The creation of corporate mobility by the ECJ – a pure critique of reasoning

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Abstract: The article critically examines the development of corporate mobility in the European Union through the case law of the European Court of Justice (ECJ). It argues that the Court has effectively acted as a substitute lawmaker in the absence of coordinated legislative action by Member States, shaping the legal framework for cross-border corporate mobility under Articles 49 and 54 TFEU. Starting from the fundamental tension in international company law between the incorporation theory and the real seat theory, the author traces the evolution of ECJ jurisprudence from the *Daily Mail* decision onward. While these judgments laid the groundwork for the modern regime of corporate mobility and ultimately influenced the adoption of the Corporate Mobility Directive (EU) 2019/2121, the article argues that the Court's reasoning has often been inconsistent, contradictory, and insufficiently grounded in legal principle. Through a detailed critique of key decisions – including *Daily Mail*, *Centros*, *Cartesio*, *National Grid Indus*, *VALE*, *Polbud*, *Kornhaas*, and *Edil Work 2* – the author highlights doctrinal tensions, particularly concerning restrictions on the freedom of establishment, the treatment of letterbox companies, and the concept of abuse. The article concludes that, although EU law now offers clearer mechanisms for cross-border corporate mobility, unresolved inconsistencies in the Court's reasoning continue to affect legal certainty in this field.

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DOI: 10.5771/2752-177X-2025-4-343

A. Introduction

I. The basic problem of international company law

Corporate Mobility in the EU is a complex legal issue. It is fraught with difficulties that find their root cause in the assumption that companies are "creatures of the law" and therefore only able to do what their "creators" allow them to do. If one followed this thought through, it would also mean that companies can only exist and act in the realms of their jurisdiction. In the early days of modern company law, this calamitous notion was indeed tried by citizens in the US with a purpose to escape their obligations to banks from other states. The Supreme Court put however a firm stop to that unmeritorious attempt by invoking the rule of comity, i.e. the obligation to recognise the sovereign acts of other states.

Bank of Augusta v Earle, 38 U.S. (13 Pet) 519 (1839), 520: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places. It is indeed a mere artificial being, invisible and intangible, yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court. It is sufficient that its existence as an artificial person in the state of its creation is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of that place to exercise there the powers with which it is endowed".

It is safe to say that this ruling saved interstate commerce in the US (and at the end of the day the US as federal state). Moreover, it paved the way for the internal affairs doctrine and today's status of Delaware as main jurisdiction of American companies. Nevertheless, the notion that the artificial existence of companies (and other entities) required explicit recognition by other states remained strong in the 19th and 20th century. The testimony are numerous bilateral agreements between nations that contain explicit recognition clauses[1]. Art. 58 EECT (today Art. 54 TFEU) made such bilateral agreements redundant between the Member States of the EU.

Modern civil laws have overcome the necessity of explicit recognition[2]. The two well-known- doctrines of International Company Law, the incorporation theory and the real seat theory, both lead to automatic recognition of foreign companies by operation of law. The basic difference is that the incorporation theory accepts *every* company validly

1 See the encompassing account of Peter Kindler in Jan v. Hein (ed.), Münchner Kommentar BGB, XIII, 9th ed., Munich, 2025, 284-290.
2 Peter Kindler (fn. 2), 279.

incorporated in another state as a company of that state, whereas the real seat theory would only accept that company if it also had its real seat in the state of incorporation. Dependent on the variant of theory dominant in the jurisdiction, the real seat can either be defined by the central administration or by the principal place of business.

The incorporation theory is in line with the venerable rule of comity (= to accept the sovereign acts of other states). By contrast the real seat theory aims to secure the privilege of states as "creators" to *exclusively* make the rules for the companies that are in their jurisdiction. To achieve this purpose, it is hostile to "letter box companies" that are incorporated in state A with a view to trade solely in state B, thereby circumventing the national company law of B.

The real seat theory marks a decisive inroad to the rule of comity. In the worst case, the legal existence of foreign letter box companies is negated. They are either deemed a "*nullum*" or they are "requalified" as entities of the jurisdiction at their real seat. In both cases, the incorporators will lose the privilege of limited liability. Less restrictive jurisdictions accept the legal personality and the limited liability granted by the state of origin but deviate from the internal affairs doctrine and impose their own company law on the acts of the company and its organs. On the flip side, real seat theory countries tend to lock in their domestic companies. The requirement of a real seat in the jurisdiction of incorporation means that any relocation of it into a foreign jurisdiction raises issues of legality, even calling the continued existence of the company into question.

II. The doctrines of international company law and freedom of establishment under Art. 49, 54 TFEU

The artificial nature of companies and the complex rules of International Company Law are overlaid by the freedom of establishment under Art 49, 54 TFEU. This results in more complexity even though the starting point seems clear and simple:

Art. 49(1) TFEU: 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 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.

Art. 54(1) TFEU: 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 shall, for the purposes of this Chapter, be **treated in the same way as natural persons** who are nationals of Member States.

Every citizen of a Member State has a right to move to any other Member State without any restrictions. And the same should apply to the companies of the Member States. This would be easily achieved if all Member States followed the incorporation doctrine. Companies could relocate their "residence", be it the central administration or the principal place of business, in the same way as natural persons. The legal situation in Europe would mirror the law in the US.

However, the European Treaties refrained from prescribing the incorporation theory. To the contrary, the wording of Art 54 TFEU equally accepts the different connecting factors of incorporation theory ("registered office") and real seat theory ("central administration or principal place of business"). This led European corporate mobility into a mine field. Contrary to the US, relocations of the real seat were not generally accepted. The obvious way around this would have been to reincorporate under the laws of the destination member state. But this would have required the instigation of a harmonised cross-border regime for corporate restructurings. For the longest time, the Member States have been unwilling to put such rules underway. This was not an outright "*déni de justice*" but still a deplorable "*déni de (juste) régulation*".

B. The ECJ as substitute law maker - and the shortcomings under the rule of law

The indolence of the Member States left ECJ with the thankless task of developing the framework for corporate mobility in the EU. A long line of cases created the central pillars since *Daily Mail*: *Centros*, *Überseering*, *Inspire Art*, *SEVIC Systems*, *Kornhaas* and most recently *Edil Work 2* concerned the treatment of incoming companies by destination Member States while *Cartesio*, *National Grid Industries*, *VALE* and *Polbud* dealt (primarily) with barriers erected by departure Member States.

The latter streak of cases brought with it the *Cartesio*-right to cross-border conversions. This led to the Corporate Mobility Directive 2019/2021 that finally settled the law, at least with a view to companies. The Directive 2019/2121 has created ample options for cross-border mobility of companies within the EU. The Member States have implemented the Directive. In this respect, the present state of the corporate mobility in the EU is positive - and quickly told.

