beyond the status quo. Moreover, there is little evidence for legal uncertainty as to the residence requirements *available* under EU law. Rather, legal uncertainty mostly seems to relate to the interpretation of the relevant national law requirements, but a codification of the status quo would undoubtedly still leave room for Member States to define their residence requirements within the boundaries of the Art 54 criteria.

The third option would give Member States a choice between different effective residence requirements. This choice would likely reduce the differences between the approaches taken in the Member States, since the criteria in the future EU instrument harmonising conflict-of-law rules would be interpreted autonomously by the Court of Justice. Apart from reducing these differences, however, such a solution would ultimately do little to encourage corporate mobility, and it may indeed have the opposite effect.

Finally, the fourth solution would effectively prohibit *Centros*-like pseudo-foreign companies, and would indeed go beyond that, as businesses would not only need to choose the company law of a Member State in which they actually operate, but would be

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[98] See SE Regulation, Art. 7.
[99] Which is what the SE Regulation requires, although no precise definition of that term exists; see ibid.
[100] See Section 5 below.
[101] Or, potentially, beyond, depending on the scope of the Regulation and on the private international law approach taken by the relevant third country.
[102] Beyond the scope of this study is the question about the legal basis for a harmonisation of such effective residence requirements.
[103] For the nature of these criteria, see Chapter IV, Section 2.1, above, as well as Section 5, below.
[104] Note that Member States may well be able to use other criteria without such rules falling within the scope of the Treaty, but the jurisprudence of the Court of Justice has so far arguably only dealt with cases where residence requirements took the form of Art. 54 TFEU-like criteria. Thus, a mere codification of the case law would probably have to be restricted to residence requirements of that type.

tied to the company law of the Member State in which their headquarters are located. The Court of Justice has repeatedly held that choice of company law is an inherent feature of the freedom of establishment.[105] This solution, however, would effectively negate choice of law in the area of company law, thus creating tensions between primary and secondary EU law.[106] Moreover, we do not believe that completely excluding horizontal regulatory competition in the area of company law would be in line with the single market objectives. Perhaps most importantly, however, this solution would create significant risks and legal uncertainty for a large number of businesses across the Union which are not currently organised under the company law of their headquarter jurisdiction.

4.4 Recommendation

<u>In light of the discussion above, we suggest that a future EU instrument harmonising conflict-of-law rules would not seek to address the topic of effective residence requirements under substantive company law.</u> We believe this question could be left to the Member States, subject of course to the scrutiny of the CJEU under the Treaty. We are of the opinion that the merits of harmonised rules in this area are questionable.

5. General private international law approach

5.1 Incorporation theory and real seat theory

Most proposals to harmonise the conflict of laws rules governing companies favour a connecting factor that is based on some form of the incorporation theory, understood in a broad sense. This is the case with both the GEDIP and Sonnenberger proposals, which stipulate that companies shall be governed 'by the law of the country under which [they have] been incorporated' (or, as far as unincorporated entities are concerned, by the law under which they have been formed)[107] and by 'the law of the state in whose public register they are entered',[108] respectively.[109] The comparative analysis also indicates that legislators and/or national courts in most (but not all) Member States seem to be of the opinion that the real seat theory is no longer an available policy choice with respect to EU-incorporated companies in light of the decisions of the Court of Justice in *Centros*, *Überseering* and *Inspire Art*.[110] However, it should be noted that the Court of Justice has never explicitly invalidated the application of the real seat doctrine by a Member State in relation to companies formed in accordance with the law of that Member State (domestic companies).

Rather, the Court has acknowledged that the *home* Member State – i.e. effectively the Member State of incorporation – enjoys regulatory autonomy over a range of questions, what we refer to as the 'reserved area',[111] which fall outside the scope of the Treaty. While the extent of the home State's reserved area remains ill-defined, the Court has stated explicitly that 'a Member State [is] 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.'[112] The Court derives this result not only from prior

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[105] See e.g. *Centros* and *Inspire Art*, discussed in the Introduction to the Field of Study in Chapter I, above.
[106] See also WG Ringe, 'The European Company Statute in the context of freedom of establishment' (2007) 7 *Journal of Corporate Law Studies* 185.
[107] GEDIP proposal, Art. 3.
[108] Sonnenberger proposal, Art. 2(1).
[109] See also Art 1 of the 1968 Convention on the mutual recognition of companies and bodies corporate, EC Bulletin Suppl. 2-1969, 7, which referred to the 'statutory seat' to much the same effect.
[110] See also Introduction to Field of Study, Chapter I, above.
[111] ibid.
[112] Case C-208/00 *Überseering* [2002] ECR I-9919, para 70 (confirmed in Case C-210/06 *Cartesio* [2008] ECR I-9641, para 107).

case law going ultimately back to *Daily Mail*, but also from the wording of Article 54 TFEU. Given that Article 54 places the registered office, central administration and principal place of business on an equal footing, the Court argues that 'in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company […] a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status.'[113] As discussed above,[114] this line of the Court of Justice's jurisprudence enables Member States to insist, in principle, that companies formed under their company laws maintain a physical presence, including their headquarters or real seat, in the territory of that Member State as a matter of substantive national law ('effective residence requirement').[115] Similarly, however, the use by a Member State of any one of the criteria mentioned in Art 54 TFEU as connecting factors in its conflict of laws rules also falls outside the scope of the Treaty, provided it is used only in relation to companies claiming their status under that Member State's laws.[116]

Thus, it seems to be well established that primary EU law places no restrictions on the type of connecting factor that a future Rome V Regulation could adopt. The effective invalidation of the real seat theory in relation to foreign-incorporated companies in *Überseering*[117] was, of course, a consequence of its restrictive effect. However, were all Member States to use the real seat as the main connecting factor in relation to *domestic* companies, the application of that connecting factor towards *foreign* companies would no longer result in a restriction of the freedom of establishment, provided that the same criteria apply in all Member States in order to determine the location of the real seat. This is because, under such a rule, no company could maintain its real seat outside of the Member State of incorporation as a matter of the law under which it was formed. Corporate mobility would thus not be restricted by the host state, at least not beyond what applies under the law of the home state.

However, as discussed, both the real seat theory and the incorporation theory are not precisely-defined doctrines, but rather umbrella terms for sets of theories that differ in questions of detail,[118] and the case law of the Court of Justice does not offer any guidance in determining the precise formulation of either doctrine. Thus, where Member States attach importance to the location of the real seat, significant differences exist in

[113] Case C-210/06 *Cartesio*, ibid. paras 109-110.
[114] See Section 4.1; this effective residence requirement can be implemented either through a Member State's private international law rules or through substantive (company) law rules. For a discussion see also e.g. G Eckert, *Internationales Gesellschaftsrecht* 110 (Vienna: Manz 2010).
[115] Note that the rules at issue in both *Daily Mail* and *Cartesio* are best characterised as substantive, rather than conflict of laws, rules. In other words, the registered office, central administration and principal place of business are substantive requirements that trigger the application of freedom of establishment to an entity already existing under a national law. See the discussion in Section 4 above. See also Art 7 SE Regulation, which in our view falls within the scope of the reserved area. For a discussion (pre-*Cartesio*), arguing that Art. 7 is incompatible with the Treaty see Ringe, supra note 106.
[116] See e.g. *Überseering*, para 70, and *Cartesio*, para 107, both of which primarily seem to have a conflict of laws rule in mind based on context.
[117] Ibid.
[118] As far as the approaches are concerned that fall under the umbrella of the incorporation theory, we have found, for example, that the Member States refer to the place of incorporation (UK, see *Dicey, Morris and Collins on the Conflict of Laws* (London: Sweet & Maxwell, 15th ed. 2012), Rules 173-75), the country where the formation procedure was fulfilled (Italy, see Riforma del diritto internazionale privato [Reform of private international law] act No 218/1995, article 154(1)), or the registered office (Spain, art 8 Capital Companies Act). The real seat, on the other hand, is defined as the location of the company's principal establishment, which corresponds to its centre of governance, business and activities (Belgium, art 4, § 3 PIL Code), the place of central decision-making, i.e. where the board of directors meets (Luxembourg, Court of appeals, 7th Chamber, 21 October 2009, n°33908 and Cass., 9 November 2010, n° 58/10; PH Conac, *Le siège social en droit luxembourgeois des sociétés*, Journal des tribunaux, Luxembourg, 2009, p. 2), or the place where the principal and effective office of administration is located (Portugal, Art. 33(1) Civil Code, Art. 3(1) Companies Act).

how that seat is defined. Consequently, in a future Rome V regulation using the real seat as the main connecting factor of a 'bilateral conflict of laws rule' would require a precise definition of that term, which would then need to be interpreted autonomously by the Court of Justice. Moreover, as discussed above in Section 4, the Court of Justice regards choice of company law as an inherent feature of the freedom of establishment.[119] Basing the main connecting factor of a future Rome V regulation on the location of the real seat would effectively negate that choice, potentially creating tensions between primary and secondary EU law.

It is suggested that the determination of the applicable connecting factor should be informed by the following criteria: (1) legal certainty, i.e. the question whether the chosen formulation is conducive to consistent and harmonised interpretation by national courts without the need to reconcile differences in interpretation or clarify ambiguities by the Court of Justice; (2) the ease with which the connecting factor can be integrated into the existing body of national and European private international law; and (3) the expectations of the various constituencies involved and the desirability of a system of more or less extensive corporate mobility.

Legal certainty militates in favour of a form of incorporation theory. As stated above, Member States differ in their definitions of the real seat,[120] and past experience with a real-seat-type connecting factor used by the Insolvency Regulation (the centre of main interest/COMI) has given rise to a considerable amount of litigation and, accordingly, a high degree of legal uncertainty.[121]

As far as the second point is concerned, the choice of the place of incorporation or registered seat as connecting factor may lead to friction in the boundary region between company law, insolvency law, and tort law.[122] These three legal areas would then be subject to three different connecting factors — the place of incorporation for company law purposes, the centre of main interest in insolvency law, and the place where the damage occurs in relation to tort law[123] (although in the latter case, it may be argued that in appropriate cases, for example when the tortious act of a director gives rise to a personal action in tort by the shareholder, the tort is 'manifestly more closely connected'[124] with the place where the company is incorporated or registered).

As far as the third point is concerned, it is necessary to consider the fact that (almost) all Member States *de facto* currently use the place of incorporation or registered seat as the main or exclusive connecting factor in relation to companies from other Member States.[125] As discussed in the statistical part of this report, a significant number of companies have made use of the resulting corporate mobility (and choice of law). We thus believe that mandating a connecting factor other than the registered office (or any other version of the incorporation theory) would likely give rise to significant transitioning costs. In addition, as discussed above, mandating a uniform connecting factor inspired by the real seat theory in a future Rome V regulation would significantly reduce corporate mobility and the possibility for undertakings to choose the company law rules that best fit their needs; such a choice may thus be seen as conflicting with the aims of the Treaty. We therefore propose that, <u>as a general rule, a company shall be governed by the law according to which it has been incorporated, and an unincorporated</u>

[119] See *Centros* and *Inspire Art*.
[120] i.e. where this concept is used at all.
[121] See, e.g., W-G Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 *European Business Organization Law Review* 579.
[122] Gerner-Beuerle and Schuster, supra note 12.
[123] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Art. 4(1).
[124] Ibid. Art. 4(3).
[125] See Comparative Analysis, Chapter IV, Section 3.1. Regarding companies from third countries, by contrast, some Member States use variants of the 'real seat' criterion.

entity by the law according to which it has been formed. Given the differences in Member State laws, it may prove useful to include in the definition of 'incorporated companies' all companies that acquire (full)[126] legal personality upon entry in the commercial or companies register of the jurisdiction of formation. This may increase legal certainty in relation to some partnerships and related business organisations in a number of Member States. The solution suggested here also corresponds to the findings of the statistical and empirical analysis of this report.[127]

While such a rule should capture most cases, it may be useful to supplement the provision by a 'residual clause' similar to the one contained in the GEDIP proposal to the effect that the law of the closest connection shall apply if the law cannot be determined pursuant to the general rule.[128] The residual clause may, for example, capture cases where founders from more than one country draw up an instrument establishing a company in a common language without specifying explicitly the governing law and where registration of the company/partnership is not required or where such registration has merely a declaratory effect. Importantly, in order to ensure legal certainty, this clause should not be formulated as a general escape clause comparable to the one applicable to international torts in the Rome II Regulation[129] or in the Slovenian Private International Law and Procedure Act.[130] Rather, it should be made clear that it has a residual function that is only engaged if the determination of the incorporation or formation law fails.

5.2 Renvoi

Renvoi is commonly excluded in international conventions on private international law and in the Rome regulations harmonising conflict of laws rules in the EU.[131] Both the GEDIP and Sonnenberger proposals also exclude renvoi.[132] As discussed in the previous Section 5.1, we believe that the primary connecting factor for determining the law applicable to companies should follow the incorporation doctrine. If future EU legislation will follow this core suggestion, and provided that the scope of the *lex societatis* will be broad enough to cover the vast majority of company law-related issues,[133] the question of whether or not to permit renvoi for the area of company law would have limited consequences for EU-incorporated companies.

First, choosing an easily ascertainable connecting factor such as the jurisdiction of incorporation (and hence, in practice the, registered office) would effectively rule out situations in which courts in different Member States disagree on the national law to

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[126] See Comparative Analysis, Chapter IV, Section 4.2, on the separate legal personality companies enjoy pre-incorporation in some Member States.
[127] See Chapter II, Section 5.3 and Chapter III, Section 3 above.
[128] GEDIP proposal, Art. 4. The residual clause of the GEDIP proposal of 2015 (but not that of the 2014 proposal, see Art. 3(2)) refers to the place where the company's 'central administration is located at the moment of formation of the company', unless 'the company is manifestly more closely connected with the law of another country'. It is not clear whether the reference to the company's central administration 'at the moment of formation' would be useful in practice, since it will likely be difficult to determine the incorporation or formation law especially in the case of very small companies or partnerships that will not have an easily identifiable central administration at the time of formation.
[129] Rome II Regulation, Art. 4(3).
[130] Art. 2 of the Slovenian Private International Law and Procedure Act provides that the law determined pursuant to general conflict-of-laws rules shall not apply if there is 'an essentially closer link to some other law'. This provision, which is contained in the general part of the Private International Law and Procedure Act, has been mentioned in the context of company law by the Appellate Court in Ljubljana, I Cpg 563/2010, ECLI:SI:VSLJ:2010:I.CPG.563.2010, 20 May 2010. It could be argued that the 'essentially closer link' exception should lead generally to the application of the law of the real seat state in the case of pseudo foreign companies, but case law to this effect does not exist.
[131] Rome I Regulation, Art. 20; Rome II Regulation, Art. 34; Council Regulation (EU) No 1259/2010 (Rome III Regulation), Art. 11. But see also Regulation (EU) No 650/2012 (Rome IV Regulation), Art. 34 (allowing renvoi in the application of the law of a third state).
[132] GEDIP proposal, Art. 13; Sonnenberger proposal, Art. 8.
[133] As we suggest in Section 6 below.

which such this connecting factor points. Second, regulation of the scope of the *lex societatis* as suggested in this Report would encompass essentially all company law matters and would – at least in theory – eliminate legal uncertainty as to the matters covered by the law at the place of incorporation from the perspective of all Member States involved.

However, questions may still arise in practice as to the exact scope of the *lex societatis* when dealing with a specific instrument of national law, even in relation to EU-incorporated companies.

Moreover, permitting renvoi could also create legal uncertainty where Member States' laws continue to contain rules of immediate application effectively overriding the harmonised conflict of laws approach, and in particular where they also accept the application of *foreign* rules of immediate application within the scope of a future Rome V regulation. An exclusion of renvoi would therefore, in our view, be preferable, in relation to EU-incorporated companies or where the scope of application of the future Rome V regulation is limited to Member States' private international law rules towards EU-incorporated companies.

If the personal scope of application of a future Rome V regulation were to also include companies incorporated in third countries,[134] additional problems would arise in relation to renvoi. In particular, if such a broader scope is envisaged for the future Rome V regulation, such that it also binds Member States in their private international approach towards companies from third countries, the applicable third country law itself may, and in practice often will, use different connecting factors for determining the *lex societatis* generally, and/or define the scope of the *lex societatis* in a way incompatible with a future Rome V regulation. The question of the permissibility of renvoi would therefore obviously have important consequences in relation to such companies. Given the wide variety of private international law approaches in this field around the globe, no one solution can completely and reliably eliminate the related problems. The exclusion of renvoi may, however, increase legal certainty for third parties dealing with companies incorporated in third countries.

<u>We thus recommend excluding renvoi in relation to the entire scope of a future Rome V regulation, whether such a regulation will be limited to companies incorporated and formed under the laws of a Member State or extended to cover companies incorporated in and formed under the laws of a third country.</u>

5.3 Protection of third parties acting in good faith

5.3.1 Introduction

Member States often provide for exceptions to the general connecting factor that determines the applicable law in relation to both the company's capacity and the authority of its organs in order to protect third parties. These exceptions typically either give third parties a choice between an application of the incorporation law and the law of the state where the company's real seat (however defined) is located, or more generally override the foreign *lex societatis* by applying local authority and capacity rules where this would lead to the validity of a transaction concluded in the respective host Member State. The preconditions for this choice range from rules granting third parties the choice irrespective of whether or not they know that the company is incorporated under another legal system,[135] to requiring good faith of the third party and limiting the application of

[134] See Section 3.4, above.

[135] See in particular Art. 1837 of the French Code Civil and Art. L210-3 of the French Commercial Code, providing that '[t]hird parties may rely for legal purposes on the registered office …. However, the company shall not be entitled to raise this against them if its actual office is located elsewhere.' Similar provisions exist in Croatia

the host state law to questions of whether the company had capacity to act or whether the corporate organs had the requisite authority to bind the company.[136]

Both the GEDIP and Sonnenberger proposals recognise the need to protect third parties where they rely in good faith on the application of a law other than the *lex societatis*. The GEDIP proposal stipulates that while the capacity of a company to enter into legal relationships with third parties and the powers of its organs shall be governed by the *lex societatis*, any restrictions or limitations regarding capacity or authority under that law 'cannot be invoked against third parties when the relationship was concluded between persons both of whom are in the same country which is not that of the governing law of the company, under the law of which those restrictions or limitations do not exist, unless those third parties were aware of them or were not aware of them as a result of their negligence.'[137] Somewhat similarly, the Sonnenberger proposal provides that '[i]f a company has effected a legal transaction through a personally present body in a state other than that to whose law the company is subject, it may not rely on any limitations on its legal capacity or on its bodies' power of representation that are not imposed on a comparable company under the law of the place where the transaction was effected. This shall not apply if the company proves that the other party was aware that the transaction exceeded the limits of the company's legal capacity or its bodies' powers of representation or could not have been unaware thereof in the circumstances.'[138]

A broad application of the law at the place of the real seat at the election of third parties is difficult to reconcile with the right of establishment of companies under the Treaty if it is applied to EU-incorporated companies (which is unclear in some of the Member States using this concept). The imposition of additional requirements on companies validly established under the law of another Member State needs to be justified, and it is hard to see how the strict *Gebhard*-conditions could be satisfied if the location of the real seat within the territory of another state had the consequence that large sections of that state's company law could be applied to the foreign company. Justification will certainly fail where third parties know that they transact with a foreign company, since they are then, in the words of the Court of Justice, 'put on sufficient notice' that they are dealing with a company governed by a foreign law.[139] The same will most likely also be the case where national rules require reliance in good faith by the third party on the law at the real seat, at least if the host state seeks to apply its law in a blanket fashion, since the proportionality test requires the host state to provide evidence that the application of the host state's law is necessary to protect specific interests that are not sufficiently well protected by the *lex societatis*.[140]

The second type of good faith protection, provisions that prevent the company from invoking the lack of capacity or authority pursuant to the *lex societatis* if the company

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and Portugal, see Comparative Analysis, Chapter IV, Section 3.2. Art. 4 of the draft Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968 goes in the same direction by allowing a host state, under certain conditions, to apply 'any provisions of its own legislation which it deems essential, to the companies or bodies corporate … having their real registered offices on its territory, even if these have been established in accordance with the law of another Contracting State.' The 'real registered office' of a company is defined as 'the place where its central administration is established', Art. 5.

[136] Comparative Analysis, Chapter IV, Section 3.2.

[137] GEDIP proposal, Art. 6. A further good faith provision is contained in Art. 7, which provides that if the company does not disclose the law under which it was formed, creditors may claim liability from those who act on behalf of the company, the company's members and its directors under the law of the state where the person acted, unless the creditors knew or should have known that the company was formed elsewhere. The legal nature of this provision is different from Art. 6, since it is designed as a liability mechanism. For this reason, we will discuss it in a different context, Section 6.3.2.

[138] Sonnenberger proposal, Art. 3(2). Similar to GEDIP, the Sonnenberger proposal contains a second good faith provision that allows parties to rely more generally on a legal system other than the *lex societatis* if the company 'purports to operate under [that] law', Art. 2(2). This provision is discussed together with the corresponding provision from the GEDIP proposal in Section 6.3.2 below.

[139] Case C-167/01 *Inspire Art* [2003] ECR I-10155, para 135.

[140] See Section 7 below for a further discussion of this point.

enters into a transaction with a third party in another country and the limitation on capacity or authority would not exist under that law, raises less concerns with regard to the Treaty. Capacity and authority are matters governed by the *lex societatis*,[141] but it is commonly acknowledged that the law of the state where the company enters into legal relationships with third parties may be relied on, under appropriate circumstances, to protect third parties acting in good faith. Such a provision can be found, for example, in the Rome I Regulation, which applies to natural persons and has served as the model for the GEDIP and Sonnenberger provisions quoted above.[142]

5.3.2 Policy options for a future Rome V Regulation and the impact of harmonisation

Including a similar provision in a future Rome V Regulation could be seen as an extension of the Rome I Regulation to legal persons. It would also avoid arguably counterintuitive results such as the outcome in the recent decision of the English Court of Appeal in *Haugesund Kommune*,[143] where the Court distinguished between the law determining capacity of the company and the law governing the *consequences* of acting without capacity. While the former was held to be a matter for the *lex societatis* (as in other Member States), the latter was considered to be governed by the putative *lex contractus* (English law in the case as the law chosen by the parties). As a consequence, the body corporate lacked capacity pursuant to the *lex societatis*, but the parties were not able to rely on the good faith provision also contained in the governing law of the body corporate in question.[144] English law as the putative *lex contractus*, on the other hand, did not provide for any protection of third parties acting in good faith when attempting to contract with a corporation that has no capacity to conclude that contract.[145] It is worth noting that for *companies*, acting *ultra vires* generally no longer affects the validity of contracts under English law, as required by Directive 2009/101 (so-called First Company Law).[146] In comparable cases concerning companies falling within the scope of the First Company Law Directive, therefore, the full application[147] of *either* host state or home (incorporation) state law would likely lead to the validity of the transaction, whereas the split application of both laws may result in its invalidity.

However, the very fact that the effect of authority and capacity questions has been largely harmonised across the Union by the First Company Law Directive may well call into question the need for a rule mirroring Article 13 of the Rome I Regulation. In most circumstances, the parallel application of home and host state law would mean that substantially the same rules, albeit from two different sources, could apply to the same corporate transaction. In addition to general questions of actual and ostensible authority, which may be governed by a law different from the *lex societatis* if the company enters into legal relationships in another country,[148] the First Company Law Directive already provides for a finely calibrated set of good faith provisions. These provisions implement a policy decision that seeks to strike an appropriate balance between protecting third parties in their reliance on the validity of acts carried out by the corporate organs and the interests of the company in not being bound by acts that exceed the company's capacity or the powers of its organs. An extension of these provisions protecting third parties would rarely protect the third party more extensively than the straight-forward application of the *lex societatis*.

