

## Does Europe still need a Fourteenth Company Law Directive?

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### Abstract

*This paper explores the progression of European Law that may have pre-empted the introduction of the 14<sup>th</sup> Company Law Directive, a piece of European secondary legislation that has been under discussion for many years as an attempt to solve the problem of corporate mobility within the internal market. For so long indeed that it is conceivable that judgements of the ECJ and other primary and secondary legislation already in force have provided solutions to the corporate mobility question which will result in the Directive no longer being necessary.*

*This article examines the complicated nature of company law particularly the interaction of international conflict provisions and the law of the European Internal Market. It considers the case law of the European Court of Justice (ECJ) in such judgements as *Centros* and *Uberseering*, seen by some as an ‘attack’ on the ‘real seat’ theory of corporate recognition. It moves on to identify primary and secondary legislation, focussing on the Statute for a European Company (SE) as potential ways forward for corporate mobility within the EU. Company law has a multi-layered persona, so within the confines of this paper only the concept of tax provisions and concerns over employee participation in the event of a change in applicable law will be considered. Finally, it will consider the draft 14<sup>th</sup> Company Law Directive, comparing it with the Statute for a European Company and involving a critique of articles 10 and 3 as potentially problematic for Member States and possibly providing a source of discontent that will make it less likely that the proposed Directive becomes adopted as legislation.*

*The conclusion of the paper will draw on the arguments within the body of the text to propose that there is still an inherent need for the proposed directive in order to ensure the grant of a fundamental freedom.*

### Introduction

Treaty regards the differences in national legislation concerning the required connecting factor and the question of whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment.

*Daily Mail case*<sup>1</sup>

Corporate mobility within the European Union is still a problem. In spite of nearly sixty years of the Common Market and its successor the Internal Market, in spite of

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<sup>1</sup> *Case 81/87 R v HM Treasury Ex p. Daily Mail* [1988] ECR 4583

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numerous amending treaties and attempts at legislation and conventions, in spite of clear primary legislation and in spite of the professed wish of Union businesses, the difficulty encountered by a company wishing to move its registered office<sup>2</sup> from one member state to another is still, in many cases insurmountable.

As part of the Modernisation of European Union company law, the High Level Group of Company Law Experts, reporting on the 4<sup>th</sup> November 2002,<sup>3</sup> recommended that the European Commission should consider adopting a proposal for the transfer of the registered office of a company within the European Union (EU) as a matter of urgency. This would be the long awaited 14<sup>th</sup> Company Law Directive. In response, the Commission, in its Action Plan of 21<sup>st</sup> May 2003<sup>4</sup> undertook to adopt such a proposal in the short term, citing it as one of its top priorities. To this end, the Commission launched an Internet consultation on the outline of the planned proposal which closed on 15<sup>th</sup> April 2004, the opening page of which states:

The planned directive would enable companies to transfer their registered office from the member state where they are registered (the “home” member state) to another member state (the “host” member state) under an appropriate procedure providing legal certainty. A company transferring its registered office would be registered in the host member state and would acquire a legal identity there, while at the same time being removed from the register in its home member state and giving up its legal identity there.<sup>5</sup>

This appears to be an admirable proposal, startling in its simplicity and common sense. Why then is corporate mobility still such a problem within Europe?

This paper will aim to show some of the complexities of the European Company Law programme by focussing on this issue in particular, incorporating as it does the historical context of disparate member states, the multi-layered persona's of the corporate body and the unresolved and potentially irresolvable clash between the *Aquis Communautaire* and private international law in general. Through examination of the proposed 14<sup>th</sup> Company Law Directive, particularly the provisions on taxation and employee participation<sup>6</sup> a conclusion will be reached on whether this is a workable or indeed desirable piece of legislation, or whether it will simply be a complex repetition of principles of case law and existing legislation<sup>7</sup> which the Community as a whole could well do without. Ultimately, it may be, shown that the much discussed proposals for a 14<sup>th</sup> Company Law Directive may be too controversial and, in the light of recent case law and legislation, no longer necessary for the sustained progression of Company law in Europe.

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<sup>2</sup> Or central administration or principle place of business as alternates under Article 48 TEC

<sup>3</sup> Report of the High Level Group of Company Law Experts on a modern Regulatory Framework for Company Law in Europe, Brussels, 4<sup>th</sup> November 2002

<sup>4</sup> Commission communication to the Council and the European Parliament on modernising company law and enhancing corporate governance in the European Union – A plan to move forward (COM (2003) 284 final)

<sup>5</sup> <http://europa.eu.int/yourvoice/consultations>

<sup>6</sup> Problems with the change in law relating to employee contracts are outside the scope of this paper.

<sup>7</sup> Particularly the Company Law Statute

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### Is there a problem?

This is, of course, an historical problem, and one grappled with for many years by private international law, and the contracting parties to what would eventually become the EU.<sup>8</sup> The entire concept of 'recognition' of a foreign company was at one time uncertain, companies being constructs of the law of a particular country, it was felt that once outside that country their continued existence was unsustainable. Within a wider, conflicts sense however, 'recognition' of a foreign company primarily rests on the problem of the *lex societatis*, or the proper law to which the company is subject as regards its formation, internal workings and possible dissolution. Once it is accepted that a company is validly formed according to the law of the state to whose laws it is subject, there is usually no problem in the company being recognised as a legal person, a bearer of rights and duties, by other states.

But why would a company want to move its head office, or registered office? It may be a relevant point that with EU company law harmonisation incomplete, the chances of a company choosing to move across a national border are slim and in this respect the Fourteenth Company Law Directive will be an unloved and impotent tool. That very few corporations presently do move between member states is not an informed response, given the complexity of the procedure where it is allowed and the consequences when it is not, but it is not difficult to envisage a low demand for the true freedom of movement for companies, if and when it is allowed. The many writers who point in horror towards the United States and the Delaware effect as the shape of things to come are perhaps arriving at simplistic conclusions, overlooking the barriers of language and corporate (and national) culture that exist within the European Union. The 'nationality' of a company is also a prized aspect of its corporate identity and one that will not be discarded lightly.<sup>9</sup> Within the last 18 months the German car manufacturer Volkswagen decided against the development of a new plant in Portugal, in spite of much cheaper costs and a more flexible labour market, preferring to keep its business within Germany because, *inter alia*, it was felt that there was something about the 'Germaness' of the Volkswagen brand which its customers identified with. Similarly, Ford has declined to move production of its Jaguar marque to the USA, saying that Jaguar is a 'British brand'.

On the other hand, the globalisation of the corporation cannot be denied. The recognition of the company as the economic powerhouses of the economy and the benefits of economies of scale mean that in order to compete with the American or Japanese corporate giant, companies within the EU must be able to shed their national constraints. To be successful in this respect, a company should be able to move within the internal market with as much freedom and as little fuss as if it were relocating within its 'home' member state.

Irrespective of the above arguments, free movement of companies in the sense of primary establishment is a clearly given treaty right and should be available even if no

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<sup>8</sup> For instance the 1956 Draft Treaty of the Hague conference on the mutual recognition of the legal personality of companies.

<sup>9</sup> See further Janice Dean, 'Corporate mobility and Company Law Cultures in Europe' I.C.C.L.R. 2003, 14(6), 197-204

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demand is envisaged, EU law should not subscribe to a *de minimis* approach to the fundamental freedoms. It would be absurd to describe the free movement of workers as a failed exercise because only a tiny minority of European citizens choose to take advantage of the provisions. It is a worthwhile ideology, even from the point of view of people who have never used their rights and can never seeing themselves so doing.

The paper will begin by introducing the ‘conflicts’ rules of the member states and will then go on to examine the case law of the European Court of Justice in this area, to see whether, as some sources claim, the problem of corporate mobility is solved via a reading of these judgements. Primary and secondary legislation already in existence will then be appraised and lastly the proposed 14<sup>th</sup> Company Law Directive itself will be considered, in order to come to a conclusion on its usefulness and desirability.