The article prefers to focus on how we got there. It is well known the jurisprudence of the ECJ laid the ground for the Corporate Mobility Directive. But it is worth revisiting the twists and turns from *Daily Mail* to *Cartesio*, *National Grid Indus*, *Vale* and *Polbud* with a critical mind because in several respects, these decisions **lacked coherence and predictability**. While some sins of the past may appear merely academic in the rearview mirror, others continue to cast their shadows over the present, particularly the misty notion of abuse under *Cadbury Schweppes* that on its face contradicts the seminal judgements of *Centros* and *Polbud* but nevertheless found its way into the Art. 86m (8) of the Directive.

The law for incoming foreign companies remains even more uncertain. The European Court could not bring itself to outright condemn the application of the real seat theory vis-a-vis incoming EU companies. Since *Centros*, *Überseering* and *Inspire Art*, we know however that the freedom of establishment protects the use of such letter box companies. We have learned that destination states must neither reject the registration of a branch that is de facto the real set of the company (*Centros*) nor deny the legal personality or limited liability of such companies (*Überseering*) nor directly or indirectly subject them to minimum capital requirement (*Inspire Art*). But beyond that, we still do not know the extent to which destination states can legitimately impose rules of their national laws on letter box companies. The *Kornhaas* judgement of 2015 and the *Edil Work 2* judgement of 2024 sent quite different messages. The first allows a lot, the second fairly little. Again, we must deplore the **lack of consistency**.

In the following main part, we will underpin this claim by reference to the contradictions in the cases the ECJ has decided to date. This is the core of the article: the pure critique of reasoning. It draws power from the famous adage "The law is reason", stemming from a hefty dispute before the Court of Common Pleas in 1345[3]. We must note that it was not rare in these times to solve cases based on oral tradition ("One has heard one XX say that..."). In the respective case, counsel had demanded from the bench to stick to such an (alleged) precedent. That sparked the fierce exchange.

> *Justice William Thorpe: I think you will wish to do what others have done or else we do not know what the law is*[4].
>
> *Justice Roger Hillary: The law is the will of the justices*[5]*!*
>
> *Chief Justice John Stonor: No, the law is reason*[6]*!*

This is dialog is the blueprint, a map that should guide every lawyer from every tradition, civil law as well as common law. The law must never be unreasonable, contradictory or arbitrary. Bearing that in mind, we embark on the following part. After that, we will summarise, have an outlook and draw final conclusions.

C. The case law of the ECJ since *Daily Mail* - a history of errors

I. *Daily Mail* - the original sin

In 1988, the Court decided *Daily Mail*[7]. It found the right decision, but for the wrong reason. Daily Mail and General Trust plc wanted to transfer its central management and control to the Netherlands. It wanted to become a Dutch tax resident to avoid tax on capital gains accrued in the UK. The UK law of the time required prior consent of the treasury to the relocation of the tax residence for the very purpose to prevent

3 Y. B. 18 & 19 Edw. III (Rolls Series), p. 80 (1892). The passage is much cited, most prominently probably by John P. Dawson, The Oracles of the Law, Ann Arbor, 1968, 58; cf. further e.g. A.W.B. Simpson, Invitation to Law, Oxford, 1988, 189.

4 Original: "*Ieo quide que vous voilletz faire come autres ont fait en tiel cas, ou autrement nous ne savons ceo que la ley est*".

5 "*Nanyl, ley est la voulenté des Justices.*"

6 "*Nanyl, ley est resoun.*"

7 CJEU 27.9.1988 - case C-81/87, ECLI:EU:C:1988:456 - The Queen v H. M. Treasury and Commissioners of Inland Revenue, *ex parte* Daily Mail and General Trust plc.

such evasions. Daily Mail plc attacked this requirement as a restriction of its freedom of establishment.

Word by word, Art. 52, 58 EECT (the precursors of Art. 49, 54 TFEU) make it obvious that:

- Daily Mail and General Trust plc was a company formed in accordance with the laws of a Member State (UK) and had its registered office within the Community.
- Daily Mail therefore had the same right to establish itself in the territory of another Member State as any natural person.
- The consent requirement was a restriction of this right.

It follows that the restriction had to be justified. From today's perspective, the justification is equally obvious: the coherence of taxation. Wealth that has been created in the departure state must be taxed in the departure state.

Unfortunately, the ECJ had not found this justification yet in 1988. The first case was decided in 1992[8]. Instead, the judges invented the creature of the law argument to reach the correct result. The argument went as follows: The state is the creator of the company. As such, it is free to set the limits of its existence. It can prohibit the company from relocating completely (real seat theory) or impose any other limits on its mobility without having to answer to freedom of establishment. The Lord has given. The Lord has taken.

Only at first sight does this seem an ingenious argument. On closer looks, it is as misguided as the attempt of the debtor from Alabama to escape his liability towards the bank of Georgia back in 1838. First, the Treaty grants to companies the same rights as to citizens. But the Court does not. It violates the text of the Treaty even though the signatories of 1957 were well aware what a company is.

Second, the consent requirement cannot even be based on the notion of the UK as the creator of Daily Mail. It applied equally to any company that had its **tax residence** in the UK, be it English or foreign. Had Daily Mail been a Dutch letter box company with its central management in London (as 23 years later National Grid Industries b.v.), it would have had to apply for the Treasury's consent in the same way. But the UK would not have been its "creator". This shows: the true and *only* correct solution would have been the justification of the consent requitement by the coherence of taxation.

Third, *Daily Mail* was not only wrongly decided but was also wrongly - if differently! - upheld. In 2010, the Court explained to us in *Cartesio*[9] that *Daily Mail* was still the law. On that basis, it decided *National Grid Indus* in 2011.[10] But amazingly, *National Grid Indus* says the contrary of *Daily Mail*.

8 CJEU 28.1.1992 - case C-204/90, ECLI:EU:C:1992:35 - Hanns-Martin Bachmann v Belgian State.
9 CJEU 16.12.2008 - case C-210/06, ECLI:EU:C:2008:723 - CARTESIO Oktató és Szolgáltató bt.
10 CJEU 29.11.2011 - case C-371/10, ECLI: ECLI:EU:C:2011:785 - National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam.

Let us remember that the UK followed the incorporation theory. UK company law is not in the least concerned with where the real seat of a company is. That is why Daily Mail and General trust plc was able to - and did - relocate its central management to the Netherlands without the consent of the Treasury, but also without losing its legal personality.

Against that background, the Commission had argued that if a Member State allows its companies to relocate, any restrictions will be tested under the freedom of establishment.

Daily Mail, para. 14: "The Commission emphasizes first of all that in the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move . [...] Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation. Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality. [...] **The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty**".

Following the Commission, *Daily Mail* could have invoked FoE the transfer of central management was possible under the legislation of the UK because the UK followed the incorporation theory.

Daily Mail, para. 3: "It is apparent from the documents before the Court that under United Kingdom company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the United Kingdom, may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom".

But the Court would not have it. Since the Treaty equally accepted the different connecting factors or incorporation theory and real seat theory, it concluded that the FoE did not grant a right to relocate. It therefore did not preclude Member States from prohibiting the relocation completely nor from imposing any other restrictions.

Daily Mail, para. 21: "The Treaty has taken account of that variety in national legislation. In defining, in Article 58, the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company [...]".