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[141] See Section 6.1.1 below.
[142] Rome I Regulation, Art. 13.
[143] *Haugesund Kommune v Depfa ACS Bank*, [2010] EWCA Civ 579.
[144] The decision concerned a Norwegian public body, rather than a company, but the relevant principles generally apply to all corporations.
[145] Since the case did not concern a UK company, UK Companies Act 2006, s. 39(1) which prevents capacity facts from affecting the validity of a transaction, did not apply.
[146] Now Directive 2009/101/EC, Art. 10.
[147] i.e. including the regulation of the consequences of a lack of capacity/authority.
[148] Peter Stone, *EU Private International Law* 330-331 (Edward Elgar 2nd edn 2010).

There are in practice only two scenarios where a rule modelled on Article 13 of the Rome I Regulation would have an appreciable effect from the perspective of a third party. First, Article 10(1) of the First Company Law Directive does not protect third parties transacting with the company where the relevant act by the company exceeds the 'powers that the law confers or allows to be conferred' on the company organ acting. In practice, this rule applies only to the most significant corporate transactions, such as mergers and issuances of shares. Since the scope of powers differs across Member States, and given that this question clearly falls within the *lex societatis*, transactions falling within the scope of that provision under the *lex societatis*, but not under the company law rules of the host state, could be rendered binding on the company if a future Rome V Regulation were to result in the parallel application of home and host state law in these situations.

Second, Member States may (but do not have to) provide under the provisions of the First Company Law Directive[149] that the company can rely vis-à-vis third parties on restrictions of the general power of representation that require several persons to act jointly in order to bind the company. Again, since Article 10(3) of that Directive leaves this choice to the *lex societatis*, a provision protecting third parties by (also) applying the law of the place where the transaction takes place may result in an otherwise invalid contract be rendered valid.[150]

To the extent that the First Company Law Directive permits such variations across Member State law, the national rules will, of course, be policy decisions attempting to balance the interests of the company and its members on the one hand, and those of third parties on the other hand.

5.3.3 Policy recommendations

In our view, it may be useful for a future Rome V Regulation to distinguish based on both the nature of the company's presence in the host Member State and the nature of the transaction. First, where a company operates in the host Member State through an establishment (as defined by the Court of Justice[151]), this may well create an expectation among third parties that the company operates on an equal footing with domestic companies in relation to its capacity and the powers of the persons acting on its behalf.[152] The expectations of third parties may well be different if a foreign company has no permanent presence in the host Member State (i.e. the state where the transaction takes place), and only concludes a specific transaction with the third party in that Member State.

Second, transactions in relation to which a Member State does not allow power to be conferred on company organs usually pose a particularly significant risk for the company and its shareholders, which may imply the need for wider-ranging protection of the company's interests. Moreover, the transactions covered by this exception will also typically raise the expectations as to the due diligence of the third party. On the other hand, where the company organ violates a joint representation requirement according to

[149] See Art. 10(3).
[150] Moreover, the First Directive also allows Member States to provide in their national laws that acts *ultra vires* the company are not binding, where the company 'proves that the third party knew … or could not in view of the circumstances have been unaware of' the *ultra vires* nature of the transaction. However, differences in the implementation of the First Directive regarding this question would not be affected by a rule modelled on Art. 13 of the Rome I Regulation, since that provision only applies to *bona fide* third parties.
[151] For a definition, see e.g. Case C-55/94 *Gebhard* [1995] ECR I-4165, para 25.
[152] On the other hand, third parties can rely on extended disclosure obligations pursuant to the Eleventh Company Law Directive if the establishment qualifies as a branch. The disclosure obligations include the requirement to disclose the particulars of the persons who are authorised to represent the company as members of the respective company organs and permanent representatives of the company for the activities of the branch, Art. 2(1)(e).

a foreign *lex societatis* which does not exist (or is not enforceable vis-à-vis third parties) under the law at the place of the transaction, a third party transacting with the company may well be seen as deserving of protection if it acts in good faith, particularly where the company has a permanent presence in the jurisdiction where the transaction was concluded.

In our view, a future Rome V Regulation should provide that all questions concerning the company's capacity or the authority of its organs are to be resolved pursuant to the *lex societatis*. This general rule would therefore also extend to the regulation of the consequences of a lack of capacity or power by the company or its organs. However, the Regulation could provide that, where the application of the *lex societatis* would lead to the invalidity of the act, this fact cannot be invoked against third parties if (i) a company organ purporting to act on behalf of the company enters into a legal relationship with the third party in a country other than the Member State of incorporation, (ii) the company has an establishment [or acts through a personally present representative] in the country where the legal relationship is entered into, (iii) according to the law of that country the relevant restriction would not exist, and (iv) the third party did not know and should not have known of the existence of the restrictions pursuant to the *lex societatis*.[153] Moreover, the rule may be restricted to acts which do not exceed the powers the *lex societatis* confers or allows to be conferred on the acting company organ. The desirability of the recommended solution depends, of course, on the scope of a future Rome V Regulation. Were it to also include companies incorporated in third countries,[154] the framework would need to apply differently to such companies, unless the underlying rules on authority are substantially equivalent to the rules of the First Company Law Directive.

6. Scope of the lex societatis

6.1 General formulation

6.1.1 Enumeration of topics

Most existing conflict of laws rules for companies, both in Member States that have codified the rules and in proposals on a harmonisation of private international law, provide for a non-exhaustive enumeration of topics that shall be governed by the *lex societatis*. The questions covered by the *lex societatis* are generally relatively uncontroversial, and the comparative analysis has found far-reaching consensus on which topics should be included in such a list. In order to facilitate comparison and the identification of a common denominator, the following table gives an overview of the topics that are explicitly mentioned as falling within the scope of the applicable law pursuant to different regulatory instruments that contain an enumeration of such matters.[155]

[153] This formulation follows the GEDIP and Sonnenberger proposals in using knowledge (or negligence in not knowing) *of the existence of the limitation* on the company's capacity or the powers of its organs as the relevant point of reference in determining whether the third party acted in good faith. As far as the interpretation of the corresponding Article 13 of the Rome I Regulation is concerned, it is controversial whether such a formulation implies that an error regarding both the governing law (i.e. the fact that the company is incorporated abroad) *and* the actual rules of the foreign *lex societatis* that determine capacity and authority is relevant for the provision, or only the latter, see U Spellenberg in *Münchener Kommentar zum BGB* (Munich: CH Beck, 6th edn, 2015), Art. 13 Rom I-VO, paras 70-81.
[154] See the discussion in Section 3.4. above.
[155] Unless otherwise noted, abbreviations refer to the Member States' two-letter ISO code. The German rules (DE) are from a draft legislation from 2008 that was not adopted, Referentenentwurf, 'Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen', available at http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/int_gesr/int_gesr-index.htm. Currently the choice-of-law rules applicable to companies are not codified in Germany.

Table 1: Subjects mentioned explicitly as falling in the scope of the lex societatis[156]

Topic	G[157]	S[158]	BE	BG	CZ	EE	DE	IT	LT	NL	PL	PT	RO	ES
1. Formation and legal nature/personality	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
2. Corporate Name	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	yes	No	no	no
3. Capacity of company and authority of organs	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
4. Capital structure	yes	yes	no	no	no	no	yes	no	no	no	no	No	no	no
5. Rights and obligations of members	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes	yes	no
6. Internal management matters (corporate governance structure)	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
7. Duties of directors and liability for a breach of duty	yes	yes	yes	yes	no	no	yes	yes	yes	yes	yes	No	no	no
8. Liability of shareholders for the debts of the company	yes	yes	no	yes	yes	yes	yes	yes	no	yes	yes	yes	yes	no
9. Voluntary winding up	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
10. Derivative action and other enforcement issues	no	no	no	no	no	no	no	no	no	no	no	No	no	no
11. Group law	no	no	no	no	no	no	no	no	no	no	no	No	no	no
12. Financial reporting, audits	yes	yes	no	no	no	no	no	no	no	no	no	No	no	no

It should be emphasised that the above table only refers to matters that are expressly enumerated in the relevant legislation. A number of issues, notably a company's capacity and legal nature, formation and dissolution, capital structure, internal governance matters, the acquisition and loss of the status as shareholder or member, as well as the ensuing rights and duties of shareholders, directors' duties, and the liability of directors *to the company* for a breach of duties, concern core issues of company law. As far as can be seen, it is not contested that these questions should be governed by the *lex societatis* even where any explicit reference to them is omitted in the relevant codifications of the Member States. Two issues, the liability of directors for conduct that may cause a loss not only to the company, but also or exclusively *to third parties*, and the liability of shareholders for the obligations of the company ('piercing the corporate veil'), which is

[156] Note that this table, necessarily, simplifies the very complex underlying questions. Just as the exact definition of the scope of the *lex societatis* differs across Member States, so does the definition of the topics included in the table.
[157] European Group for Private International Law, Regulation X on the Law Applicable to Companies and Other Bodies (3rd Draft, 2015) ('GEDIP proposal').
[158] HJ Sonnenberger (ed), *Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts* (Tübingen: Mohr Siebeck 2007) ('Sonnenberger proposal').

assigned to the *lex societatis* in the majority of Member State codifications and also treated as falling under the *lex societatis* in some of the Member States without a codified private international law,[159] warrant closer consideration. In addition, it is necessary to examine whether it is sensible to harmonise issues commonly not mentioned in codifications of private international law, namely the last three points listed in the table (derivative actions, corporate group law, and financial reporting requirements), in a possible Rome V Regulation. We discuss these cases in more detail in Section 6.3.1 below.

With regard to the other topics mentioned in Table 1,[160] a non-exhaustive enumeration would reflect a wide consensus in the Member States. Therefore, we propose (at this point[161]) that a future Rome V Regulation should in any case include an enumeration of these matters in order to give guidance as to the future (autonomous) interpretation of the scope of the *lex societatis*. In addition, the regulation should make it clear that the enumeration is non-exhaustive, since it is clear that no list can anticipate all relevant questions of delimitation and it is consequently essential to retain flexibility to develop the law further. This would also be in line with the approach in other relevant legislative measures at the European level, for example the Insolvency Regulation.[162]

6.1.2 Problematic areas

In addition to the last three points mentioned in Table 1 (derivative actions and other enforcement issues, corporate group law, and financial reporting requirements), the classification of the following matters can be regarded as less well established across Member States:

- the composition of the corporate organs as far as employee participation and gender diversity is concerned;
- the liability of the directors and shareholders directly to third parties; and
- special rules regarding certain debt instruments (especially bonds) issued by companies.

Furthermore, the comparative analysis has shown that some of the matters that are acknowledged as falling within the scope of the *lex societatis*, especially the name under which the company trades, touch upon important policy interests of the host state. The relevant problems often arise only in the context of a company's cross-border activity. For instance, a corporate name may not be misleading or give rise to a risk of confusion in the Member State of incorporation, but may well do so in the host state. Policy makers and commentators in a number of Member States are therefore of the opinion that certain regulatory requirements of the host state may effectively override the *lex societatis* in order to protect third parties transacting with the company in the host state. We will address these issues in turn.

6.1.2.1 Derivative actions and other enforcement issues

While derivative actions are not mentioned in the codified private international laws of the Member States, several Member States regard the right of the company's shareholders to enforce claims of the company against its directors (derivative actions or minority shareholder lawsuits) as an integral aspect of the country's corporate

[159] Dicey, Morris and Collins, supra note 118, 30-028.
[160] Topics 1-7 and 9.
[161] But see our discussion in Section 6.1.2, which suggests that in addition to the topics mentioned in the preceding footnote, the enumeration should include topics 10 and 12.
[162] See Art. 7(2) Regulation (EU) 2015/848 (applicable law).

governance system. Consequently, these Member States classify the relevant rules as coming within the ambit of the *lex societatis* (this is the case, for example, in Denmark, France, and the United Kingdom). The challenge with this approach is, of course, to distinguish between general procedural requirements, which are determined by the law of the forum, and requirements that regulate specifically the minority shareholder lawsuit and are governed by the *lex societatis*. Where case law exists, it has been pointed out that even though the question whether a shareholder can bring a derivative action is answered by the law in procedural terms, its 'real nature'[163] is not procedural. Similar problems exist in relation to rules regarding, for instance, the challenging of general meeting resolutions, which play an equally important role in the enforcement of shareholder rights in several Member States.

Derivative actions are part of substantive company law in that they 'confer a right on shareholders to protect the value of their shares by giving them a right to sue and recover on behalf of the company.'[164] This quote also suggests a way to distinguish between purely procedural aspect of the derivative action mechanism and aspects that are substantive in nature. Rules that set out, specifically for the case of shareholders seeking to enforce the company's claims, whether and when a shareholder has standing to sue on behalf of the company (for example, by imposing minimum shareholding requirements, asking whether the majority shareholders could have ratified the challenged action,[165] or requiring the court to balance the interests of the shareholders in bringing the lawsuit and the detrimental effects that the litigation may have on the company[166]), that limit the types of the company's claims that may be brought by a shareholder, or regulate whether the shareholder bears the costs of the litigation, ultimately determine how likely it is that the company's claims will be enforced and, consequently, affect the value of the shareholder's holding. The same holds true for rules allowing individual shareholders to challenge general meeting resolutions. On the other hand, rules that regulate in a general manner, for example, how a claim form can be served, are purely procedural in nature from both a formal and a functional viewpoint.

Finally, it should also be considered that the design of the derivative action mechanism and the content of directors' duties are intrinsically connected. Given the governance structure of (particularly large, listed) companies, the effectiveness of directors' duties in regulating behaviour is highly dependent on the interplay between both, the content of the duties and the ease of enforcement. While procedural and substantive rules are, of course, always interdependent, this is particularly true in the area of derivative actions.[167] A regulatory solution that seeks to calibrate the risk of liability that directors face may therefore focus on either of the two dimensions (or, often, on both).[168] Consequently, a choice-of-law approach that separates these two dimensions may result in the misalignment of liability risks. The same line of reasoning applies to the right of shareholders to challenge resolutions of the corporate organs, notably decisions of the general meeting[169] Again, the respective enforcement mechanisms are not only procedural in character, but they shape the position and rights of shareholders and may, functionally, be regarded as part of the substantive law. In relation to the procedures

[163] See the English case *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 W.L.R. 1269, 1284. But see also *Base Metal Trading Ltd v Shamurin* [2005] 1 W.L.R. 1157, 1175, where the court held that '[t]he question whether a shareholder has a right to bring a derivative action [has] to be distinguished … from the question whether the shareholder has satisfied any procedural rules from bringing a derivative claim, for example by serving prior notice on the company.' Whereas the former falls within the scope of the *lex societatis*, the latter 'are matters of procedural law for the lex fori'.
[164] *Konamaneni*, ibid.
[165] Foss v Harbottle (1843) 67 ER 189.
[166] German Stock Corporation Act, § 148(1), sentence 2, no. 4.
[167] See e.g. RM Buxbaum, 'Conflict-of-Interests Statutes and the Need for a Demand on Directors in Derivative Actions' (1980) 68 *California Law Review* 1122: *'Nowhere is the substantive law so dependent upon the availability of a person entitled to complain of its breach as in the case of litigation on behalf of a corporation.'*
[168] Gerner-Beuerle and Schuster, supra note 12.
[169] For example pursuant to §§ 241-249 German Stock Corporation Act.

regarding the challenging of resolutions of the corporate organs it must also be borne in mind that the procedural rules will often reflect particularities of the national companies register. For instance, where a Member State permits the challenging of a general meeting resolution regarding the increase of the company's capital, it will typically also deal with the question of whether or not the challenged resolution may be implemented by the company despite pending legislation. Solutions of this type will, however, only be effective where the procedural rules regarding the enforcement of shareholder rights follow the *lex societatis*. The analogous problem had to be addressed in the context of the Cross-Border Merger Directive,[170] which at least implicitly follows this logic. Art 10(3) of that Directive permits the implementation of cross-border mergers notwithstanding pending litigation in one of the Member States, provided the shareholders of the (foreign) acquiring company effectively accept the future decision of the 'court having jurisdiction over one of the acquired companies'. It is clear from the context of the Cross-Border Merger Directive that (sole) jurisdiction over the issues in question is assumed to be vested in the courts of the Member State of incorporation. However, such a quasi-contractual solution[171] would not be feasible in the present context.

<u>We, therefore, propose to clarify in the non-exhaustive list of matters governed by the *lex societatis* that these matters include the enforcement of the company's claims by its shareholders and the right of shareholders to challenge resolutions of the corporate organs</u>.

<u>It should be noted, however, that the general solution proposed in this Report regarding the primary connecting factor would render such a clause redundant, at least as far as challenges of general meeting resolutions are concerned</u>.[172] Under the Recast Brussels Regulation, the courts of the Member State in which a company has its 'seat' have exclusive jurisdiction in proceedings about the validity of the constitution, the nullity or the dissolution of companies, as well as the validity of the decisions of their organs (including the general meeting).[173] Currently, the courts in each Member State may determine the meaning of the term 'seat' according to the national rules of private international law.[174] If a future Rome V Regulation were to follow our recommendation that a company be governed by the law according to which it has been incorporated,[175] we would submit that the reference to 'seat' in Art 24 (2), last sentence, of the Recast Brussels Regulation would necessarily have to be one to the place of incorporation for all Member States.[176] Accordingly, the courts in the Member State under whose laws a company has been incorporated would have exclusive jurisdiction in relation to such claims, thus effectively resulting in the application of that countries procedural (and substantive rules).

6.1.2.2 Corporate group law

A separate body of law governing corporate groups can only be found in a minority of Member States (Croatia, Czech Republic, Germany, Hungary, Italy, Latvia, Portugal and Slovenia).[177] The treatment of groups for purposes of private international law is not always clear in these states and specific conflict rules are often missing. However, there is relatively widespread agreement that mechanisms to protect minority shareholders

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[170] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p.1.
[171] i.e. the voluntary acceptance of the foreign court's jurisdiction.
[172] See Section 5.1. above.
[173] See Art 24(2) Recast Brussels Regulation.
[174] Ibid.
[175] See in detail Section 5.1. above.
[176] See in detail Section 10 below.
[177] See e.g. KJ Hopt, 'Groups of Companies - A Comparative Study on the Economics, Law and Regulation of Corporate Groups' in: J Gordon and W-G Ringe (eds) *Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press 2015) Ch II 26.

and creditors of the controlled undertaking (i.e. typically the subsidiary) are governed by the *lex societatis* of the subsidiary. In Member States without a codification, the legal mechanisms used to address problems in corporate groups are diverse and subject to general conflict of laws rules that may lead to a combination of applicable laws, for example the *lex contractus* with regard to control agreements between the parent and the subsidiary and the *lex societatis* of the controlled undertaking as far as the position and rights of the minority shareholders of the subsidiary and the liability of the parent for the debts of the subsidiary are concerned.[178] In addition, the *lex concursus* will often be relevant to determine the rights of creditors of the subsidiary in the insolvency of the subsidiary. Because of this variation in legal strategies, it seems questionable whether a harmonisation of the conflict rules applicable to corporate groups is advisable. <u>It may be helpful to emphasise in the recitals of a future Rome V Regulation that company law mechanisms designed to protect the position of controlled undertakings should be governed by the *lex societatis* of the controlled undertaking (rather than the controlling undertaking) and that other legal mechanisms follow general principles of private international law. However, a conflict rule governing the legal relationships of corporate groups in a more holistic fashion will likely not be effectual without harmonisation of the internal law on groups of companies</u>.[179]

6.1.2.3 Financial reporting and disclosure

Financial reporting requirements are explicitly mentioned as falling within the scope of the applicable law only by the GEDIP and Sonnenberger proposals.[180] However, even without explicit codification Member States generally agree that the *lex societatis* determines financial reporting requirements. In spite of the far-reaching substantive harmonisation of accounting law at the European level, the question is not irrelevant since EU accounting rules operate on the basis of minimum harmonisation[181] and allow for various Member State options. In some Member States, commentators argue that those parts of accounting law that are not fully harmonised should be classified as public law, given that they protect public interests.[182] Alternatively, it has been suggested that the reference in the Eleventh Company Law Directive to 'the law of the Member State by which the company is governed', which determines the form and content of the accounting documents that have to be disclosed by branches of EU-incorporated companies,[183] leaves open the question of the applicable law, and Member States are free to apply the law of the state where the real seat is located to financial reporting requirements.[184] These views are ultimately unconvincing. The concept of the governing law should be interpreted consistently throughout Union law, and as discussed above,[185] Member States are prevented by the Treaty, as interpreted by the Court of Justice, from applying the law at the place of the real seat in a blanket fashion as far as EU-incorporated companies are concerned. In our view, this also determines the meaning of the reference to the 'governing law' in the Eleventh Company Law Directive. If a future Rome V Regulation provides for the incorporation law as a harmonised conflict-of-laws rule, this reference would likewise have to be interpreted as referring to the jurisdiction of incorporation.

[178] See, for example, the Spanish country report, Section 4.1.
[179] For previous attempts to harmonise the law of corporate groups see Hopt, supra note 177.
[180] GEDIP proposal, Art. 5(e); Sonnenberger proposal, Art. 3(1), no. 9.
[181] Directive 2013/34/EU, recital 10.
[182] For example, H Merkt in A Baumbach and KJ Hopt (eds), *Handelsgesetzbuch* (Munich: Beck, 36th edn 2014), § 238, para 9.
[183] Directive 89/666/EEC, Art. 3.
[184] P Kindler, in *Münchener Kommentar zum BGB* (Munich: CH Beck, 6th edn, 2015), 'Internationales Handels- und Gesellschaftsrecht', paras 273-279. For further references see also H Altmeppen and A Ego, in *Münchener Kommentar zum Aktiengesetz* (Munich: CH Beck, 3rd edn, 2012), 'Europäische Niederlassungsfreiheit', paras 490-491.
[185] See text to note 140 above.

Similarly, allowing a public law override by the host state would lead to problematic regulatory outcomes. Branch establishments of foreign, including EU-incorporated, companies would be bound by two sets of accounting rules, the incorporation law as well as the law of the place where the branch was located. The company, accordingly, would have to produce two sets of accounting documents, which would not be in line with the Eleventh Company Law Directive.[186] Therefore, we propose that a future Rome V Regulation should resolve these contentious questions by including financial reporting requirements in the non-exhaustive list of matters governed by the *lex societatis*.