### **The problem defined – case law**

In general terms, the member states of the European Union subscribe to one of two different ways of recognising the legal personality of a company or firm, each linked to a chosen ‘connecting factor’ to the member state in question. A member state which is an incorporation theorist will recognise a company as a legal person under the law of the state in which it was incorporated, (the incorporation being the ‘connecting factor’ to the chosen state). This is essentially unproblematic; a company validly incorporated under the law of a member state is therefore recognised by all other incorporation states. The UK, Ireland and the Netherlands operate this system of recognition, the Nordic<sup>10</sup> registration system in the Netherlands being in reality a modified application of the incorporation theory.

A criticism of the incorporation theory is that it leads, particularly in a trading bloc such as the EU, to ‘forum shopping’ by managers anxious to secure the most favourable legal climate for their company, the much discussed ‘Delaware effect’. The European Court of Justice has made it clear in, *inter alia* the *Centros*<sup>11</sup> case, that this is something which is not prohibited by European law. It is even possible to see that this kind of ‘consumer choice’ available to companies may eventually lead to a levelling of company law regimes across the EU as states with less attractive laws soften their approach to prevent ‘drift’ into other member states.<sup>12</sup>

Other member states, for instance Germany have as the connecting factor the head office or principle place of business of the company, or the ‘real seat’. A real seat theorist will only recognise a company as a legal person, (by virtue of it being validly formed within the *lex societatis*) and subject to the laws of a state, with the protection that entails for individuals ‘behind the corporate veil’,<sup>13</sup> if the ‘real seat’ of that company is in the member state in which the company is incorporated. For instance a company incorporated in England with its head office or principle place of business in

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<sup>10</sup> Also applied by Denmark, Finland and Sweden

<sup>11</sup> *Case C-212/97 Centros Ltd v Erhvers-og Selskabsstyrelsen* [1999] ECR I-1459

<sup>12</sup> See however the article by Mathius Siems, “*Convergence, competition, Centros and Conflicts of Law: European law in the 21<sup>st</sup> Century*” (2002) *European Law Review* 27(1), pp 47 –59, where the author argues that the ‘Delaware effect’ in Europe may be more feared than likely to happen.

<sup>13</sup> See *Salomon v Salomon* [1897] 45 WR 193, HL

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France would be seen by German law to be subject to the laws of France. If the company was not validly incorporated according to French law, then German law would not consider it to be a legal person at all. While the incorporation system appears to be a straightforward one, which can be seen as analogous to citizenship for a natural person, the adherence by member states to the real seat theory is problematic. It becomes more complicated still when a company moves its head office out of a real seat state (or is deemed to have moved its head office or principle place of business) and then becomes unrecognisable as a valid company within its 'home state'. It will therefore not be recognised even by incorporation theorists.

While it is plain that the incorporation theory is more conducive to the establishment of 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' as enunciated in the preamble to the TEC it would be hasty to denounce the real seat theory as against European law or in any way discriminatory as the regime is equally applicable to domestic and non-domestic companies alike. Further, it is argued that the real seat theory is justified in order to ensure that the law most relevant to the company is the one that governs it, and if the company does not conform to the rules of that member state (the one where it conducts most of its business), then other states should not recognise it as a company at all. On the other hand, the 'real seat' theory can present a nightmare to legal certainty, particularly in the present globalised economy, if a dispute arises as to where the real seat of a company actually is. It is easily conceivable in the 21<sup>st</sup> century that a company's administrative centre is on one continent, its manufacturing base on another, and its distributors and customers on a third, leading to a complex, individualistic balancing of the concepts of 'head office' or 'principle place of business' to enable a judgement to be made about which country's law the company is subject to, which may not be the same system as the company itself claims. It should also not be forgotten, that while the incorporation theory facilitates the secondary establishment of companies within the EU, it actually forbids a company from moving its registered office, (i.e. primary establishment) to another member state without liquidation. In this respect, neither of the conflict rules of the member states could be said to be better than the other for 'true' corporate mobility within the EU.

This is a general overview of the way the real seat theory works, although different member states adherent to it may allow the emigration of a company subject to shareholder votes and the amendment of the company constitutions. In reality however, these processes are complicated and may demand the liquidation and subsequent re-incorporation of a company under the laws of the new 'host' state, something which will give rise to a number of tax liabilities and which a company will wish to avoid.

It is important here to differentiate between the real issue that needs to be solved by EU law, that of the unproblematic transfer of a company's registered office – whether or not the conflicts laws of that member state demand the head office is in the same state - and the transfer of a *de facto* head office, or something that is seen as a *de facto* head office by a member state. The former is the equivalent of a natural person wishing to change his nationality, as a company can only be a creature of national law, and forms the basis for the proposed 14<sup>th</sup> Company Law Directive, the latter is a problem for freedom of establishment under Articles 43 TEC (old Art 52) and Article

48 TEC (old Art 58), which some may consider solved after the cases of *Segers*,<sup>14</sup> *Centros*<sup>15</sup> and *Inspire Art*<sup>16</sup> and *Uberseering*.<sup>17</sup>

*Centros* was seen by some<sup>18</sup> as a 'first move' by the ECJ to refute the alignment of the real seat theory with EU law, by denying that Denmark could refuse to register a company incorporated in England but which only conducted business in Denmark, in spite of the fact that the English incorporation was purely in order to circumvent the Danish minimum capital requirement.<sup>19</sup> This, commentators contended, was the equivalent of the company moving its 'real seat', a move that Denmark was forced to accept. This slightly bizarre reasoning tends to overlook the fact that Denmark is an incorporation country and what it was in fact doing was acting in a discriminatory and disproportionate manner towards a company validly incorporated in another member state and hence within the protection of Art 43 and 48. It is plainly discriminatory to treat *Centros* in a way that a company incorporated in Denmark would not have been treated. The court was also careful to say that Denmark could take measures to combat fraud or to intervene if the company was trying to avoid obligations towards private or public creditors in Denmark, but its refusal to register the company was disproportionate.

In *Uberseering* a company was formed under the law of the Netherlands and had its registered office there, but then, according to Germany, transferred its real seat to Germany. As the company was not formed according to German law, the German courts would not recognise *Uberseering* as a legal person able to be a party to legal proceedings within Germany. The ECJ held that Germany could not refuse to recognise *Uberseering* and *locus standi* must be granted.

These judgements were hailed by some commentators as the death of the real seat doctrine, open to the interpretation that EU law and the ECJ favours the incorporation theory and rejects the real seat theory, but is seen by others, the author<sup>20</sup> included, as merely a restatement on the rules of freedom of establishment contained in Articles 43 and 48 TEC, and enunciated years previously in cases such as *Segers* and *Commission v France*.<sup>21</sup> It is perhaps worthy of note that the ECJ in *Centros* did not once refer to the freedom of primary establishment.

Article 43 is a dynamic piece of legislation, clearly focussed on achieving the goal of the internal market:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of

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<sup>14</sup> Case 79/85 *Segers v Bedrijfsvereniging voor Bank en Verzekeringswezen* [1987] 2 CMLR 247

<sup>15</sup> Case C-212/97 *Centros Ltd v Erhervs-og Selskabsstyrelsen* [1999] ECR I-1459

<sup>16</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*

<sup>17</sup> Case C-208/00 *Uberseering v Nordic Construction Company Baumangement*.

<sup>18</sup> See for instance Alexandros Roussos 'Realising the Free Movement of Companies' [2001] European Business Law Review Jan/Feb p 7

<sup>19</sup> Some £17,000 as opposed to £100 in the UK

<sup>20</sup> See M Johnson 'Roll on the 14<sup>th</sup> – EC case law fails to solve the problems of corporate mobility – again.' Hertfordshire Law Journal 2(2) pp 9 -18

<sup>21</sup> Case 270/83 *Commission v France* [1986] ECR 273

another member state shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies and firms within the meaning of Article 48, under the conditions laid down for its own nationals by the law of the country where the establishment is effected, subject to the provisions relating to capital.<sup>22</sup>

Article 48 TEC states:

Companies or firms formed in accordance with the law of a member state and having their registered office, central administration or principle place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of member states.