Daily Mail, para. 25: "The answer to the first part of the first question[11] must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, 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".

The Court clearly deviated from the view of the Commission. Nevertheless, in C-371/10 *National Grid Indus*, all of a sudden the Court adopted the opposing view of the Commission:

National Grid Indus, para. 32: "In the main proceedings, since the transfer by National Grid Indus of its place of effective management to the United Kingdom did not affect its status of a company incorporated under Netherlands law, the transfer did not affect that company's possibility of relying on Article 49 TFEU. As a company incorporated under the legislation of a Member State and having its registered office and central management within the European Union, it benefits, in accordance with Article 54 TFEU, from the Treaty provisions on freedom of establishment, and can thus rely on its rights under Article 49 TFEU, in particular for challenging the lawfulness of a tax imposed on it by that Member State on the occasion of the transfer of its place of effective management to another Member State".

This is exactly what the Commission had argued in *Daily Mail*, para. 14. Daily Mail and General Trust plc did not lose its status as company incorporated under UK law when relocating to the Netherlands. Therefore, it should have been able to invoke FoE. But in 1988, the Court held otherwise. 24 years later, it silently switched to the Commission's view while officially claiming to adhere to *Daily Mail*. That is inconsistent. It is not good practice for a case law Court to overrule precedents implicitly. "You may wish to do what others have done or else we do not know what the law is".

Moreover, the new approach is not even convincing! It allows the complete exclusion of relocations under the real seat theory but subjects other, less invasive restrictions to the FoE test. This is illogical from a purposive perspective. Had the Netherlands adhered to a strict real seat theory, National Grod Indus b.v. could not have left the country without winding up and liquidation, thus triggering immediate taxation. National Grid Indus b.v. could not have converted itself into a UK limited either because English law did not provide for this opportunity[12]. The *Cartesio*-right would have run into the sand. And the relocation would have been prohibited without the FoE coming to rescue.

11 The first part of the first question had been: "Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances [...]".

12 This point is arguable only in theory. True, the CA 2006 contains provisions on re-registrations. Under the logic of VALE, this could have sufficed to open the door to the UK for foreign companies seeking cross-border conversion into an English ltd or plc. In practice however, England has never accepted the

II. The *Cartesio* - conundrum

As seen, *Daily Mail* used the wrong argument to reach the right result. It was the original sin that put a lasting curse on European company law. The Court has painted itself in a corner. This became obvious in C-210/06 *Cartesio*.

Fully aware that the *Daily Mail* prerogative of the Member State of origin provided a severe impediment for the free movement of companies in Europe (and having become wary of waiting for harmonisation measures in C-212/97 *Centros*), the Court devised a seemingly ingenious way out. It derived directly from the FoE a right to cross-border conversion **without prior winding up and liquidation** (*Cartesio*, para 112). This right should exist notwithstanding *Daily Mail* (para. 110) and allow companies to escape their "creators" by changing into another MS company form.

But this caused an insolvable conundrum. If the company is a creature of the law and cannot therefore invoke FoE against limitations posed by its "creator", how could it then invoke FoE to force its "creator" to let it leave.

The Court tried to convince us by the following distinction: the *Daily Mail* prerogative only concerned the state of origin's right to determine *the connecting factors to its own jurisdiction* (paras. 107 et seq.) whereas the cross-border conversion aimed to leave this jurisdiction behind and change into the legal form of *another* country (paras. 111-113).

It is true that these are distinct cases. But contrary to the Court, that distinction cannot justify why Daily Mail and General Trust plc could not invoke FoW while Cartesio Oktató és Szolgáltató Bt could.

For starters, *Daily Mail* was not restricted to the justification of the real seat theory. To be sure, the ECJ specifically mentioned the unfettered freedom of Member States to determine the connecting factors to their laws (paras. 23-24[13]). But the case was from the UK and not about the real seat theory at all. Rather, the ECJ concluded from the stated "freedom- proofness" of the real seat theory *a fortiori* that Member States were also free to impose any less far-reaching restrictions. Contrary to what C-106/18 *Polbud* tried to convince us in the references given at the end of para. 43, the ECJ did certainly not envisage in 1988 in *Daily Mail's* paras. 19-21 that FoE granted companies a right to leave the jurisdiction without prior winding up and liquidation.

Cartesio-right to cross-border conversions (as has become obvious in the aftermath of the Brexit vote); that route would have been a dead end.

13 CJEU 27.9.1988 (fn. 8), paras. 23 ("It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.") and 24 ("Under those circumstances, Articles 52 and 58 of the Treaty 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.").

That leads us to the plain and simple truth that *Daily Mail* and *Cartesio* are irreconcilable from a (methodo) logical point of view.

If *Daily Mail* is right, it is impossible to invoke FoE against any limitation imposed by the creator state. If the company is a creature of the law, it cannot exist and act beyond that law. The entity is a legal fiction that does not have a being independent of the law[14]. It cannot act *ultra vires* and suddenly do something that its law does not allow it to do. In particular, a company cannot "go to the border" of its jurisdiction, lay off its "legal clothes", stand "bare naked" at the customs control and demand to please be "dressed" in the "new clothes" of the destination state. There is no "meta-legal" person beyond and above the law, not even an illegal person. Just emptiness. The only persons who could have invoked FoE were the natural persons behind the legal entity. But this is not the content of *Daily Mail*.

If to the contrary *Cartesio* was right to hold that a validly incorporated company can invoke Art. 49, 54 TFEU to force its creator to let it convert across the border, it allows the company to overcome a prohibition or - better - non-permission of such transactions under its home law. Then the same must be true for any other restriction on the activity of existing domestic companies, of course including the prohibition / non-permission to relocate the real seat across the border. Either Art. 49, 54 apply against restrictions imposed by the state of origin - or they do not. But they cannot "half-apply" as the Court thinks fit.

To pick up the time-honoured yearbook discussion: when the second judge dressed down his colleague who was impressed by the complaining counsel by saying "The law is the will of the judges", Chief Justice Stonor rightly overrode him: "No, the law is reason". If the Chief Justice was right - as we hopefully all agree today - courts are bound by the laws of logic and reason. That is why *Cartesio* is wrong. It should not have let *Daily Mail* stay alive just to save the Court's face because in broad daylight, the logic of these judgements is irreconcilable, no matter what the ECJ tried to make us believe. The paradox "implicit overruling" of *Daily Mail* soon afterwards in *National Grid Indus* confirms this point beyond any reasonable doubt.

III. The incoherent judgements on letter box companies and abuse: *Centros* and *Cadbury Schweppes*

In 1998, the ECJ decided the famous *Centros* case[15]. A Danish couple (the Brydes) had set up a UK limited company (Centros) as letter box to run their business in Denmark. Their - openly admitted - purpose was to avoid the Danish minimum capital requirement

14 This has been disputed by Otto von Gierke's Theorie der realen Verbandsperson. The argument was that Germany is not a fiction. While that may seem self-evident at first sight, it is nevertheless flawed. Just think of Catalonia or Kurdistan today or of Poland and Lithuania in the 19th century. The reality is the country, the people, their language and their culture. The fiction is the legal personality of a "state" that acts on every citizen's behalf.

