Kooperationswerke Beck - Hart - Nomos

The Private International Law of Companies in Europe

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1. Auflage 2019. Buch. XX, 770 S. In Leinen
ISBN 978 3 406 71457 3
Format (B x L): 16,0 x 24,0 cm
Gewicht: 1404 g

common understanding of what type of rules may be considered to be overriding mandatory provisions, or what type of situation may warrant intervention on the part of the forum state, is not evident. Suggested applications of the positive *ordre public* range from employee co-determination and capital maintenance rules (according to views expressed in the Austrian, German and Spanish academic literature)[330] to rules on company names (Germany),[331] directors' disqualification (Poland), labour law (Lithuania, Latvia), and laws regulating the social security system (France).[332] However, in areas that can be considered part of 'core' company law, little case law exists. This may in part be a consequence of the fact that it will be problematic to enforce mandatory overriding provisions in areas that concern the internal organisation of a company, such as, for instance, in relation to board structure and board composition, if the mandatory provision of the forum state is not well aligned with the *lex societatis*.

6. Reincorporations

Companies incorporated under the law of a given Member State may seek to subject themselves to another Member State's law without having to go through the process of liquidation in their original jurisdiction. This process is typically referred to as 'reincorporation'. This transaction, if allowed, normally requires companies to transfer their 'registered office' (or 'statutory seat' in jurisdictions that simply refer to the company's seat as indicated in the articles of association) and to be registered in the new country as a company governed by the law of this jurisdiction. As we shall see below, however, national rules are extremely diverse and reincorporation requirements vary widely across Member States. Furthermore, most Member States have traditionally restricted, prohibited or rendered excessively difficult such transactions. In part, the difficulties can be explained in political terms, as Member States' legislators often regard company law as a device for protecting a wide range of corporate constituencies rather than merely addressing the shareholder-director relationship. The new applicable company law may be less protective for creditors, for other stakeholders or for minority shareholders than the law of the country of origin – or, at least, the country of origin may consider this to be the case. Consequently, a reincorporation might be harmful for such 'weak constituencies', unless other legal mechanisms are in place for protecting them.[333] Moreover, whenever the legal rules protecting such constituencies differ, this may create the possibility for companies to exploit such differences opportunistically, even where the absolute level of protection is similar in the Member States concerned. **100**

In the European Union, however, alternatives to reincorporations exist for companies that want to change the law applicable to them. First, most companies incorporated in an EU Member State can make use of cross-border mergers in order to achieve effects equivalent to a reincorporation. Such *de facto* reincorporations are typically implemented by incorporating a new 'shell' company (normally a subsidiary) in another Member State and then merging the holding company 'into' the newly formed foreign company. Cross-border mergers of this type can now be implemented under a common procedural framework,[334] which lead to a significant simplification of these transactions. However, **101**

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[330] On employee co-determination, see Section 4 c bb above.
[331] See n 324 above.
[332] See n 323 above.
[333] See FM Mucciarelli, 'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU' (2012) *Tulane Journal of International and Comparative Law* 421, 454–458.
[334] Directive 2005/56/EC on cross-border mergers.

cross-border mergers may still be burdensome and costly, depending on the legislation of Member States' involved and due to the absence of a 'fast-track- procedure',[335] mostly so when the only aim of a cross-border merger is relocating a company's registered office, without implementing a real integration between different companies.[336] The second option for an undertaking to achieve a change of applicable company law without liquidation is by using the vehicle of a European Company ('SE').[337] In this regard, it is worth recalling that the SE Regulation only provides a general regulatory umbrella, and that SEs are mainly governed by the legal framework for public companies in the Member State where their registered office is situated.[338] SEs can relocate their registered offices from one Member State to another, which also triggers a change in the applicable national rules.[339] SEs, however, are required to maintain their head office in the same Member State as that of registered office.[340] Additionally, SEs can only be incorporated by pre-existing public companies under specific circumstances, which are detailed in the SE Regulation and whose common denominator is the existence of a 'cross-border' connection.[341]