The article then goes on to define 'companies or firms'.

Member states are thereby instructed, by primary legislation, to treat a legal person in the same way as it would be obliged to treat a natural person exercising their right to free movement around the EU, a right encapsulated within the citizenship provisions<sup>23</sup> added to the treaty by the Treaty of European Union in 1992. This right must necessarily be qualified, as has been recognised by the ECJ, because a legal person is capable of having a presence in more than one member state simultaneously, and hence an exact analogy cannot apply. Case law however, is clear, once a company is a 'national' of a member state, by whatever that member states connecting factor is, by incorporation or by having its real seat on the territory, all other member states must allow secondary establishment of that company on their territory in a non-discriminatory manner. Derogations from this rule will only be allowed either under Article 46 or, under the mandatory requirements doctrine established in *Cassis*,<sup>24</sup> providing the requirement is objectively justified, non-discriminatory and proportionate.

These articles are appropriate then, in a point reiterated in *Uberseering*, where secondary establishment is sought. Having been duly incorporated under Dutch law, it was not open to Germany to challenge the status of the company in question. Neither Arts 43 and 48, nor this line of case law however, addresses the problem of the *bete noir* of EU freedom of establishment in company law, the real seat doctrine and the member states right to choose it as its connecting factor. If *Uberseering* had been primarily established in Germany, and had then moved its head office or principle place of business to another member state, it would have then been unrecognised in its 'home' state and therefore not a 'company or firm formed in accordance with the law of a member state', and hence would fall outside the protection of Arts 43 and 48 anyway.

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<sup>22</sup> As amended by the Treaty of Amsterdam

<sup>23</sup> Articles 17 and 18 TEC

<sup>24</sup> *Case 120/68 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649

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The real problem to be grappled with by the 14<sup>th</sup> Company law directive is the problem of primary establishment, where a French company C, wishes to become, perhaps for reasons of tax, or convenient location, an Irish company. Here as well, the natural person analogy to a legal person, holds up. If I am a French Citizen, it is not open to me simply to take an aeroplane to Ireland and become Irish. Although I am free to live and work in Ireland, my 'Frenchness' is inescapable at least until I have satisfied the individual requirements that might be imposed upon me by the Irish state before I can obtain Irish citizenship. Why should a legal person be treated any differently? The ECJ said in the *Daily Mail* case:

It should be borne in mind 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.<sup>25</sup>

Ultimately, as Rammeloo<sup>26</sup> suggests, the anthropomorphism of a legal person and the approximation of the legal forms may not be helpful as it is an over-simplification of the corporate form, which needs to address many different areas of law, tax, employment, etc. and can be physically present in dozens, if not hundreds of locations simultaneously. However, the approximation is the one that is made in the TEC, granting the legal person the same rights as the natural person in this context, so it is difficult to escape.

The initial six member states of the European Economic Community<sup>27</sup> were, at the inception of the EEC, all adherents of the 'real seat' theory, although it is interesting to note that even though the 1956 draft treaty of the Hague Conference on the mutual recognition of the legal personality of companies never entered into force due to lack of ratification by contracting parties, the Netherlands passed a bill purporting to implement the treaty which stated that '*the Netherlands is not a country whose law recognises the siege reel as defined in Art 2 [of the draft of the Hague Treaty].*'<sup>28</sup> Later attempts by the EEC to resolve the matter of the conflict between incorporation and real seat member states and especially between the latter concept and the free movement provisions have been no more successful. The 1968 draft treaty on the mutual recognition of companies signed in Brussels on the 29<sup>th</sup> February 1968 was felt to be a flawed document which attempted to reconcile the two plainly irreconcilable systems of recognition by offering room for both of them to exist simultaneously within the remit of the treaty. Clarke<sup>29</sup> called the draft treaty '*a typical, but extreme example of a Community fudge, which, in the event, satisfied no one.*'<sup>30</sup>

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<sup>25</sup> Case 81/87 see fn 1 infra p 1

<sup>26</sup> Stephan Rammeloo, "*Corporations in Private International Law – A European Perspective*" Oxford University Press.

<sup>27</sup> France, Germany, Belgium, Italy, the Netherlands and Luxembourg

<sup>28</sup> *Supra.* Rammeloo n. 26 p 25

<sup>29</sup> M.G. Clarke QC 'The conflicts of law dimension' *Corporate law. The European dimension.* Ed. A Celia Tranting. Butterworths

<sup>30</sup> *ibid* p164

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The Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial matters, signed in Brussels on 27<sup>th</sup> January 1968 also encountered problems, since the national court first seized was allowed to inflict its own recognition rules on the dispute, allowing the added confusion of either positive or negative jurisdictional conflicts, where either two, or no national courts were capable of claiming jurisdiction.

### **The Lamot Doctrine**

Interestingly, this problem of a potential dual nationality is also perceived under a doctrine which has been quietly facilitating corporate mobility between Belgium and the United Kingdom and the Netherlands<sup>31</sup> since 1959 – the *Lamot*<sup>32</sup> doctrine. The Belgium Supreme Court, on being asked to decide a case concerning the transfer of the head office of Lamot Ltd, a company registered in England to the city of Mechelen in Belgium, concluded *inter alia*;

...it cannot be concluded from any Belgian legislative provision solely on the ground that a company has transferred its head office in the way described above, it has ceased to be a legal person under Belgian law.<sup>33</sup>

There are five conditions which must be fulfilled if the seat transfer is to be realised:

- The absence of *fraus legis*;
- All legal requirements of the emigration company must be obeyed;
- The immigration country must not oppose the continued existence of the legal person;
- The continued existence of the legal person must be allowed under the law of the emigration company;<sup>34</sup> and
- The structure of the company should be fundamentally compatible with the law of the immigration country.<sup>35</sup>

This being a decision of national law taken by a national court it is perhaps unrealistic to expect such a pragmatic approach be adopted by the wider EU community. The doctrine certainly is not without its problems, temporary dual nationality being among them, and the Courts legal reasoning becomes puzzling when applied to the facts of the case, but a mutually agreed and agreeable solution to corporate mobility between member states with disparate conflicts laws was thereby engendered and has been followed ever since. Rammeloo<sup>36</sup> makes the salient point that the decision by this Belgian court: ‘Which after all dates back to the mid-1950’s, seems to be more in the spirit of EC law than *Daily Mail*.’

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<sup>31</sup> Note that the UK and Netherlands are incorporation states, Belgium is a real seat theorist.

<sup>32</sup> Cass. 12 Nov 1956 , Pas 1966 I p.336

<sup>33</sup> Rammeloo’s translation – see fn 26 pp 281

<sup>34</sup> This will principally favour incorporation states

<sup>35</sup> See Rammeloo – fn 26 post

<sup>36</sup> *Ibid*

The resolution to the wider problem of corporate mobility, the struggle between allowing a company its choice of law (incorporation) and enforcing a method of legislative control over the company (real seat) appears, after case law and conventions, as far away as ever. To move forward, either a decision needs to be taken to bring all EU member states into line, or a third way of recognition needs to be established within the Community, favouring neither pre-existing rule.

## Legislation

Case law, it would seem, has little to offer to the problems of primary establishment, dealing – as the above cases do – with the concept of secondary establishment of a company validly incorporated in another member state. Arguments that the ECJ has signalled the death of the real seat doctrine in *Centros* may also be premature, particularly as this idea seems to go against the general tide of secondary legislation in this area currently being produced. It is to this legislation that this paper will now turn.