15 CJEU 9.3.1999 - case C-212/97, ECLI: ECLI:EU:C:1999:126 - Centros Ltd v Erhvervs- og Selskabsstyrelsen.

of 200.000 DK (≈ 27.000 EUR). Consequently, the Danish Business Authority denied Centros ltd the registration of a branch in Denmark on grounds of abuse. But the ECJ objected.

Contrary to *Daily Mail* more than 10 years before, the Court simply tested the FoE word by word this time[16], without introducing unwritten exemptions like the "creature of the law" doctrine: Centros ltd was a company incorporated under the laws of a MS (UK) and had its registered office there. It could therefore invoke FoE. This included the right to set up branches in other MS (Denmark). The denial by Denmark was a restriction of Centros' FoE that had to be justified. Justification failed for several reasons, the preeminent one being that the use of a UK company to escape the Danish minimum capital was legitimate use, not abuse of the FoE in the eyes of the Court:

Centros, para. 27: "[...] the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".

Many observers felt at the time that *Centros* had given up *Daily Mail* without saying so[17]. Later in C-210/06 *Cartesio*, it turned out that this had not been the case. But undeniably, *Centros* had tested the FoE word by word whereas *Daily Mail* had not. Moreover, *Centros* curtailed the MS privilege to create their own companies. It is trite that states can only create their own companies. The whole point of the real seat theory had always been to grant them a monopoly over regulating all aspects of limited liability companies established and acting in their territory. If a company had its real seat in the territory of the state, it should be incorporated under the laws of that state. This is similar to the *lex rei sitae* that grants a legal monopoly over the rights in rem to be created in the territory of a state. This legislative prerogative has two complementary sides: the creation of the rights by domestic law and the exclusion of foreign rights. The real seat theory protects the same two sides. Far from aiming to exclude foreign companies to act on domestic markets, the real seat theory only aimed at preserving the monopoly of states to regulate the creation of companies within their own territory. While *Daily Mail* had accepted this wholeheartedly, *Centros* cut the legislative prerogative into two halves. While *Centros* did not contradict *Daily Mail* openly, it clearly undermined its spirit and left both practitioners and academics baffled. *Centros* was an onslaught on the coherent regulation of the dangers that are connected with limited liability. To give but one example: UK company law does not require a minimum capital for private companies. But it contains a strict

16 CJEU 9.3.1999 (fn. 16), paras. 17 et seqq., 27.

17 The Court had surely given up waiting for further harmonisation, contrast CJEU 9.3.1999 (fn. 16), para. 28 with CJEU 27.9.1988 (fn. 8), para. 23.

regime of directors' disqualifications under the CDDA to prevent abusive conduct, inter alia barring people for acting ad directors for years. Instead of this retroactive approach, many civil law systems preferred ex-ante safeguards. They relied on minimum capital requirements as entry barrier to fend off unreliable persons who are not prepared to put their money where their mouth is. Of course, minimum capital requirements do not prevent insolvencies. But they help to prevent abusive practices proactively and make a broad retroactive disqualification regime like the CDDA superfluous. This choice was undermined by the Court when letting UK letter box companies into other MS. Even worse: the legislative choice of the UK was undermined as well because the CDDA would not work against directors of UK companies that were run as letter box companies abroad. Therefore, the result of *Centros* was that **both the prerogative of the host state and that of the home state were undermined**. No state was able to provide a coherent regime of company law protection any more.

Things got even worse in 2006 when the ECJ decided C-196/04 *Cadbury Schweppes*. In this judgement, the Court developed a definition of abuse that directly contradicted *Centros*.

Cadbury Schweppes, para. 51: "On the other hand, a national measure restricting freedom of establishment may be justified where it specifically relates to **wholly artificial arrangements** aimed at **circumventing** the application of the **legislation of the Member State concerned**".

What else is a letter box company than a wholly artificial arrangement? And what else did the clever Brydes do than "aiming at circumventing the (company) legislation of the Member State concerned" (Denmark)? Indeed, the Court itself was explicit that letter box companies were artificial arrangements.

Cadbury Schweppes, para. 68: "If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a 'letterbox' or 'front' subsidiary".

Centros and *Cadbury Schweppes* clearly collide. Having realised that, the ECJ tried an explanation in *Cadbury Schweppes*.

"(52) It is necessary [...] to take particular account of the **objective pursued by the freedom of establishment** (see, to that effect, **Centros, paragraph 25**, and X and Y, paragraph 42).

(53) That **objective is to allow a national of a Member State to set up a secondary establishment in another Member State to carry on his activities** there and thus assist economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see Case 2/74 Reyners [1974] ECR 631, paragraph 21). To that end,

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freedom of establishment is intended to allow a Community national to participate. [...] in the economic life of a Member State other than his State of origin and to profit therefrom (Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 25).

(54) Having regard to that objective of integration in the host Member State, the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period (see Case C-221/89 Factortame and Others [1991] ECR I-3905, paragraph 20, and Case C-246/89 Commission v United Kingdom [1991] ECR I-4585, paragraph 21). Consequently, it presupposes **actual establishment** of the company concerned **in the host Member State** and the **pursuit of genuine economic activity there**."

These considerations stood in the way of a FoE-based right to cross-border conversions into foreign letter box companies. ECJ C-378/10 *VALE* (and A-G Kokott) had recognised this correctly. That being so, we would have expected the ECJ in C-106/18 *Polbud* to reconcile the cases, to try to explain them to us. But instead of reasons, we were served the pure will of the justices who deign to let us know that they prefer *Centros* over *Cadbury Schweppes*:

Polbud, para. 40: "However, it must be observed that, as the Court has previously held, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse".

With respect, this is not jurisprudence but judicial arbitrariness. The ECJ cannot establish a definition of abuse that covers a case letter by letter ("artificial arrangement circumventing the law of a MS") and then simply say: but I do not want to apply my own definition in *this* case because I prefer another outcome, namely I want to create a right to convert existing companies into foreign letter boxes[18].

By sweeping its own precedents off the table in that way, the ECJ severely undermined legal certainty. As consequence, the law has been left in limbo until today, even overshadowing Art. 86m n°8 of the Corporate Mobility Directive 2019/2121. We have the definition of abuse according to *Cadbury Schweppes*. And we have the opposing statements of *Centros* and *Polbud* that evasion of national company law via letter box companies is not abuse but perfectly fine use of the FoE. The paradox showed up again in ECJ-276/22 *Edil Work 2* (below, 5 c) where the Italian Government invoked the exemption for "wholly artificial arrangements circumventing national law" (para. 44) whereas the ECJ relied on

18 Note that CJEU 9.3.1999 (fn. 16) did NOT grant any such right. The case was not about any right of the couple Bryde to incorporate a letter box company in the UK but only about the right of that company (Centros ltd) to register a branch in the "host state" Denmark where it wanted to pursue its economic activity.

Centros and *Polbud* (paras 45 et seq.), still failing to admit that the evasion of national law by artificial arrangements *as such* was described as fraud in *Cadbury Schweppes*.

