except those relating to permitted characters in a corporate name.[59] The Eleventh Directive does not provide for controls on the choice of name by overseas companies and the virtual non-application of such controls to the corporate names of EEA companies seems to have been the result of a fear that to impose them would infringe the freedom of establishment rules of the Community.[60]

Other mandatory provisions

6–8 In the final analysis, Pt 34 applies the equivalent of only a small part of the British Act to overseas companies and, as we have seen, where the home state requires the production of public, audited accounts, even Pt 34 relies on the rules of the state of incorporation rather than on the rules of the British Act. Some further protection for third parties, based on British law, may apply as a result of provisions in the Insolvency Act 1986. Thus, the rules restricting the re-use by successor companies of the name of a company which has gone into insolvent liquidation[61] apply to overseas companies. This is achieved by use of the formula that the relevant sections of the 1986 Act apply also to companies "which may be wound up under Part V of this Act".[62] Part V of the 1986 Act permits the court in certain circumstances compulsorily to wind up an unregistered company, the definition of which is broad enough to include overseas companies.[63] To fall within Pt V the overseas company need not have an established place of business in Great Britain nor, indeed, any assets here at the time the application for winding up is made.[64] The courts have also accepted that the jurisdiction to wind up unregistered companies brings into play certain other sections of the Insolvency Act, even though those sections do not in terms apply to "Part V" companies.[65] These include the important provisions relating to fraudulent and

[59] s.1047(3),(5). These controls are set out in s.57 and regulations made thereunder.

[60] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] E.C.R. I-10155, where the ECJ struck down Dutch "pseudo-foreign company" requirements applied to an overseas (in fact, British) company which went beyond the Eleventh Directive. However, the Court recognised the possibility of justification which, one would have thought, would have been applicable in principle to the domestic name requirements, on the grounds of third-party protection, not involving a disproportionate cost to the company. However, this conclusion cannot be firmly arrived at without knowing the nature and extent of the name controls applied in the Member State of incorporation. The approach of the Act simply side-steps these difficulties.

[61] See below, para.9–12.

[62] IA 1986, ss.216(8) and 217(6).

[63] s.220 ("any company", except, of course, those incorporated under the British companies legislation). See *Paramount Airways Ltd, Re* [1993] Ch.223 at 240, CA. Voluntary winding-up of an unregistered company, however, is not permitted: s.221(4).

[64] *Stocznia Gdanska SA v Latreefers Inc (No.2)* [2001] 2 B.C.L.C. 116, CA. However, the company must have some connection with Great Britain and there must be some good reason for winding it up here.

[65] See previous note.

wrongful trading.[66] Important though these provisions may be, they apply only to companies which are being or have been wound up in the United Kingdom, which in the case of an overseas company may well not happen.[67] Finally, the Company Directors Disqualification Act 1986[68] also applies to a company incorporated outside Great Britain if it is a company capable of being wound up under the Insolvency Act 1986.[69]

Company Law at Community Level

Harmonisation

6–9 The underlying policy of Pt 34 of the Act is to rely on the company law of the state of incorporation when a foreign company does business in the United Kingdom. When the European Economic Community was founded in the middle of the 1950s, a very different approach was taken in the Treaty of Rome. It was expected that, in the Community, companies based in one Member State would penetrate more readily the economies of other Member States, without necessarily establishing subsidiaries in those States. It was decided that this was acceptable only if accompanied by a programme for the mandatory harmonisation by the Community of the company laws of the Member States.[70] In other words, in the minds of the drafters of the original EC Treaty, freedom of establishment for companies and harmonisation of company laws in the European Union were closely linked. Consequently, what is today art.50(2)(g) TFEU provides that the Council of Ministers by qualified majority vote, on a proposal from the European Commission and under the joint decision-making procedure with the European Parliament,[71]

[66] See *Latreefers* (above, fn.64) and IA 1986, ss.213 and 214. See also Ch.9, below. Whether the application of ss.213 and 214 to EC companies could be challenged under the Treaty provisions relating to freedom of establishment is unclear. It could be argued that these provisions, which apply equally to British companies, do not impede freedom of establishment but only the subsequent conduct of an established business.

[67] In the case of insolvent companies with the centre of their main interests in another EU Member State, Council Regulation 1346/2000/EC on insolvency proceedings ([2000] OJ L160/1), art.3(2) favours the opening of insolvency proceedings in that other Member State.