In one sense, the idea and the object of the 14<sup>th</sup> Company Law Directive are already obsolete. Specific, primary legislation has been in place since the inception of the European Economic Community in 1957 to deal with the issue of corporate mobility within the Common Market;- Art 293, (formerly 220) states:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:  
...The mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of a transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries...<sup>37</sup>

This Article gave rise to the ill-fated draft treaty of the Hague Treaty,<sup>38</sup> and it may be safe to assume this Article was the one the ECJ had in mind when it spoke about ‘future legislation’ in *Daily Mail*. It is true that the problems of ratifying such a convention with 25 member states would be formidable, and history records the failures past, even with many fewer member states. The wording of the Article may however be instructive. Although a convention ratified by all member states is clearly one way of fulfilling the obligations of Article 293, ‘*enter into negotiations with each other*’ could also suggest a member state by member state approach, with agreements brought into being as and when the issue of corporate migration arises between any two member states. The logistics are difficult to imagine, but European Union Countries have little problem in negotiating reciprocal agreements for corporate recognition and mobility rights between themselves and non-EU countries, for example Germany has such an agreement with the USA, and Italy has already negotiated reciprocal rights with other member states, allowing companies to retain legal personality when transferring between member states. In this light, the intractability of member states over their clear obligations in Art 293 become suspect,

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<sup>37</sup> Article 293 TEC

<sup>38</sup> See page 11 *infra*

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and the ECJ is seen to display a rare modesty in not insisting treaty obligations are enforced. That a Court which has instigated legislative supremacy, direct and indirect effect and state liability as a means to efficate Community law and values, should be so wary of such a comparatively minor piece of the treaty, (at least in effect) is puzzling. No less so is the Commissions perceived unwillingness to bring Article 226 actions against member states for breach of Art 293. However, there are currently no such negotiations between member states, either pending, or completed under Art 293 TEC.

Another treaty provision that may be relevant is Article 65(b) TEC, which states:

Measures in the field of judicial cooperation in civil matters having cross-border implications...in so far as necessary for the proper functioning of the internal market, shall include...

(b) Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

Company law is plainly within the remit of 'civil matters having cross-border implications' and judicial cooperation on a national level would do much to alleviate the harshness of the individual member states conflicts provisions. Indeed, this seems to be precisely what occurred in the Belgium courts in 1959 at the inception of the Lamot doctrine – proof again, in spite of the difficulties of the doctrine – that cross border corporate mobility can transcend conflicts provisions. However, as far as other member states are concerned, in the field of corporate mobility at least, article 65 has been no more noticed or adhered to than article 293. Further, article 65 has not been mentioned in the ECJ's judgements in this area. It could be argued that article 65 is procedural in nature, but the clear mention of the functioning of the internal market and the conflict provisions may invite another interpretation.

The fact that such obvious, primary legislation has been virtually ignored by the EC institutions is one of the reasons that the 14<sup>th</sup> Company Law directive has become necessary for corporate governance within the EU. The directives long gestation and tortuous labour have already been alluded to, but another piece of EC legislation which came into force on the 8<sup>th</sup> October 2004 may have made the need for the 14<sup>th</sup> less pressing than it hitherto has been.

### **The European Company Statute**

The idea of a truly European company has been around since 1959, when the concept was introduced by Professor Saunders in the opening lecture of the Rotterdam School of Economics.<sup>39</sup> It too has had a troubled history, beset with working groups and radical, rejected proposals,<sup>40</sup> before agreement on the Statute for the European

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<sup>39</sup> *Naar een Europese NV* delivered on 22<sup>nd</sup> October 1959

<sup>40</sup> Among others ; Proposal for a Council Regulation embodying a Statute for the European company (OJ C 124, 10<sup>th</sup> Oct 1970), Amended proposal for a Council regulation on the statute for European companies (COM (75) 150 final), Proposal for a Council regulation on the statute for a European company and Proposal for a Council directive complementing the statute for a European company with regard to the involvement of employees in the European company (OJ C 263, 16<sup>th</sup> Oct 1989), Amended

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Company was reached at the European Council at Nice in December 2002. The Statute<sup>41</sup> and the Supplementary Directive on Employee Involvement<sup>42</sup> created a new legal form of European Company or *Societas Europaea* (SE) which is intended to be available to companies above and beyond the legal forms available at a national level. This could be likened to a 'European citizenship' in that it does not impinge upon the nationality of the legal person, which has to be granted by the member state where the company is registered, but gives rise to an extra bundle of rights and advantages not available to the national corporate form, among them, the right to corporate mobility within the EU subject to a specific set of processes which must be followed.

This new corporate form, and new set of processes, however is intrinsically linked with the country where the company is registered by being subject to many of the company laws applicable to a non-SE company within that member state.<sup>43</sup> As far as corporate mobility is concerned, the Statute makes what may be considered a surprising choice, by opting for the Real Seat connecting factor as mandatory for SE's. This is sometimes seen as the 'hardest' rule of the two connecting factors, the least flexible and the most restrictive of movement within the Internal Market, as well as going against the general movement against the real seat theory that may be evident in case law such as *Centros*. By choosing this as a mandatory connecting factor, the drafters of the statute leave themselves open to the criticism that they seem to be actively *discouraging* corporate mobility within the EU. Critics of this choice by the drafters of the Statute may have overlooked the 'new' circumstances under which companies are required to conform to the real seat theory.

Problems with the real seat theory have arisen, it must be remembered, in cases regarding the secondary establishment of companies, and principally because of the wording of Art 48 which demands that a company seeking the right to establishment must be 'formed in accordance with the law of a member state'. In the scenario of a company wishing to exercise the freedom of primary establishment, which would be the case under the European Company Statute, the adoption of the real seat criteria is good for legal certainty as it will not allow the formation of 'brass plate' companies, something that has been a bone of contention amongst member states in cases such as *Centros* and *Inspire Art*, fearful of fraud, yet restricted in the measures available to them by virtue of Art 43 and ECJ case law. The link with the company law of the member state in which the company was registered would therefore be guaranteed, but the Statute may still be seen to not discourage 'forum shopping' by companies because of the use it makes of national law in the areas not covered by the new legislation. A straightforward harmonisation of all aspects of company law would be seen as removing incentives for corporate mobility but the use of a hybrid mix of harmonisation where appropriate and national law at other times means an SE may still be attracted to a particular member state because of its taxation<sup>44</sup> regime, (and be able to move to that member state without dissolution), because the question of

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proposal for a Council regulation (EEC) on the statute for a European company (OJ C 176, 8<sup>th</sup> July 1991).

<sup>41</sup> Council Regulation (EC) no. 2157/2001 of 8<sup>th</sup> October 2001

<sup>42</sup> Council Directive 2001/86/EC of 8<sup>th</sup> October 2001

<sup>43</sup> See Recital 20 European Company Statute

<sup>44</sup> Or competition, intellectual property or insolvency – Recital 20

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taxation remains outside the European Company Statute and so subject to the national law where the SE is registered. This would still allow member states to attempt to attract companies to their territory by having an attractive company law regime and may lead to a useful harmonisation of company law by consent in the long term as member states disposed of onerous company law provisions which were 'out of step' with the laws of other member states.

### **Tax Provisions**

The other major criticism of the European Company Statute is that it omits the tax regime from its remit, but as has been pointed out, the disparity of the national systems could be a positive boon to encouraging corporate migration leading to a gradual harmonisation of tax regimes by consent, a much more acceptable outcome than a proscribed harmonisation by application of ECJ case law or contested legislation. There are however, several tax advantages to be had by forming an SE, for instance being able to balance out profits and losses made by parts of the company which are no longer considered to be subsidiaries, but as establishments under the same company umbrella.

### **Employee Participation**

The European Company Statute has a companion Directive<sup>45</sup> on the involvement of employees, which is necessary due to the wide divergence of systems of employee involvement in corporate decisions throughout the EU. The problem of employee rights in the event of a corporate transfer from one member state to another has been one of the major sticking points of the 14<sup>th</sup> Company Law Directive. Member states have been understandably anxious not to find companies able to circumvent their own stricter systems of employee participation (and hence protection), by migration, or to have to accommodate versions of participation which have arisen in other Member states where a company may have migrated from, but which have no equivalence within the legal system of the host state.