IV. Another devil in another detail: the "genuine economic activity" between *VALE* and *Polbud*

The clash over abuse or use of FoE was closely interwoven with the (presumed) requirement of "genuine economic activity". ECJ C-378/10 VALE dealt with the conditions and limitations of the *Cartesio*-right to cross-border conversions. While the main point at trial was the *Cartesio*-reservation on the side of the destination Member State[19], the ECJ also stated that a company could only invoke FoE if it aimed to pursue "genuine economic activity" in the destination MS[20].

VALE, para. 34: "As regards the existence of a restriction on the freedom of establishment, the Court notes that the **concept of establishment within the meaning of the Treaty provisions on the freedom of establishment** involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there".

But in ECJ C-106/16 *Polbud*, these well-founded considerations disappear without a trace. The Court even disowns his requirement of "genuine economic activity" and pins it to the Austrian government instead (para. 31), in order to reject it outright in paras. 37 and 40:

Polbud, para. 31: "According to the **Austrian government**, freedom of establishment cannot be relied on when the reason for the transfer of the registered office is not the pursuit of an actual business by means of a permanent establishment in the host[21] Member State".

Polbud, para. 37: "First, **the argument** of the **Austrian government** that no business is actually being conducted by Polbud in the host Member State **cannot be accepted**".

Polbud, para. 40: "It follows that ... the fact that it was decided to transfer to Luxembourg the registered office alone ... cannot ... mean that such a transfer does not fall within the scope of Articles 49 and 54 TFEU".

19 CJEU 16.12.2008 (fn. 10), para. 112 granted a company the right to cross-border conversion into another MS "to the extent that it is permitted under that law to do so". In *VALE*, the Court explained that this reservation did not grant free discretion to the destination MS. Rather, it argued by reference to CJEU 13.12.2005 - case C-411/03, ECLI: ECLI:EU:C:2005:762 - SEVIC Systems AG that MS had to admit companies from other MS to *all* restructuring options provided for domestic companies.

20 Referring to CJEU 12.09.2006 - case C-196/04, ECLI: ECLI:EU:C:2006:544 - Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, paras. 52-54 (see above).

21 The Court speaks of "host MS". In the more precise terminology of the Corporate Mobility Directive, this means destination MS.

The Court said quite the opposite of what it had said in *Cadbury Schweppes* and *VALE*.[22] Again, the yearbooks spring to mind: “You will wish to do what others have done or else we do not know what the law is”. The well-argued opinion of A-G Kokott to *Polbud* shows the necessity of this plea through the centuries.

V. Restrictions on the FoE - from *Centros* via *Kornhaas* and *Edil Work 2*

1. The wide test for restrictions on the FoE (*Centros*): “measures that make the exercise of the freedom less attractive”

In C-212/97 *Centros*, the ECJ applied a wide definition for restrictions of the FoE and introduced the “Gebhard criteria” as possible justifications

Centros, para. 34: “Next, it should be borne in mind that, according to the Court’s case-law, **national measures liable to hinder or make less attractive the exercise of fundamental freedoms** guaranteed by the Treaty must fulfil 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 (see Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraph 37)”.

The “measures liable to hinder or make less attractive the exercise of the FoE” became the litmus test for national laws to be imposed on letter box companies from other MS. Neither the non-recognition of the legal personality and limited liability of foreign companies with real seat in Germany (C-208/00 *Überseering*) nor the indirect imposition of a minimum capital via a directors’ liability in the Dutch Act on pseudo-foreign companies[23] (C-167/01 *Inspire Art*) passed the test.

But beyond these decided cases, the legal situation had remained unclear. With the rise of UK letter box companies after *Inspire Art*, the issue became the most debated topic of German company law at that time. According to the majority writers, German company law was not to be imposed on companies from other MS. However, if European rules called for the application of national insolvency law or tort law with respect to such companies, this was held to be freedom-proof. As consequence, German academics had endless debates on the correct classification of the duty to file for insolvency, the prohibition to make payments from an insolvent company, the rules on capital-replacing loans or

22 The attempted explanation in CJEU 25.10.2017 - case C-106/16, ECLI:EU:C:2017:804 - Polbud - Wykonawstwo sp. z o.o., para. 39, fails: “It must be recalled that the question of the applicability of Articles 49 and 54 TFEU is different from the question of whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation [...]”. While this refers to CJEU 9.3.1999 (fn. 16), para. 18, it does not reconcile *VALE* and *Cadbury Schweppes* because in those cases, the Court elaborated on the *applicability* of FoE.

23 Wet op de formeel buitenlandse vennootschappen.

the case law on the *Existenzvernichtungshaftung* under the conflict rules of International Private Law[24]. Even the legislator adopted this view, too, and shifted important rules of creditor protection from the German Companies Acts (GmbHG, AktG) into German insolvency law (InsO) in the major Reform Act of 2008, the MoMiG.[25] However, the dominant doctrinal approach was far from generally accepted. If it really was possible to make a legal provision freedom-proof by (re-)labelling them as "insolvency law", the Netherlands could just have relocated the directors' liability for trading without minimum capital into the national Insolvency Act, the "*Faillissementswet*", and everything would have been oK[26]. That is why some writers argued for applying the Keck-exception in the context of FoE[27]. Others would subject the application of local insolvency law or tort law to a freedoms-test in principle but would see it generally as justified[28]. By contrast, an opposing view argued that national rules should not be applied on foreign companies if and because the protection under their law of origin was sufficient[29].

2. The failed application of the test in C-594/14 *Kornhaas*

In 2014, the *Kornhaas* case provided an opportunity to settle some of these scores authoritatively. This was the case: Simona Kornhaas was the director of a UK ltd with real seat in Germany. She had made prohibited payments of more than 100.000 EUR at a time when the company had already been insolvent. She was therefore held accountable to repayment of said sum under the former § 64(2)(1) GmbHG (since 2021 completely recast as § 15b InsO).

The defence of Ms Kornhaas was that this was a provision of the German Private Companies Act (GmbHG) and therefore only addressed the "Geschäftsführer" of a "GmbH", whereas she had acted as director of a UK ltd (the Kornhaas Montage- und Dienstleistungen ltd = KMD ltd).

The German Supreme Court wanted to follow the lower instances and allow the claim. The judges tended towards the prevailing opinion in Germany that classified the former

24 See the account by Alexander Schall, The Forthcoming ECJ Decision of the Kornhaas Case (C-594/14) – The Final Chapter of the European Traveller's Tales?, ECFR 2015, 280, at 294 et seq.; leading contributors to the German debate at the time were e.g.: Holger Altmeppen, Schutz vor Europäischen Kapitalgesellschaften, NJW 2004, 97, 101; Horst Eidenmüller, Geschäftsleiter- und Gesellschafterhaftung bei europäischen Auslandsgesellschaften mit tatsächlichem Inlandssitz, NJ 2005, 1618; Peter Ulmer, Gläubigerschutz bei Scheinauslandsgesellschaften, NJW 2004, 1201, 1208 et seq.; M. P. Weller/A. Schulz, Die Anwendung des § 64 GmbHG auf Auslandsgesellschaften, IPRax 2014, 336.