[68] See Ch.10.

[69] s.22(2). See also *Seagull Manufacturing Co Ltd (No.2), Re* [1994] 1 B.C.L.C. 273—Act applicable to foreigners outside the jurisdiction and to conduct which occurred outside the jurisdiction, though presumably only in relation to a company falling within the Act. In the case of undischarged bankrupts the connecting factor is instead whether the company has an established place of business in Great Britain.

[70] See Wouters, "European Company Law: *Quo Vadis?*" (2000) 37 C.M.L.R. 257 at 269 and Wolff, "The Commission's Programme for Company Law Harmonisation" in Andenas and Kenyon-Slade (eds), *EC Financial Market Regulation and Company Law* (London, 1993), p.22. This position was adopted in particular by France.

[71] Now referred to as the "ordinary" legislative procedure of the Community: art.294 TFEU.

may adopt Directives[72] which aim to protect the interests of members "and others"[73] by "co-ordinating to the necessary extent the safeguards which . . . are required by Member States of companies and firms . . . with a view to making such safeguards equivalent throughout the Community". Thus, reliance on other member states' company laws was to be accompanied by Community legislation which made those laws "equivalent", at least in certain respects.

The resulting programme for extensive mandatory harmonisation, from the top down, of Member States' domestic company laws got off to an impressive start, but by the middle 1990s, if not earlier, it had run out of steam, with only part of the proposed programme of "company law directives" enacted. This may have been because the theory linking freedom of establishment with a need for harmonised company law was never satisfactorily articulated. There was little empirical evidence that "members and others" were suffering in the Community's single market from the lack of harmonised company laws. There was also the criticism that, once a policy had been embodied in Community company law, it was more difficult to change it than in the case of domestic legislation, at least for the majority of Member States. In other words, the Community legislative process was more "sticky" than national ones.

6–10 In any event, for harmonisation to be fully successful, (a) there must exist a common best rule for all the Members States; (b) the Commission, which has a monopoly on the initiation of Community legislation, must be able to identify it; and (c) the participants in the Community's legislative process must accept the common rule. None of these characteristics was ever completely in evidence. The structure of shareholding (dispersed or concentrated) differs across the Member States, at least in relation to large companies, so that the dominant problem in some jurisdictions is the relationship between management and shareholders as a class and in other jurisdictions that between controlling and non-controlling shareholders. In some Member States board level representation of employees is an important part of the domestic industrial relations system, whilst in others it is not. Both features made the identification of a single common rule very difficult in the most sensitive areas of company law. As to the Commission, it never had the time or the resources to develop the highly sophisticated comparative law analysis which legislating for an ever-growing block of countries requires. Finally,

[72] Directives are binding on the member states as to the principles to be embodied in national legislation but give the states some flexibility in the transposition of the Directive into national law: art.288 TFEU.

[73] This includes creditors and, probably, employees. Basing the Directive on employee involvement in the SE (see above, para.1–33) on what is now art.50 was controversial and it was eventually adopted on the basis of what is now art.352 TFEU, which requires unanimity. However, the controversy was as much about whether the SE rules could be regarded as a harmonising measure as about the subject-matter of the Directive.

since the adoption of legislation requires a supermajority vote of the Member States, there is plenty of scope for the states to defend national interests, normally by watering down the proposals put forward by the Commission. It may be difficult to say whether the resistance of a Member States is driven by the fact that the Commission has proposed an inefficient rule for that state or by pressure from incumbent national interests which will lose out if the efficient rule is adopted.

6–11 Nevertheless, some parts of the proposed programme of company law directives were enacted by the middle 1990s. This period saw the First (safeguards for third parties),[74] Second (formation of public companies and the maintenance and alteration of capital),[75] Third (mergers of public companies),[76] Fourth (accounts),[77] Sixth (division of public companies),[78] Seventh (group accounts),[79] Eighth (audits),[80] Eleventh (branches)[81] and Twelfth (single-member companies) Directives,[82] though they were not adopted in that precise order. Subsequently, there have been significant directives on takeovers, cross-border mergers and shareholders' rights (though the twenty-first century directives are no longer allocated a number in an overall proposed programme of directives). However, the Directives are not equally important for the United Kingdom. Some of them did not significantly alter the existing national law, because the EU rule reflected existing national law or because Member States were given a range of options in implementing the Directive and could choose to preserve the status quo or because the subject-matter of the Directive was not important in the United Kingdom.[83] As far as the United Kingdom is concerned, the most important Directives have been the First (which triggered a review of the common law rules on ultra vires and agency as they applied to companies);[84] the Second (which led to a tightening of the rules on dividend distributions and legal capital generally and which, unlike the First, has proved to be an obstacle to radical domestic reforms);[85] and the Fourth (which led to a re-thinking of the relationship between the law and accountancy

[74] Council Directive 68/151, [1968] OJ 68.