Based on the Davignon Group Final report, the Directive basically adopts a 'hands off' approach by relying initially on the concept of freedom of negotiation between the parties for three of the four corporate forms permissible under the ECS.<sup>46</sup> Only if the parties fail to agree within a specific time deadline do 'standard' rules come into play. These rules walk a fine line between trying not to impinge on national company law rules and traditions, while conterminously retaining rights acquired by employees prior to the establishment of the SE, and proceed on the 'before and after' principle described in Recital 18 of the Directive. These rules apply only to the formation of a SE in the first instance. If an SE, once established, wishes to transfer its registered office (and hence, under real seat theory, its head office or principle place of business as well) employees have less protection.

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<sup>45</sup> See fn 42 post

<sup>46</sup> By merger, by creation of a common subsidiary (subsidiary SE), by creation of a holding company (holding SE), or by conversion. The latter of this list are subject to slightly different rules.

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Article 8(2)b and Article 8(3) mentions that the implications for employees and their involvement should be explained in the transfer proposal,<sup>47</sup> assuming, it can be supposed, that having made appropriate arrangements for employee participation (or otherwise) depending upon the 'free negotiation' or the 'before and after' principle on the formation of the SE, on the occasion of the transfer of the registered office there will be employee representatives already in place (or otherwise) to protect the interests of the workers. Failing that, it may be assumed that the national employment laws will apply to workers who lose their positions or otherwise suffer through the transfer going ahead.

This may be felt to be an unsatisfactory scenario. The individuals with the most to lose in a company transfer of head office will not be the shareholders or the creditors, who indeed may be the major beneficiaries of any transfer for cost or taxation reasons, but the workers in the company. As the subject is transfer of head office between member states, it may be totally impractical for many workers to follow the new registered office out of its home state, facing as they would the necessity to move their place of abode and learn a new language in many cases, although border situations may be much less disruptive. The practical outcome of the transfer for employees then would be redundancy. On the other hand it may be felt that employees in this situation deserve no special treatment above the many employees who lose their jobs every day for all sorts of reasons, and a company with much to gain by migration would have to factor the costs – both social and economic – into its decision to move, a decision which would not be taken lightly. However, the plans made for employee protection upon the formation of an SE do seem to count for little or nothing if that SE then wants to move its registered office away from its home state. Even more alarmingly, if the 14<sup>th</sup> Company Law Directive ever becomes law, the employee protection will be identical to the SE provisions, with the Directive being amended to cover the fourteenth Directive as well.

However, Rajak<sup>48</sup> makes an interesting plea for employee participation and co-determination to be left to be considered at other times and by other legislative or other acts. He argues that these concerns have no place in the regulation of company law which should properly deal with how the legal person is formed, operates and can be un-formed. This would certainly make for a less complicated Company law programme within the EC, and would facilitate agreement between member states, but the clean separation of the two areas is unlikely to occur, and serves to emphasise the multi-party aspects of company law as a whole.

The European Company Statute then provides a detailed procedure for the transfer of an SE from one member state to another without dissolution even where the national law of the member state forbids such an action for companies otherwise registered on its territory. The perennial problem of the conflicting 'connecting factor' has been neatly solved in the regulation, by the wholesale adoption of the real seat theory. In the event of a transfer of an SE from one member state to another, but where the head

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<sup>47</sup> 'The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees' Article 8 (3)

<sup>48</sup> *Supra* n. 59.

office does not accompany the registered office (ie the real seat theory is not adhered to), the legislation gives powers to the member state where the SE is registered to oblige the SE to rectify the position. Where an SE fails to do so, the Member state where the SE is registered must take steps to liquidate the company and must set up a judicial remedy which has a suspensive effect.

The procedure for the migrating company to follow is laid down principally in Article 8 of the European Company Statute paragraphs 2 to 13, paragraph 14 allows member states to refuse to transfer the registered office of an SE on the grounds of public interest, (and subject to judicial review), and paragraphs 15 and 16 are protective measures to prevent fraud and to safeguard creditor and other interests.<sup>49</sup>

### **The European Economic Interest Grouping**

Small firms, companies or indeed individuals not eligible to form an SE may consider a European Economic Interest Grouping (EEIG) as an alternative. A Regulation adopted in 1985<sup>50</sup> allows for a group to be formed 'to facilitate or develop the economic activities of its members.'<sup>51</sup> The use of an EEIG is a way for smaller commercial bodies to cooperate with others from different member states, by pooling resources or skills to the benefit of all the participants and possible academic or technical advancement that would not have been achievable by individuals acting alone. This regulation is relevant to the present discussion as it clearly provides for the 'official address' of the EEIG to be transferred from one member state to another while maintaining its capacity as a legal person by virtue of Article 13.

Is the 14<sup>th</sup> Company Law Directive then pre-empted by the European Company Statute? It is submitted that this is not the case. The plain truth is that the European Company Statute does not solve, or even pretend to tackle the problems of corporate mobility apparently given to companies and firms under Article 48 TEC. The creation of a new corporate form is a major step forward in European company law, but does not alter the position of a validly constructed national corporation wishing to move its registered office or *de facto* head office to another member state and be subject to the laws of that member state without liquidation. Should a company that wishes to move its registered office or *de facto* head office be obliged to change its corporate form in order to take advantage of a plainly expressed right given in the treaty? If the company is only present in one member state it will anyway not be eligible to form a European Company. A company which wishes to become an SE by transformation must already have a subsidiary governed by the law of another member state for at least two years.<sup>52</sup> This ensures the genuine nature of the transnational element it has been felt necessary to insist upon in an SE. If the European Company proves to be a simple and successful format, then the 'carrot' of easier migration may tempt companies to convert or otherwise adopt the form. This would be advantageous to the cohesiveness of European Company law as a whole as, over time, the SE becomes the regular corporate form and the idea of a company as a

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<sup>49</sup> See further discussion Section II – post.

<sup>50</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Interest Grouping (EEIG).

<sup>51</sup> *ibid.* Article 3.

<sup>52</sup> Council Regulation (EC) 2157/2001 recital 11

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creature purely of national law becomes obsolete. Clearly a long-term goal. As usual however, the 'transition' period would be one of uncertainty and discrimination particularly against small companies which would not be able to afford the start up capital of an SE of EUR 120,000. These companies, possibly the most likely to move between member states due to their relative uncomplicated systems of production and management, would be prevented from easy migration under the SE corporate form. The treatment of employees in the event of a company migration does however seem to be solved through Directive 2001/86/EC which has been deemed acceptable by all the member states. It may be however, that member states will choose to implement the legislation in ways which may give stronger protection to employee interests than the directive requires, taking the directive as a minimum standard and hence the problem will be a recurring one.

Ultimately of course, neither the European Company Statute nor the EEIG legislation achieves the freedom of primary establishment for legal persons in line with Article 48 TEC. These pieces of agreed legislation do however prove that member states are not averse to relaxing their preferred conflicts rules in the face of workable harmonisation that does not appear to be detrimental to their national corporate interests. Maybe this is the reason for the agreement on the SE Statute. Member states may feel it has little relevance to their systems or that it will not prove a popular corporate form. The EEIG certainly seems to have been helpful in allowing smaller companies to form prosperous links with other such bodies and any transfer of registered or head office occurring will have minimal impact on the member states as the EEIG of itself is not allowed to make profits, and as such will be very small fry as regards taxation revenue for a member state. A country will clearly gain from the kind of link available by virtue of formation of an EEIG to boost the development and business of its own small companies with no corresponding loss if the 'head office' of the EEIG itself is transferred to another member state.

The conclusion of this brief look at some relevant EU law is that apparently workable legislation exists that allows and encourages corporate mobility with little problem or complaint from member states. This is encouraging for European company law as a whole, as is the successful introduction of the SE statute after so many years, but it does beg the question that if a workable solution has been found, why is the fourteenth company law directive still getting such a rough ride, and will it – ultimately – overtake the thirteenth law directive<sup>53</sup> as the longest running piece of potential legislation that never was.

### **The Fourteenth Company Law Directive**

The search for a workable directive to facilitate the corporate mobility denied to the legal person in *Daily Mail* began soon after that case in 1993 with the publication of a study by the Commission<sup>54</sup> which led to the draft proposal for a Fourteenth Directive on the transfer of the registered office or *de facto* head office to an other member state

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<sup>53</sup> The 'take-over' directive aimed to protect (inter alia) the interests of shareholders when their company is subject to a takeover bid or a change of control.