25 Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen.

26 For this argument, see Alexander Schall, Deutscher Gläubigerschutz und Europarecht, NJW 2011, 3745 et seq.

27 KG, 24. 9. 2009 - 8 U 250/08, NZG 2010, 71, 72 et seq.; Eidenmüller (fn. 25), 1618, 1621; but contrast Wolf-Georg Ringe / Charlotte Willemer, Zur Anwendung von § 64 GmbHG auf eine englische Limited, NZG 2010, 56, 57 et seq., denying the transferability of the Keck-exception to the freedom of establishment.

28 Weller/Schulz (fn. 25), 336, 339.

29 Alexander Schall, Englischer Gläubigerschutz bei der Limited in Deutschland, ZIP 2005; id., The UK Limited Company Abroad – How Foreign Creditors Are Protected after Inspire Art, EBLR 16 (2005), 1534, 1552; Walter Paefgen, Wider die gesellschaftsrechtliche Ausländerphobie, ZIP 2004, 2253, 2257.

§ 64 GmbHG as insolvency law and saw no conflict with the FoE when applying it to other EU companies having their real seat in Germany. But the BGH realised that the issue was beyond its own jurisdiction and therefore asked the ECJ[30]:

(a) whether the German prohibition to make payments out of the assets of insolvent companies was insolvency law under the EIR and

(b) whether the application of this prohibition to a company from another MS violated the FoE?

The ECJ answered the first question persuasively in the affirmative[31]. Consequently, we would have expected a test whether the application of § 64(2)(1) GmbHG to a company from another MS was a measure that "rendered the exercise of FoE less attractive". But this is not what happened in 2015.

Instead, the ECJ failed the FoE test completely. They denied any restriction of the FoE (paras. 25 and 28) *only because* the case concerned neither the non-recognition of the foreign company (paras. 23 and 26) nor the enforcement of a minimum capital requirement by the host state (paras. 24 and 27):

Kornhaas, para. 22: "[...] the referring court asks [...] whether Article 49 TFEU and Article 54 TFEU preclude the application of a provision of national law, such as the first sentence of Paragraph 64(2) of the GmbHG, to a managing director of a company established under the law of England and Wales, which is the subject of insolvency proceedings opened in Germany.

23 In that regard, it follows from the case-law of the Court that [...] the **refusal** by one Member State to **recognise the legal capacity** of a company formed in accordance with the law of another Member State [...] may constitute a restriction of freedom of establishment incompatible...

24 The Court has also found before that [...] national provisions concerning **minimum capital are incompatible** with freedom of establishment [...] the same must necessarily be true of the penalties attached to non-compliance with those obligations [...] (see, to that effect, judgment in Inspire Art, C-167/01, EU:C:2003:512, paragraph 141)

25 However, as regards a provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG, it is clear that the latter concerns **neither the refusal** by a host Member State **to recognise the legal capacity** of a company formed in accordance with the law of another Member State and having transferred its actual headquarters into the territory of that first Member State, **nor the personal liability of administrators**

30 BGH, 2.12.2014 – II ZR 119/14 (OLG Jena), NZG 2015, 101 = NZI 2015, 85 annotated by Mock.

31 This was in line with the prevailing view in Germany, BGH, 2.12.2014 (fn. 30), 101, 103, para. 19; Schall (fn. 29), 1534; but contrast e.g. Sebastian Mock/Charlotte Schildt, Insolvenz ausländischer Kapitalgesellschaften mit Sitz in Deutschland, Hirte/Bücker (eds.), Grenzüberschreitende Gesellschaften, 2nd ed., Cologne, 2006, § 17 para. 89. Cf. the account by Schall (fn. 25), 280, 284 et seq., containing more references.

where the capital of that company has not reached the minimum amount laid down by the national legislation".

This result is fundamentally flawed. The ECJ plainly forgot about the established test whether the application of § 64(2) GmbHG **made the exercise of the FoE less attractive**. The conclusion in para. 28[32] is an obvious *non sequitur*. The observation that § 64(2) GmbHG neither questioned the legal capacity of the company nor enforced a minimum capital is perfectly true. But it does not tell us in any meaningful way whether the application of § 64(2) GmbHG rendered the exercise of the FoE less attractive or not.

To unveil the Court's fallacy, imagine a fictitious land where the law states: § 1: "Murder is a *very bad killing*". In the first case, the Supreme Court of this land rules that killing for greed is a very bad killing = murder. In the second case, the Court rules that killing for racism is a very bad killing = murder. The next case coming up is the cruel killing of a baby during a satanic ritual. This killing is neither for greed nor for racism. But that clearly does not to mean that this killing is not a "very bad killing" = murder, too. To adjudicate the case correctly, the fictitious Supreme Court must determine whether a brutal killing for satanism is a very bad killing = murder. To simply tell us that the killing was neither for greed nor for racism misses the point. And to conclude that the satanic killing was no murder *simply because* it was neither for greed nor for racism is plainly wrong - a fallacy akin to the famous misconclusion that "Socrates is a dog"[33]. Had the Court applied the freedoms-test correctly, it would have come to very different conclusions. This will be shown below, after considering C-267/22 *Edil Work 2*.

3. Potentially conflicting duties as restrictions that render the exercise of FoE less attractive - *Edil Work 2*

ECJ C-276/22 *Edil Work 2* concerned the Italian conflict rule of Article 25(1) of Law No 218/1995. This rule, while accepting the legal personality and limited liability of foreign letter box companies, subjects all activities of foreign companies with real seat in Italy to Italian company law. This super-imposition of Italian law invalidated an important transaction (the sale of Castello di Tor Crescenza) by STE, a letter box company from Luxembourg, because Italian law, unlike under the laws of Luxembourg, provides that powers of representation could only be delegated to members of the board of directors (Art. 2381 CC). After the Courts differed on the applicable law and the validity of the transaction, the Italian Supreme Court referred the case to the CJEU to find out whether the super-imposition of Italian company on companies from other MS with "real seat"[34] in Italy was in line with the FoE. This time, the ECJ put the relevant provisions to the

32 *Kornhaas*, para. 28: "A provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG does not, therefore, affect freedom of establishment".

33 To the well-known syllogism "All men are mortal. Socrates is a man. Therefore, Socrates is mortal." the critics counter: "All dogs are mortal. Socrates is mortal. Therefore, Socrates is a dog".

34 Under Article 25(1)(2) of Law No 218/1995, this is either the location of the seat of the administration or of the principal object ("l'oggetto principale") of the company.

freedoms test in textbook fashion. By doing so, the Court found an interference with FoE the justification of which they denied by reciting the mantras on *Centros* and *Polbud* (paras. 44 et seq., see already above).

ECJ C-276/22 *Edil Work 2*, para. 30: "**All measures which prohibit, impede or render less attractive the exercise of freedom of establishment** must be considered to be restrictions on that freedom [...].