6.1.2.4 Employee participation in company organs and gender quotas

The composition of the administrative organs of the company, the board of directors in one-tier board systems and the management board and supervisory board in two-tier systems, is a central aspect of company law and, accordingly, all legal systems qualify it as part of the *lex societatis*. In some Member States, commentators submit that the law should allow for an exception from this clear rule as far as employee participation at board level is concerned, since rules that establish, for example, a system of co-determination pursue specific societal goals linked to the place where the company's operations are located and, consequently, where the employees' interests are affected. The exception is suggested to be implemented either by relying on the real seat instead of the incorporation law for the specific case of employee representation or regarding the employee participation regime as overriding mandatory provisions that apply notwithstanding a foreign *lex societatis*.[187] Another possible option is to exclude the topic of employee co-determination from the scope of a future Rome v Regulation.[188]

Looking at the actual legal situation in the Member States, all aspects of board composition, including the involvement of employees, are governed by the l*ex societatis*.[189] Furthermore, as far as can be seen, no court in the Member States has been prepared to impose the host state's employee participation requirements on foreign, EU-incorporated companies. It would also be impracticable to incorporate the host state's rules on co-determination into a foreign corporate governance regime, since a wide array of rules ranging from board structure to appointment and removal rights would need to be adjusted. This would inevitably lead to friction between the home and host state corporate governance regimes and, hence, to legal uncertainty. Moreover, the Cross-Border Merger Directive and the SE Regulation both operate under the implicit assumption that employee participation forms part of the *lex societatis*. Both instruments may, of course, effectively result in foreign employee participation rules affecting the board composition of 'domestic' companies, but this may be achieved by harmonising the relevant rules of the *lex societatis*, rather than by excluding the question from its scope.[190]

Nevertheless, it is also worth pointing out that employee participation rules and, similarly, requirements concerning gender quotas, not only address the internal affairs of the company, but reflect wider policy goals as these rules seek to balance the interests of

[186] See Art. 3 of Directive 89/666/EEC, which provides that the accounting documents that must be disclosed by the branch '*shall be limited* to the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed' (our emphasis). As discussed, a violation of Directive 89/666/EEC could be avoided only if the 'governing law' referred to in the Directive was interpreted as the law at the real seat *and* the public law override was restricted to cases where the branch was identical to the real seat of the company.
[187] See, e.g., German country report, Section 4.3.
[188] See also Section 9.3, below, on the possibility to exclude areas of law.
[189] Comparative Analysis, Chapter IV, Section 4.3 for details.
[190] See Art 16 Cross-Border Merger Directive, which in effect assigns this question to the *lex societatis*.

different social actors within the society where a company operates.[191] Within the confines of the Treaty, Member States are of course entitled to protect such social policy goals also in relation to companies governed by a foreign *lex societatis*, for example by relying on overriding mandatory provisions.[192] In this regard, all additional requirements imposed on companies incorporated in another EU Member State are subject to *Gebhard* justification. Given the strict conditions for a justification under *Gebhard*, however, it seems unlikely that the Court of Justice would find that the application of the host state's board-level employee participation regime to foreign companies is compatible with the freedom of establishment.[193]

In order to attain a reasonable level of legal certainty, <u>we would suggest that a future Rome V Regulation should clarify that all internal governance matters, including board structure, the composition of corporate boards, and the involvement of employees, if any, at board level, shall fall within the scope of the *lex societatis*, unless specific social policy reasons justify, according to the *Gebhard* test, the classification of national rules on board composition as overriding mandatory provisions. However, we recognise that this question may be of a highly political nature and that an exclusion from the scope of the future instrument might offer an alternative solution.</u>

6.1.2.5 Liability of directors and shareholders

In several Member States, the opinion has been expressed—and case law can be found to the effect—that Member States in whose territory a foreign company pursues some form of business activity has authority to hold directors and shareholders of the company liable under domestic law.[194] The necessary link to the territory of the host state to engage such liability is defined differently in the Member States, as is the legal basis for regulating directors and shareholders of foreign companies.

<u>Liability of directors</u>

As far as the liability of directors is concerned, we can distinguish between legal systems that (i) impose domestic rules on directors' duties and branch managers' liabilities for mistakes made in the course of operating a branch; (ii) hold directors liable if they caused or contributed to the company's insolvency (using different connecting factors ranging from 'carrying on business' within the territory of the host state to being subject to corporate taxation in the host state); (iii) hold directors liable if they caused damage to third parties; or (iv) hold directors liable if they created the false legal appearance that a person with unlimited liability (for example, a partnership or a natural person) would be party to the contract between the company and a third party.[195] The following observations may be helpful in conceptualising these diverse approaches. As the discussion in Section 6.1.1 above has made clear, all legal systems agree that directors' duties, as well as the consequences of a breach of duties, are matters that in principle fall within the scope of the *lex societatis*. As far as the liability of directors of foreign companies for their conduct is concerned, the default position should, accordingly, be an allocation of regulatory authority to the home state.

In principle, this allocation of regulatory authority is exclusive. However, it may be modified pursuant to two considerations. First, it may be possible to regard the host

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[191] See, for instance, HW Arthurs and C Mummé, 'From governance to political economy: insights from a study of relations between corporations and workers', in *The Embedded Firm* 350 (CA Williams, P Zumbansen eds., Cambridge: Cambridge University Press 2011).
[192] See Section 7 below.
[193] See e.g. G Eckert, *Internationales Gesellschaftsrecht* 346 (Vienna: Manz 2010); M Weiss, A Seifert, 'Der europarechtliche Rahmen für ein „Mitbestimmungserstreckungsgesetz"' (2009) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 542.
[194] Comparative Analysis, Chapter IV, Sections 3.3, 4.3.2 and 4.5.2.
[195] Comparative Analysis, Chapter IV, Section 4.3.2.

state rule as an overriding mandatory provision (*lois d'application immédiate*), in which case the rule can be applied notwithstanding a foreign *lex societatis*. Second, the host state's liability provision may be classified as a legal rule not coming within the ambit of company law for purposes of private international law but of another conflict-of-laws rule *and* this conflict rule refers to the law of the host state. The first regulatory strategy mentioned above, holding directors of foreign companies liable for a breach of directors' duties where the breach is connected to a domestic branch, is evidently a matter of company law and could only be maintained under the first approach (overriding mandatory provision). Regulatory strategies (ii)-(iv), on the other hand, concern the scope of the applicable law and may, in appropriate circumstances, be classified as falling outside the *lex societatis*. In either case, the 'default rule' outlined above remains unchanged.

Accordingly, we propose that a future Rome V Regulation should stipulate that the *lex societatis* shall apply to the duties of directors, as well as the liability of directors for a breach of duty and generally for breaches of company law. Whether overriding mandatory provisions of the host state are permissible, and how the *lex societatis* and other areas of the law can be delimited constitute complex questions that will be discussed comprehensively in the appropriate context below.[196]

Liability of shareholders

The treatment of the liability of shareholders for the obligations of the company is equally problematic. We have seen that piercing the corporate veil is commonly mentioned in codifications of private international law as a matter falling within the scope of the *lex societatis*.[197] However, this regulatory choice may give rise to incoherent results because often legal mechanisms that are grouped under the rubric 'piercing the veil' operate very differently and pursue different functions in the Member States. A particular type of veil piercing, namely holding the shareholders liable for the company's debts if they abuse the corporate form, for example in order to evade a pre-existing obligation, concerns the nature and limits of the concepts of separate legal personality and limited liability. These concepts are part of the *lex societatis* in all Member States. It is therefore convincing to argue that a mechanism qualifying these concepts should also be classified as company law. Other types of veil piercing, however, may be functionally closer to insolvency law, e.g. where they apply only in the vicinity of insolvency, or to general tort law. In such a case, a classification as company law would dissect a body of rules intended to address problems that arise specifically in insolvency and in the vicinity of insolvency[198] and may therefore lead to inconsistent and ineffectual regulatory outcomes. Consequently, it would be advisable not to use a potentially overreaching term such as 'liability of shareholders for the obligations of the company' in defining the scope of the *lex societatis*. We propose not to follow the GEDIP and Sonnenberger drafts and the majority of private international law codifications in including the shareholders' liability for obligations of the company in the enumeration of topics governed by the *lex societatis*. Instead, it seems advisable to clarify — possibly in the recitals of a future Rome V Regulation — that the general criteria developed for the demarcation of the *lex societatis*, *lex concursus* and *lex loci delicti* determine how different types of legal mechanism imposing liability on the shareholders for the debts of the company shall be classified for purposes of private international law. We will discuss this problem in more detail in Section 6.3.1.2 below.

[196] See Section 7 for strategy (i), Section 6.3.1.1 for strategies (ii) and (iii), and Section 6.3.2 for strategy (iv).
[197] See Table 5.1 above.
[198] See text to notes 249-251 below.

6.1.2.6 Debt securities

The law applicable to corporate bonds (i.e. non-equity securities) and to the terms and conditions of bonds, including the rights of bondholders and the mechanisms of bondholder meetings, are in practice generally determined by a choice of law clause in the relevant documentation. These choice-of-law clauses are accepted in most jurisdictions,[199] since validity, content and underlying rights of bonds are commonly assumed to be matters falling within the scope of the Rome I Regulation, which excludes negotiable instruments from its scope of application only 'to the extent that the obligations under such […] negotiable instruments arise out of their negotiable character'.[200] However, the laws in some Member States provide for additional sets of rules governing the rights of bondholders and bondholder meetings. In some cases, such rules are only applicable where the underlying bonds are made subject to that state's law by virtue of contractual choice-of-law.[201] In some Member States, however, such rules are held to be applicable on the basis of mandatory connecting factors, such as the domicile of the issuer or offeror in a public offering.[202]

In several Member States, rules regarding corporate bonds and the position of bondholders are included in the national company law.[203] In these countries, the argument has been made that the classification for purposes of private international law should follow the internal legal classification and at least certain matters, notably concerning the authority of the bondholder meeting, should be governed by the *lex societatis*. However, case law is rare and there seems to be some legal uncertainty regarding these questions.

It is worth noting in this context that the main rights and obligations arising under bonds issued by a company, such as those relating to the payment of interest and the repayment of the principal, generally fall within the scope of application of the Rome I Regulation.[204] In particular, unless the bonds give special rights to their holders, such as the right to convert the bonds into shares, pre-emption rights over newly issued shares, or the right to participate in the company's profits, the contractual relationships between the bondholder and the company underlying the bond do not fall within the company law exemption in Art 1(2)(f) of the Rome I Regulation.[205]

The scope of the company law exemption in the Rome I Regulation does not depend on national classification, but has to be determined autonomously, ultimately by the Court of Justice.[206] In our view, the legal relationships between the company and its bondholders should therefore generally be regarded as being governed exclusively[207] by the law chosen in the relevant contract. In exceptional circumstances, a Member State's courts may insist on the application of additional rules based on Art. 9 of the Rome I Regulation (overriding mandatory provisions).

[199] PR Wood, *Conflict of Laws and International Finance* (London: Sweet & Maxwell 2007), para 2-055.
[200] Rome I Regulation, Art. 1(2)(d). The Rome I Regulation therefore excludes only questions that concern the transfer of the negotiable instrument and the position of transferor and transferee, Dicey, Morris and Collins, supra note 118, 33-378; see also D Martiny, in *Münchener Kommentar zum BGB* (Munich: CH Beck, 6th edn, 2015), 'Rom I-VO', Art 1 para 57.
[201] This is the case, for example, with the German Debenture Bond Act [Schuldverschreibungsgesetz], see § 1(1) of the Act.
[202] For an example, see Art. 1157 of the Swiss Code of Obligations [schweizerisches Obligationenrecht].
[203] Arts. 205-214 Bulgarian Companies Act; Art. 2415 Italian Civil Code; Arts. 348-372-B Portuguese Commercial Companies Act.
[204] Unless the obligations arise 'out of their negotiable character', which will typically only be the case for (rights and) obligations between subsequent holders of the negotiable instrument. For a discussion see e.g. Martiny, supra note 200, para 57.
[205] See also (at least implicitly) Case C-483/14 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group*, 7.4.2016.
[206] See e.g. Martiny, supra note 200, para 63.
[207] As far as they fall within the scope of application of the Rome I Regulation; see text to notes 200 and 204 above.

This possibility, however, exists irrespective of whether that Member State is the Member State under whose laws the company was incorporated, and it seems unlikely that a blanket application of any Member State's rules regarding the relationship between bondholders and the issuer (and between bondholders) would meet the prerequisites for the application of Art 9, as such rules will not typically be 'regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation'.[208] Moreover, the insistence on the application of rules concerning corporate bonds not governed by the law of the Member State of incorporation by that Member State may, depending on the content of these rules, also restrict the free movement of capital under Art 63 TFEU, and would thus likewise require justification.

In light of this assessment, it would in our view be useful for a future Rome V Regulation to clarify that three different groups of questions concerning corporate bonds should be distinguished: First, the capacity of companies to issue bonds, which is an aspect of the general formulation of capacity and authority of the company and its organs and hence clearly a matter for the *lex societatis*;[209] second, the regulation of the offering itself, which will depend on the international scope of application of the various measures of securities regulation that apply in this context;[210] and third, the relationship between the issuer and the bondholders, as well as the bondholders among each other. As far as bonds in question do not grant special rights, such as conversion or pre-emption rights to its holders, and instead only require the repayment of the principal and the stipulated interest, the latter issue falls within the scope of the Rome I Regulation.

<u>We therefore recommend that a future Rome V Regulation excludes from the scope of the *lex societatis* rules relating to the legal relationship between the bondholders and the company, as well as between bondholders. In order to ensure legal certainty, such exclusion should be made explicit in the Regulation. However, in relation to non-equity securities which give its holders the right to (i) convert bonds into or exchange bonds for shares in the issuer, whether carrying voting rights or not, (ii) exercise pre-emption rights over such shares when issued, or (iii) participate directly in the profits of the company ('hybrid securities'), rules regarding the rights of its holders *relating to these special (equity-like) rights* should in our view be subject to the *lex societatis*.</u>

6.1.2.7 Corporate names

Finally, any attempts by the host state to override the matters addressed by a foreign *lex societatis* to protect domestic interests, for example the requirement that foreign companies trade under a name that does not give rise to the risk of confusion because the name is similar to that of a domestic company, should not lead to a limitation of the scope of the *lex societatis*. Rather, in order to protect the completeness and consistency of the *lex societatis*, it is more convincing to allow the host state to amplify the requirements of the *lex societatis* in clearly defined situations if this is necessary to protect domestic interests. We will discuss this point more comprehensively in the context of '*ordre public*' and 'overriding mandatory provisions' in Section 7 below.

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[208] See Art 9 (1) Rome I Regulation. See also recital 37 of the Regulation: 'Considerations of public interest justify giving the courts of the Member States the possibility, in *exceptional circumstances*, of applying exceptions based on public policy and overriding mandatory provisions' (our emphasis). See also e.g. Martiny, supra note 200, Art 9, para 14 et seq.

[209] Some commentators criticise this approach and instead propose an application the law of the place where the bonds are brought into circulation, see Kindler, supra note 184, para 557. However, this solution seems counterintuitive, since a company could then act simultaneously with and without capacity to issue bonds. As a consequence, some of the securities from the offering might be invalid, while others might be valid if the offering was conducted in more than one country.

[210] Legislative instruments of the EU generally divide regulatory authority between the 'home state' and the 'host state', as defined in the relevant instruments, see e.g. Art. 2(1)(m), (n) Directive 2003/71/EC (Prospectus Directive).

6.1.3 Formal requirements

An issue that is not addressed coherently in the Member States is the question whether and under what conditions formalities required for the incorporation of a company may be fulfilled abroad, for example before a foreign notary public. In some Member States, this question has not yet been addressed, in others it is well established that documents certified by a foreign notary public can be substituted for domestic notarisations, at least if certain conditions are satisfied (for example, reciprocity, authentication by an authority of the state of incorporation, or comparability of the roles of the foreign and domestic authenticating institutions and the applicable procedure), and in a sizeable minority of Member States such documents are not accepted.[211] The results of our empirical survey clearly show the perceived high degree of legal uncertainty in this regard.[212] The question is of considerable importance for corporate mobility, since the refusal to recognise authentications undertaken in the state where the company's founders, shareholders or managers are located would impede their right to establish companies under the laws of another Member State.

Formal requirements are generally determined pursuant to the law applicable to the legal relationship forming the subject matter of the respective legal act. In the present context, this would mean that notarial and other formalities applicable to the documents drawn up to establish the company are governed by the *lex societatis*, which is indeed the position in all Member States. Some countries allow for an additional connecting factor and provide that the legal act is also valid if it complies with the law of the country where the act has been performed.[213] The Sonnenberger proposal suggests an intermediate solution that distinguishes between acts 'relating to the constitution of a company', which are valid only if they meet the formal requirements of the *lex societatis*, and other legal acts, which 'shall be valid in form if they meet the formal requirements prescribed by either the law applicable under [the general conflict rule determining the *lex societatis*] or the place where the act was concluded.'[214] This limitation of the alternative connecting factor to acts that do not concern the formation of the company seems overly restrictive, given that the Treaty framework seeks to facilitate corporate mobility (and likewise a possible Rome V Regulation, were it to adopt the incorporation law as applicable law). It would also constitute a departure from the solution espoused by the Rome I Regulation, which uses alternatively the *lex contractus* and the law of the place where the contract is concluded to determine the formal validity of contracts.[215]

<u>Therefore, we suggest that a future Rome V Regulation should stipulate that formal requirements of both acts performed in the establishment of a company and the acts of corporate organs and shareholders shall be governed by the *lex societatis*, provided that the acts as such fall within the scope of the *lex societatis*. Furthermore, the regulation should provide that, alternatively, compliance with the formal requirements of the law of the Member State where the acts were performed shall suffice, provided that the formal requirements in that Member State are functionally equivalent</u>.[216]

The rationales of some Member States' formal requirements in the area of company law, especially where they require involvement of a notary public, include the expectation that the parties involved receive some form of (national) legal advice regarding the relevant act. <u>It is our recommendation that a future Rome V Regulation clarifies that, in</u>

[211] Comparative Analysis, Chapter IV, Section 4.2.2, above.
[212] See Empirical Survey, Chapter III, Section 3.3 above.
[213] For example, s. 8 Austrian Private International Law Act; Art. 11(1) German Introductory Act to the Civil Code (EGBGB).
[214] Sonnenberger proposal, Art. 4.
[215] Rome I Regulation, Art. 11(1), (2).
[216] This would, for instance, always be the case where the main function of the involvement of the notary public is to ascertain the identity of the parties.

such cases, acts performed according to the laws of a Member State other than the Member State of incorporation shall only be regarded as equivalent where advice on the applicable law can also be given in the context of the compliance with formalities under the law of the Member State where the act was performed. However, where a party may, under the law of the Member State of incorporation, opt not to receive such advice, acts performed in another Member State shall not be subject to this requirement.

6.2 Lex societatis and lex concursus

In EU law, the question of whether to classify rules as falling within the *lex societatis* or the *lex concursus* has so far largely been shaped by the Insolvency Regulation. The Regulation provides that the *lex concursus* shall determine the conditions for the opening of insolvency proceedings, their conduct and closure, and further lists a number of questions falling within the scope of international insolvency law.[217] Most of these questions are concerned with the operation and effects of the insolvency proceedings themselves. They fall clearly outside the scope of the *lex societatis* and problems of demarcation are unlikely to arise with regard to them. Nevertheless, the exact boundaries of the *lex concursus* are difficult to draw because the Court of Justice has held that the courts that have jurisdiction to open insolvency proceedings (the courts of the Member State where the company's COMI is located[218]) also have jurisdiction to hear 'actions which derive directly from [insolvency] proceedings and which are closely connected to them'.[219]

The Court's jurisprudence has now been codified in the Insolvency Regulation Recast, which mentions avoidance actions as an example of such closely connected actions.[220] However, the Regulation does not provide for any definition of closely connected actions, but merely summarises some of the Court of Justice case law in the recitals.[221] Thus, two questions arise that are of importance in the present context: First, how closely connected actions are to be defined in general terms, and second, whether the definition thus derived is only relevant for the determination of the jurisdiction of the court of the insolvency proceedings, or whether jurisdiction and the applicable law go hand in hand and closely connected actions, accordingly, are always governed by the *lex fori*.

In its case law, the Court of Justice made a number of important points that can guide the development of a general definition of closely connected actions. First, the Court has pointed out that the scope of Article 3(1) of the Insolvency Regulation Recast (international jurisdiction) and the bankruptcy exception of the Judgments Regulation[222]

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[217] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141/19 (Insolvency Regulation Recast), Art. 7(2) (formerly Art. 4(2) of Regulation (EC) No 1346/2000). See FM Mucciarelli, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?' (2016) 13 *European Company and Financial Law Review* 1; R Bork and R Mangano, *European Cross-Border Insolvency law* (Oxford: Oxford University Press 2016) at 106-116.
[218] Regulation (EU) 2015/848, Art. 3(1).
[219] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767, para 21 (dealing with avoidance actions).
[220] Regulation (EU) 2015/848, Art. 6(1).
[221] Recital 35 of Regulation (EU) 2015/848 provides: 'The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings. In contrast, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings. Where such an action is related to another action based on general civil and commercial law, the insolvency practitioner should be able to bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum. This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law.'
[222] Now Regulation (EU) No 1215/2012, Art. 1(2)(b).

are mutually exclusive and exhaustive.[223] Given that the legislator intended the Judgments Regulation to have a broad scope of application, encompassing all civil and commercial matters except certain well-defined issues,[224] it follows that the scope of the Insolvency Regulation is to be interpreted narrowly.[225] Second, 'the decisive criterion' to distinguish between civil and commercial matters and actions that derive from insolvency law 'is not the procedural context of which that action is part, but [its] legal basis'.[226] Thus, the Court asks 'whether the right or the obligation which [constitutes] the basis of the action finds its source in the common rules of civil and commercial law or in the *derogating rules* specific to insolvency proceedings.'[227] In addition, in several decisions, the Court stressed that the purpose of the action was the protection of the interests of 'the general body of creditors'[228] and that the action was 'the exclusive prerogative of the liquidator',[229] which was 'brought in the context of insolvency proceedings'.[230] On the other hand, if the action *could* also be brought by the liquidator, but it was actually 'brought outside the context of insolvency proceedings [it] may fall within the scope of … Regulation No 44/2001.'[231] Summarising this case law, it can accordingly be said that the concept of 'closely connected action' is based on three criteria. Closely connected actions (i) derogate from common rules of civil and commercial law; (ii) are adopted in the interests of the general body of creditors; and (iii) are in fact brought by the liquidator in the context of insolvency proceedings, rather than by individual creditors.

Whether these criteria can be transposed to the question of the applicable law has, so far, only been address by the Court in one decision, *Kornhaas*, which was decided in December 2015.[232] In this case, dealing with the classification of a provision of German law imposing liability on managers of a private limited company for payments made after the company becomes cash flow insolvent or over-indebted,[233] the Court held that the German liability provision fell within the codified scope of the applicable law as set out in the Insolvency Regulation. By interpreting what is now Article 7(2) Insolvency Regulation Recast, the Court stressed that 'the conditions for the opening of [insolvency] proceedings' within the meaning of that provision include 'the consequences of an infringement of [the] obligation' to apply for the opening of proceedings'.[234] However, the Court's decision is, arguably, more sweeping. The Court went beyond the codified scope of the *lex concursus* by embracing explicitly its case law concerning jurisdiction, especially its judgment in *H v H.K.*,[235] which dealt with the same provision of German law. Given that the liability provision was to be qualified as a closely connected action, as decided in *H*, the Court held that it 'must be regarded as being covered by the law applicable to insolvency proceedings and their effects'.[236] Thus, it seems highly likely that the three criteria outlined above are intended to apply similarly to the determination of the scope of the *lex concursus*.

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[223] The two provisions 'must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum', Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB*, nyr, para 21.
[224] Regulation (EU) No 1215/2012, recital 10.
[225] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, para 25.
[226] *Nickel & Goeldner*, supra note 223, para 27.
[227] Ibid. (our emphasis). Similar *Gourdain v Nadler* (Case 133/78) [1979] ECR 733, para 5.
[228] *Gourdain v Nadler*, ibid.; *Seagon v Deko Marty*, supra note 219, para 16; Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, para 32; Case C-147/12, *ÖFAB v Frank Koot*, nyr., para 25.
[229] *ÖFAB v Frank Koot*, ibid.
[230] Case C295/13 *H v H.K.*, nyr, para 20.
[231] Ibid. para 25.
[232] Case C-594/14 *Simona Kornhaas v Thomas Dithmar*, nyr.
[233] Now s. 64, sentence 1 German Limited Liability Companies Act (GmbHG). The reference was made by BGH, decision of 2 Dec. 2014, II ZR 119/14.
[234] *Kornhaas*, supra note 232, para 19.
[235] See supra note 230.
[236] *Kornhaas*, supra note 232, para 17.