102 The main question of cross-border reincorporations by way of relocation of registered office throughout the EU, therefore, remains to be answered. In particular, the question arises whether the freedom of establishment requires Member States to allow domestic companies to reincorporate abroad (in the EU) and foreign companies incorporated in another Member State to incorporate as domestic companies without the need to liquidate. In recent years the Court of Justice has gradually clarified its case law in order to favour mobility. The original position of the Court of Justice, at least according to a widespread view, allowed Member States to pose limitations to relocations abroad of a company's central management and to 'outbound reincorporations'. In the decision *Daily Mail*[342], the European Court of Justice addressed the limits placed by a Member State (the UK) to the relocation abroad of a domestic company's administrative seat and tax domicile. The ECJ held that such restriction was not a violation of the freedom of establishment. The Court based its opinion on a general assumption regarding the relation between a company and its state of incorporation, which seem to stretch far beyond tax law. In particular, it was maintained that '*unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning*'.[343] As a consequence, the ECJ concluded that the freedom of establishment '*cannot be interpreted as conferring on companies incorporated under the law of a Member State a right*

[335] See Becht-Bruun & Lexidale, *Study on the Application of the Cross-Border Merger Directive* (2013) 36 and 112.

[336] The steps to implement cross-border mergers are: (a) the merging companies need to draw-up a draft terms of the merger and make it public – in the domestic business register or on company's website (Directive 2005/56/EC on cross-border mergers, art 5 and art 6(1)); (b) publication in the national gazette of the essential elements of the transaction (ibid, art 6(2)); (c) the boards and an independent expert should draw-up respectively business and financial reports (ibid, art 7 and art 8); (d) the transaction should be approved by the shareholders meeting (ibid, art 9); (e) the documents relevant to the transaction should be submitted to judicial or notary authorities to scrutinise the legality of the transaction (ibid, art 10 and art 11); (f) creditors' protection mechanisms need to be respected; (g) eventually, the merger is published in the register of the company resulting from the merger and taken out of the register(s) of the merging companies.

[337] Regulation (EC) 2157/2001 ('SE Statute').

[338] ibid, art 9(1).

[339] ibid, art 8.

[340] ibid, art 7.

[341] ibid, art 2.

[342] C-81/87 *Daily Mail.*

[343] ibid, at 19.

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.'[344] According to widespread opinion, in light of *Daily Mail,* Member States could place any limitations in the way of any 'moving out' of a domestic company. *Daily Mail,* however, also revealed several ambiguities. This decision, indeed, only addressed restrictions placed by a Member State against an outbound relocation of a company's tax residence, while it was not related to outbound reincorporations (which are, as we shall see hereunder, impossible from the standpoint of English law). In the same decision, additionally, the ECJ also added that the freedom of establishment '*also prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation*'.[345] The ECJ confirmed this statement in other decisions, maintaining that the freedom of establishment '*prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation*.'[346]

The Court of Justice partially clarified these issues in the more recent decisions rendered in the cases *Cartesio, VALE* and *Polbud*.[347] The former decision was related to a Hungarian company that aimed at transferring its 'seat' to Italy, while keeping the Hungarian *lex societatis.* In *Cartesio,* the Court concluded that '*a MS has the power to define […] the connecting factor required*' for being incorporated under its law, and thus is capable of enjoying the right of establishment, and the criteria for continuing to maintain that status. That included the power '*not to permit a company governed by its law to retain that status if it intends to reorganise itself in another MS by […] moving its seat*' there, '*thereby breaking the connecting factor required under the national law of the MS of incorporation*'.[348] On the other hand, the Court also explains[349] that this Member State power does not include a power to require the liquidation or the winding-up of companies that seek to reincorporate abroad, as outbound reincorporations fall within the scope of the freedom of establishment and any restriction must be assessed under the *Gebhard* test. This statement, however, was not necessary for deciding the case at hand and it might be questioned whether it is entirely binding or a mere *obiter dictum*. The *Cartesio* ruling, therefore, does not seem to provide for conclusive answers to the question of whether Member States must allow domestic companies to reincorporate abroad (or, at least, it may be debated whether this part of the *Cartesio* ruling is directly binding or not). In the decision rendered in the *VALE* case[350], the Court of Justice argued that national law '*cannot escape all review in the light of articles 49 and 54*'.[351] The Court of Justice maintained that any national legislation '*which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of*' the freedom of establishment[352], with the 103

[344] ibid, at 24.