[75] Council Directive 77/91, [1977] OJ L26/1.

[76] Council Directive 78/855, [1978] OJ L295/36.

[77] Council Directive 78/660, [1978] OJ L222/11.

[78] Council Directive 82/891, [1982] OJ L378/47.

[79] Council Directive 83/349, [1983] OJ L193/1.

[80] Council Directive 84/253, [1984] OJ L126/20.

[81] Council Directive 89/666, [1989] OJ L395/36.

[82] Council Directive 89/667, [1989] OJ L395/40.

[83] For similar reasons, the overall significance of the EU company law directives has been questioned: L Enriques. "EC Company Law Directives and Regulations: How Trivial Are They?" (2006) 27 *University of Pennsylvania Journal of International Economic Law* 1.

[84] See Ch.7, below.

[85] See Chs 11–13 below.

practice).[86] Of lesser impact were the Eighth on audits[87] and the Eleventh on branches.[88]

By contrast, some proposals were never adopted by the Community legislature because it proved difficult to obtain the necessary level of Member State support for the more controversial proposed harmonisation measures. This was true, in particular, of the proposed Fifth Directive which dealt with two sensitive topics upon which Member States are pretty equally split: should the board be a one-tier structure (as is the practice in the United Kingdom) or a two-tier one, consisting of separate supervisory and management boards, and, even more controversially, should employee representation on the board (whether one-tier or two-tier) be mandatory?[89] The Fifth Directive was never adopted. For many years, the issue of mandatory employee representation also held up agreement on the European Company and on a Directive on cross-border mergers, and the issue was resolved there only by abandoning any significant commitment to uniformity, or even equivalence, of rules on employee representation. Instead, the matter is regulated, mainly though not exclusively, according to the model required by the law of the State from which the merging company with the highest level of representation comes.[90] Equally controversial has been the draft Ninth Directive on corporate groups, where the majority of States deal with group problems through general mechanisms of company law, whereas Germany has developed a separate regime for addressing issues of minority shareholder and creditor protection in group situations.

A new approach and subsidiarity

6–12 Such was the state of uncertainty into which the company law harmonisation programme had fallen by the end of the twentieth century that, at the end of 2001, the Commission appointed a High Level Group of Experts with the brief of providing "recommendations for a modern regulatory European company law framework". The HLG's Final Report[91] proposed a "distinct shift" in the approach of the Community to company law. Instead of the emphasis being, as hitherto, on the protection of members and creditors, the focus in future should be on what the Group saw as the "primary purpose" of company law: "to provide a legal framework for those who wish to

[86] See Ch.21, below. The Seventh on group accounts was less important since domestic law already recognised the principle of group accounting.
[87] See Ch.22, below, but the Eighth was revised in 2006 (Directive 2006/43/EC, OJ L157/87, June 9, 2006) and the second version was more significant. See Ch.22 below.
[88] See above.
[89] See Ch.14 below.
[90] See para.14–68.
[91] *Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework of Company Law in Europe*, Brussels, November 4, 2002.

undertake business activities efficiently, in a way they consider to be best suited to attain success."[92] Although the proper protection of members and creditors was an element of an efficient system of company law, those protections themselves should be subject to a test of efficiency. The Commission responded to the Group's Report in 2003 by producing a company law Action Plan which largely accepted the Group's recommendations.[93]