However, these criteria give rise to the problem that the classification of legal mechanisms at the intersection of company law and insolvency law depends on technical, and functionally not justified, differences in the formulation of the internal law. In particular, the necessary involvement of the liquidator may depend on relatively arbitrary idiosyncrasies of the national law. According to this criterion, some liability provisions, for example wrongful trading pursuant to English law[237] and the French *action en responsabilité pour insufissance d'actif* (liability for insufficiency of assets)[238], would be classified as insolvency law for purposes of private international law. The same would hold for the liability of company directors for the failure to file for the opening of insolvency proceedings under German law, as far as the loss suffered by pre-duty creditors is concerned (creditors whose claims existed at the time when the duty to file arose),[239] but not as regards the loss suffered by post-duty creditors, because they have standing to sue individually even if insolvency proceedings are opened.[240] Likewise, in the Czech Republic, directors can be held liable for the debts of the company if they knew, or should have known, that the company was facing an imminent threat of bankruptcy and, in breach of the duty of care, failed to take all necessary steps to prevent the bankruptcy. Again, creditors have standing to bring a lawsuit in separate proceedings independent of any decision by the insolvency court.[241]

An additional problem is the potential misalignment of legal mechanisms from insolvency law and company law. Since it is proposed to base a future Rome V Regulation on the incorporation theory, insolvency law and company law would use two different connecting factors. This may give rise to the risk of regulatory gaps or the cumulative application of legal mechanisms from different jurisdictions, leading to potential over-deterrence. This problem exists, first of all, if the demarcation between the *lex societatis* and the *lex concursus* is not well established; this is currently the case in many, if not most, Member States.[242] In this case, the risk exists that the COMI Member State classifies a legal mechanism as company law for purposes of private international law and the state of incorporation as insolvency law, thus leading to a negative conflict of the applicable law, or vice versa, leading to a positive conflict. This situation is likely to continue to exist for some time as the Court of Justice slowly establishes the demarcation from the viewpoint of the Insolvency Regulation. However, the problem may persist even after well-established criteria to delimit the *lex societatis* and the *lex concursus* have been developed by the policy maker or the courts. Member States may utilise legal mechanisms of differing design and provenance to address the same social conflict. While conflicts that arise in insolvency and in the vicinity of insolvency will be governed by a combination of company law and insolvency law in most Member States, jurisdictions may place different emphasis on one strategy or the other. If a legal system that may provide for an adequate regulatory environment if applied as a whole is dissected as a result of the use of different connecting factors, the same negative and positive conflict of the applicable law may occur that was described above.[243]

A straight-forward solution to this problem would be the use of the same connecting factor for legal areas as closely related as company law and insolvency law.[244] However, we realise that it is unlikely that the connecting factor of the Insolvency Regulation will

[237] Section 214 UK Insolvency Act 1986; for the classification of wrongful trading see *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57, para 42.
[238] Art L.651-2 of the French Commercial Code. For the classification see *Gourdain v Nadler*, supra note 227.
[239] Such creditors are limited to recovering the loss suffered because of the delay in filing, i.e. the difference between the recovery rate that they could have obtained in the case of timely filing and the actual rate (so-called 'rate reduction loss' or *Quotenschaden*).
[240] BGHZ 126, 181, 201.
[241] Section 68 Business Corporations Act. For a discussion of the provision see the Czech country report, Section 4.4.
[242] These problems of legal uncertainty have also been identified in the Empirical Survey, Chapter III, Section 3.3 above.
[243] Gerner-Beuerle and Schuster, supra note 12, 323-328.
[244] See also the discussion in Gerner-Beuerle and Schuster, ibid. 330.

be amended in connection with the enactment of a possible future Rome V Regulation. In addition, the use of the incorporation law as the *lex societatis* and the law at the COMI as the *lex concursus* can of course be rationalised convincingly in light of the different interests that are typically at play in the two areas, with choice of law being generally less desirable in insolvency law than in company law.[245] In any case, we suggest that for most purposes, the problem of positive and negative conflicts of the applicable law can be mitigated by providing in a future Rome V Regulation, for example in a subsection following the enumeration of the matters governed by the *lex societatis*, that legal mechanisms designed to address problems arising specifically in insolvency or in the vicinity of insolvency (to be defined more precisely in the recitals[246]) shall not be included in the scope of the *lex societatis*.

Thus, we suggest that the definition of the scope should include a 'functional carve-out', notwithstanding the enumeration of matters falling within the scope of the *lex societatis*, since the latter necessarily builds on concepts derived from internal company law and, consequently, is formulated to some extent in a 'non-functional' way. Of course, correctly understood, the scope of both the *lex societatis* and the *lex concursus* are to be determined functionally, i.e. they should be differentiated by taking account of the function of the legal mechanism as addressing conflicts between the relevant corporate actors while the company is a going concern and when it is, or is about to become, insolvent, respectively. In this sense, the functional carve-out is merely declaratory. However, relying on classification along purely functional lines may, in itself, create legal uncertainty, as many core company rules also serve the purpose of, for instance, reducing the risk of insolvency.[247] An explicit carve-out combined with an enumeration of matters falling within the scope of the *lex societatis* would thus serve an important function, not least because the solution suggested here would also mean a partial deviation from the criteria the Court of Justice has developed to define closely connected actions, as the discussion that follows will show.

A functional determination of the boundary region between company law and insolvency law would characterise all mechanisms designed to mitigate risk-shifting in the vicinity of insolvency as insolvency law, irrespective of the internal classification of the provision in the Member State's company or insolvency law. If defined in this way, the first and second criteria used by the Court to determine whether an action is 'closely connected' (derogation from common rules of civil and commercial law, and protection of the interests of the general body of creditors) would retain their significance. However, the third, rather formalistic criterion (involvement of the liquidator in insolvency proceedings) would not be applicable. This is indeed the criterion that, as argued here, leads to results that depend often on idiosyncrasies of the national law and that are difficult to substantiate on functional grounds.

However, even under the solution suggested here, differences in the internal laws of the Member States[248] would not become entirely irrelevant. A legal mechanism would be characterised as company law for purposes of private international law if it regulated the structure and operation of the company as a going concern, starting with the company's formation, and independently of the company's financial position. Conversely, it would be characterised as insolvency law if it derogated from the common rules of civil and commercial law and applied only from a certain 'trigger point' onwards that was defined with reference to the company's financial situation. The formulation of the trigger point

[245] See e.g. the discussion in FM Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 *European Business Organization Law Review* 175.
[246] See the discussion in the following paragraphs.
[247] One could even argue, for instance, that minimum capital rules fall into this category.
[248] For the possibility to harmonise insolvency law see now the 'Initiative on Insolvency' (DG JUST (A1), 2016/JUST/025 – INSOLVENCY II), inception impact assessment from 3/3/2016 available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_025_insolvency_en.pdf.

would necessarily vary to some degree between the Member States, since the respective rules of company and insolvency law that apply in the vicinity of insolvency are not harmonised by either the Company Law Directives or the Insolvency Regulation.[249] Save future legislative action by the European Institutions, these differences in determining when the body of rules designed to address the problem of risk-shifting in the vicinity of insolvency is triggered would need to be respected by the conflict rules embedded in the Insolvency Regulation and the Rome V Regulation. The autonomous concept of 'connected action' builds on the trigger point pursuant to national law (both under the current test of the Court of Justice, because 'provisions derogating from the general rules of civil law'[250] will become operational when the trigger point is reached, and under the functional approach suggested here), but it does not determine the trigger point itself, since it is a jurisdictional and conflicts rule. On the other hand, a conflicts rule that delineates company law and insolvency law on the basis of the function of the mechanism of substantive (internal) law as addressing risk shifting from shareholders to creditors that occurs specifically in financial distress (since financial distress leads to incentive misalignments that do not exist otherwise[251]) allows the Court of Justice to ensure a certain EU-wide consistency in the classification of the relevant legal mechanisms. The Court of Justice will be able to review, as part of the interpretation of the conflicts rule suggested here, whether the mechanism of substantive law is triggered by a condition that falls within the range of what can plausibly be claimed to be an approximation of the point where such risk shifting occurs. If it is not, the mechanism does not come within the scope of the insolvency conflicts rule.

If implemented, the following mechanisms, whose classification was identified as controversial in the Comparative Analysis,[252] would clearly be governed by the *lex concursus*: the duty to file and liability for failure to file (notwithstanding whether the claim is brought by the liquidator or, as in the case of liability to post-duty creditors pursuant to German law), wrongful trading, *responsabilité pour insufissance d'actif*, and also — in contrast to what is probably currently the prevailing opinion — the shift of directors' duties that occurs in some legal systems in the vicinity of insolvency.[253]

6.3 Lex societatis and non-contractual obligations

6.3.1 Tort

6.3.1.1 Liability of directors

The comparative study has shown that Member States largely follow one of three approaches in determining the boundary between the *lex societatis* and the *lex loci delicti* as far as the liability of directors is concerned,[254] which may inform the determination of boundary conditions in a possible future Rome V Regulation.

First, the distinction may be drawn along the lines of substantive law: liability questions that arise from a breach of directors' duties, the articles of association, or more generally from a breach of company law, could be characterised as company law for purposes of private international law, and situations where liability arises from a wrongful act that is

[249] Currently, the Member States' mechanisms to address risk shifting in the vicinity of insolvency are based on different approximations of when risk shifting is likely to have occurred. For an example, wrongful trading pursuant to s. 214 UK Insolvency Act 1986, see PL Davies and S Worthington, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 9th ed. 2012), 9-6 to 9-11.
[250] *Nickel & Goeldner*, supra note 223, para 24.
[251] Shareholders may take decisions that do not have a net present value and hence do not to maximise the overall market value of the firm, see Gerner-Beuerle and Schuster, supra note 12, 301.
[252] Comparative Analysis, Chapter IV, Section 4.4.
[253] See for example 172(3) UK Companies Act 2006.
[254] See also C Gerner-Beuerle, P Paech, and E Schuster, 'Study on directors' duties and liability' (LSE Enterprise 2013), available at http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf.

not grounded in company law – and that does not consist in the breach of contract or trust either – could be characterised as a non-contractual obligation, and hence be made subject to the Rome II Regulation.[255]

Second, the conflict rule could distinguish according to the type of injured party: the *lex societatis* governs any mechanism that gives rise to liability if the loss is caused to the company (and only so-called reflective loss to the shareholders), and the *lex loci delict* governs damages claims of third parties that suffer a direct (i.e. not only reflective[256]) loss. In this context, it would be necessary to define who is a third party for purposes of the conflict rule. Third parties may conceptually include both company insiders, in particular shareholders, since they may suffer a loss either in their capacity as shareholders because of a reduction in the value of their shareholding or in an individual capacity,[257] and company outsiders such as creditors or customers. Finally, the distinction may be based on the type of harmful act. If the act involves the exercise of corporate power, the *lex societatis* is engaged; otherwise, conflict rules from contract law, tort law, or other legal areas apply.

In defining the boundary between the *lex societatis* and the *lex loci delicti*, any approach needs to be informed by, and needs to be compatible to, the interpretation of the relevant provisions in the Rome II Regulation and the Recast Brussels Regulation. The former provides that '[n]on-contractual obligations arising out of the law of companies … regarding matters such as … the personal liability of officers and members as such for the obligations of the company or body' shall be excluded from Rome II.[258] The latter establishes special jurisdiction in matters relating to tort of 'the courts for the place where the harmful event occurred or may occur'[259] and 'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated'.[260]

The first approach has the advantage that it is in line with the current interpretation of national law in the majority of Member States[261] and some proposals on the harmonisation of private international company law.[262] It is also the approach that seems to correspond most closely to those taken in the Rome I and Rome II Regulations. Insofar as this approach does not classify breaches of company law duties as tort law, it would probably also be in line with the opinion of the Court of Justice, which decided in Case C-47/14 *Holterman Ferho Exploitatie BV v Spies von Büllesheim* that liability claims based on a breach of directors' duties does not fall within the special tort jurisdiction of the Brussels Regulation. The Court of Justice held that where 'a company sues its former manager on the basis of allegedly wrongful conduct, Article 5(3) of Regulation No 44/2001 [dealing with jurisdiction for tort claims[263]] must be interpreted as meaning that

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[255] Non-contractual obligations are not defined by the Rome II Regulation, which merely points out that they should be understood as an autonomous concept, see Rome II Regulation, Recital 11. The literature defines tort as 'an act which is wrongful, other than by reason of its being a breach of contract or trust', Stone, supra note 148, 371.

[256] It is not clear in all Member States whether the law accords shareholders a dual role depending on the type of loss suffered, although this seems to be the case at least in the Member States where case law on the issue exists, for example France (Cass. com., 1 April 1997, *Bull. Joly Sociétés* 1997, p. 650, comment by J.F. Barbièri; Cass. crim., 13 December 2000, *Bull. Joly Sociétés* 2001, p. 497) and the UK (Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204). The GEDIP proposal for a Regulation X on the Law Applicable to Companies also does not distinguish between shareholders that suffered a direct or a reflective loss, but suggests that the claim of either shall be governed by the *lex societatis* (see text to notes 268-272 below). For further details and references, see Comparative Analysis, Chapter IV, Section 4.5.

[257] For an example form the UK, see Pender v Lushington (1877) L.R. 6 Ch. D. 70.

[258] Article 1(2)(d) Rome II Regulation.

[259] Art. 7(2) Recast Brussels Regulation.

[260] Art. 7(5) Recast Brussels Regulation.

[261] Comparative Analysis, Chapter IV, Section 4.5.

[262] The Sonnenberger proposal stipulates that the *lex societatis* shall govern, *inter alia*, 'liability arising from the breach of duties imposed by company law', Art. 3(1), no. 8.

[263] Now Art 7 (2) Recast Brussels Regulation.

that action is a matter relating to tort or delict where the conduct complained of may *not* be considered to be a breach of the manager's obligations under company law'.[264] Instead, such claims, brought by the company and based on a breach of company law duties are considered by the Court of Justice to fall under what is now Art 7(1) of the Recast Brussels Regulation.

Furthermore, a correspondingly broad interpretation of the *lex societatis* would not impose undue disadvantages on injured parties seeking to enforce a claim. First, the majority of cases are likely to involve claims based on a breach of director's duties, which are usually owed to the company, rather than to outsiders. In other cases, the special jurisdiction of the court for the place where the harmful event occurred[265] would not be available (as such claims would not be classified as tort law). However, where the injured party is not located in the home jurisdiction of the company the behaviour giving rise to the liability action will presumably often be connected with the operations of an establishment of the company in the host state. The injured party would therefore be entitled to sue in the courts of the host state pursuant to Article 7(5) Recast Brussels Regulation.

On the other hand, the first approach has the disadvantage that it may lead to the cumulative application of two liability regimes if the director's conduct constitutes both a breach of company law and of general tort law *and* the place where the damage occurs pursuant to Article 4(1) Rome II Regulation is not in the country where the company is registered or incorporated (provided the *lex societatis* is determined according to a variant of the incorporation theory). In addition, the classification may depend, at least to some extent, on the formulation of the Member States' internal company law and directors' duties. However, it is unlikely that this second problem will create major inconsistencies in the classification of the relevant social conflicts between Member States. In most cases, it should be possible to arrive at an autonomous understanding of 'company law' for purposes of private international law by defining what belongs to company law independently from the classifications of internal law and in contradistinction to neighbouring areas of private international law, especially insolvency law and securities regulation. In this way, for example, liability for misstatements made in disclosures required under capital markets or takeover law or liability for entering into obligations that the director knows the company will not be able to perform would be excluded from the scope of the *lex societatis*, even if the corresponding obligations were set out in the internal company law. Likewise, where a Member State relies on provisions of general tort law for the regulation of directors' duties, the application of these rules would effectively be restricted to domestic companies.

In addition, any potential inconsistency in regulatory outcomes as a function of the formulation of legal mechanisms of internal law could be further mitigated by an appropriate application of the conflict rules of tort law pursuant to the Rome II Regulation. The classification as *lex societatis* or *lex loci delicti* becomes irrelevant if the applicable law in the case of the classification as a tort is determined pursuant to Article 4(3) Rome II Regulation instead of Article 4(1) (manifestly closer connection). While Article 4(3) is described as an 'escape clause',[266] it is arguably possible to develop a certain presumption (similar to the second sentence of Article 4(3) Rome II) that results in the disapplication of the general rules of Article 4(1)-(2) in favour of the *lex societatis*, if the defendant is a director or manager of the company and the act complained of is 'connected' with the management of the company (or a similar formulation). While invoking Article 4(3) Rome II Regulation would add an element of legal uncertainty since the question of a 'connection with the management of the company' is open-ended and in need of specification by the courts, the appeal to a manifestly closer connection is not

[264] Case C-47/14, para 79 (emphasis by us).
[265] Art. 7(2) Recast Brussels Regulation.
[266] Rome II Regulation, Recital 18.

entirely novel in the present context and can build on existing case law in some Member States.[267]

The second possible solution, a distinction according to the type of injured party (and presumably also according to the type of loss suffered[268]), would have the advantage that it presents (at least at first sight[269]) a relatively clear criterion that allows a functional demarcation between the *lex societatis* and the *lex loci delicti* not dependant on the internal delineation of company law and tort law. It also seems to be the preferred solution of the European Group for Private International Law, which proposes that 'the liability in tort of the members and directors of a company vis à vis third parties' shall be excluded from the scope of a proposed Regulation X on the Law Applicable to Companies.[270] The recitals to the proposed GEDIP Regulation would clarify that the exclusion applied to liability 'in particular resulting from misrepresentation or undercapitalization', which would instead be governed by the Rome II Regulation.[271] Thus, a bright line rule is envisaged that includes liability to the company and the shareholders[272] and excludes liability to third parties. Notably, this solution does not distinguish between direct and indirect (reflective) loss but proposes to qualify shareholders always as parties governed by the *lex societatis* and never as third parties.[273]

However, arguably, there are good reasons not to choose a bright line rule as in the GEDIP proposal. First of all, it is clear that some consideration of the type of behaviour that gives rise to liability is unavoidable. A director who commits a tortious act in an entirely private capacity, i.e. who neither exercises corporate powers nor acts in any way within the sphere of corporate activity, will evidently not be liable pursuant to company law but pursuant to tort law, even if the injured party happens to be a shareholder of the director's company. More ambiguously, but still relatively well established in the Member States, a director who misrepresents facts in disclosures to investors who purchase or sell the company's shares as a consequence of the misrepresentation is also liable to the investors under tort law.[274] If a certain substantive assessment of the defendant's behaviour is therefore inherent in the test, it is not clear why shareholders who complain of the violation of an individual right and suffer a loss that is not only a reflection of the loss incurred by the company should be treated differently from other parties injured by the tortious acts of directors. Shareholders and third parties are, in the above examples, in the same position, and presumably the policy decisions underlying the provisions of internal law that apply in these cases will take account of the difference in position between such claimants (both shareholders and non-shareholders) on the one hand and shareholders suffering a reflective loss on the other. If this is correct, it is accordingly

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[267] For example, Johnson v Coventry Churchill International [1992] 3 All ER 14. In addition, guidance is available from US law, where the 'most significant relationship' is the predominant approach to determining the applicable law in tort cases, see ALI Restatement (Second) of Conflict of Laws, ss. 6, 145.

[268] See supra note 256 and presently in the text.

[269] But see the discussion in the text to notes 274-281 below.

[270] GEDIP, Art. 2(a) Regulation X (3rd Draft, 2015).

[271] GEDIP, Vingt-cinquième reunion, Luxembourg, 18 - 20 septembre 2015, Compte rendu des séances de travail, at I 1.1.

[272] GEDIP, Art. 5(g) Regulation X (3rd Draft, 2015).

[273] The former proposal by GEDIP had stipulated that 'the *direct* liability in tort of members and directors of a company to third parties' should be excluded from the scope of the *lex societatis*, Art. 6(3) GEDIP Regulation X (2nd Draft, 2014) (our emphasis). The emphasis on 'direct' liability was removed because it was felt that there was no 'indirect' liability and the Group sought to bring the scope of application of the regulation in line with the definition of the scope of the applicable law (Art. 5(g)), GEDIP, Vingt-cinquième reunion, Luxembourg, 18 - 20 septembre 2015, Compte rendu des séances de travail, at I 1.1

[274] This has been decided in a number of countries, especially in the wake of the dotcom bubble in the early 2000s, see for example in Germany BGHZ 160, 134 (*Infomatec I*); BGHZ 160, 149 (*Infomatec II*); and in France Cass. com., 22 November 2005 (*Sté Eurodirect marketing c/ Pfeiffer*), *RTD com.* 2006, p. 445. The GEDIP proposal also presumably has this situation in mind when it argues that liability 'resulting from misrepresentation … should be governed by Rome II', see supra note 271. Thus, in this case, shareholders are presumably included in the group of 'third parties' mentioned in Art. 2(a) Regulation X (3rd Draft, 2015).

more convincing (provided this second solution is adopted) to delineate the *lex societatis* and the *lex loci delicti* not simply pursuant to the type of injured party, but by asking whether the claimant has suffered a loss (1) as a result of the violation of an individual right *and* (2) the loss is not only a reflection of the loss suffered by the company.

Once this substantive assessment is injected in the test, the ostensible advantages in terms of legal certainty compared to the first approach are no longer apparent. In particular, the scope of the *lex societatis* would be defined pursuant to the open-ended terms 'acting within the sphere of corporate activity' (or a comparable formulation) and 'individual right' (and correspondingly, 'third party'). It should be noted that these terms will not depend on their understanding by national courts and policy makers. As part of the conflict rule of a future Rome V Regulation, they would become concepts of EU law and would consequently need to be interpreted autonomously. Thus, there would be no risk of shifting boundaries between the *lex societatis* and the *lex loci delicti*, irrespective of differences in understanding in the Member States' internal laws, for example, of the definition of an individual right of the shareholders as opposed to a right they hold *qua* shareholder. However, it may take some time before a commonly accepted definition emerges, and until then legal certainty will not be guaranteed.

More importantly, a broad formulation of directors' duties would allow Member States to bring a provision designed to regulate the behaviour of company directors relatively easily within the reach of the host state law (where injured parties are located[275]), and the host state could accordingly impose part of its liability regime on the directors of foreign companies operating within its territory. For example, a formulation of directors' duties as in the French Commercial Code, which provides that directors shall be liable 'to the company *or third parties* either for infringements of the laws or regulations applicable to public limited companies, or for breaches of the memorandum and articles of association, or for management mistakes' [276] would presumably need to be characterised as tort law according to the second approach, provided that the claimant is a third party. To what extent this classification would lead to overreaching host state law would depend crucially on the conditions that give rise to liability under national law. Pursuant to the current situation in France, liability to third parties (understood as not including the shareholders) requires a so-called *faute séparable des fonctions* (a fault separable from the functions of the defendant director). *Faute séparable* was described by the Cour de Cassation as 'an intentional fault of a particular gravity that is incompatible with the normal exercise of the director's corporate functions.'[277] This can arguably be equated with a tortious act and may, therefore, justify the tort-law classification for purposes of private international law. However, it should be noted that the concept is case-law based and its contours are evolving. In more recent case law, the courts seem to be willing to acknowledge that an action may constitute a *faute séparable* even where the directors exercise their corporate powers, for example to approve financial accounts that are materially misleading.[278] Thus, it is clear that this approach to classification leads to a potentially broad scope of application of the host state's law, including in matters that fall within the core area of managerial activity, such as the approval of the company's accounts.[279] If a third party sues, this approach would lead to the risk that two or more liability regimes apply cumulatively, namely the incorporation state's company law and the tort laws of all countries where the damage occurs.