(31) It is important to note that legislation of a Member State which provides that companies established in another Member State [...] must comply [...] with the law of the first Member State as well as with any obligations arising under the law of their Member State of establishment **could render the management of such companies more difficult, since they might have to comply with the requirements imposed by those two sets of rules**.

(32) It follows that **such a legislation is liable to render less attractive** the exercise of the freedom of establishment and therefore constitutes an obstacle to the exercise of the freedom of establishment. [...]

(34) [...] a company [...] could be subject, cumulatively, both to Luxembourg law and to Italian law. Such a **cumulative application of the law of two Member States may render the management of that company more difficult.**

(35) It is therefore necessary to analyse, in the third place, whether a restriction on freedom of establishment resulting from legislation such as that at issue in the main proceedings might nevertheless be justified".

We condone the textbook-proof approach to test the restriction of FoE in principle. In this respect, the judgement was sound. Nevertheless, the ECJ misjudged an important point in the legal framework of the case. Once the connecting factor of a real seat in Italy is fulfilled, there will be no more *cumulative* application of Italian and Luxembourgian law. Rather, the company law of Luxemburg is being superseded. It follows that the company will *not* have to comply with two competing and potentially even conflicting sets of rules at the same time. Rather, it has to comply with only *one* set of rules.

This calls the conclusions of the Court into question. Even under the wide notion of "measures making the exercise of the freedom less attractive" mere complexity of the law cannot as such amount to a restriction of the FoE just as being too stupid to know the law cannot excuse from following the law.

4. The ECJ failing to recognise the cumulative duties in *Kornhaas*

In truth, it is the *Kornhaas* case where the application of cumulative, potentially even conflicting duties was at stake. Had the ECJ applied the freedoms-test in *Kornhaas* as correctly as in *Edil Work 2*, it would have found a restriction of the FoE. It would have recognised that the cumulative application of two competing duties rendered the exercise of FoE less attractive.

The two competing duties in question were the English duty for the benefit of the creditors[35] and the German prohibition to stop trading and file for insolvency (today: § 15a InsO; originally: § 64(1) GmbHG)[36]. The best interest of the creditors may oblige the directors of a UK company **to keep on trading** for a certain time, in order to minimise losses. By contrast, the German duty to file for insolvency (today § 15a InsO) and the supporting prohibition to make payments out of an insolvent company (today § 15b InsO) give a clear and strict command: **stop trading and file for insolvency asap**[37]. The Kornhaas Management und Dienstleistung ltd (KMD) was subject to both sets of rules. § 64(2) GmbHG applied via Art 3 EIR because the COMI of KMD was in Germany[38]. At the same time, the duty for the benefit of creditors applied, too, because KMD was a UK private limited company subject to the general fiduciary duties under English company law.

The English duty for the benefit of the creditors marks the famous "shift of fiduciary duties" in the vicinity of insolvency.[39] The directors are bound to serve the best interest of the company. While this interest equals the interest of the shareholders als whole in the solvent company, it shifts in the crisis of the company until it is only defined by the interests of the creditors in the insolvent company[40]. The duty "for the benefit of creditors" is channelled through the directors' duties towards the company under general

35 BTI *2014* LLC v *Sequana* SA and others, UKSC 5.10.2022 - UKSC/2019/0046.

36 The conflict has been described by Schall (fn. 25), 280, at 296; id. (fn. 29), 1534; id. (fn. 29), 965, 974.

37 § 15a InsO prescribes 3 weeks in case of inability to pay the debts (§ 17 InsO) as they fall due and 6 weeks in case of balance sheet insolvency (§ 19 InsO).

38 The fact that the text of § 64(2)(1) GmbHG only addressed the "*Geschäftsführer*" of a "GmbH" was irrelevant. Both requirements would be fulfilled by way of substitution with their English equivalents "director" and "private company limited by shares".

39 The concept came via Australia (*Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 4 NSWLR 722) to the UK (*West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250) but is far more controversial elsewhere. Delaware Courts are unimpressed (N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007); Quadrant Structured Prods. Co., Ltd. v. Vertin, 115 A.3d 535 (Del. Ch. 2015)), and so remains Germany even after the StaRuG has implemented the Restructuring Directive (EU) 2019/ 1023 where Art. 19 seemed to embrace the shift of fiduciary duties (for the dominant view see Korch GmbHR 2021, 793 mn. 2; Kuntz ZIP 2021, 597, 602).

40 BTI 2014 LLC v Sequana SA and others (fn. 35), para. 11: "Rather, there is a rule which modifies the ordinary rule whereby, for the purposes of the director's fiduciary duty to act in good faith in the interests of the company, the company's interests are taken to be equivalent to the interests of its members as a whole. I understand all the members of the court to be in agreement on that point. Where the modifying rule applies – a rule which I shall describe as the rule in West Mercia, after the leading case of West Mercia Safetywear Ltd (in liq.) v Dodd [1988] BCLC 250 - the company's interests are taken to include the interests of its creditors as a whole. The duty remains the director's duty to act in good faith in the interests of the company. The effect of the rule is to require the directors to consider the interests of creditors along with those of members. The weight to be given to their interests, insofar as they may conflict with those of the members, will increase as the company's financial problems become increasingly serious. Where insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole".

company law (s.172(1) CA 2006)[41]. It applies to UK companies regardless of where they are trading.

To sum up: The ECJ assumed cumulative duties in *Edil Work 2* although there were none, but overlooked cumulative duties in *Kornhaas* where that problem actually existed. The Court did not realise this problem in *Kornhaas* because of the flawed freedoms-test.

VI. The bleak summary of the case law

As said in the subtitle: This paper is a pure critique of reasoning. It looks at the validity and consistency of the reasons given by the Court in the judgements. It is not concerned with context or subtext, with the long and winding road to the ever-closer Union and the difficult situation of the ECJ / CJEU in that process. Therefore, it does not celebrate the decisions as the motor of harmonisation that they often were. There can for example be no doubt that the Court must be credited with pushing the other institutions of the EU to the much-needed Corporate Mobility Directive. Also, the paper does not seek to rerun the rich discussion whether or not regulatory competition in company law is desirable or not, whether it leads to a race to the bottom or to the top and whether it was even in the powers of the Court to bring that competition on.

Rather, the paper analysed the reasoning of the judgements and exposed several (too many) inconsistencies and misconclusions. This served the superior purpose to demand adherence to the rule of law, the law understood as being "reason" and not simply "the will of the justices". The analysis of the ECJ judgements from this specific angle led to a bleak picture. To sum up in short:

Daily Mail was the original sin. The Court should have applied Art. 49, 54 word by word and found both a restriction of FoE and a justification instead of conjuring up the creature of law exception.

The consequences of the original sin are two irreparable inconsistencies: *Daily Mail* and *Cartesio* are irreconcilable: Either a company can invoke FoE against its creator state, or it cannot. *Daily Mail* and *National Grid Industries* are irreconcilable, too: The ECJ solved *National Grid Industries* with the very argument that it had rejected in *Daily Mail* where it had been put forward by the Commission.