What were the main features of the new approach? First, the role of the Community in the area of company law became a more modest, though still significant, one. So long as the Community's task was viewed as one of harmonising Member States' company laws so as to produce equivalent protections across the Member States, no serious question could be raised about the central role of the Community in this process and the whole of company law was in principle open to Community regulation. By definition, harmonisation of national systems (if it is to be achieved by legislative fiat) is something which only Community law can guarantee and national laws cannot.[94] However, once the goal is put in terms of identifying an efficient framework for company law, the issue of subsidiarity[95] is clearly raised. It is not obvious that the Community, in principle, is better equipped to identify an efficient system of company law than the Member States, especially as national contexts differ substantially. An important implication of this new approach therefore was that the Community should concentrate, as far as new Directives were concerned, on those areas of company law where it has an especial legislative advantage, principally in relation to cross-border corporate issues.[96] The most significant Directives adopted in the company law area since the adoption of the Action Plan have fitted this pattern: the Cross-Border Mergers Directive (2005)[97] and the Directive on Shareholder Rights (2007).[98] However, it should be noted, in relation to the latter, that although the driving concern of the Commission was the difficulties facing a shareholder in Member State A wishing to exercise voting rights in a company incorporated and listed in Member State B, the Directive approaches this issue by conferring minimum rights on all shareholders in companies whose shares are traded on a regulated market. It is the limitation of the Directive to

[92] Final Report, Ch.II.1.
[93] Communication from the Commission to the Council and the European Parliament, COM(2003) 284, May 21, 2003.
[94] On harmonisation "from the bottom up" see below para.6–25.
[95] Art.5 TFEU. Where both the Community and the Member States have competence, the Community should take action "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".
[96] See above, fn.91, Ch.II.1.
[97] Directive 2005/56/EC, OJ L310/1, November 25, 2005. See Ch.29 below.
[98] Directive 2007/36/EC, OJ L184/17, July 14, 2007. See Ch.21 below.

companies with publicly traded shares which really indicates the cross-border impetus of the Directive.

6–13 The Community also achieved success with the creation of a new form of Community incorporation, the European Company (SE),[99] a form of incorporation available only to existing national companies (not individuals). The proposals, of very long standing, had been beset by the same two problems as afflicted the Fifth Directive proposal (above). These problems were solved by giving the SE a choice between one-tier and two-tier board structures and by making employee representation mandatory for the SE only if one of the founding companies was already subject to such requirements under its national law. It may have helped that the SE, unlike the Fifth Directive, did not require changes in national law but made available to national companies, if they wished to use it, a form of Community re-incorporation. Those supporting the SE proposal hoped it would encourage cross-border mergers (the founding companies were normally required to be in different Member States), either at top company level or within corporate groups. In fact, there is little evidence that the SE has been used extensively for this purpose—or, indeed, extensively used at all except in a few Member States.[100] Nevertheless, the Community was emboldened by the adoption of the SE later to propose a European Private Company (SPE). This, however, is in effect a disguised harmonisation measure (it was to be available to individuals and had only a weak cross-border requirement) and it has, perhaps predictably, run into opposition from some of the Member States.[101]

The single financial market and company law

6–14 An even more important conclusion which was drawn from taking subsidiarity seriously was that the creation of a single financial market in Europe was a more appropriate area for Community activity than a harmonised company law. The Community came to concentrate on these matters since the integration of the national capital markets was seen as a crucial aspect of the construction of the Single Market, more so than company law harmonisation, which was, so to speak, the price for freedom of establishment (also an

[99] Council Regulation (EC) No 2157/2001 on the Statute for a European Company, OJ L294/1, November 10, 2001 and the accompanying Directive on employee involvement in the SE (Council Directive 2001/86/EC, OJ L294/22, November 10, 2001). See para.1–33.

[100] Eidenmuller, H., Engert A. and Hornuf, L. "Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage" (2009) 10 *European Business Organization Law Review* 1.

[101] Davies, P. *The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws* (Oxford Legal Studies Research Paper No 11/2011; ECGI - Law Working Paper No 154/2010. Available at SSRN: *http://ssrn.com/abstract=1622293* [Accessed March 28, 2012]).

essential feature of the Single Market) rather than a direct contributor to the Single Market.