[275] Art. 4(1) Rome II Regulation.
[276] French Commercial Code, Art. L225-251 (our emphasis).
[277] Cass. com., 20 May 2003 (*Sté d'application de techniques de l'industrie (SATI)*), *Bull. Joly Sociétés* 2003, p. 786.
[278] Cass. com., 10 February 2009, appeal n° 07-20445 (*Société de gestion Pierre Cardin c/ Société MMS International*).
[279] Furthermore, the scope of application of the host state law may be extended relatively easily through targeted amendments of internal company law and may therefore invite what we have called 'reclassifications'.

This problem could again be mitigated by an appropriate interpretation of Article 4(3) Rome II Regulation,[280] but the element of legal uncertainty that is added by relying on Article 4(3) is arguably more relevant here than in the context of the first approach, where the scope of the *lex societatis* is broader and the risk of heightened liability because of the cumulation of the *lex societatis* and the *lex loci delicti* is consequently comparatively low.[281]

Finally, the third approach mentioned above, a distinction according to the type of harmful act, with an application of the *lex societatis* if the act consisted in the exercise of corporate power, will in many cases lead to similar results as the first approach. It has the disadvantage that the exercise of corporate power may depend on the scope of that power as defined in the Member States' internal company laws. The boundaries between the *lex societatis* and the *lex loci delicti* may consequently shift from one Member State to another. In addition, as opposed to the first approach, it suffers from an inherently unclear criterion that will be difficult to define at the European level. Notably, if the criterion was interpreted as implying that the directors must have acted within the scope of actual powers conferred on them, it would certainly fall short of capturing all situations relevant for company law, for example the breach of the duty to act within powers.[282] Legal uncertainty could also exist where a Member State attaches liability under tort law to inaction by the director. On the other hand, the term 'exercise of corporate power' is presumably narrower than the criteria that apply pursuant to the first approach (breach of directors' duties, the articles or company law) and would therefore combine an ill-defined connecting factor with the risk of a cumulation of the *lex societatis* and the *lex loci delicti*.

We therefore propose to add a provision—for example as part of the enumeration of matters falling within the scope of the *lex societatis*—stipulating that <u>the *lex societatis* shall govern the liability of directors for breaches of the company's constitution (the articles of association), directors' duties and company law</u>.[283] It may also be useful to give examples in the recitals of situations where liability does not fall within the autonomous concept of 'company law' that is used to determine the applicable law in order to guide the development and interpretation of this autonomous term. Some such cases will be discussed below in 6.3.1.3.

6.3.1.2 Liability of shareholders for obligations of the company

As discussed, the liability of the shareholders for the obligations of the company (piercing the corporate veil) is commonly classified as part of the *lex societatis*.[284] This is the case in the majority of Member States that explicitly address the problem (notably Croatia, Greece, and the UK), and both the GEDIP proposal and the Sonnenberger proposal envisage that the law applicable to companies governs the liability of members for obligations of the company.[285] However, conceptually it is not evident why a classification as company law is the most appropriate solution, and it is indeed possible to find differing views in some Member States and in the academic literature suggesting a classification as tort law or insolvency law.[286]

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[280] See text to notes 266-267 above.
[281] For example, pursuant to the first approach, it seems natural to classify the case discussed in the text to n 278 as company law for purposes of private international law. This is also the opinion of the French courts, see Cass. civ. 1ère, 1st July 1997 (*Africatour*), Bulletin Joly des sociétés 1997, p. 1062, note M. Menjucq (holding that Senegalese law applied to the liability of directors of a Sengalese company to third parties).
[282] UK Companies Act, s. 171.
[283] See already Section 6.1.2.5 above.
[284] See Section 6.1.1 above.
[285] GEDIP proposal, Art. 5(i); Sonnenberger proposal, Art. 4(g).
[286] See, for example, GP Calliess, *Rome Regulations: Commentary on the European Rules on the Conflict of Laws* (Alphen aan den Rijn: Wolters Kluwer, 2011), Article 1 Rome II, para 52 (arguing that piercing the corpo-

A characterisation based on a functional assessment of the relevant legal mechanisms, as favoured here in different contexts, would suggest that it is necessary to distinguish according to the precise operation and aim of the mechanisms. It can easily be seen that what is sometimes grouped under the term 'veil piercing' serves different functions, and a functional characterisation in private international law must take account of these differences. For example, veil piercing according to English law generally applies only in the limited circumstances where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.'[287] This formulation shows that the principle neither derogates from ordinary company law, within the meaning of *Nickel & Goeldner*,[288] nor is meant to address the specific problem of risk shifting in the vicinity of insolvency. Rather, its ambit is wider: to provide a legal response to abuses of the principles of limited liability and separate legal personality generally.[289] Thus, the criteria here identified as being determinative of a classification as insolvency law, derogation from the common rules of civil and commercial law and responding to the problem of risk shifting from shareholders to creditors, are not present—at least not both of them together—if the veil piercing doctrine is formulated as in English law.

In comparison, causing the company's insolvency under German law (*Existenzvernichtung*),[290] which is also commonly described as a case of veil piercing (*Durchgriffshaftung*),[291] applies to the specific case of the shareholders entering into a transaction (or otherwise transferring assets out of the reach of the creditors) in order to benefit certain parties to the detriment of the creditors as a whole and in the knowledge that the action may lead to the company's insolvency.[292] As a consequence, the shareholders are liable to the company for the loss caused by their action. Given that the company is the claimant, the liability claim will generally be enforced by the liquidator after insolvency proceedings have been opened. Thus, the situation is similar to that of any other legal mechanism imposing liability on directors for acting in a manner causing a loss to the company's creditors at a time when the directors knew or should have known that their action would cause or aggravate the company's insolvency. The

rate veil should be classified as 'a general problem of (tort) law' and should, therefore, be covered by Rome II). In the Czech Republic, persons (other than directors) who use their influence over the company's directors in a way that results in damage to the company's creditors are liable pursuant to s. 71(3) Business Corporations Act. It is not clear whether this liability should be classified as company law or tort law, but it has been pointed out that it is in character closer to a civil wrong than an obligation under company law, Czech Country Report, Section 4.5. Controversial is also the characterisation of the German doctrine of causing the company's insolvency (*Existenzvernichtung*). The basis for the shareholders' liability pursuant to this doctrine can be found in tort law. In the case law, there is some indication that veil piercing falls within the scope of the *lex societatis*. In a case dealing both with 'traditional' veil piercing, the liability of the shareholder for the obligations of the company, and in a case dealing with what can be called 'reverse veil piercing', the liability of a company for claims against the sole shareholder, which the shareholder sought to evade by forming the company and transferring assets to that company, the German Federal Court of Justice argued that the liability of the shareholders and the company, respectively, were questions of the reach and meaning of the legal personality of the company (BGH [Federal Court of Justice] WM 1957, 1047, at D I; BGHZ 78, 318, at III 2 b). They were therefore part of the governing law of the legal person. Whether this jurisprudence can be transposed to the case of liability for causing the company's insolvency is not clear. The liability of the shareholder exists since BGHZ 173, 246 (*Trihotel*), which introduced a change in the case law, in relation to the company; creditors do not have a direct claim. The doctrine is thus comparable to causes of action of the company against a director who makes payments in the vicinity of insolvency that have been characterised as insolvency law by the Court of Justice (for example the cause of action discussed in *Kornhaas*, supra note 232). Accordingly, some commentators favour a similar classification of the doctrine of causing the company's insolvency, while others submit that the doctrine is tortious in nature, and yet others that it is part of the *lex societatis*. An overview of the debate with references is given by Altmeppen and Ego, supra note 184, paras 418-420. Case law dealing with the question does not exist.

287 Petrodel Resources Ltd v Prest [2013] 2 A.C. 415, 488.

288 Supra note 223.

289 Davies and Worthington, supra note 249, 8-4.

290 See supra note 286.

291 T Raiser and R Veil, *Recht der Kapitalgesellschaften* (Vahlen, 6th ed. 2015), § 39/24.

292 See for example BGHZ 151, 181 (*KBV*).

German doctrine should accordingly be classified similarly for purposes of private international law, namely as insolvency law.

Thus, we suggest that the characterisation of legal mechanisms imposing liability on the shareholders or managers, either for pre-existing claims of a third party to the company or because a loss suffered by a third party gives rise to a claim for damages by the company, should follow the general criteria developed for the demarcation of the *lex societatis*, *lex concursus* and *lex loci delict* set out above. It may be useful to make these considerations explicit in the recitals, but it does not seem to be necessary or useful to include a separate provision on veil piercing in the regulation.[293]

6.3.1.3 Other cases

Two additional cases at the intersection of the *lex societatis*, *lex concursus* and *lex loci delict* should be mentioned, since they received attention in several Member States and were also discussed and regulated explicitly by GEDIP: liability for misrepresentation and undercapitalisation.[294] Liability of the directors for misrepresentations, for example incorrect statements in ad hoc disclosures required pursuant to the Market Abuse Regulation[295] or public offering prospectuses, is generally classified as tort law in the Member States, although some uncertainty persists,[296] not least because in some cases liability rules are contained in national company law statutes. The Court of Justice has also held in *Harald Kolassa v Barclays Bank*[297] that for purposes of interpreting the Brussels Regulation and determining international jurisdiction, prospectus liability claims as well as damages claims for 'breaches of other legal information obligations towards investors'[298] concern 'matters relating to tort, delict or quasi-delict'.[299] While the connecting factor for jurisdiction ('place where the harmful event occurred'[300]) is different from the connecting factor to determine the applicable law pursuant to the Rome II Regulation ('the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred', i.e. leading to an application of the *lex loci damni*[301]), the underlying policy objectives of both provisions are similar,

[293] See also our discussion in Section 6.1.2.5 above.
[294] See supra note 271-274 and accompanying text.
[295] Regulation (EU) No 596/2014, Art. 17.
[296] For example, in the Netherlands, it is unclear whether misrepresentations in the annual accounts and reports that cause damage to third parties should be classified as tort law or company law. P. Vlas, *Rechtspersonen* (Antwerpen, Maklu 2009), no. 307, suggests that liability is governed by the *lex societatis*. In Cyprus, prospectus liability is laid down in the Law of Companies, Cap.113, Art. 43, which has led commentators to conclude that the provision should be classified accordingly as company law, Cyprus Country Report, Section 4.3. In Germany, some commentators suggests a classification of liability for incorrect disclosures to the capital markets as a tort, HD Assmann and RA Schütze, *Handbuch des Kapitalanlagerechts* (Munich: Beck, 4th edn 2015), § 7, para 24; WG Ringe and A Hellgardt, 'An international dimension of issuer liability - Kapitalmarkthaftung als Corporate Governance' (2009) 173 ZHR 802, 809-810, whereas others favour an autonomous classification that relies on the market place where the securities are traded and that has been affected by the disclosure as the relevant connecting factor, H Eidenmüller, *Ausländische Kapitalgesellschaften im deutschen Recht* (Munich: Beck 2004), § 4, para 36; S Grundmann, 'Deutsches Anlegerschutzrecht in internationalen Sachverhalten' (1990) 54 RabelsZ 283-322; KJ Hopt, *Die Verantwortlichkeit der Banken bei Emissionen* (Munich: Beck 1991), para 238.
[297] Case C-375/13, nyr.
[298] Ibid. para 44.
[299] Brussels Regulation, Art. 5(3) (now Art. 7(2) Brussels Regulation Recast).
[300] The Court of Justice interprets the 'place where the harmful event occurred' as covering 'both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places', Case C-360/12 *Coty Germany v First Note Perfumes*, nyr, para 46. In the case of the dissemination of incorrect information to the market, the harmful event takes place not necessarily where the investors who has suffered a loss is domiciled, but where 'the decisions regarding the arrangements for the investments … and the contents of the relevant prospectuses were taken … or [where the incorrect] prospectuses were originally drafted and distributed', *Kolassa*, supra note 297, para 53.
[301] Rome II Regulation, Art. 4(1).

namely (in the present context) to strengthen the protection of investors in all markets that have been targeted by the issuer of the incorrect statement.[302]

It is therefore convincing to argue that liability for incorrect disclosures to public markets should be governed by the *lex loci delicti*, rather than the *lex societatis*. However, it is again important to emphasise that rules referring in a general manner to the *lex loci delicti* for any liability questions arising from misrepresentations by directors[303] are likely not to capture the differences in function of different types of disclosure obligation. For example, if company law provides for an obligation of directors to disclose relevant information to the company's shareholders in appropriate circumstances, such as the exercise of their voting rights under company law or the sale of their shares to the directors,[304] it would be in our view appropriate to classify the consequences of a breach of this obligation as a matter for the *lex societatis*.

The second problematic case is the liability of directors and other corporate insiders for operating an undercapitalised company that eventually fails, with the consequence that the creditors cannot realise their claims. In some Member States, creditors can bring an action in tort to claim damages, under certain conditions, from the corporate insiders in such a situation.[305] As in the case of misrepresentations, it has accordingly been suggested that this question should be governed by the *lex loci delicti*,[306] while others argue that the consequences of forming and operating a company without sufficient capitalisation are a part of the general rules on capital structure and hence of the *lex societatis*.[307] The Court of Justice has not addressed the question directly, but the Court's case law on the demarcation between the scope of the Insolvency Regulation and the Brussels Regulation, which excludes 'bankruptcy, proceedings relating to the winding-up of insolvent companies … and analogous proceedings' from its scope of application,[308] is relevant in this context. The interpretation of the respective provision of the Brussels Regulation is the mirror image of that of 'closely connected actions' within the meaning of the Insolvency Regulation. The Brussels Regulation, accordingly, does not apply if the action is closely connected with insolvency proceedings, and it applies if it is not.[309]

In *ÖFAB v Frank Koot*,[310] the Court discussed the demarcation in light of a provision of Swedish company law that is related to the type of action of interest in the present context. The Swedish law imposed liability on directors for the debts of the company if they failed to monitor the financial situation of the company and allowed the company 'to carry on business even though it was undercapitalised and was forced to go into liquidation.'[311] The Court regarded the liability action as not being closely connected with insolvency proceedings, because it did 'not concern the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors', but could be brought, and was in fact brought, by individual creditors.[312] Consequently, the action fell within the scope of the Brussels Regulation and was classified by the Court as a matter

[302] Case C-168/02 *Rudolf Kronhofer v Marianne Maier* [2004] ECR I-6009, para 20; *Kolassa*, supra note 297, para 56 (both dealing with the Brussels regulation); and Recital 16 of the Rome II Regulation.
[303] For an example see the reference in supra note 271.
[304] See, e.g., the UK cases *Percival v Wright* [1902] 2 Ch 421; *Peskin v Anderson* [2001] 1 BCLC 372.
[305] See, for example, the decision of the Dutch Hoge Raad of 6 October 1989, NJ 1990/286NJ 1990/286 (*Beklamel*). Creditors were able to rely on the general tort law provision in the Dutch Civil Code, Art. 6:162, where a company had incurred additional obligations at a time when the director knew, or reasonably should have known, that the company would not be able to meet the obligations and the company's assets would not be sufficient to satisfy all claims of the creditors.
[306] For example by GEDIP, supra note 271.
[307] Altmeppen and Ego, supra note 184, para 424.
[308] Brussels Regulation Recast, Art. 1(2)(b).
[309] Case C-147/12 *ÖFAB v Frank Koot*, nyr, para 24.
[310] Ibid.
[311] Ibid. paras 8, 36.
[312] Ibid. para 25.

relating to tort.[313] This did not create undue disadvantages for the defendant, since the relevant connecting factor, the place where the harmful event occurs, referred in this case to one location, the place where the board of directors monitored (or should have monitored) the financial situation and business of the company.[314] However, it is problematic to transpose the same reasoning to the context of the applicable law. As discussed, a functional approach to classification casts doubt on relying on the involvement of the liquidator to determine whether the *lex concursus* is engaged.[315] A classification of liability for allowing the company to trade while being undercapitalised as tort law would have particularly severe consequences. Since the applicable law pursuant to the Rome II Regulation is the *lex loci damni* and not the *lex loci delicti commissi* (unless the escape clause of Article 4(3) Rome II can be invoked), the directors would potentially face liability pursuant to a multitude of ill-aligned legal systems. Arguably, where the directors continue to trade in violation of legal obligations and creditors enter into contracts with the company, the damage occurs in all countries from which goods are delivered or funds are transferred to the company.[316] This seems to run counter the goal of the Rome II Regulation to 'ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.'[317]

<u>Therefore, we suggest that liability provisions similar to the one discussed in *Beklamel*</u>[318] <u>and *ÖFAB v Frank Koot* should be characterised as insolvency law for purposes of private international law</u>. This is in line with the criteria determining the *lex societatis* that we outlined above,[319] since the violation of legal obligations relates in both cases to trading at a time when the company lacks sufficient funds to meet its obligations. <u>On the other hand, should a legal system impose liability more generally for setting up or operating a company that is not adequately capitalised, a doctrine that is discussed in some jurisdictions</u>[320] <u>but, to our knowledge, not embraced by the courts in any Member State, it is submitted that a characterisation as company law would be appropriate</u>. However, it is difficult to see that the requisite causal connection between the formation or operation of an undercapitalised company and the loss suffered by creditors would be present unless the transaction between the claimant and the company was concluded at a time when it was clear that the company would not be able to avoid becoming insolvent. This is precisely the risk that mechanisms applying in the vicinity of insolvency seek to address, which would bring the liability provision within the ambit of the *lex concursus* according to the solution suggested here. Finally, it should be mentioned that, as before, it is not necessary to include a separate conflict rule dealing with these cases in a Rome V Regulation, since the characterisation follows the general rules set out above, but it may be useful to include guidance on the demarcation between the *lex societatis*, *lex loci delicti*, and *lex concursus* in these situations in the recitals.

6.3.2 Quasi-contract

Some Member States, for example Germany and Austria, have used the doctrine of creating a false legal appearance in order to hold directors of a foreign limited company liable where they act on behalf of the company without making sufficiently clear that a legal person with limited liability should be contracting party (i.e. they do not use the

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[313] The Court used a negative definition of 'torts', holding that 'all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)(a) [Brussels Regulation]' are matters relating to tort, ibid. para 32. A contract, on the other hand, 'presupposes the establishment of a legal obligation freely consented to by one person towards another', ibid. para 33.
[314] Ibid. paras 54-55.
[315] See Section 6.2 above.
[316] Stone, supra note 148, 385, with references. The place where the creditors assets are located or where the creditor is domiciled, on the other hand, are irrelevant, see *Kronhofer*, supra note 302, paras 19-21.
[317] Rome II Regulation, Recital 16.
[318] Supra note 305.
[319] Section 6.2.
[320] For example, Raiser and Veil, supra note 291, § 39/44-47.

addition 'ltd.' or a similar designation).[321] Such a doctrine can be characterised as a quasi-contract. It has been held that the connecting factor in such a case is the place where the false legal appearance was created and had an effect on third parties.[322] The doctrine serves to protect the expectations of third parties dealing in good faith with the company.

This is somewhat comparable to the GEDIP proposal, which requires companies to disclose to third parties the law under which the company was formed. Failing such a disclosure, creditors of the company 'may claim the liability of the persons acting on behalf of those companies, its members and directors under the law of the Member State where that person is acting, unless such creditor was aware of that information or [was] not aware of it as a result of his negligence.'[323] The proposal of the Sonnenberger commission is broader in its application, stipulating that '[i]f a company purports to operate under a law other than that determined pursuant to [the general conflict of laws rule], a third party acting in good faith may invoke such law.'[324]

While such good faith provisions are relatively rare in the Member States, the comparative analysis gives various examples of Member States seeking to apply their own law to foreign companies in particular circumstances or generally in order to protect third parties acting in good faith or relying—irrespective of their knowledge of the company's situation—on the law of the host state where the company's real seat is located.[325] These examples indicate that there seems to be a policy need for some form of host state intervention, which a Rome V Regulation will need to take account of.[326] A sensible, targeted approach would protect third parties that rely on the impression, which must be imputable to the company, that the company has been incorporated under another legal system or that it operates as a different (incorporated or unincorporated) form of business association. In order to ensure an application of the *lex societatis* that is as consistent and complete as possible, it is suggested that a solution based on an action for damages is preferable to one that substitutes the law of the host state for the *lex societatis* if a third party relies on the application of the host state law in good faith.[327] The latter solution would also lead to difficult questions of determining the area of the *lex societatis* that was affected by the legitimate expectations of the third party and that, accordingly, should be supplanted.

Conceptually the liability of persons creating a false legal appearance is comparable to that of an agent acting without authority.[328] The relationship between the agent and third parties is excluded from the scope of the Rome I Regulation.[329] Some guidance can be found in the Hague Convention of 14 March 1978 on the Law Applicable to Agency, which provides that 'the effects of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the State in which the agent had his business establishment at the time of his relevant acts' or, alternatively, by the law of the state where the agent acted if this is also the state where the principal's or the third party's business establishment or habitual residence is located.[330] That same law 'shall also govern the relationship between the agent and the third party arising from the fact

[321] Comparative Analysis, Chapter IV, Section 4.3.2.
[322] BGHZ 43, 21, 27.
[323] GEDIP proposal, Art. 7.
[324] Sonnenberger proposal, Art. 2(2), last sentence.
[325] The farthest-reaching such provision is probably the choice that French law grants third parties when the company is registered abroad but the company's real seat is located in France, see the French country report, Section 3.2.
[326] This point is discussed further in Section 7 below.
[327] For the specific case of lack of authority or capacity, we propose a separate provision protecting good faith, see Section 5.5.3 above.
[328] This is also the reasoning of the German courts that use the concept of creating a false legal appearance to impose liability on directors of foreign companies, see the German country report, Section 4.3.
[329] Rome I Regulation, Art. 1(2)(g).
[330] Hague Convention, Art. 11.

that the agent has acted in the exercise of his authority, has exceeded his authority, or has acted without authority.'[331]

The European Commission proposal for the Rome I Regulation of 2005 drew on the approach laid down in the Hague Convention and stipulated that 'the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power' shall be governed by the law of the country where the agent has his habitual residence, unless 'either the principal on whose behalf [the agent] acted or the third party has his habitual residence' in the same country where the agent acted.[332] Applying the rationale underlying these provisions to the present context, and considering that the Rome I and II Regulations equate the location of the branch, agency or other establishment of a company with the habitual residence of the company if the contract in question is concluded, or the damage arises, in the course of operation of the branch, agency or other establishment,[333] a provision seeking to protect third parties acting in good faith could be phrased as follows:

<u>The liability of persons who create the legal appearance that the company is governed by a law different from the law of incorporation or that the company operates as a different type of business association shall be governed by the law of the place where that appearance was created, unless the third party was aware, or should have been aware of the true facts. However, in derogation from the first sentence, the applicable law shall be the law of the place where a branch, agency or any other establishment of the company is located if the legal appearance is created in the course of operation of that branch, agency or any other establishment</u>.