[345] ibid, at 16.

[346] *Marks & Spencer*, at 31. See also C-264/96 *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (HM Inspector of Taxes)* [1998] *ECR* I-4695 (ECLI:EU:C:1998:370); C-9/02 *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] *ECR* I-2409 (ECLI:EU:C:2004:138); C-446/03 *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837 (ECLI:EU:C:2005:763).

[347] These cases were adressed in Chapter I Section 3, above. See C-210/06 *Cartesio*; C-210/06 VALE; C-106/16 *Polbud*.

[348] *Cartesio,* at 110.

[349] *Cartesio,* at 111–113.

[350] C-378/10 *VALE*.

[351] *VALE,* at 45.

[352] *VALE,* at 33.

consequence that Member States must provide 'the same possibility' for conversion to foreign EU companies as they provide to those governed by national law.[353] Any restrictions to inbound reincorporations must be justified by overriding reasons in the public interest and should be proportionate to the goals that the Member State aims at achieving ('Gebhard test'). In this regard, the Court of Justice argued that a complete ban of inbound reincorporations goes beyond what is necessary to protect the interests of creditors and minority shareholders.[354] Member States thus must comply with the principles of 'Equivalence and Effectiveness', and the recording of the status of predecessor in law could not be denied to *VALE Costruzioni* if it was granted in domestic conversions.[355] The reach of the freedom of establishment in outbound reincorporations was clarified in the decision *Polbud*.[356] A duty to liquidate all assets of companies that seek to reincorporate abroad is deemed a restriction on the freedom of establishment, which must be justified under the 'Gebhard test'. The Court added that such a mandatory liquidation could never be justified, as less restrictive measures existed to attain the same goals. The freedom of establishment covers reincorporations even with regard to companies that do not relocate any 'establishment' (such as their head office) to the territory of the jurisdiction of arrival.[357]

104 Nevertheless, as a matter of fact, a number of powerful obstacles to cross-border reincorporations still exist, and outbound reincorporations by way of transfer of registered office seem to be rarely used in practice (although data in this regard are sparse and unclear), unless both the country of origin and the country of arrival provide for clear regulations of these transactions and agree upon the prerequisites. Therefore, the question arises as to whether the most appropriate and desirable solution is introducing a harmonisation directive (originally envisaged as the 14th company law directive) that allows and regulates cross-border reincorporations throughout the European Union. The first detailed proposal for a directive, which was eventually not approved, was presented in 1997.[358] The 1997 proposal did not alter Member States' choice as to the primary connecting factors, be it the 'incorporation theory' or the 'real seat theory'.[359] Consequently, companies that sought to reincorporate out of a real seat country should have also relocated the connecting factor abroad, and companies that sought to reincorporate into a real seat country should have relocated the connecting factor onto their territory. According to the 1997 proposal, additionally, a project of reincorporation was to be published in the commercial register of the country of origin[360] and shareholders should approve this proposal with qualified majority.[361]

105 In 2002 a panel of corporate law specialists, entrusted by the EU Commission with the task of developing reform proposals for European company law (the 'high level group'), recommended liberalising reincorporations, as a way to increment both efficient allocation of resources and the quality of domestic laws.[362] Along this line, the Action Plan issued in 2003 by the Commission, aimed at modernising company law,

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[353] *VALE,* at 41.
[354] *VALE,* at 39.
[355] *VALE,* at 57.
[356] C-106/16 Polbud.
[357] *Polbud*, para. 38.
[358] Document XV/D2/6002/97-EN REV.2 (hereinafter the '1997 Proposal'). See RR Drury, 'Migrating companies' (1999) *European Law Review* 362.
[359] 1997 Proposal of a 14th Directive, art 3.
[360] ibid, art 4.
[361] ibid, art 6.
[362] High Level Group, *A modern regulatory framework for company law in Europe'* http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf, p. 101.