One consequence of the focus on securities law was to favour the adoption of some Directives which could be, and had been, regarded as creations of the company law reform process—the line between company and securities law being inexact. Thus, a Directive on takeover bids[102] was adopted in 2004, which had originally been proposed as the Thirteenth Directive in the company law series, but it eventually emerged without that formal designation. Equally, rules on disclosure of financial information by companies, a traditional area of Community company law activity when viewed through the lens of shareholder protection, could be re-packaged in a securities market context and presented as investor protection measures. Thus, in 2002 the Community adopted a Regulation requiring companies with securities traded on a regulated market to produce their accounts in accordance with International Accounting Standards, in the hope of making the accounts of such companies more easily comparable, no matter in which Member State they were incorporated. In the same light can, perhaps, be viewed the revised and substantially extended Eighth Directive on auditors (2006).[103] However, here should be noted the significant impact, not just of theories of law-making and subsidiarity, but also of concrete financial scandals (notably those in the United States involving the Enron Corporation and other companies and the Parmalat scandal in Europe). The result was to release a considerable regulatory impulse, the revised Eighth Directive, like its predecessor, applying to all companies, whether traded on a public market or not.[104]

However, the focus of the Community on the single capital market did not just operate as a way of taking forward what might be regarded as "really" company law initiatives. Some financial market Directives necessarily were aimed mainly at companies in their capacity as fund raisers on public markets. Clear examples were the Directives dealing with initial process of raising capital through public offers and the admission of securities to trading on public markets; subsequent disclosure to the market by issuers and, to some extent, their shareholders; and ensuring the non-distorted functioning of securities and other markets. The first two sets of Directives are discussed in more detail in Chs 25 and 26 below and the third in Ch.30. All that need be noted here is that the first area (public offers and admission to trading) became a focus of Community action as long ago as 1979, so that for some time the company law and securities law programmes of the Community proceeded in parallel. However, a major change of gear occurred with the adoption in 1999

[102] Directive 2004/25/EC, OJ L142/12, April 30, 2004. See Ch.28 below.

[103] Directive 2006/43/EC, OJ L157/87, June 9, 2006. See Ch.22 below.

[104] Though there are some additional requirements for such companies. See para.22–27.

of a Financial Services Action Plan (FSAP),[105] which led to a significant level of legislative activity in the succeeding years and to the production, in particular, of Directives on prospectuses,[106] on disclosure by issuers (the Transparency Directive),[107] and on market manipulation (the Market Abuse Directive),[108] as well as the Directive on takeovers referred to above.

The FSAP was accompanied by an innovation in legislative procedure at Community level, known as the "Lamfalussy" procedure for the regulation of European securities markets,[109] under which the Directive contains only the principles of the legislation and the detail is laid down subsequently by the Commission, after consultation with (now) the European Securities Markets Authority, but without the need to go through the full Community legislative process.[110] Consequently, the above Directives have to be read along with various implementing instruments (Directives or Regulations) issued by the Commission, which constitute a very significant part of the legislative process. The Commission recently announced that it had achieved the main goals set by the FSAP and that it did not intend to introduce a second FSAP, but it is clear that securities law will continue to be a main area of Commission interest.

Corporate governance

6–15 A further implication of the new approach was that Community law-making, where this was required, should be less reliant on detailed Directives of the traditional type and make more use of Recommendations[111] and of instruments which imposed disclosure requirements rather than substantive rules.[112] This approach has been particularly apparent in the sensitive area of corporate governance. Thus, the topics of board composition[113] and directors' remuneration[114] have been dealt with at Community level in this way—indeed

[105] Financial Services, *Implementing the Framework for Financial Markets: Action Plan*, COM (1999) 232, May 11, 1999.
[106] Directive 2003/71/EC, OJ L345/64, December 31, 2003.
[107] Directive 2004/109/EC, OJ L390/38, December 31, 2004.
[108] Directive 2003/6/EC, OJ L96/16, April 12, 2003.
[109] See the *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, Brussels, February 2001.
[110] In EU jargon the subsequent procedure for law-making by the Commission is known as "comitology".
[111] "Recommendations . . . shall have no binding force": art.288 TFEU.
[112] See HLG, above, fn.91, Ch.II.2 and 3.
[113] Commission Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and on committees of the (supervisory) board, OJ L52/51, February 25, 2005, supplemented by the recommendation of 2009 mentioned in the following note.
[114] Commission Recommendation 2004/913/EEC fostering an appropriate regime for the remuneration of directors of listed companies, OJ L385/55, December 29, 2004, supplemented by Commission Recommendation C(2009) 3177, April 30, 2009.