7. Mechanisms to protect public interests (*ordre public* and overriding mandatory provisions)

7.1 Overview

Virtually all Member States provide that parts (or, in the case of a few Member States, all[334]) of their internal company law apply to companies that are incorporated under the law of another jurisdiction, as long as they have some connection (however defined) with the territory of that Member State (which we will call, henceforth, the 'host state'). The fact that the acceptance of a foreign *lex societatis*, even within the confines of what is commonly classified as company law for purposes of private international law,[335] is not without exception in any Member State, including in states that have traditionally embraced a relatively pure version of the incorporation theory,[336] indicates that there is a strong policy desire on the part of the Member States to retain at least some control over foreign companies operating within their territory. Any harmonising measure, therefore, needs to acknowledge this broad consensus and make some allowance for the preservation of a certain degree of regulatory authority on the part of the host state. At the same time, due regard has to be paid to the Treaty freedoms, especially the

[331] Ibid. Art. 15.
[332] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM/2005/0650 final, Art. 7(2), (4).
[333] Rome I Regulation, Art. 19(2); Rome II Regulation, Art. 23(1).
[334] In particular, as discussed in the text to notes 135-136 above, in Croatia, France, and Portugal, third parties can choose between the host state's law and the incorporation law if the real seat of a foreign company is located in the host state. Good faith of the third party contracting with the company is not a criterion, and this rule is not explicitly restricted to companies incorporated in non-EU countries. If it were to be applied to EU-incorporated companies, which has been critically discussed in these countries, the host state's law could be scrutinized under *Gebhard* (unless, of course, such a rule were to be included in a harmonizing Rome V Regulation, in which case the standard of review of the law—now in the form of a European measure—changes).
[335] i.e. within the sphere of the *lex societatis* as defined, for example, autonomously in a future Rome V Regulation.
[336] Such as the UK.

Freedom of Establishment, as interpreted by the Court of Justice, which of course place limits on the host state's ability to insist on the application of its own laws.

However, potential harmonisation is complicated by the fact that the Member States differ significantly in the design of the laws that they hold to be immediately applicable, the extent of the required connection with their territory, and the rationale they use in order to justify the application of the host state's law, notwithstanding a foreign *lex societatis*.[337]

This variation in national approaches lends itself to a number of general observations, before we present the policy options available for a future Rome V Regulation. First, simplifying somewhat, it can be said that the scope of the host state law that is declared immediately applicable[338] is inversely proportional to the intensity of connection with the host state's territory that is a precondition for overriding the foreign *lex societatis*.[339] For example, pursuant to some Member States' laws, a highly targeted override of the *lex societatis*, for instance by an extension of the host state's directors' disqualification regime to foreign-incorporated companies, is triggered relatively quickly, namely whenever assets of any kind are located in the host state's territory.[340] Conversely, the application of broad areas of host state law typically requires a more durable and substantial connection, and the host state may only invoke its laws in case the undertaking is a pseudo-foreign company with its real seat and virtually all of its business activity in the host state. Thus, notwithstanding the question whether it is permissible for the host state under EU law to apply wide swathes of its company law to foreign companies, there is a nexus between the type of immediately applicable law and the required connecting factor, which may inform the interpretation of any 'overriding mandatory provisions' reservation in a future Rome V Regulation.

Second, the application of a set of host state rules because they fall outside the scope of the *lex societatis* (defined autonomously once the conflict rules are harmonised) and are governed by a different connecting factor is not a question of overriding mandatory provisions, but of determining the demarcation between the *lex societatis* and other legal areas. This point is particularly relevant in respect of provisions imposing liability on directors of foreign companies. We have argued that such provisions should be either understood as falling within the scope of the *lex societatis*, in which case the host state is not able to apply them to directors of a foreign company, or of the *lex concursus* or *lex loci delicti*, in which case the applicability of the host state's law depends on the relevant connecting factor.[341] Given that the respective connecting factors (COMI and *lex damni*) are designed to take account of a variety of interests going beyond the constituencies protected by the incorporation doctrine, it seems counterproductive to allow the host state to exercise regulatory authority and impose liability on directors of foreign companies notwithstanding any of these applicable laws and thus override the policy decisions on which the connecting factors are based.

Finally, the deviation from the main connecting factor (as discussed, currently some variant of the incorporation theory in most Member States) in favour of the real seat is, without harmonisation, difficult to justify in light of the Court's right of establishment jurisprudence. If harmonisation was based on a uniform connecting factor corresponding to the incorporation theory, as has been proposed here,[342] it would constitute a violation of the harmonising legislative measure to deviate from this connecting factor unilaterally

[337] See the overview of the approaches that can be found in the Member States, distinguishing between the type of laws that are declared to be immediately applicable, the required connecting factor, and the conceptualisation of the host state's intervening measure, in the Comparative Analysis, Chapter IV, Section 3.3.
[338] The first dimension analysed in the Comparative Analysis, Chapter IV, Section 3.3., para 6.
[339] The second dimension analysed in the Comparative Analysis, Chapter IV, Section 3.3., para 7.
[340] Comparative Analysis in Chapter IV, Section 3.3., para 3.
[341] Sections 6.1.2.5 and 6.3.1.1 above.
[342] Section 5.1 above.

in particular situations. A different result would only be justified if the provisions of the host state's internal law that displace the *lex societatis* could be qualified as overriding mandatory provisions and a future Rome V Regulation reserved the power of the host state to apply such provisions. 'Overriding mandatory provisions', if used in a future Rome V Regulation, would be a concept of EU law to be interpreted autonomously.[343] The Court of Justice has defined the term 'as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.'[344] The Rome Regulations that use the concept of 'overriding mandatory provisions' also make it clear that public interest considerations can justify the disapplication of the applicable law only in exceptional circumstances and that the concept is not synonymous with mandatory national law, but must be construed more narrowly.[345] Thus, the immediate applicability of the host state's provisions must be assessed in light of the 'nature and purpose'[346] of each individual provision. Moreover, the existence of an 'overriding mandatory provisions' clause in a possible future Rome V Regulation would not affect the obligation of Member States to comply with their Treaty obligations. As the Court of Justice has held in relation to an equivalent provision in the Rome Convention, the overriding mandatory provisions are subject to full scrutiny under the Treaty freedoms.[347] Given the Court's jurisprudence, it must therefore be concluded that a blanket application of large sections of any host state's company law is unlikely to be compatible with EU law, even if a future Rome V Regulation included a wide 'overriding mandatory provisions' reservation.[348]

7.2 Policy options

As the discussion in the previous section shows, a future Rome V Regulation could take account of the legitimate interests of host states to retain some control over companies operating within their territory by either making use of a general *ordre public* clause or reserving the authority of the host state to apply its own overriding mandatory provisions, or both.

It is common for measures harmonising conflict of laws rules, for example the Rome Regulations,[349] and national systems of private international law to contain an *ordre public* clause.[350] The GEDIP and Sonnenberger proposals also both provide for a general public policy exception.[351] Typically, such exceptions stipulate that the application of any provision of the law that is applicable pursuant to the relevant conflict of laws rules may be refused by the forum 'if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'[352] However, the *ordre public* is of limited relevance in

[343] Martiny, supra note 200, Art. 9 para 10.
[344] Joined Cases C-369/96 and C-376/96 Arblade and others [1999] ECR I-8453, para 30.
[345] Rome I Regulation, recital 37.
[346] See Rome I Regulation, Art. 9(3).
[347] See Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, 17.10.2013, para 46-47; see also the discussion in G Rühl, 'Commercial agents, minimum harmonization and overriding mandatory provisions in the European Union: *Unamar*' (2016) 53 *Common Market Law Review* 209.
[348] For a similar argument with regard to Art. 9 Rome I Regulation see Martiny, supra note 200, Art. 9 paras 12-17.
[349] See, for example, Rome I Regulation, Art. 21; Rome II Regulation, Art. 26; Regulation (EU) No 1259/2010 (Rome III Regulation), Art. 12; Regulation (EU) No 650/2012 (Rome IV Regulation), Art. 35.
[350] Comparative Analysis, Chapter IV, Section 5.2.
[351] GEDIP proposal, Art. 11; Sonnenberger proposal, Art. 10. See also Art 4 of the 1968 Convention on the mutual recognition of companies and bodies corporate, EC Bulletin Suppl. 2-1969, 7.
[352] This formulation is from the Rome Regulations, supra note 349, which has been adopted verbatim by the GEDIP proposal. The Sonnenberger proposal uses a very similar formulation, providing that the application of a provision of the *lex societatis* 'may be denied if such application is manifestly incompatible with the fundamental principles of the law of the [forum]'.

company law and has been invoked rarely in the Member States.[353] It sets a high threshold in the form of a conflict with fundamental principles of domestic law, which are commonly understood to refer to human rights or 'some prevalent conception of good morals'.[354] It is clear that this threshold will often not be reached, even where the host state has a legitimate interest in regulating certain aspects of a foreign company's operations within its territory. For example, if a person is subject to a disqualification order, the Member State that has issued the order has a legitimate interest in ensuring that the underlying rationale of the order, such as the desire to protect the public against directors who are 'unfit to be concerned in the management of a company',[355] is not circumvented by the incorporation of a company by the disqualified director in a jurisdiction where the order may have no effect.[356] An *ordre public* clause would be of limited use in this example.

<u>Therefore, it is necessary to provide, in addition to the general *ordre public* clause, for a reservation of the host state's overriding mandatory provisions</u>. Such a reservation has also been proposed by GEDIP and Sonnenberger[357] and could be modelled after the corresponding clause contained in the Rome I Regulation, which provides that '[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum', and which defines overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable' pursuant to the regulation.[358] The GEDIP proposal further stipulates that, in addition to the mandatory provisions of the forum, '[e]ffect may be given to the overriding mandatory provisions of the law of the country in which the company has its central administration [or has an establishment] [is carrying on activities].'[359] The alternative formulation was included in order to take account of the possibility that some Member States seek to apply overriding mandatory provisions that rely on a different connecting factor than the real seat (or central administration).[360]

Two considerations should inform the transposition of these formulations to a future Rome V Regulation. First, as discussed above,[361] given that the Member States use connecting factors of differing intensity to address legitimate domestic policy objectives, the application of the clause should not be restricted to situations in which the company's real seat is located within the territory of the Member State invoking the overriding mandatory provisions clause. <u>Rather, we propose that a more open-ended formulation should be used, not defining any rigid prerequisites for the application of overriding mandatory provisions, since any national rules invoked by the clause would</u>

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[353] Courts in the UK have invoked the *ordre public* to prohibit arrangements permitted pursuant to the law of incorporation that were considered to be equivalent to a fraudulent transfer, Adams v National Bank of Greece [1961] AC 255. Somewhat comparable to the negative *ordre public* (but probably with a lower threshold) is the Danish 'doctrine of circumvention', which was used in a number of company law cases, including *Centros*. See the Danish country report, Section 5.1.
[354] See the formulation in *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19, para 17 (quoting *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202).
[355] UK Company Directors Disqualification Act 1986, s. 6.
[356] The same example is given by Sonnenberger, supra note 158, 61.
[357] GEDIP proposal, Art. 10; Sonnenberger proposal, Art. 9 (without, however, specifying what should constitute overriding mandatory provisions, because the Sonnenberger commission intended to await the outcome of the negotiations concerning the Rome I and Rome II Regulations, which were ongoing at the time, see Sonnenberger, supra note 158, 61).
[358] Art. 9(1)-(2) Rome I Regulation. The GEDIP proposal reproduces the provision verbatim, Art. 10(1)-(2). The Rome II Regulation, Art. 16, is shorter and simply provides that '[n]othing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.'
[359] GEDIP proposal, Art. 10(3), modelled after Art. 9(3) Rome I Regulation.
[360] GEDIP, Vingt-cinquième reunion, Luxembourg, 18-20 septembre 2015, Compte rendu des séances de travail, at I.7.
[361] Section 7.1 above.

still need to fully comply with the Member State's Treaty obligations.[362] Such an open-ended formulation would also allow a flexible application that takes the nexus between the intensity of the connection and the breadth of the intervention by the host state into consideration.[363]

Second, in order to increase legal certainty, it would be useful to give examples of overriding mandatory provisions, either in the provision itself in the form of a non-exhaustive enumeration or in the recitals of a future Rome V Regulation.[364] These examples should include provisions regulating the use of corporate names to avoid the creation of a misleading impression and rules on the eligibility and disqualification of directors.[365]

8. Change of Law (Reincorporations)

8.1 Policy issues behind cross-border reincorporations

Although rules on the *process* of changing the applicable company law without liquidation (hereinafter: 'reincorporations') may not fall within the scope of the proposed 'Rome V' regulation on companies' private international law,[366] this issue is closely related to general private international law questions and cannot be ignored in this study.

Companies incorporated in a Member State may seek to convert into a company type governed by another jurisdiction without liquidation in the original country. At the firm level, such a transaction may aim at attaining efficiency gains due to the application of a 'better' or more suitable company law. In all Member States, reincorporations are accompanied by a relocation of the company's 'registered office' to another Member State. Such a change of the applicable law brings with it a number of changes for shareholders, directors, and others. For instance, majority requirements, the balance of powers between shareholders and the board, the structure of the board, as well as rules limiting departures from the one-share-one-vote default may all change as a result of the operation. Apart from the change of the applicable company law, reincorporations may also have a number of additional effects. First, such transfers also lead to a change of the competent insolvency venue and the applicable insolvency regime, unless creditors provide evidence that the company's centre of main interests ('COMI') is still in the country of origin (or otherwise has not changed).[367] Furthermore, a relocation of the registered office may shift the competent jurisdiction in civil cases to the country of arrival.[368]

National company law rules go beyond just regulating the relationship between shareholders and directors. Company law rules, indeed, also protect creditors and other stakeholders, for instance by way of legal capital rules and minimum capital requirements, directors' duties in the vicinity of insolvency, limitations to dividend distributions or participation rights of employees in the company's decision-making bodies ('codetermination'). Therefore, a decision to reincorporate from one jurisdiction to

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[362] See C-184/12 United Antwerp Maritime Agencies, para 46; see also text to note 347 above.
[363] See text to note 340 above.
[364] Similar to Rome II Regulation, recital 32.
[365] Thus, those of the points discussed in the Comparative Analysis, Chapter IV, Section 3.3., para 6, that are not governed by the *lex concursus* or *lex loci delicti* or by a good faith provision and where the application of the host state's law is also not in violation of the Eleventh Company Law Directive or the Treaty.
[366] See Section 2.2 above for the suggestions that those topics may be addressed by a separate Directive.
[367] Insolvency Regulation Recast, Art. 3(1).
[368] See, art. 63 Brussels I Regulation Recast [2015]: 'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.' On jurisdictional issues see: MV Benedettelli, 'Conflicts of jurisdiction and conflicts of law in company law matters within the EU "market for corporate models": Brussels I and Rome I after Centros' (2005) *European Business Law Review* 55 at 61-3. See also Section 10 below.

another may also negatively affect creditors or other stakeholders. As discussed above,[369] this is true, first, where the company law regime of the new jurisdiction is generally 'less protective' than the original *lex societatis*. From that perspective, the impact of reincorporations on creditors and other stakeholders, in particular, will depend on the general designs of the two company laws in question. If, for instance, a jurisdiction relies exclusively or mostly on company law rules to protect creditors and other stakeholders, rather than addressing these issues through insolvency or tort law, a reincorporation to another jurisdiction using different strategies to address the same underlying problems could be detrimental.[370] A detrimental effect does not, however, depend on differences in the absolute level of protection afforded to different corporate constituencies. The mere fact that significant differences exist between company laws across the Union may give rise to regulatory arbitrage, as companies seek to become subject to the legal regime least burdensome to them, given the specific situation they are in. In the absence of legal rules addressing this potential problem, reincorporations may pose a significant risk for stakeholders, as companies may act in opportunistic ways when deciding to change the law by which they – and their relationships to third parties – are governed.

Additionally, since a reincorporation also entails the presumption that the company's COMI is henceforth located in the new jurisdiction, creditors' interests may be at risk even where their protection is based on insolvency law rules,[371] unless they provide evidence that the company's COMI is still in the country of origin. Therefore, although companies may attain efficiency gains through the application of more suitable company law or insolvency regimes, reincorporations may also harm creditors and other stakeholders when the newly applicable rules are less protective than the original ones.[372]

8.2 Current possibilities to reincorporate in the EU

Despite the interpretation of the Treaty given by the Court of Justice,[373] as a matter of practice companies can only reincorporate in another jurisdiction if both the country of origin and the country of destination explicitly address this type of transaction in their national laws, whether through statute or through judicial interpretation. As we shall see below, several Member States do not currently accept the right of domestically incorporated companies to reincorporate in another Member State. In addition, even where both Member States concerned do allow reincorporations, compliance with the substantive laws of both countries[374] can give rise to significant practical problems.

Companies, however, can also effectively change the applicable company law regime, without liquidation, by following other strategies, in particular by converting into or otherwise forming a European Company (*Societas Europaea,* hereinafter 'SE')[375] or by implementing a cross-border merger.[376]

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[369] See text to n 461 in Chapter IV, Section 6 above.
[370] There may also exist a systematic difference between traditional real seat theory-countries on the one hand and incorporation theory-countries on the other hand; see the discussion in Gerner-Beuerle and Schuster, supra note 12, 318-20.
[371] Provided the insolvency law rules of the destination country are less favourable to them.
[372] See Mucciarelli, supra note 245.
[373] See the *Cartesio* and *VALE* judgements, discussed in detail below, Section 8.3.
[374] Note, however, that compliance with the rules of the country of departure is only required insofar as they do not constitute restrictions of the freedom of establishment, or else are justified; see to that effect e.g. *National Grid Indus*.
[375] Regulation of the Council 2157/2001/CE, October 8th 2001, on the statute of the European Company (hereinafter, the 'SE Regulation').
[376] Under the national rules implementing Directive 2005/56/EC, [2005] OJ L 310/1.

a) European Companies

The SE Regulation only provides a general regulatory framework for SEs, which are mostly governed by the regime for public companies of the Member State where their registered office is situated.[377] In practice, therefore, SEs are national public companies incorporated under an EU 'umbrella'. One advantage of the SE regime is that these companies can relocate their registered office from one Member State to another and, in this way, change the applicable national law under a clear and predefined procedure.[378] In this regard, it is worth noting that the registered office of an SE must be located in the same Member State where its 'head office' is situated.[379] Therefore, the SE is not a vehicle for free (or 'pure') choice of law, for an SE must always transfer its head office together with its registered office from one jurisdiction to another. Nevertheless, changes of applicable company law are made possible for undertakings incorporated under the form of an SE, although, in practice, this is not an option accessible to small companies and start-ups, as SEs need to have a legal capital of at least €120,000. It is also worth emphasising that the company law rules applicable to SEs are generally less diverse than those applicable to private limited companies, as a number of key harmonisation measures in company law are (only) applicable to public companies, including SEs.

b) Cross-border merger

The Cross-Border Merger Directive[380] introduced a specific procedure for implementing mergers between companies incorporated in different Member States. Cross-border mergers, therefore, can be vehicles for *de facto* reincorporations, since companies can incorporate a new entity in the desired Member State and then merge into that company.

This transaction, in addition, is typically tax neutral, as are national mergers in most cases.[381] However, the procedure for reincorporations using a cross-border merger can be relatively time-consuming and costly.[382] The procedure involves, at a minimum, the following steps: (a) incorporating a 'shell' company in the new jurisdiction; (b) drawing-up draft terms of merger and making them publicly available in accordance with the relevant national rules;[383] (c) publishing in the national gazette of both countries (where required by national law) the essential elements of the transaction;[384] (d) drawing-up of the business and relevant financial reports by the board and an independent expert;[385] (e) approval of the transaction by the shareholders meetings of both companies no sooner than one month after the publication of the draft terms of merger in the public register;[386] (e) the documents must then be filed with the judicial or administrative authorities in both countries;[387] (f) the merger takes effect once entered into the register

[377] SE Regulation, Art. 9(1). See e.g. J Rickford, 'The European Company' in J Rickford (ed) *The European Company: Developing a Community Law of Corporations* (Antwerp: Intersentia 2003) ch 2.
[378] SE Regulation, Art. 8.
[379] SE Regulation, Art. 7. On this see e.g. Ringe, supra note 106.
[380] Directive 2005/56/CE, of the Parliament and the Council, October 26th 2005, on cross-border mergers of limited liability companies (hereinafter 'Cross-Border Merger Directive').
[381] See Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, as amended by Directive 2005/19/EC.
[382] For a similar the assessment see J Schmidt 'Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?', Study for the JURI committee (Legal Affairs) of the European Parliament, at pp 32-3.
[383] Cross-Border Mergers Directive, Art. 5 and Art. 6(1).
[384] Cross-Border Mergers Directive, Art. 6(2).
[385] Cross-Border Mergers Directive, Art. 7 and Art. 8.
[386] Cross-Border Mergers Directive, Art. 9 and Third Council Directive 78/855/EEC of 9 October 1978, based on Art. 54(3)(g) of the Treaty, concerning mergers of public limited liability companies (hereinafter 'Third Directive'), Art. 8(1)(a).
[387] Cross-Border Merger Directive, Article 10 (pre-merger scrutiny) and Article 11 (overall scrutiny of the completion of the merger).

of the destination country, and the acquired company is struck off the register of the jurisdiction of origin.

8.3 Case law of the Court of Justice

The general question arises as to whether a right to reincorporate abroad (by way of a relocation of the registered office) is part of the EU freedom of establishment. The current state of the case law of the Court of Justice (*Daily Mail*, *Cartesio*, *VALE*) regarding reincorporations and, in general, relocations of a company's 'seat' across the EU[388] can be summarised as follows: (a) companies are 'creatures of the law, and, in the present stage of Community law, of national law'[389]; (b) Member States can apply their own connecting factors to domestic companies and can decide that domestically incorporated companies have to maintain a certain connection with the domestic territory (e.g. one of those mentioned in Article 54 TFEU); (c) Member States must provide 'the same possibility' of cross-border conversions for EU companies as they provide for internal conversions; (d) restrictions on reincorporations must pass the *Gebhard*-test (they should be necessary to protect the general interest and proportionate to this aim); and (e) a complete prohibition of reincorporations is neither necessary nor proportionate.

The decisions of the Court of Justice, however, are not free from ambiguities. In *Cartesio*, the Court of Justice stated, albeit in an *obiter dictum*, that the Member State of incorporation cannot prevent a domestic company '*from converting itself into a company governed by the law of* [another] *Member State, to the extent that it is permitted under that law to do so*'. In *VALE,* the Court of Justice maintained that reincorporations cannot be prohibited if the destination Member State allows internal conversions, and therefore it may seem that companies can reincorporate only if, and to the extent that, domestic conversions are allowed (consequently, the principle of non-discrimination is paramount). Thus, case law of the Court of Justice indicates that Member States cannot prohibit cross-border reincorporations, but it provides only for limited guidance as to whether and to what extent restrictions of 'outbound' or 'inbound' reincorporations are compatible with the freedom of establishment (beyond the need to comply with the *Gebhard* test and with the principles of non-discrimination and effectiveness). Importantly, the case law does not clarify the operational details of such transactions. European case law, in other words, does not provide for a complete regulation of cross border reincorporations.

8.4 Results of the comparative analysis

Despite the most recent decisions of the Court of Justice, Member States still follow a variety of strategies with regard to cross-border reincorporations. The comparative analysis shows that Member States may be divided into five categories:

> (a) jurisdictions that (as a matter of positive law or 'law in action') have not adopted legislation allowing reincorporations and in which this operation is impossible or not allowed (Croatia, Ireland, Lithuania and the United Kingdom, whereas Hungary only allows inbound reincorporations and prohibits outbound ones; Poland and Romania do not allow outbound reincorporations while the situation for inbound reincorporations is more controversial);
>
> (b) jurisdictions that regulate reincorporations, either through a specific statutory procedure (Cyprus, Czech Republic, Denmark, Malta and Spain) or through some minimal rules (Belgium, France, Greece, Luxembourg and Portugal);

[388] For details see Comparative Analysis, Chapter IV, Section 7.
[389] *Daily Mail,* at 19.