<sup>54</sup> 'Study on the transfer of the head office of a company from one member state to another' - KPMG European Business Centre, Brussels 1993

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with a change in applicable law, issued in 1997. The proposal draws its validity from Article 44 TEC which begins:

In order to attain freedom of establishment as regards a particular activity, the Council, acting in accordance with the procedure referred to in Article 251<sup>55</sup> and after consulting the Economic and Social Committee shall act by means of directives.<sup>56</sup>

The long awaited fourteenth company law directive avoids the perennial problem of seeming to favour one set of conflict rules over another, by introducing a 'third way' for corporate mobility to be undertaken and leaves member states rules on primary establishment untouched. Companies (and the directive applies only to companies, not to firms, thereby engendering a split between the incorporated and the unincorporated which does not exist in the Treaty provisions) will only be 'allowed' to migrate and become subject to the laws of another member state when they follow the procedure set down in the directive.

The new procedure put forward in the proposal for the fourteenth company law directive (hereinafter 'the directive') is almost directly synonymous with the one adopted in the European Company Statute (hereinafter 'the statute'):

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<sup>55</sup> Article 251 refers to the use of the co-decision procedure for the legislative process

<sup>56</sup> Article 44 TEC, s1

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The statute	The directive
The transfer proposal including; Proposed office Proposed statute Proposals regarding employee participation The proposed transfer timetable Rights for protection of shareholders and/or creditors Article 8(2)	Transfer proposal including; Proposed office Proposed statute Proposals regarding employee participation The proposed transfer timetable Article 4(1)
Publication of the transfer proposal in line with directive 68/151 EEC <sup>57</sup> Article 8(2)	Publication of the transfer proposal in line with directive 68/151 EEC Article 4(2)
Management or administrative organ draws up a report justifying legal and economic reasons for the proposed transfer and the likely effect on shareholders, creditors and employees Article 8(3)	Management or administrative organ draws up a report justifying legal and economic reasons for the proposed transfer and the likely effect on members and employees Article 5(1)
Creditors and shareholders must be able to examine the transfer proposal and report at least one month before the general meeting and to take away free copies of the documents if required Article 8(4)	Creditors and shareholders must be able to examine the transfer proposal and report at least one month before the general meeting and to take away free copies of the documents if required Article 5(2)
General meeting to decide transfer of seat Must be at least two months after the publication of the transfer proposal <sup>58</sup>	General meeting to decide transfer of seat Must be at least two months after the publication of the transfer proposal
Publication of the decision and the amendment to the company statute in line with directive 68/151 EEC by MS in Which company has it's registered office	Publication of the decision and the amendment to the company statute in line with directive 68/151 EEC by MS into whose jurisdiction company is transferring Article 6(4)
Competent authority in MS in which company has it's registered office must issue a certificate stating all formalities have been complied with before the transfer Article 8(8)	Competent authority in Ms in which company has it's registered office or <i>De facto</i> head office must issue a certificate stating all formalities have been complied with Article 9
The SE is registered in the 'host' member state. Once this is done, notification to the 'home' member state allows deletion	The company is registered in the 'host' member state. Once this is done, notification to the 'home' member state

<sup>57</sup> First Company Law Directive – especially article 2 on disclosure

<sup>58</sup> Subject to appropriate majority vote

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of the old registration Article 8 (9), (10), (11)	allows deletion of the old registration Article 11(1), (3)
Publication of the re and de-registration shall take place in the member states concerned in line with directive 68/151 EEC Article 8 (12), (13)	Publication of the re and de-registration shall take place in the member states concerned in line with directive 68/151 EEC Article 11(4)
Notice must be given of the SE's transfer of registered office in the Official Journal of the European Communities Article 14(2)	

Both the procedures also give the right to take steps to ensure the interests of creditors and 'holders of other rights' which arise before publication of the transfer proposal have been adequately protected. This duty of protection is on the SE in the statute (Article 8(7)), but is left to the creditors and holders of the rights themselves to require the security is given under the directive (Article 8(1)). The Directive also states that a member state MAY adopt provisions to ensure protection of minority shareholders who oppose a transfer. This would seem to suggest a buy out scheme at a fair price, but does appear to leave the discretion for measures of this kind firmly within the remit of member states. Both the statute and the directive forbid transfer where insolvency, liquidation or winding-up proceedings have been brought against the company in question, but Rajak<sup>59</sup> makes the point that this seems to penalise a company which was once struggling and may have faced such measures, possibly some time ago, but is now a successful and solvent concern.

Only the statute for the SE seems to allow the 'home' member state to oppose the move by the SE on the grounds of 'public interest' within the two months after the publication of the transfer proposal. There are no clues however, as to what 'public interest' may be. Otherwise the two pieces of legislation – as far as they concern the mobility of the legal person – are very similar. Indeed it makes perfect sense, having found what is apparently a workable (or at least non-contentious) system for the transfer of the registered office or *de facto* head office of a company, to apply the same concept throughout EC legislation as and when it is required. Neither procedure is critical of the domestic conflicts provisions, and each leaves the provisions untouched as far as national law is concerned, and is advantageous in proceeding by consensus rather than command. This single procedure is bound to be less complicated in the long run than an alternative and acts to harmonise and normalise the relationship between an SE and a national corporate form. Further to this, the Supplementary Directive on Employee Involvement which accompanies the SE statute is to be employed (as amended) to regulate employee involvement when a company relocates under the proposed 14<sup>th</sup> directive. Making one procedure different

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<sup>59</sup> Professor Harry Rajak, "*Proposal for a fourteenth European and Council Directive on the transfer of the registered office or de facto head office of a company from one member state to another with a change in applicable law – The legal issues in the United Kingdom arising out of this proposal*"

European business law review Jan/Feb 2000 pp 43-49

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to the other may therefore have led to over-complication on the application of directive 2001/86.

The new system for transfer of registered office or de facto head office (the very phrasing reflects the delicacy of the subject as it is careful to include both 'connecting factors' which member states may use),<sup>60</sup> means that both incorporation states and real seat states must shift the parameters of their conflicts provisions, as they now must allow a company with its registered office on their territory to move to another state without the attendant liquidation, something, which states previously did not allow.

### **Tax Provisions**

As with the European Company Statute, provisions for the taxation of a legal person which becomes subject to the laws of another state without dissolution have been largely ignored in the Directive. It will be recalled that the infamous *Daily Mail* case centred around just such an issue. Given that the Directive makes clear that a company must be allowed to leave its home state without liquidation, the payment of a liquidation tax (the present major disincentive for inter-state corporate mobility) will not be an issue. The company is however still departing from its home state and taking itself beyond the home states laws. It is therefore in the interests of the state of departure to receive the tax that it considers to have fallen due, or at least to have a security to that effect from the company in question.<sup>61</sup> Rammeloo<sup>62</sup> suggests that 'tax neutrality'<sup>63</sup> may be a way out of this problem, but then goes further to suggest 'purely tax-driven' transfers should be a ground for the home member state to refuse a company leave to depart. Drury<sup>64</sup> makes the point that a potential reason for member states to object to the proposed directive would be the fear that large tax payers will migrate to more favourable fiscal regimes. It is of course a valid point, but not a valid argument given the overriding ethos of the EU as an internal market with freedom of movement, and given the clear approval of this strategy by the ECJ in the *Daily Mail* case itself. In the current state of EC law, it is difficult to imagine the ECJ allowing a state to impose a restriction on a company wishing to leave its territory, or making the departure contingent on certain taxes being paid. This would surely be a breach of Article three of the Directive,<sup>65</sup> as well as a breach of fundamental freedom provisions.

### **Employee Participation**

The protection of the rights of employees to participate in corporate governance has been fiercely defended by member states which have such provisions in their national company law. However, the provisions differ substantially between EU members,

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<sup>60</sup> See definitions of these two concepts in Article 2 of the proposed directive

<sup>61</sup> Article 8(2) of the proposed Directive may enable Member states to insist on security for any outstanding 'debts to public bodies'

<sup>62</sup> *Supra* n.26 p 310.