through Commission rather than Community recommendations—with the recommendations again confined to publicly traded companies. Further, the Community rules on corporate governance codes take the form of a comply or explain obligation (as indeed is typical of national corporate governance codes) but with the content of the code being determined, not by the Community, but by national-level bodies.[115] However, nothing is stable in the battle over law-making between central and national levels. The financial crisis of late 2007 has naturally led to increased regulation of banks and other financial institutions, which is an area where Community legislation has always been dominant. It remains to be seen how much of this reform impetus, which includes the corporate governance of financial institutions, will spill over into the area of corporate law in general.[116]

Reform of the existing directives

6–16 Some minor steps have also been taken to address the point about the "stickiness" of Community legislation. In fact, the Commission moved on this front ahead of the High Level Group's Report. It adopted in 1996 the Simpler Legislation for the Single Market ("SLIM") initiative. This was a general initiative, not confined to company law, but several of the initial company law directives have been amended through the SLIM process, albeit with only modest results.[117] In the middle of 2007 the Commission issued a Communication on simplification in the area of company law,[118] which raised two more radical possibilities. One was the abandonment of certain areas of Community company law on the precise ground that Community action was not needed where cross-border issues were not entailed; and the other was moving from detailed Directives to principles-based drafting, which would give Member States more freedom in adapting them to their national situations. Neither of these initiatives has led to concrete results. The acid test for this initiative was proposals to substantially down-grade the Second Directive, already lightly reformed under the SLIM initiative, but no radical action emerged.[119]

[115] See art.46A of the Fourth Directive, inserted by Directive 2006/46/EC, art.1(7).
[116] In early 2012 the Commission issued a public and wide-ranging consultation on the way forward for European company law.
[117] See Directive 2003/58/EC, OJ L221/13, September 4, 2003 (amending the First Directive); Directive 2006/68/EC, OJ L264/32, September 25, 2006 (amending the Second Directive); Directives 2007/63/EC, OJ L300/47, November 17, 2007 and Directive 2009/109/EC, OJ L259/14, October 2, 2009 (amending the Third and Sixth Directives); and Directive 2009/49/EC, OJ L 164/42, June 26, 2009, amending the Fourth and Seventh Directives.
[118] Communication from the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, COM(2007) 394 final, July 2007.
[119] The Commission commissioned a study on the utility of the Second Directive but, after receiving that report in January 2008, decided that no further reform of the Second Directive was needed.

CORPORATE MOBILITY

6–17 Corporate mobility can mean a number of things, perhaps most obviously the question of what constraints exist on a company's freedom to move its head office from one jurisdiction to another, something it may want to do in order to obtain the benefit of a more favourable tax regime.

However, for the purposes of this discussion corporate mobility refers to the constraints on the freedom of a company to choose the jurisdictional location of its registered office and, having made an initial choice, to move it to another legal jurisdiction. This is a significant question because, under the British conflicts of law rules and those of most other jurisdictions, the company law applicable to a company is determined by the jurisdictional location of its registered office. If a company can freely choose its initial jurisdiction for incorporation and subsequently alter it, it is in a position to choose and subsequently alter the company law to which it is subject.

If we assume that entrepreneurs are free to choose and subsequently alter the law applicable to their company, then the scene is set, potentially, for regulatory competition among States as they seek to offer the law which is most attractive to companies and for regulatory arbitrage by companies as they move to the jurisdiction which offers the law which they favour. Corporate mobility does not in itself ensure regulatory competition by states and regulatory arbitrage by companies. Regulatory competition also requires that States conceive it to be in their interests to attract incorporations and regulatory arbitrage requires that companies perceive that the advantages of choosing the most favourable law outweigh any potential disadvantages.

Nor does it follow that the result of competition would be that companies (or companies of a particular type) incorporate overwhelmingly in a particular state. This is certainly what has happened in the United States where regulatory competition has led a large proportion of publicly traded companies to incorporate in the state of Delaware. It might be, instead, that states all bring their company laws in line with the model which companies prefer (in order not to lose incorporations) so that what competition produces is not migration of companies but convergence of states' company laws. In this perspective, the power to transfer the registered office would put some pressure on those responsible for company law in a particular jurisdiction to ensure that it remained attractive to businesses. The CLR thought this was the correct approach in principle: "In general, it is desirable that businesses should remain in Great Britain because it is attractive for them to do so, and not because company law in some sense locks them in."[120] If Member States reacted in this way to

[120] Completing, para.11.55.