(c) jurisdictions in which, despite the absence of any statutory provisions, legal scholars and courts maintain that the decisions *Cartesio* and *VALE* are binding and that, as a consequence, reincorporations should be feasible (Austria, Germany and the Netherlands);

(d) one jurisdiction (Italy) explicitly allows and regulates the cross-border relocation of the statutory seat of domestic companies, without clarifying the private international law effects of this decision and the procedure and prerequisites for cancelling domestic companies from the commercial register;

(e) jurisdictions in which, lacking statutory provisions, the legal situation is still uncertain, although in some of these countries a general consensus seems to be emerging that such transactions should be feasible at least with regard to inbound reincorporations (see, with different positions: Bulgaria, Estonia, Finland, Latvia, Slovenia and Sweden).

We suggest that this complex situation should be analysed along the dimensions of legal certainty, 'quality' of legal procedures and protection of local interests:

Legal certainty. Jurisdictions falling in category (b) do not raise issues of legal certainty: Companies incorporated under their law know that they can reincorporate abroad, and companies from other Member States know that they can reincorporate as a company of one of those countries, and what procedure is to be followed. Jurisdictions in category (a) partially pose an issue of legal certainty: since, as a matter of positive law, reincorporations are not allowed or not feasible, the conformity of the legal situation with the Treaty is problematic and one can expect that the current situation will change in the near future. Countries in categories (c), (d) and (e) often also pose questions of legal certainty. With regard to Austria, Germany and the Netherlands, companies only know that inbound and outbound reincorporations are allowed, but the details of the procedure for implementing these operations are still uncertain. As we have seen above (and we will also discuss hereunder) this situation is confirmed by the empirical survey. Effectively, companies incorporated in countries from categories (c) and (d) do not know the procedure they need to follow in order to reincorporate abroad, and companies from other jurisdictions do not know the procedural requirements for reincorporations into one of these countries.

'Quality' of procedures and protection of local interests. Procedures for reincorporating abroad should clarify which company body has the power to decide on this transaction and when and under which circumstances the company should be struck off the original register. Most countries from category (b) provide for complete and coherent rules and procedures that govern these issues; several other countries, by contrast, do not clarify how reincorporations are to be implemented, with the consequence that commercial registers (and courts) must fill these legislative gaps and decide on a case-by-case basis how the requirements are to be fulfilled. Furthermore, as mentioned above, outbound reincorporations may create risks for pre-existing creditors and other stakeholders. Therefore, mechanisms should be in place to protect pre-existing creditors, employees and minority shareholders.

8.5 Results of the empirical survey

Our empirical survey confirms that EU Member States follow quite divergent paths with regard to reincorporations. Question 10 of the questionnaire addressed the hypothetical situation of a domestic company that wants to reincorporate in another Member State, with the destination country permitting such an operation.[390] Only 33.3% of all

[390] For details see the Empirical Survey, Chapter III, above.

respondents replied that they would recommend simply transferring the company's registered office, while more than 48% of the respondents would advise to enter into a cross-border merger; interestingly, for more than 18% of the respondents the only option is to dissolve the company and incorporate a new company in the envisaged jurisdiction. Not surprisingly, respondents from countries explicitly allowing reincorporations are significantly more likely to suggest relocations of a company's registered office (43% vs. 19%, with the difference being significant at the 5% level); 20% of the respondents from countries that, on paper, do not allow or make reincorporations impossible recommended this procedure nonetheless, which shows that domestic rules are probably uncertain and inconsistent.

Question 11 asked about the main reason for that choice, and a vast majority of respondents hold that their main concern is legal certainty. Interestingly, respondents who would recommend relocating the company's registered office claim that this solution is preferable because it is cheaper and faster than other types of transactions.

The empirical analysis also reveals that respondents from Southern European countries (Cyprus, Greece, Italy, Malta, Portugal, Spain) have a relative preference for the direct change of a company's statutory seat (or registered office); indeed, some of these countries provide for a codified procedure for transferring the seat and reincorporating abroad. In this regard, it is extremely interesting to note that respondents from countries providing for a comprehensive statutory procedure for reincorporations (Cyprus, Malta and Spain) overwhelmingly recommended transferring the registered office in order to reincorporate abroad (92%), while this procedure is relatively less popular (36%) among countries that allow reincorporations but do not fully and comprehensively regulate this procedure (Greece and Portugal); this difference is statistically significant at the 5% level.

This result is confirmed at a broader EU level: respondents from countries with a comprehensive regulation on reincorporations (Cyprus, Czech Republic, Denmark, Malta and Spain) are less likely to recommend merging into a newly established company (23% vs. 51%, significant at the 5% level) and are more likely to recommend transferring the registered office into the target jurisdiction than respondents from countries without a comprehensive regulation (57% vs. 27%, significant at the 5% level).

The empirical results also confirm that the private international law classification of a country (whether it follows a pure incorporation theory or not) has no influence on the respondents' preferences, which reflects the fact that the general conflict-of-laws approach is in effect neutral with regard to reincorporations.

8.6 Past and present private sector and academic proposals

The oldest proposals for harmonising private international law for companies did not include rules on reincorporations. Neither the proposal drafted in 1965 by the Institute of International Law, nor the European Draft Convention of 1968, mention the possibility to relocate a company's 'registered office' abroad or to reincorporate under the law of another jurisdiction. The Hague Convention on the recognition of the legal personality of foreign companies, associations and institutions, drafted in 1956, only provided that contracting States should recognise the continuity of a company's legal personality after a transfer of the statutory seat (*siège statutaire*), provided that such continuity is recognised in the two States concerned. The Hague Convention, in other words, respected each jurisdiction's choice on whether domestic companies could reincorporate abroad and foreign companies could reincorporate as a domestic company without the need to liquidate, it just required third states to respect decisions of the jurisdictions involved.

Most recent academic proposals seem to be more open towards reincorporations. The 'Report of the Reflection Group on the Future of Company Law in Europe' of 2011 recommended adopting a directive allowing cross-border reincorporations in the EU and harmonising procedures governing this operation.[391] The GEDIP proposal of 2015 addresses this issue by suggesting that companies incorporated in a Member State 'may change [their] applicable law in favour of the law of another Member State without losing [their] legal personality'.[392] Furthermore, according to this proposal Member States would need to accept both 'outbound' reincorporations of domestic companies into non-EU jurisdictions and 'inbound' reincorporations of companies originally incorporated in a third state, provided that the third State accepts this operation.[393] Additionally, it is clarified that the law of the jurisdiction of origin should regulate mechanisms for protecting minorities and creditors and the destination jurisdiction should regulate the procedure and the conditions for incorporating the company. The main tenet of the GEDIP proposal, therefore, is to require Member States to accept cross-border reincorporations and establishing the applicable law. Yet the GEDIP proposal addresses neither minority and creditor protection rules, nor 'procedural' issues (such as the moment when the 'emigrating' company can be cancelled from the register of the state of origin), limiting its scope only to conflict-of-laws rules.

As mentioned previously, in the Sonnenberger report the main connecting factor is a company's 'country of registration' (while non-registered companies are 'subject to the law of the state under whose law they are organised').[394] Therefore, in the Sonnenberger proposal companies incorporated in an EU/EEA Member State can reincorporate abroad by relocating their place of registration to another jurisdiction (and non-registered companies can simply decide to be governed by the law of another Member State of the EU or EEA, provided that this change is apparent to third parties).[395] The State of origin shall regulate requirements for cancelling companies from the domestic register, which should also aim at protecting 'rights of third parties' and dissenting shareholders. In particular, 'creditors shall be publicly informed of the forthcoming change of applicable company law and invited to state their claims.' Requirements for registration in the new jurisdiction shall be governed by the law of that state. The Sonnenberger proposal, therefore, does not address the moment when a company can be cancelled from the register of the state of origin. It clarifies, however, that the law of the country of origin shall apply until the 'company has been registered in its new place of registration'.

These projects developed by academics have accompanied the debate in the EU political bodies, which was sketched above. In this regard, it is interesting to remember that the European Parliament repeatedly requested the European Commission to present a proposal for a directive harmonising rules on cross border transfers of a company's registered office.[396] Mirroring some of the academics projects, the main concern of the European Parliament is that the current lack of consistency of legislation on cross-border transfers of company 'seats' undermines corporate mobility, which is seen as an essential element of freedom of establishment, so that the latest recommendation specifies general principles of reincorporations, in particular that Member States should adopt provisions for the protection of dissenting shareholders, including a withdrawal

[391] European Commission, Report of the Reflection Group on the Future of Company Law in Europe, Brussels, 5 April 2011, (available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf).
[392] GEDIP Proposal, Art. 9(1).
[393] GEDIP Proposal, Art. 9(2) and 9(3).
[394] Sonnenberger proposal, Art. 2. See also Section 5.1 above.
[395] Sonnenberger proposal, Art. 7.
[396] See Resolution of the European Parliament of 25 October 2007 [P6_TA(2007)0491]; Resolution of the European Parliament of 10 March 2009 [P6_TA(2009)0086]; Resolution of the European Parliament of 2 February 2012 [P7_TA(2012)0019].

right from the 'emigrating' company, and creditors should be protected by obtaining a security deposit.

8.7 Specific issues to be addressed in the new directive

(1) The specific legislative instrument

As discussed above,[397] we recommend that cross-border reincorporations should be regulated at the EU level by a new directive. As we have seen, reincorporations from one jurisdiction to another can only be implemented when procedural and substantive rules are in place in both jurisdictions that make this operation possible. Member States should implement these rules in a way that accommodates the structure and substance of their domestic company laws and of their national commercial registers. Thus, the instrument of a directive seems to be more appropriate to harmonise rules on reincorporations.

(2) Elements to be transferred in order to 'reincorporate' in another jurisdiction

The question of whether companies can reincorporate abroad is often addressed under the label 'transfer of registered office' (or 'transfer of statutory seat'). Companies are registered in a public register governed by the country of incorporation, whose jurisdiction is normally established according to the location of the company's 'seat' as indicated in the articles of association ('statutory seat'). England and other common law jurisdictions use the concept of 'registered office', indicating the office (which might be a mere letterbox) that is filed with the public register.[398] These solutions are in line with the 1st Company Law Directive, which requires the presence of a 'registered office' in the Member State of registration[399] and, consequently, we will here refer to a company's 'registered office', unless it is necessary to distinguish a concept of 'statutory seat'; however, we should also be aware that these concepts may diverge in specific circumstances or in certain jurisdictions (as we shall see presently).

In order to reincorporate abroad, companies need to be struck off the initial public register and registered in the public register of the destination Member State. Thus, companies should first decide to 'relocate' their statutory seat (or their registered office) to the new jurisdiction. This explains why all legislative proposals for a 14th directive and the resolutions of the European Parliament refer to the transfer of a company's 'registered office' or to the need to harmonise and clarify rules on the transfer of a company's 'seat'.

Yet, a decision to amend the articles of association and to 'relocate' the registered office does not trigger *per se* a reincorporation abroad. In order to achieve this effect, further conditions are necessary: (a) the company must also show the aim to change the *lex societatis* and, consequently, must file for cancellation from the original register and for registration in the public register of the new country; (b) the company should have fulfilled all substantial and procedural requirements of both the jurisdiction of origin and the jurisdiction of arrival. Consequently, in a normative proposal aimed at coherently regulating the whole subject, it is more appropriate to address the whole operation of 'reincorporation', rather than just the transfer of the registered office or statutory seat (which is just an element, albeit an essential one, of this transaction).

[397] See Section 2.2 above.
[398] See D Prentice, 'The incorporation theory – The United Kingdom' (2003) *European Business Law Review* 1.
[399] First Council Directive 68/151/EEC of 9 March 1968 on coordination 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, as amended (now recast as Directive 2009/101/EC).

Furthermore, Member States might require domestic companies to keep certain physical elements or economic links, such as their headquarters, administrative seat or another establishment on their own territory.[400] As a consequence, a reincorporation into these Member States also requires compliance with these substantive (or private international law) requirements. In this regard, it is worth remembering that freedom of establishment, as interpreted in the decisions *Cartesio* and *VALE*, does not hinder Member States from establishing certain requirements for cross border conversions, provided that foreign companies are not discriminated against compared with domestic companies. In particular, it is worth remembering that we have previously suggested, in the context of a future EU instrument harmonising conflict-of-law rules, that the decision whether or not to impose substantive law residence requirements on companies should be left to the Member States.[401]

A further issue is whether companies can relocate the 'seat' indicated in their articles of association without reincorporating abroad. As we have noticed in the comparative analysis, the law of the Czech Republic and the practice of some Italian local offices of the company register allow domestic companies to transfer their statutory seat without reincorporating abroad. At the same time, however, a number of EU legislative instruments are implicitly based on the assumption that registered office (or statutory seat) and applicable law always coincide.[402] For instance, according to the Takeover Directive, if a listed company could transfer its statutory seat abroad without reincorporating in the new jurisdiction, rules on defensive measures of the new jurisdiction would apply, even though this company would still be governed by the original *lex societatis.* Therefore, it is advisable that a reform avoids diverging interpretations at the national level and any ambiguities as to the consequences of a decision to relocate a company's statutory seat on the applicable law. A harmonising measure should also clarify that the law of the Member State in which the company was originally incorporated shall apply until the company is entered into the commercial register of the other Member State.

(3) Decision-making body and the role of the board

The first questions to be addressed are: (a) which corporate organ should decide on 'outbound reincorporations'; and (b) which are the procedures and the required majority for taking such a decision. In all jurisdictions that allow outbound reincorporations the ultimate decision is for the general meeting of the company's members, similarly to an amendment of the articles of association or a merger. This is also the solution adopted for cross-border mergers[403], the SE[404] and the European Cooperative Company (Societas Cooperativa Europaea, 'SCE')[405]. Further, the question arises whether the board of directors should retain an exclusive power to call the meeting and to draw up the proposal and a report explaining the underlying reasons. In this regard, both the SE Regulation and the Cross-Border Merger Directive follow quite complex procedures.

[400] See comparative analysis, Chapter IV, Section 2 above.
[401] See Section 4 above.
[402] See for instance Directive 2007/37/CE on shareholders' rights, or Directive 2004/25/EC on takeover-bids.
[403] Cross-Border Merger Directive, Art. 9.
[404] SE Regulation, Art. 8(4).
[405] Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE) (hereinafter the 'SCE Regulation'), Art. 7.

Table 2: Decision making rules for cross-border merger / transfer of registered office in EU legislative instruments

Legislative instrument	Role of directors and publicity	General meeting decision
SE Regulation and SCE Regulation	Directors shall draw up a transfer proposal and file it with the domestic public register. Directors shall draw up a report on the impact of the relocation.	No decision to transfer may be taken for two months after publication of the proposal.
Cross-Border Merger Directive	Each company needs to draw-up draft terms of merger and publish them in accordance with national rules. Each company should publish in the national gazette the essential elements of the transaction. The board and an independent expert should draw-up business and financial reports.	The transaction should be approved by the general meeting no earlier than one month after the publication of the draft terms in the national gazette.

Some Member States regulate in detail the role of directors and the powers of the general meeting in deciding on a reincorporation abroad. Here, we will use the Czech Republic and Spain as examples.

Table 3: Decision making rules for transfer of registered office in selected Member States

Member State	Role of directors and publicity	General meeting decision
Czech Republic	A proposal should be published in the Commercial Gazette	Decision of the general meeting to approve the transformation (supermajority of three fourths of the attending shareholders); (b) notary certificate of the cross-border transformation
Spain	Transfer project (drafted by directors) in a public document should be published in the official journal of the Commercial Register.	Approval of general meeting of shareholders with supermajority and special formalities.

Following the blueprint of the Cross-Border Merger Directive, the SE Regulation and the SCE Regulation, <u>we recommend that the proposal for reincorporations shall be drafted by the board of directors and be made public in the local register before it is approved by the general meeting of shareholders.</u> Such proposal should include the proposed new Member State of incorporation, its legal form, the articles of association of the company as amended to comply with substantive rules of this Member State and the proposed transfer timetable, including the date from which the company will be treated as a company regulated by the incoming Member State for accounting purposes. By contrast, it seems that the duty to make the proposal public in the national gazette, which is prescribed by the Cross-Border Merger Directive, is far too burdensome and that publicity by filing the proposal with the companies register is sufficient. It also seems useful to specify that the board of directors needs to draw up a report explaining and justifying the legal and economic aspects of the reincorporation and explaining the implications of the reincorporation for members, creditors and employees.

(4) Protection of dissenting shareholders

One reason for an explicit legal instrument regulating reincorporations is the need to protect minority shareholders from risks related to a change of the *lex societatis*. In this regard, in both the SE Regulation and the Cross-Border Merger Directive minority shareholder protection is merely optional. The SCE Regulation, by contrast, provides for a mandatory mechanism protecting dissenting minorities, who have the right to withdraw from the company.

Table 4: Shareholder protection in cross-border mergers / transfer of registered office in EU legislative instruments

Legislative instrument	Super-majorities	Withdrawal right
SE Regulation	Optional	Optional
Cross-Border Merger Directive	Yes (based on 3d Company Law Directive on domestic mergers: at least 2/3 of the represented capital)	Optional
SCE Regulation	Optional	Yes

Table 5: Shareholder protection in transfer of registered office in selected Member States

Member State	Super-majorities	Withdrawal right
Cyprus	Special resolution of the shareholders according to the memorandum and articles of association of the company.	No
Czech Republic	3/4 of attending shareholders	No
Portugal	75% of the share capital	Yes
Spain	- Private companies: 2/3 of capital - Public companies: ½ of voting shares if 50% or more of voting capital attended the meeting; 2/3 of voting shares if between 25% and 50% of shares with voting capital attended the meeting	Yes

A comparison of the Member States with the most comprehensive legislation on reincorporations shows that: (a) in the Czech Republic, Portugal and Spain the decision should be taken by the general meeting of shareholders by supermajority; (b) these supermajorities range from two thirds of the attending shareholders to 75% of the share capital; (c) some jurisdiction grant a right to withdraw from the company to dissenting shareholders.

It is a problematic question which level of harmonisation of shareholder rights is desirable. The risks of negative externalities of national rules do not justify a full harmonisation of shareholder protection mechanisms. It may be useful to distinguish between possible strategies for the protection of minority shareholders along two dimensions: (a) supermajority and quorum, and (b) withdrawal rights.

(a) Majorities and quorum

The very existence of a legal person separate from its members, and the corresponding benefit of limited liability, stem from rules rooted in a specific legal system in which companies are embedded. In the words of the Court of Justice, 'companies are creatures of the law and, in the present state of Community law, creatures of national law'.[406] Consequently, a decision to 'reincorporate' under a different jurisdiction, if allowed, should be decided by shareholders with at least the same quorum and majority as needed for amending the articles of association, or for converting the company into another type of domestic company. A directive on reincorporations can either leave the decision on the proper quorum and majority entirely to the Member States, or impose some minimum requirements. In this regard, in order to ensure conformity with the Cross-Border Merger Directive, which is the alternative mechanism for implementing a reincorporation throughout the EU, <u>it might be advisable for a future harmonisation instrument to harmonise quorum and majority requirements for domestic mergers, cross-border mergers and reincorporations.</u> At the same, if the level for quorum and majority requirements were set too high, reincorporations would risk becoming impossible in practice, which would be considered as a restriction of freedom of establishment in need of justification under the '*Gebhard* test'. Additionally, it seems advisable that a mandatory protection of classes of shares is included in the new directive.

(b) Withdrawal right

A common strategy for protecting dissenting shareholders against decisions that alter fundamental characters of the company is granting them a right to withdraw their participation. In this regard, both the Cross-Border Merger Directive and the SE Regulation leave with the Member States the decision of whether and under which conditions dissenting shareholders can withdraw their participation. The SCE Regulation, by contrast, makes this mechanism for protecting shareholder mandatory in all Member States. This solution reflects the different nature of membership in a cooperative company, which justifies harmonised protection throughout the EU. <u>Regarding other companies, however, it is questionable whether particular reasons justify a full harmonisation of the Member States' strategies for protecting minority shareholders of domestic companies, other than introducing super-majorities and specific quorum requirements</u>.

(5) Protection of creditors

Protecting pre-existing creditors of the company as well as other stakeholders is one of the main problems related to outbound reincorporations and the main reason why several jurisdictions are restrictive towards reincorporations.[407] According to the SE Regulation, the Member State of original incorporation should provide for adequate protection, while the Cross-Border Merger Directive implicitly refers to the Third Directive on domestic mergers, according to which Member States should provide 'adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards'. Additionally, the SE Regulation and the SCE Regulation do not allow relocations of a company's registered office abroad if proceedings for 'winding-up, liquidation, insolvency or suspension of payments or other similar proceedings' have been brought.[408]

Member States that have detailed regulations on cross-border conversions in place also provide for adequate creditor protection mechanisms, mostly based on the right to object to the reincorporation.

[406] *Daily Mail*, para19.
[407] See Ringe, supra note 106, 203-4; Mucciarelli, supra note 28, at 45-48.
[408] SE Regulation Art. 8(15) and SCE Regulation Art. 7(15).

Table 6: Creditor protection in transfer of registered office in selected Member States

Member State	Creditor protection
Cyprus	Solvency statement of directors. Any creditor can object to the reincorporation, indicating sufficient reasons. The Court may approve the reincorporation with an order, or on the basis of sufficient guarantees, or can prohibit it.
Czech Republic	Creditors can demand that the company puts up security for unpaid debts. The company shall furnish the notary with documents proving that all known debts have been satisfied or secured or that creditors have not exercised their right to ask for a security.
Spain	Pre-existing creditors can object to the reincorporation according to the rules on mergers (only unsecured creditors can object, the reincorporation cannot be implemented and is ineffective until the company has provided a security).

The first option that could be considered by policy-makers is to provide for the same minimum level of harmonisation as for cross-border mergers and a transfer abroad of the SE's registered office. This solution would leave the protection of creditors in the Member States' hands according to their policy preferences. Member States would only be subject to the obligation to provide for 'adequate protection' of creditors. This solution would significantly increase the level of creditor protection throughout the European Union for countries that allow domestic companies to reincorporate abroad but do not regulate this transaction. In this regard, it might be more appropriate to grant such protection only to creditors whose claim arose before a reincorporation proposal was published in the domestic commercial register. This minimum level of harmonisation could be drafted, for instance, according to the model of the SE Regulation.

In the EU, however, companies can decide not to conduct their business in the Member State of incorporation, in which case most of their creditors are likely to be situated in the jurisdiction of the place of business. The decisions taken by the Member State of origin as to the level of creditor protection in reincorporations, therefore, might have negative externalities on creditors situated in Member States where this company conducts its business. These creditors, indeed, are not citizen of the Member State of incorporation and, therefore, cannot influence its rules by exercising their political rights. Thus, leaving creditor protection mechanisms in the hands of Member States of incorporation may produce negative externalities ('spill-over effect'),[409] which might justify some form of harmonisation of creditor protection rules beyond a minimal duty to provide 'adequate protection'.

To be sure, these negative externalities are 'natural' effects of the creation of a common market, whose geographical dimension (the whole EU) is obviously broader than that of any Member States.[410]. It might be however possible to consider addressing the 'spill-over effects' of reincorporations, to some extent, by increasing the level of creditor protection mechanisms object to minimum harmonisation. For instance, a possible solution may be that <u>Member States grant pre-existing unsecured creditors a right to object to the reincorporation and to require adequate security or payment, and that a court should assess whether the reincorporation is detrimental to creditors or not</u>. Additionally, in order to avoid opportunistic reincorporations decided in insolvency or in the vicinity of insolvency, it seems desirable that a new directive prohibits companies

[409] See Inman and Rubinfield, supra note 32, at 668.
[410] See W Streeck, *Gekaufte Zeit* 144-6 (Frankfurt: Suhrkamp 2013)

against which proceedings for liquidation, insolvency or suspension of payments had been brought to reincorporate abroad.[411]

(6) Employee protection

In some Member States, employees can appoint a certain number of members of the supervisory board or of the board of directors ('codetermination').[412] Therefore, reincorporations out of these countries risk to disenfranchise the employees if the new state of incorporation does not have similar mechanisms. To address this risk, the Directive on employee involvement accompanying the European Company (SE) Statute and the Cross-Border Merger Directive[413] establish mandatory legal frameworks aimed at protecting existing employee participation arrangements. A new directive, therefore, should address this issue and should carefully consider whether to apply those mechanisms to reincorporations.