<sup>63</sup> Characteristic that taxes do not interfere with the natural flow of capital toward its most productive use.

<sup>64</sup> R Drury 'Migrating Circumstances' (1999) *European Law Review* 24

<sup>65</sup> See below, p

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and some member states have no such provisions at all. Without harmonisation, something that would clearly be resisted by member states, employee participation has been the hardest fought and potentially the most divisive issue within the 14<sup>th</sup> Company Law Directive and responsible for the dramatic stalling of the proposed legislation in the middle of 2004. At the time of writing<sup>66</sup> it is envisaged that employee participation will be governed by Directive 2001/86<sup>67</sup>, which will be amended to take account of the new legislation if and when it is adopted. The limitations of 2001/86 have already been discussed, but it may be safe to assume that where the EU legislation leaves rights unprotected then national provisions such as apply to other national corporate forms will be used to protect employees. Rameloo<sup>68</sup> considers that '*employees are bestowed with a crucial position*' under Articles 4 and 5 of the Directive, but this position may be more imagined than real. True, the transfer proposal must make clear how employee representation is to be handled, and the likely effect on employees and the proposal and management report must be available free to the employees (or other interested bodies) at least a month before the general meeting where a vote on the proposal will be taken. These measures can easily be seen as administrative only and more in the spirit of rules already in place in most member states that prohibit secrecy when livelihoods are at stake, than a newly granted power to employees to make a meaningful contribution to the debate. It seems that employees certainly cannot prevent a company from changing its nationality as long as the appropriate majority of shareholders agrees with the move.

Although member states cannot be at fault for wanting to protect their employees, it is to be hoped that the constant arguments and delays over this aspect of corporate mobility give way to a more pragmatic judgement. A company wishing to transfer its head office or principle place of production *within* a member state will enter into negotiations with the workforce and their representatives with a view to minimising the loss of jobs and skilled personnel, but rarely, if ever, would a workforce be able to prevent such a move. The concept of the Internal Market is to make inter state mobility as simple (and as numerous) as intra-state. To suggest that employees and their representatives should have more power and rights in one scenario rather than the other would be unjustified.

Overall, the strength of European Union companies will be increased with the loosening of the stranglehold of the purely national form, whether through the SE or through enhanced corporate mobility. With this increased strength will come an increased competitiveness with, for instance, American or Japanese (and latterly Chinese) corporate giants, with the attendant rewards for member state economies and employment. Short term thinking in this area should not be allowed to obscure the long term goals of the Internal Market in which the free movement of companies may have an important part to play.

## **Article 10(2)**

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<sup>66</sup> November 2004

<sup>67</sup> See page 11 – 12 and discussion thereunder

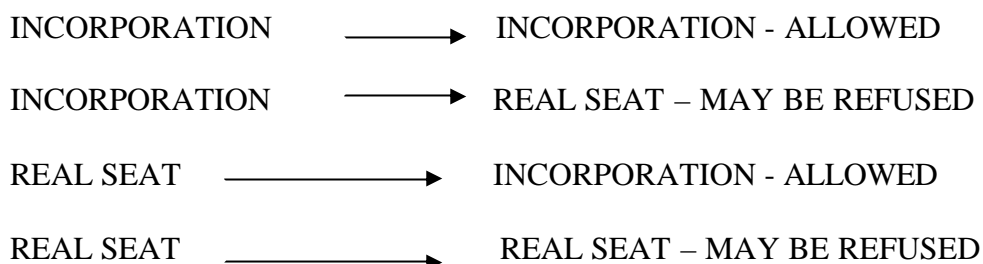
<sup>68</sup> *Supra* n 26 p 307

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A potential major problem in the Directive comes in Article 10(2), which allows real seat member states to refuse to register an ‘incoming’ company which does not bring its head office with it upon registration, ie, the head office is in another member state. This could, in theory, lead to the following situation;



Looked at dispassionately, this can be seen to be exactly the situation that is so despaired of presently, and over the last forty years of the internal market, as regards secondary establishment. It is, in effect, allowing real seat adherents to continue to practise the theory, while demanding that incorporation member states accept a different and quite radical regime to the one on which their conflicts laws have traditionally operated.

Although the arguments for the practicality of the real seat doctrine, as enunciated in the previous section about the European Company (SE) hold up here as well, the different aims of the two pieces of legislation must be remembered. The whole object of the 14<sup>th</sup> Company Law Directive is to:

...enable companies to transfer their registered office from the member state where they are registered to another member state under an appropriate procedure providing legal certainty.<sup>69</sup>

The concept behind the Directive is surely to allow an English company, registered in England and subject to English law, to become a German or Italian company and subject to the laws of that member state by following the procedure in the directive, and shedding its ‘English nationality’ while simultaneously being endowed with German or Italian ‘nationality’ and considering itself subject to the company laws of its chosen ‘host state’. It is to be suggested that one of the main reasons a company may put itself through this procedure would be because it finds the company laws of another member state more advantageous or attractive than the laws of its home member state, and one of the main aims of the directive must be to facilitate the free movement of such a company to the advantage of that company in particular and the internal market as a whole.

Article 10(2) puts up potentially huge barriers for a company wishing to make a transition which the directive is designed to allow with the least possible fuss. The relocation of a company’s head office or principle place of business could represent the relocation, (or more likely redundancy and re-recruitment) of hundreds of jobs, the

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<sup>69</sup> *Supra* n. 5

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sale and purchase of real estate, and, by virtue of the definition of 'head office' in some member states, the relocation of the boards of directors or senior management of the company, who would then have to reside within the 'host' member state. These factors are going to be major disincentives to corporate bodies considering mobility within the EU, and may be grounds for discontent amongst member states that adhere to the incorporation theory who see the requirement for compromise on their part with no equivalence on the part of real seat theorists. If a company merely wishes to move its registered office, because its principle place of business has, over time, become another member state then Article 10(2) is unlikely to be problematic, but again in this circumstance, there would be no compromise on the part of real seat member states because if the *de facto* head office was felt to be in a different member state to the registered office, and the registered office was in a member state that has the real seat as its chosen connecting factor, then the company in question would not be a valid company in the eyes of that member state and would not be allowed to take advantage of the procedure mooted under the 14<sup>th</sup> Company Law Directive anyway.

It is hard to see therefore exactly where a real seat member state has to compromise its conflicts provisions to align itself with the Directive, except in circumstances which are clearly advantageous to it such as when a company wishes to move its head office *and* registered office into such a state. The directive would facilitate this move, which presently would not be allowed by either real seat or incorporation theorists<sup>70</sup> without the winding up and liquidation of the company and its re-incorporation in the host state. By being allowed to demand that the chosen connecting factor is respected, real seat states would then gain the added bonus of job creation and the fiscal advantages for a given area that go along with a rise in the employment rate. However, a state which adheres to the incorporation theory arguably also keeps its chosen connecting factor with the corporate body, that of the registered office, so the directive could be accused of doing no more than accomplishing its task of ensuring corporate mobility without liquidation, but allowing the internal conflicts laws of the individual member states to stay as far as possible intact. The fact that some member states have an 'easier' conflicts provision with regard to the formation and valid recognition of a company than others at least as far as secondary establishment goes may indeed have already led to a kind of Delaware effect into those member states as companies seek to avoid – for instance – onerous capital provisions. It may be said that it is hardly for these member states to complain then if they are expected to 'redress the balance' to a certain extent by making a bigger compromise in terms of their conflicts provisions under the proposed directive.

### Article 3

Article three of the directive may also be problematic:

...member states shall take all measures to allow a company to transfer its registered office or de facto head office to another member state.