maintained that the 14th directive was a priority for the EU.[363] This aim was confirmed by a consultation launched in 2004, the large majority of whose respondents supported the idea that 'the transfer of registered office should not entail the company being wound up in the home Member State'.[364]

A fully-fledged policy analysis conducted a few years later, however, revealed a much **106** more complex scenario. This impact assessment, indeed, concluded that a harmonisation by way of regulation would be too rigid a mechanism and would not be proportionate to the planned goals. Therefore, according to this analysis the only options left on the table were either a harmonisation through directives, or leaving the present situation unaltered. In this regard, the assessment also argued that harmonisation by way of directive could be too onerous and not proportionate 'considering that the practical effect of the existing legislation on cross-border mobility (i.e. the cross-border merger directive) is not yet known and that the Community approach to the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future', with the consequence that 'it might be advisable to wait until the impacts of those developments can be fully assessed and the need and scope for the EU action better defined.'[365] Therefore, the project of harmonising Member States' regime`s on cross-border transfers of registered office was eventually put on hold.

A need for clarification of the rules on cross-border reincorporations, however, still **107** exists in business practice. Various resolutions and reports of the European Parliament, indeed, have requested the European Commission to present a new proposal for a directive on the cross border transfer of companies' registered offices.[366] Furthermore, a public consultation launched in 2012 on the future of European company law confirmed the interests of the respondents in a legislative initiative aimed at clarifying that European companies can transfer their registered office throughout the EU and reincorporate into another Member State without liquidating in the country of origin, and at regulating these cross-border reincorporations.[367] The 2012 Action Plan on company law and corporate governance[368] acknowledged that the issue of cross-border reincorporations is relevant, but that 'any future initiative in this matter needs to be underpinned by robust economic data and a thorough assessment of a practical and genuine need for and use made of European rules on transfer of seat.' Following this acknowledgement, in 2013 the European Commission launched a new public consultation on the transfer of companies' seat, which confirmed that in most Member States the rules on cross-border transfers of statutory seat (or registered office) were still unclear and that the Court of Justice's decisions rendered in the case *Cartesio* and *VALE* are not sufficient for clarifying all regulatory issues.[369]

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[363] Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, at 22 (COM(2003) 284 final).

[364] See the webpage: http://ec.europa.eu/yourvoice/results/transfer/index_en.htm.

[365] See Commission of the European Community, Impact assessment on the Directive on the cross-border transfer of registered office, Brussels, 12.12.2007 SEC(2007).

[366] See Resolution of the European Parliament of 25 October 2007 [P6_TA(2007)0491]; Resolution of the European Parliament of 10 March 2009 [P6_TA(2009)0086]; Resolution of the European Parliament of 2 February 2012 [P7_TA(2012)0019].

[367] See http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf.

[368] Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies (Text with EEA relevance) Strasbourg, 12.12.2012 COM(2012) 740 final.

[369] See European Commission (DG Market), Feedback statement, Summary of responses to the public consultation on cross-border transfers of registered offices of companies, September 2013. This book was already finished when the European Commission presented a proposal for a directive regulating cross-

108 In light of the efforts undertaken by the European Commission and by the European Parliament, aimed at understanding whether harmonisation is appropriate, the comparative analysis of this study assesses how Member States deal with the issues related to outbound and inbound reincorporations. In this regard, it is worth remembering that, in order to 'reincorporate' from one jurisdiction to another, a company should follow both private international law and substantive rules of the State of origin and the State of arrival, provided that these countries allow this transaction. In particular, the 'emigrating' company must comply with the rules and requirements on formation and registration of new companies imposed by the State of arrival, and should eventually be cancelled from the company register of the 'State of origin'. In this regard, it is useful to distinguish the standpoint of the 'State of origin' ('outbound reincorporations') from the standpoint of 'State of arrival' ('inbound reincorporations'). Finally, for countries that follow the 'real seat theory' (in one of its versions) the question arises as to whether a foreign company by transferring the connecting factor onto the domestic territory should reincorporate according to domestic company law.