(7) *Jurisdiction*

The Brussels I Regulation Recast stipulates that companies can be sued in the Member State where they have either their statutory seat (which should mean 'registered office' in Cyprus, Ireland and the UK), or their head office or central place of business.[414] Therefore, a reincorporation, being always connected with a simultaneous transfer of the registered office, is likely to also shift international jurisdiction (unless the company already had its head office or central place of business in the Member State of the new registered office, in which case nothing changes in terms of competent courts).[415] Furthermore, according to the Brussels I Regulation Recast, in proceedings related to 'the validity of the constitution, the nullity or the dissolution of companies' or to 'the validity of the decisions of their organs', the courts of the Member State in which the company has its 'seat' have exclusive jurisdiction,[416] and each Member State should interpret the concept of 'seat' according to their own rules of private international law.[417] Regarding these 'core company law' matters, therefore, a relocation abroad of a company's statutory seat or registered office will also shift the international jurisdiction, unless neither the country of arrival nor the country of departure interpret the concept of 'seat' as 'statutory seat' (or 'registered office') for jurisdictional purposes.

It follows that creditors, whose claims came into existence before their debtor decided to relocate its registered office abroad, may be disadvantaged by a shift of the competent forum. To address this risk, the SE Regulation and the SCE Regulation provide that, if a company decides to relocate its registered office to another Member State, it shall be deemed, in respect of any cause of action arising prior to the transfer, to continue to have its registered office in the Member State of origin.[418] It is advisable to extend this provision to reincorporations, as the same risk can arise in this case. However, it should be made clear that this general principle of 'jurisdictional continuity' should not apply to insolvency proceedings included in the scope of the Insolvency Regulation Recast.

[411] This is the same language used in the SE and SCE Regulations, which should be then adapted by each Member State while implementing this directive.
[412] For an overview of employee participation regimes in the EU see Gerner-Beuerle et al., supra note 254, 8-10.
[413] Council Directive 2001/86/EC of 8 October 2001, supplementing the SE Regulation, Art. 4(4). The same mechanism is to be applied to cross-border mergers, although with some adaptations: Recital 13 and Art. 16 Cross-Border Merger Directive.
[414] Brussels I Regulation Recast, Art. 4 and Art. 63 (formerly Brussels I Regulation, Art. 60).
[415] KE Sørensen and M Neville, 'Corporate migration in the European Union: an analysis of the proposed 14th EC company law directive on the transfer of the registered office of a company from one Member State to another with a change of applicable law' (2000) 6 *Columbia Journal of European Law* 181, 204.
[416] Brussels I Regulation Recast, Art. 24(2), first sentence (Art. 22 (2) Brussels I Regulation).
[417] Brussels I Regulation Recast, Art. 24(2), second sentence (Art. 22 (2) Brussels I Regulation). This issue will be further discussed in Section 10 below.
[418] SE Regulation, Art. 8(16) and SCE Regulation, Art. 7(16).

(8) *Reincorporation procedure*

Procedural requirements for companies wishing to reincorporate are often uncertain under the national laws of the Member States involved. Additionally, national legislations could make reincorporations prohibitively difficult in practice, even where they are theoretically allowed. The question therefore arises as to whether procedural rules on reincorporations should be harmonised and, if the answer is in the positive, how such harmonisation should be fashioned. In this context, it should also be considered that EU companies can reincorporate, in effect, by way of cross-border mergers and that European Companies (SE) can also relocate their registered office from one Member State to another; consequently, it needs to be discussed whether the procedures provided for in the Cross-Border Merger Directive and in the SE Regulation should be used as a model. The main procedural problem arising for reincorporations is the coordination of actions taken by the relevant companies registers, as legal personality is typically tied to registration. The risk exists that the company register of the country of origin strikes off a company before it 'reappears' in the destination country. This risk is not trivial, as the cases *Interedil* and *VALE* clearly show.[419]

In this respect, the SE Regulation, the SCE Regulation and the Cross-Border Merger Directive all stipulate that (a) Member States should designate a court, notary or other authority, which shall scrutinise the legality of the transaction and issue a certificate attesting the completion of acts and formalities to be accomplished in the country or origin; (b) this certificate should be submitted to (i) the commercial register of the new registered office of an SE or SCE, or (ii) the court, notary or authority designated by the Member State of the company resulting from a cross-border merger; (c) the new registration, or the registration of the company resulting from a cross-border merger, may not be affected until this certificate has been submitted; (d) when the new registration has been affected, the registry shall notify the commercial register of the jurisdiction of origin, or of the jurisdiction where the companies entering into a cross-border merger are registered; (e) a company can be deleted from the commercial register of the original country only after its name is entered in the commercial register of the new Member State, or the company resulting from a cross-border merger is registered in the Member State where its registered office is situated. Consequently, a simple solution for regulating reincorporations in this respect might be to replicate the rules provided for in these EU instruments.

9. Relevance of other areas of law

9.1 Criminal law

In all Member States, specific criminal sanctions ensure the enforcement of company law rules, in particular the obligations of directors. The question, therefore, arises as to whether these offenses only apply to domestic companies or also to directors of foreign companies. Our comparative analysis has revealed an intricate web of national solutions regarding the international scope of directors' criminal liabilities.[420] For the purposes of this report, we only address those criminal offenses that enforce 'company law rules', with a particular attention to directors' and other corporate officers' duties.

The comparative analysis has also shown that strategies in the Member States are highly diverse. In some Member States, criminal offenses related to the violation of directors' duties only apply to directors of domestic companies (this is the case in Croatia, Denmark, Italy, Romania and the UK). Consequently, in these jurisdictions, directors of foreign companies do not face the risk of being held liable for such criminal offenses,

[419] Both cases dealt with companies that were cancelled from the original register before being entered in the commercial register of the new Member State.
[420] See Comparative Analysis, Chapter IV, Section 7 above.

even if these companies are active in the Member State or the action is committed on the domestic territory, unless the company has entered into insolvency proceedings. National reports of several other Member States indicate that criminal offenses enforcing ‘company law rules’, notably directors’ duties, also apply to foreign companies having some connection with the domestic territory (this is the case in Austria, Bulgaria, Cyprus, Estonia, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Spain). National reports mention the following connecting factors that trigger the application of criminal law enforcing ‘company law’ rules: (a) the fact that the crime is committed on the domestic territory, regardless of the country of incorporation (Austria, Croatia, Cyprus, Germany, Denmark, the Netherlands, Poland, Portugal, Spain); (b) the fact that the company has activities or its real seat or administrative seat on the domestic territory (France and Portugal).

In this inconsistent scenario, the risks arise either that the criminal laws of two countries (the country of incorporation and the country where the criminal act is committed) are applicable, or that no criminal offense is applicable at all. Additionally, if criminal liability also applies to directors or other corporate officers of foreign companies, the ultimate effect may be that the underlying duties indirectly apply to these companies too. In other words, a criminal sanction may be a functional substitute of directors’ and officers’ civil liability, which applies to foreign companies similarly to outreach statutes.

In this regard, in order to make a comprehensive assessment, a further study seems to be needed to precisely evaluate all relevant scenarios and possible inconsistencies in the criminal laws of the Member States.[421] This is not a topic comprised in the scope of a legislative instrument harmonising private international law for companies. Nevertheless, an approximation of the international scope of criminal sanctions that enforce national company law rules might be desirable. Regarding criminal sanctions triggered by the violation of company law rules, it seems advisable that their scope should coincide with the international scope of the underlying rule, with the consequence that these liabilities should be only applicable to directors and other officers of domestic companies. However, it should be clear that this narrow scope should not apply to law duties and actions deriving from an insolvency proceeding or ‘closely linked to it’, such as certain criminal offenses for the failure to file for insolvency, which should preferably follow the COMI criterion and also apply to foreign insolvent companies having their COMI on the domestic territory, following the logic of the Insolvency Regulation Recast.[422]

9.2 Tax law

Although there is no common definition of ‘tax residence’ applicable in all Member States, this concept is commonly understood as the place where a company’s business is undertaken or where revenues are generated. Therefore, a company’s ‘tax residence’ diverges both from its registered office and from its ‘administrative seat’ or ‘central management’ (although it is more likely to coincide with the latter, being somewhat linked to the physical presence of a company on a specific territory).[423] In other words, a company’s tax residence is likely to be situated in a country within whose economic and social environment that company is embedded. Thus, it is politically understandable that relocations abroad of a company’s tax residence may trigger a reaction from the country of origin, such as the taxation of all unrealised profits similar to a winding-up situation (‘exit tax’). It is necessary to clarify that the prerequisite of exit taxes is normally a

[421] The literature also identifies a number of problems see, e.g., A Schneider ‘Corporate Criminal Liability and Conflicts of Jurisdiction’ in R*egulating Corporate Criminal Liability* 249 (D Brodwoski et al eds., Heidelberg: Springer 2014); M Ladiges, ‘Criminal Liability of Directors of a Private Limited Company Seated in Germany’, (2013) 24 *Criminal Law Forum* 87, but there is no study or publication that provides a comprehensive comparative analysis of those problems.
[422] Article 6 Insolvency Regulation Recast.
[423] For a good overview see G Maisto (ed.), *Residence of Companies Under Tax Treaties and EC Law* (Amsterdam: IBFD, 2009).

transfer abroad of a company's 'tax residence', which does not necessarily imply a reincorporation under the law of another jurisdiction and the transfer of the registered office to the territory of that state (as the ECJ decision in the case *Daily Mail* clearly shows, which was related to restrictions on the outbound relocation of a company's tax residence). Such exit taxes, however, might unnecessarily restrict corporate mobility throughout the EU and infringe the freedom of establishment, as the Court of Justice highlighted in *National Grid Indus*.

The comparative analysis of this report shows that several Member States do not apply exit taxes.[424] Other jurisdictions, by contrast, tax unrealised profits of companies that decide to transfer their tax residence abroad. Some of these countries have not yet amended their rules to comply with the most recent case law. In the following table we summarise these results:

Table 7: Overview of exit taxes in Member States

Countries	Exit tax
Bulgaria, Cyprus, Croatia, Czech Republic, Estonia, Greece, Lithuania, Poland, Spain	No exit tax
Austria, Denmark, France, Ireland, Italy, the Netherlands, Portugal, Sweden	Exit tax in compliance with the case law of the Court of Justice
Belgium, Germany, Hungary, Latvia, Luxembourg, Slovenia	Exit tax not amended after the Court's decision in *National Grid*

Tax law issues do not fall within the scope of a legislative instrument harmonising private international law rules for companies. Any instrument on this matter would thus not affect tax law. However, as far as relocation of companies is concerned, it seems relevant to mention tax matters, mostly because 'exit taxes' have a relevant impact on freedom of establishment. <u>We would, therefore, recommend undertaking further research and analysis, as far as re-incorporations are concerned, with the aim of clarifying to what extent exit taxes may constitute an obstacle to the freedom of establishment</u>.

9.3 Other areas of law: private and public

Previous sections of this normative analysis already discussed the often contentious scope of the *lex societatis*, paying particular attention to private international law rules of insolvency law, contract law, tort law and securities law.[425] It could therefore be contemplated that, as in the Rome I and II Regulations, the first article of a future Rome V Regulation should clarify the relationship to those (and other) areas of law in its article 1(2) stating that 'the following shall be excluded from the scope of this Regulation …'. Indeed, the GEDIP proposal indicates a list of excluded matters in its proposed article 1(2).[426]

However, we are not convinced that such a generic list can provide a sufficient degree of legal certainty for the complex questions about the relationship between company law and related areas of private international law. <u>Thus, we suggest that the exclusion of</u>

[424] See Comparative Analysis, Chapter IV, Section 7 above.
[425] See Section 6, above.
[426] Referring to '(a) Contractual and non-contractual obligations of the company itself, and the liability in tort of the members and directors of a company vis à vis third parties; (b) Rights in rem over shares or other participation rights; (c) Insolvency; (d) The constitution of trusts and the relationship between settlors, trustees and beneficiaries; and (e) Labour relationships and employees rights [other than rights of participation in the organs [or other bodies] of the company].'

certain topics should be addressed more specifically in the individual sections of a Rome V Regulation that deal with these particular issues.

Beyond other areas of private international law (and the specific issues of criminal and tax law; see 9.1 and 9.2. above), there can be situations where the applicable public law raises the question whether to focus on the 'statutory seat' or the 'real seat' of companies; for example, where a Member State requires a license to pursue a particular business and a company is registered in one Member State but has its headquarters in another.[427] However, this situation is likely to have a straightforward solution, since the international scope of public law is based on a strictly territorial approach. Thus, such rules will cover any activity in the Member State in question, even if it is conducted in the form of a foreign company. There are also situations where Member States coordinate more closely with respect to certain cross-border aspects of public law, say in questions of banking and securities regulation. In these areas, the corresponding EU rules generally specify precisely which Member State is competent and how coordination between the Member States is conducted.[428]

In the Rome I and II Regulations, the corresponding articles 1(1)(s.2) clarify that the Regulation 'shall not apply, in particular, to revenue, customs or administrative matters'. A similar proposal is made by the GEDIP proposal. For reasons of consistency, this report suggests that a future Rome V Regulation should phrase this issue in the same way as the Rome I and II Regulations.

10. Jurisdiction

Jurisdiction issues and conflict of laws rules applicable to companies are necessarily closely related. The main risk arising in a situation with a cross-border element is that the competent venue may be situated in a Member State different from the state of incorporation. Since the procedural rules of the forum apply, a consequence would be divergence of procedural law and applicable substantive rules. This issue was already addressed above when we discussed to what extent rules on derivative actions and other enforcement mechanisms are to be classified as merely procedural rules or as substantive law provisions.[429] In this respect, it was also highlighted that procedural and substantive mechanisms are interdependent and often reveal significant complementarities, with the consequence that it would be infeasible, if possible at all, to disentangle them.

Regarding companies, the Brussels I Regulation partially harmonises jurisdiction rules for proceedings relating to 'the validity of the constitution, the nullity or the dissolution of companies' or to 'the validity of the decisions of their organs'.[430] For these proceedings, courts of the Member State of a company's 'seat' are competent, but national courts should interpret this term in accordance with their own private international law rules.[431] Therefore, the concept of 'seat' is likely to reflect the main conflict-of-law criterion employed in a given Member State; consequently, currently 'real seat' countries may interpret the term as 'real seat' or 'administrative seat', while 'incorporation theory' countries may tend to interpret it as 'registered office', with the consequence that positive and negative conflicts of jurisdictions could arise.

[427] Another example from public law concerns the question of human rights obligations of companies; for the discussion see, e.g., S Deva and D Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press 2015).
[428] See, e.g., Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV), Arts. 13, 47, 50; Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, Arts. 2(1)(m),(n), 23.
[429] See Section 6.1.2.1, above.
[430] Brussels I Regulation, Art. 24(2), first sentence (Art. 22(2) of the 'old' Brussels I Regulation).
[431] Brussels I Regulation, Art. 24(2), second sentence (Art. 22(2) of the 'old' Brussels I Regulation).

The comparative analysis has partially confirmed this assumption. In most countries that follow the 'incorporation theory', the concept of 'seat' is interpreted as 'statutory seat' or 'registered office'. This is the case in Austria (for EU companies), Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany (for EU companies), Latvia, Lithuania, the Netherlands, Romania, Slovakia, Slovenia, Sweden, the UK (which however expands the competence of domestic courts to foreign companies whose central management and control is exercised from the UK). The sole exceptions among incorporation theory countries are Ireland, where this issue has never been explicitly addressed by any courts, and Italy, where just one judiciary decision is known on that matter, stating that a company's seat is the place of its main business activity. In most other countries the concept of a company's 'seat' is interpreted with reference to fact-based criteria, such as the 'real seat' or the actual management of the company, even for companies incorporated abroad. It is, however, surprising that several national reports indicate that domestic courts have never explicitly addressed the concept of 'seat' under the Brussels I Regulation (this is the case in Denmark, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, and Portugal). The most striking result of this overview is, therefore, that the content of the law is simply uncertain in several jurisdictions and it is unpredictable whether courts of these countries will be held competent or not.

A Rome V Regulation harmonising conflict of laws rules for companies throughout the EU would have an indirect impact on the interpretation of the concept of 'seat' pursuant to article 24(2) of the Brussels I Regulation Recast, which should then be interpreted as 'registered office' in all Member States. Nevertheless, in order to increase legal certainty, it seems advisable to explicitly replace the jurisdiction criterion concerning 'core' company law matters in article 24(2) Brussels I Regulation Recast with a uniform criterion, such as the 'registered office' (or the 'statutory seat'), the country in which a company is incorporated, or the country according to whose laws an unincorporated company was formed. This new formulation would be consistent with the general private international law regime for companies and would avoid both positive and negative conflicts of jurisdiction. Additionally, it seems advisable to expand the scope of the 'core' company law matters beyond the narrow boundaries set by article 24(2) Brussels I Regulation Recast, with the aim of including at least derivative actions, any other actions concerning the liability of directors and other company organs, and any procedure that domestic shareholders, directors or supervisory bodies may invoke in front of a court to enforce compliance with company law requirements.

11. Conclusion

This report suggests a possible harmonisation of conflict-of-laws rules in the area of company law at the EU level, in response to the significant legal variation and uncertainty identified in the Member States' regimes.

Given the persistent diversity of substantive company laws, conflict of laws rules will continue to play a crucial role. This study supports the idea of common EU conflict of laws rules applicable to companies in a future 'Rome V Regulation'. Those rules would not cover substantive rules of company law, for example as far as they relate to seat transfers. In the medium/long term, it is suggested that a new regulation on conflict of laws rules applicable to companies and all existing (and forthcoming) 'Rome regulations' should be merged into one regulation. Such a consolidated regulation ('European Code of Private International Law') can best clarify ambiguities about the relationship between the *lex societatis*, the *lex contractus*, the *lex delicti* etc. and may therefore foster the 'unity of the legal order'. It can also provide for a consistent regulation of the common themes (*ordre public*, *renvoi* etc) that have been addressed in the existing Rome regulations and that are discussed in this report.

It is proposed that, as a general rule, a company shall be governed by the law according to which it has been incorporated, and an unincorporated entity by the law according to which it has been formed. It is useful to include in the definition of 'incorporated companies' all companies that acquire (full) legal personality upon entry in the commercial or companies register of the jurisdiction of formation. This provision should be supplemented by a 'residual clause' to the effect that the law of the closest connection shall apply if the law cannot be determined pursuant to the general rule.

The regulation should provide for a non-exhaustive enumeration of the matters governed by the applicable law in order to give guidance as to the future (autonomous) interpretation of the regulation. The enumeration should include the following matters: formation of the company and legal nature/personality; corporate name; capacity of the company and authority of its organs; capital structure; rights and obligations of the members; internal management matters (board structure, the composition of corporate boards, and the involvement of employees, if any); duties of directors and liability for a breach of duty and generally for breaches of company law; voluntary winding up; enforcement of the company's claims by its shareholders; the right of shareholders to challenge resolutions of the corporate organs; and financial reporting requirements.

The scope of the *lex societatis* should extend to the regulation of the consequences of a lack of capacity or power by the company or its organs. However, in order to protect third parties acting in good faith, the regulation should provide that, where the application of the *lex societatis* would lead to the invalidity of an act, this fact cannot be invoked against third parties if (i) a company organ purporting to act on behalf of the company enters into a legal relationship with the third party in a country other than the Member State of incorporation, (ii) the company has an establishment or acts through a personally present representative in the country where the legal relationship is entered into, (iii) according to the law of that country the relevant restriction would not exist, and (iv) the third party did not know and should not have known of the existence of the restrictions pursuant to the *lex societatis.*

On the other hand, legal mechanisms designed to address problems arising specifically in insolvency or in the vicinity of insolvency shall not be included in the scope of the *lex societatis*, irrespective of the internal classification of the provision in the Member State's company or insolvency law. Such mechanisms are in particular legal provisions that derogate from common rules of civil and commercial law to protect the interests of the general body of creditors and mitigate risk-shifting in the vicinity of insolvency. However, in contrast to the jurisprudence of the Court of Justice interpreting the scope of the Insolvency Regulation, it would be irrelevant for the functional determination of the boundary region between company law and insolvency law suggested here whether the action in question was in fact brought by the liquidator in the context of insolvency proceedings.

The recitals of the regulation may emphasise that company law mechanisms designed to protect the position of controlled undertakings in a corporate group should be governed by the *lex societatis* of the controlled undertaking (rather than the controlling undertaking) and that other legal mechanisms governing the rights and obligations of group companies follow general principles of private international law. In addition, the recitals may clarify that the general criteria developed for the demarcation of the *lex societatis*, *lex concursus* and *lex loci delicti* determine how different types of legal mechanism imposing liability on the shareholders for the debts of the company shall be classified for purposes of private international law.

The regulation should further stipulate that formal requirements of both acts performed in the establishment of a company and the acts of corporate organs and shareholders shall be governed by the *lex societatis*, provided that the acts as such fall within the scope of the *lex societatis*. Alternatively, compliance with the formal requirements of the law of the Member State where the act was performed shall suffice, provided that the formal requirements in that Member State are functionally equivalent. If the rationale for the required involvement of a notary public includes the expectation that the parties involved receive some form of legal advice regarding the relevant act, the regulation should clarify that acts performed according to the laws of a Member State other than the Member State of incorporation shall only be regarded as equivalent where advice on the applicable law can also be given in the context of the compliance with formalities under the law of the Member State where the act was performed. Furthermore, Member States should be allowed to apply the overriding mandatory provisions of the forum or of a state where the company carries out relevant activities to companies incorporated in another jurisdiction. Such mandatory provisions may be, in particular, provisions regulating the use of corporate names to avoid the creation of a misleading impression and rules on the eligibility and disqualification of directors.

Finally, due to persisting significant legal uncertainty as regards cross-border reincorporations, the report suggests that a directive should be adopted to provide for harmonised rules and procedures allowing companies created under the law of a Member State to convert into a company governed by the law of another Member State. Such reincorporations shall not result in the winding up of the company or in the creation of a new legal person. The Directive should also harmonise procedures for implementing cross-border reincorporations and provide minimum harmonisation of the rules on creditor protection, with the aim of avoiding opportunistic reincorporations at the expenses of creditors and other stakeholders.

VI. SELECTED LIST OF PRIMARY AND SECONDARY SOURCES

1. Relevant secondary EU legislation

- Council Regulation (EC) 2137/85 the European Economic Interest Grouping
- Council Directive 89/666/EC concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State
- Council Regulation (EC) 1346/2000 on cross-border insolvencies
- Council Regulation (EC) 2157/2001 on the Statute for a European company (SE).
- Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
- Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Company (SCE)
- Directive 56/2005/EC of the European Parliament and the Council on cross-border mergers of limited liability companies
- Regulation (EC) 864/2007 of the European Parliament and the Council on the law applicable to non contractual obligations (Rome II)
- Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)
- Council Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (codified version)
- Directive 2011/35/EU concerning mergers of public limited liability companies
- Brussels I Regulation (Regulation (EU) 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters
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