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<sup>70</sup> Except possibly Italy

All measures? Rammeloo<sup>71</sup> asks if this phrase is going to encompass taxation systems too, problems with the 'home' state requiring due taxes to be paid before a company leaves have been real since before the *Daily Mail* case and continue to be so. Or what about the conflicts provision themselves? These are surely the biggest obstacle to corporate recognition between member states and hence valid corporate mobility. Article three could be seen as the Directives equivalent of Article 10<sup>72</sup> of the TEC, as a clause establishing a duty of cooperation for the member states in this area. Given the ECJ's propensity to rely on Article 10 TEC for the furthering of the teleological aims of the Community, this could potentially give Article three of the Directive a huge scope.

Might 'all measures' be read in the same light as 'all trading rules' in *Dassonville*?<sup>73</sup> If so, anything capable of hindering, directly or indirectly, actually or potentially, intra community corporate mobility, may be deemed to be in breach of the provision.

As stated in the first section of this paper, the ECJ seems to 'prefer' the incorporation theory as regards secondary establishment as it is more in tune with the Community's ethos of free movement, the judgement in *Centros* is clear on this. What the ECJ has yet to explore, and what may easily arise under a challenge to a member state by a company wishing to exercise its right to free movement under the directive, is the extent to which the conflicts provisions themselves fall under the remit of 'all measures', as far as primary establishment is concerned.

Given the progressive convergence of the free movement provisions across Community law as a whole, this is not difficult to envisage. The directive will both satisfy article 293 in that member states have entered into negotiations with each other to secure rights of cross border mobility for legal persons on their territory, and prove to be a valuable piece of secondary legislation for the interpretation of those rights by the ECJ. If the convergence of free movement provisions is taken as fact, then in a case concerning a member states reluctance to either allow a company to leave its territory or to welcome an incoming legal person,<sup>74</sup> the ECJ's and the national courts duties will be clear:

- Does the member states measure hinder or restrict the freedom?;
- If yes, is there a valid derogation under the treaty or under secondary legislation? (the 'public interest');
- If there is no valid derogation, is it possible to discern a valid 'rule of reason' due to mandatory requirements of a member state that are non-discriminatory and proportionate.

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<sup>71</sup> See fn 26

<sup>72</sup> Member states shall take all appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the Community. They shall facilitate the achievement of the Communities tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

<sup>73</sup> Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837

<sup>74</sup> Although there is little to suggest this will be a problem

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It may be that ECJ interpretation of the Directive will indeed come to this conclusion based on previous case law concerned with the free movement provisions, and given that these precedents are clearly concerned with a fundamental freedom granted under the Treaty of Rome, secondary legislation, such as this directive which clearly allows the retention of the real seat theory may be found to be in breach of Treaty provisions as far as Section 10(2) is concerned.

The next battle to then be fought before the national and European courts will be the definition of the 'public interest' and the extent to which the 'rule of reason' can infiltrate this area of law as it has done so many others.

### **Derogations?**

Equating the legal person with the natural person may also suggest that the Article 39(3) or Article 46 derogations of public health, public policy and public security may be available to member states wishing to impose restrictions on corporate mobility, but it may be relatively easy to dismiss this claim. The Articles above are clearly based on the nationality of the worker or service provider, but from the corporate aspect, the freedom sought is not to operate as a 'foreign company' – a right already granted under Articles 43 and 48 anyway, and subject to Article 46 – but to transform itself into a *national* company, making any claims of discrimination based on nationality spurious. It seems that as far as the 14<sup>th</sup> Company Law Directive is concerned, it is in the hands of the 'home' state only, the state that the company is emigrating from, to ensure the procedures and formalities for the transfer are complied with. If they are, there is little legislation a 'host state' can turn to in order to prevent a company incoming. Although this balance of power is clearly correct in that the emigrating state has nothing to gain from letting a company move and so is more likely to see that procedures are strictly complied with.

### **Conclusion**

The Fourteenth Company Law Directive is needed by the European Union because the European Union needs corporate mobility. It is a clearly given fundamental freedom and a right increasingly required by the business community battling global economies of scale. Presently the international conflicts rules all but preclude the relocation of a corporate body across state lines without liquidation and re-incorporation in the host state. Both the incorporation and the real seat theories will fail to recognise an incoming company without re-incorporation in spite of the perception of incorporation as a more 'internal market friendly' provision. The principle problem arising from these facts is that, given the refusal by the ECJ and the Commission to enforce Article 293 or Article 65, no secondary legislation or relevant case law exists to guide the expectations of a company aspiring to cross border mobility. Thwarted, companies increasingly use the fiction of a 'brass plate' company in an incorporation member state with the 'real' head office then transferable – previously only within other incorporation states, but, after *Centros*, arguably throughout the Union. Although *Centros* does nothing for the freedom of primary establishment of companies, it may be seen - providing it is sustained and built upon by the ECJ - to provide a viable and less fussy alternative to genuine

corporate mobility within the EU. This will be to the disadvantage of states such as Germany which will not be able to enforce worker participation provisions within companies registered elsewhere, and Denmark which has high capital provisions for the setting up of a company. This may have already led to a 'Delaware effect' in places such as the UK with its low cost incorporation regime. It may therefore be that the 14<sup>th</sup> Company Law Directive is needed most by the Real seat theorists who are increasingly seeing their choice of connecting factor undermined by case law, but, in clinging to their conflicts provisions are not readily accessible to new companies which may be looking at a Europe wide territory.

The increasing harmonisation of European Company Law and particularly the adoption of the European Company Statute are large steps forward, and there is no doubt that the choice of the real seat as the connecting factor for an SE is a robust and practical decision. The success or otherwise of the SE may serve to prove to member states that the demand for corporate mobility or the truly 'European Company' is likely to be small which may engender confidence in the 14<sup>th</sup> Directive. However, even if the demand is miniscule, secondary legislation is still a must. The co-existence of the real seat and incorporation theories and the different aims of International and European<sup>75</sup> law which meet so untidily in this area are still problematic.

Progress however has been made and it is obvious that European Law, be it case law or legislation is making much more determined efforts to come to grips with the problem than member states alone would have had either the power or the inclination to do. Indeed, the recital to the proposed Directive states:

Whereas, in accordance with the principles of subsidiarity and proportionality set out in art 3(b) of the Treaty, the objectives of making it possible for a registered office or de facto head office to be transferred without affecting the connecting factors established albeit by diverging national laws cannot be satisfactorily achieved by the Member States acting in isolation; whereas they are not in a position to organise the entire operation in question since it transcends national frontiers whereas these objectives can therefore be achieved only through action at Community level.<sup>76</sup>

Accepting EU legislation as the way forward, and the acceptance of the Statute for a European Company appears to show willing on the part of the member states to at least bring reasonable discussions to bear on the fourteenth directive. Indeed, those real seat theorists who see their connecting factor undermined as contrary to EU freedoms in case law, may be the ones most eager for the protection that the Directive appears to grant to them. By accepting the proposal though, member states also leave themselves open to the interpretation of article 3 by the ECJ, which may be less than welcome.

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<sup>75</sup> International conflicts provisions aim to discover the 'proper law' to be applied in a given situation and then are satisfied – EU law is concerned with the legal problems between national and European systems on an ongoing and increasingly involved basis.

<sup>76</sup> Note article 3(b) is now Article 5

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Corporate mobility should not be a problem within the European Union at this stage in its history, any more than the free movement of goods or natural persons. At each stage of the progression of the internal market member states have had to accept that cherished national concepts were open to challenge and possible overruling by the 'new legal order' that has been created by the Treaty of Rome. National borders are now porous and member states accept that except in narrowly defined circumstances, they no longer have tight control over who or what moves legally into their territories. So it must be with legal persons also, and legislation in the shape of the 14<sup>th</sup> Company Law Directive is a clearly defined and workable solution based as it is on the successfully proposed Statute for a European Company. At the time of writing, the proposal is inexplicably stalled again, with a September deadline for a fresh draft fading into the distance, but hopefully the hiatus will be shortlived. With proposals for a European Private Company Directive already in the pipeline, the failure or shelving of the Directive would be an unmitigated disaster for European Company Law and the internal market and would allow the compartmentalisation of the corporate body along strictly national lines to continue unabated.