109 **a) Outbound reincorporations.** From the viewpoint of the State of incorporation (hereinafter also the 'State of origin') of a company that seeks to reincorporate under the law of another country, the most important issue is whether domestic private international law rules allow companies to change the applicable company law (the *lex societatis*) without previously liquidating. If this general question has a positive answer, we should inquire what substantive rules and which procedure a company should follow in order to reincorporate under the law of another country. Normally, as we shall see, reincorporations require a decision of the shareholders to transfer the company's registered office or statutory seat abroad. These concepts (statutory seat and registered office) are normally used interchangeably in this book, but we should be aware that they might refer to different concepts in different jurisdictions. In particular, the concept of 'registered office' derives from English law and refers to the place registered in the official company register; by contrast, 'statutory seat' refers to a place mentioned in the articles of association, which almost invariably also coincides with the place of registration. Nevertheless, we cannot exclude, however curious such hypothesis might seem, that companies could be allowed to transfer their 'statutory seat' (by amending the corresponding clause in the articles of association) without transferring their registration to the State where the new statutory seat is situated. That a company might amend the clause of its articles of association indicating its 'statutory seat' without triggering a transfer of registration is a possibility that legal scholars have considered;[370] additionally, as we shall see, the comparative analysis reveals that there are cases where this dissociation is possible.

110 From a policy viewpoint, the issue of whether and under which conditions a jurisdiction should allow voluntary outbound reincorporations is quite complex. In all Member States, company law rules also address the relationship between companies and their creditors and, in some jurisdictions, their employees, in addition to the agency problem arising between shareholders and directors and the 'horizontal' relation among shareholders. A widespread strategy for protecting creditors is based upon rules on

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border reincorporations, which has adopted some suggestions proposed in Gerner-Beuerle et al. (n 47). See: Proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, Brussels, 25.4.2018, COM(2018) 241 final, 2018/0114 (COD).

[370] See, e.g., J Rickford, 'Current development in European law on restructuring of companies: An introduction' (2004) *European Business Law Review* 1229; H Eidenmüller, 'Mobilität und Restrukturierung von Unternehmen im Binnenmarkt' (2004) JZ, 32; S Lombardo, 'Libertà di stabilimento e mobilità delle società in Europa' (2005) *Nuova giur. civ. comm.* 372.

capital formation and capital maintenance, and upon minimum capital requirements, but the intensity of creditor protection varies from Member State to Member State. Additionally, in several jurisdictions the level of creditor protection is higher in public companies than in private companies.[371] Furthermore, certain Member States include in the *lex societatis* rules on debentures and on the powers of debenture holders. Finally, in some Member States employees have the right to appoint a certain number of directors or of members of the supervisory board ('codetermination'). In these circumstances, a reincorporation under the law of another jurisdiction would harm creditors or employees if the new jurisdiction is less protective than the country of origin (e. g.: when the law of the country of arrival does not provide for codetermination mechanisms or when capital maintenance rules are weaker than those of the country of origin), unless the country of origin considers these rules as overriding mandatory provisions to be applied to pseudo-foreign companies. The impact of reincorporations on creditors and other stakeholders also depends on the scope of company law in the country of origin. If rules protecting creditors and other stakeholders are included in the scope of company law, reincorporations might harm these stakeholders, if the country of arrival is not as 'protective' as the country of origin, for example because functional substitutes are part of another area of law, such as insolvency law, which is inapplicable pursuant to the relevant conflict rules. By contrast, if the country of origin protects creditors and other stakeholders through non-'company law' rules, such as insolvency law or tort law, a reincorporation is likely to be less harmful for pre-existing stakeholders, who can continue to rely on the application of insolvency or tort law of the country of origin.[372] Regarding creditor protection, things are further complicated by the significant differences between the regulation of private and public companies that exist in several countries. Rules on creditor protection of public companies are partially harmonised at EU level, while virtually no such harmonisation has taken place in relation to private companies. Furthermore, in recent years a trend has emerged throughout the European Union to reduce or abolish minimum capital requirements and creditor protection mechanisms based on company law rules more generally, at least as far as private limited companies are concerned. Consequently, in some Member States significant differences have emerged in the level of protection afforded to creditors of private and public companies, respectively. The effects of a reincorporation may thus depend not only on the countries, but also on the national company types involved. Moreover, the powers and protections of minority shareholders vary from Member State to Member State. Where the law of the 'country of arrival' is less protective of minority shareholders than the 'country of origin', a cross-border reincorporation could therefore also harm this group of stakeholders. These are the main reasons why in several Member States reincorporations are restricted or not allowed by national law. In particular, a complete ban of reincorporations (in particular of outbound reincorporations) would be an effective (albeit drastic) strategy for protecting the acquired interests and expectations of pre-existing creditors or other stakeholders relying on an application of the company law rules of the country of incorporation. However, such legislation is unlikely to be compatible with the Treaty. Additionally, as we shall see hereunder, even when reincorporations are allowed, the State of incorporation may provide for specific legal mechanisms to protect minority shareholders, creditors and other stakeholders, such as: (a) supermajority requirements for the approval of these decisions; (b) further safeguards aimed at protecting dissenting minority shareholders, such as the right to