The next massive conflict arose as consequence of the Court's condoning of letter box companies to instigate regulatory competition in company law. The *Centros* arguably violated the spirit of *Daily Mail*. But surely, the judgement conflicts with the definition of abuse developed in *Cadbury Schweppes* ("**wholly artificial aimed at circumventing the application of the legislation of the Member State concerned**").

Cadbury Schweppes and *VALE* tried to resolve this conflict. Both judgements elaborated that the concept of FoE demanded the pursuit of genuine economic activity in the destin-

41 BTI 2014 LLC v Sequana SA and others (fn. 35), para. 1.

ation MS. Since Centros Ltd had aimed to pursue economic activity in Denmark, the *Centros* judgement seemed not to conflict with the abuse exception. However, Denmark had tried to justify a restriction of the FoE on grounds of abuse (circumvention of the Danish minimum capital). *That* argument was refuted by the ECJ. But it could not have been refuted under *Cadbury Schweppes*.

Polbud solved the conflict in favour of *Centros*. Implicitly overruling *VALE*, the Court allowed companies to invoke FoE without any intention to pursue economic activity in the destination MS. As consequence, FoE now guarantees a right to incorporate letter box companies with the sole purpose of evading the company law of the destination MS even though such conduct still falls foul of the now generally accepted definition of abuse in *Cadbury Schweppes*. This has been confirmed again in *Edil Work 2* where the Italian government attempted in vain to invoke the justification to fight abuse. This shows the burdens that the Court imposes on legal certainty and reliability. They weigh so much heavier since they were all unnecessary.

Looking back, *Cadbury Schweppes* should have recognised that evasion of national law (*fraus legis*) cannot be generalised as ground for abuse under European law because the evasion of national *company* law by letter boxes had already been condoned by the Court in *Centros*. *Cadbury Schweppes* concerned evasion in tax law. No need to make more general announcements. Conversely, *Polbud* should not have overstretched FoE beyond any genuine economic activity because that requirement did NOT even stand in the way of *Centros*. Rather, genuine economic activity is a sound condition that can also be derived from the last part of Art. 54(2) TFEU where non-profit making entities are excluded from invoking FoE.

Art. 54(2) TFEU: Companies or firms' means 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**.

In short: If *Centros* was right, the abuse definition of *Cadbury Schweppes* was wrong for overreach. But still, the FoE interpretation in *VALE* was right and *Polbud* got that wrong.

Finally, *Kornhaas* failed to apply the FoE test correctly ("measures that make the exercise of the freedom less attractive") and therefore missed the crucial point of the cumulative duties. By contrast, *Edil Work 2* returned to the correct approach to test a restriction on the FoE but failed to recognise that there were no cumulative duties in the case.

This leads to a deplorable list of critical judgements (*Daily Mail; Cartesio; National Grid Indus; Kornhaas/Edil Work 2; VALE/Polbud)*. They are based on logically inconsistent and (sometimes severely) methodologically flawed reasoning. They do not necessarily reach the "wrong outcome". But they get there in an arbitrary and hardly predictable manner:

This a bleak outcome for the rule of law. An ever-closer Union must not be based on dysfunctional institutions. Many of the structural shortcomings of the CJEU that may have contributed to those flaws in the judgements have been discussed in the past (e.g. to few judges, no specific expertise for the different areas of the law). Personally, I think that being (and actually having to be) a driver for European integration ("effet utile") may have brought the Court into this mess. Having an embedded agenda is generally incompatible with the function of Supreme Courts. Justice must be blind, and so must Justices. Imagine a Court that is bound to always prioritise the interests of the general public. Which citizen would sue his country before such a Court?

D. Outlook on corporate mobility in Europe

Let us not end on too dark a note. The future of corporate mobility in Europe seems bright. The Directive has brought much-needed legal certainty for relocations within the Single Market.

We must deplore though that partnerships were not included. Despite their importance as drivers for the economies of the Single Market, they are still subject to all the uncertainties of the *Cartesio*-right to crossborder-conversion (that have reduced this option to a handful of cases in Germany prior to the Corporate Mobility Directive). Arguably, partnerships and limited partnerships eligible to invoke FoE can now demand to convert across the border in analogy to the provisions of the Corporate Mobility Directive, **regardless** of the law of the destination MS allowing for transformations of partnerships in general. This would at least overcome the cumbersome *Cartesio*-restriction in C-210/06 para. 112.

Whether a 28th regime will promote corporate mobility in Europe in a significant way remains to be discussed. Personally, I tend to be sceptic, last not least because I conclude from the experiences with the Societas Europaea that there will be more likely 28-54 regimes, and that those regimes will be most attractive if they can used to circumvent national (e.g. codetermination) laws. At least, the proposal does not include a minimum capital requirement at present[42].

Companies should be allowed to register in other Member States. FoE grants them a right to do so. *Daily Mail* and *Cartesio* got this wrong and are due to be overruled by a more clearsighted and less path dependent CJEU. EU Citizens do not have to change their nationality when relocating to other Member States. Why should companies? Art. 54 says the contrary! Why should national company registers be less able and obliged to cooperate than tax authorities after *National Grid Indus.*

42 For the non-viability of minimum capital requirements see Wolfgang Schön, The Future of Legal Capital, EBOR 2004, 429; id., Balance Sheet Test or Solvency Test - or both, EBOR 2006, 181.

The abuse exception of Art. 86m (8) must be read with an unwritten case law amendment that the circumvention of national company laws is legitimate use. That being so, the application of real seat theory elements like Article 25(1) of Law No 218/1995 can no longer prevail *vis-a-vis* companies from EU Member States. *Edil work 2* teaches us: Double duties must be avoided. Likewise, a mere changing of the duties dependent on the real seat of the company (which may not always be easily determined anyway). The judgement does not only concern Italy but also for example Spain.[43] In light of *Edil work 2*, *Kornhaas* must be reconsidered and a justification for adding a layer of national directors' duties in the onset of insolvency must (and probably can) be found. If Member States choose to adhere to the real seat theory *vis-a-vis* companies from third countries, they will have to accept split rules on conflict of company laws.

At the end of the day, we observe that corporate mobility in Europe has made considerable progress since the early days of the EU / EC. But we have to thank the wrong institution for this. It would have been up to the regulator, not to the ECJ, to bring the freedom of establishment to full bloom. When the ECJ felt they had to step in, they overstepped their brief. The consequences for the rule of law are beyond the pale. We can only hope that the integration has been pushed far enough into the right direction, so that the CJEU will move European law away from the forbidden land of the will of the justices and back to the realm of reason. Further impulses are not to be expected. Make no mistake: true freedom to roam within the Single market will require two very different things: a common lingua franca and a uniform civil code. All else will remain poor patchwork. And that is not worth sacrificing the dignity and impartiality of the third power.

43 Art. 8 LSC: Serán españolas y se regirán por la presente ley todas las sociedades de capital que tengan su domicilio en territorio español, cualquiera que sea el lugar en que se hubieran constituido. [All limited companies having their registered office in Spain shall be deemed to be Spanish companies and shall be governed by this Act, regardless of where they were incorporated.]