[371] See L Enriques and M Gelter, 'Regulatory competition in European company law and creditor protection' (2006) *European Business Organization Law Review* 417.

[372] Mucciarelli (n 335) 458–461.

withdraw from the company; (c) special safeguards aimed at protecting creditors, such as the right to object to the reincorporation or to request a guarantee.

111 It is therefore important to also assess the procedural and technical aspects of reincorporations in the State of origin. Such technicalities and procedures have significant practical and theoretical implications. Companies cannot exist without being registered in an official commercial or company register and without being incorporated under the law of a specific jurisdiction. Companies, in other words, cannot exist 'outside' or independently of a jurisdiction of incorporation and, consequently, reincorporations require continuity of registration across jurisdictions. Once a company – in accordance with the private international law rules of both jurisdictions involved – starts being governed by the law of the new jurisdiction, its articles of association will already need to be in compliance with the provisions of the new jurisdiction of incorporation.[373] Furthermore, it is the State of origin that governs the point in time when the domestic commercial register strikes off that company. In this context, the question arises as to whether the 'emigrating' company should be cancelled only after it has been registered in the companies register of the destination country as a domestically incorporated company. Indeed, if a company was cancelled from the company register of the State of origin before being registered in the State of arrival, there would be a period of time during which that company would not be registered anywhere, and thus not exist. It goes without saying that this possibility would raise the risk of opportunistic decisions. All these issues, as we shall see in the comparative analysis, are still uncertain in most Member States of the EU.

aa) Overview of national laws

Table 6.1: Voluntary outbound reincorporations

Country	**Are voluntary outbound reincorporations allowed?**	**Company law requirements for outbound reincorporations**	**Procedure to implement such decisions**	**Comparison with cross-border mergers**
Austria	No explicit statutory route to outbound reincorporations, but it is generally acknowledged that reincorporations are permitted within the EU to comply with the CJEU's case law.	Unclear, but some scholars argue that the rules regarding cross-border mergers and the reincorporation of SEs should be applied by analogy.	Unclear, but according to some scholars the rules regarding the reincorporation of SEs can be applied by analogy.	Unclear whether re-incorporations, which are not provided for explicitly in statute, follow the same rules as cross-border mergers, particularly in relation to the preservation of employee participation.
Belgium	Yes (art. 112 PIL Code).	The possibility to reincorporate	Companies have to comply with	Considerable legal uncer-

[373] See T Luchsinger, *Die Niederlassungsfreiheit der Kapitalgesellschaften in der EG, den USA und der Schweiz*, (Freiburg, 1992) 21; Mucciarelli (n 2) 83.