competition, then the result might be characterised as harmonisation of company laws "from the bottom up" rather than "from the top down", as under the Community's original programme of company law Directives, discussed in para.6–9. Alternatively, competition might lead not to harmonisation on a single model but to a form of "specialisation" in which different Member States offer somewhat different corporate laws, each adapted to the dominant form of business organisation to be found in their jurisdiction. Whatever the precise result, it would be the operation of competitive pressures rather than legislative fiat which determined the nature and extent of the harmonisation process.[121]

As we shall see below, whilst corporate mobility has long been freely available in the United States, in the European Union that is not (or not yet) the case. Some jurisdictions (such as the United Kingdom ones) have long made the choice of company law on initial incorporation available and as a result of decisions of the Court of Justice of the European Union, interpreting the Treaty provisions on freedom of establishment, this principle now applies throughout the Community. Freedom subsequently to alter the applicable company law by moving the registered office, however, is much less securely available—as is also the case within the British jurisdictions. We begin with a brief discussion of the purely domestic rules on corporate mobility before moving onto the more challenging question of how far they have been modified by Community law.

Domestic rules

6–18 As we have seen in para.6–2, British law recognises the existence of companies validly formed under the law of a foreign jurisdiction when they carry on business in the United Kingdom. This principle is applied even if the company carries on no business in its state of incorporation but operates entirely in the United Kingdom—and it was always intended that it should do so. So, the British rule of recognition of a foreign company is simply its valid incorporation elsewhere. As it is usually said, the United Kingdom is an "incorporation theory" state. Thus, at the point of initial incorporation of a company, the founders have a free choice of the applicable company law. As far as British law is concerned, they may choose any jurisdiction for incorporation and then carry on business entirely in the United Kingdom. The alternative recognition rule, used by many Member States of the European Union, is the "real seat" theory, which requires the registered office to be in the same jurisdiction as the company's headquarters (or place of central management). Such

[121] For an extended analysis of the issues discussed in this paragraph see Armour, J. *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition*, ECGI Working Paper Series in Law, No 54/2005.

a state would refuse to incorporate a company whose central management is not present in that state. Thus, "real seat" theory states are not available as providers of company law to businesses which intend to operate only in the United Kingdom, because the founders would not succeed in establishing their company in that jurisdiction. Conversely, in principle a real seat state will not recognise a company established in a British jurisdiction if its central management is not located there as well. That position, however, has been modified by Community law, as we shall see in para.6–20.

If a company incorporated in a foreign jurisdiction, but operating in the United Kingdom, wishes to move its registered office to another foreign jurisdiction, that is a matter for the jurisdictions involved. However, British law is engaged if a company registered in one of the United Kingdom jurisdictions wishes to move its registered office to a foreign jurisdiction—or if a company registered in a foreign jurisdiction wishes to move its registered office to the one of the United Kingdom jurisdictions. Curiously, in contrast with its liberal stance at the point of incorporation, British law provides no simple mechanism whereby a company may make such a move, even as between the British jurisdictions. When the founders apply to register a company in the United Kingdom, they must state in which of the three United Kingdom jurisdictions its registered office is to be situated: England and Wales, Scotland or Northern Ireland.[122] There is no simple mechanism provided whereby the registered office can be changed subsequently from the jurisdiction of incorporation to another.[123] Thus, a company which is formed with its registered office in England and Wales cannot decide by resolution to transfer its registered office to Scotland, still less to some other Member State of the European Community or to a state outside the European Community.[124]

6–19 It is possible to produce this result indirectly. The company might go into (solvent) liquidation and in that process transfer its assets to new or existing company formed in the jurisdiction of choice, but the tax consequences of such a way of proceeding make that course of action unattractive. Within the United Kingdom the company might use a scheme of arrangement to effect a merger with another com-

[122] s.9(2)(b).

[123] The facility for companies whose registered office is in fact in Wales to alter the statement so as to toggle between "Wales" and "England and Wales" does not involve a change of legal jurisdiction. The change has an impact on the availability or otherwise on the use of Welsh in the company's official documents and in communications with Companies House. See s.88.

[124] Since British law adopts the incorporation theory, a UK company may freely move its headquarters out of the United Kingdom without imperilling the validity of its incorporation in the United Kingdom in the eyes of British law. This is useful for companies which wish to retain British company law but does not address the issue of companies which wish to change the applicable company law.

pany located in the jurisdiction of choice.[125] But a simple transfer of the registered office is not a technique which is made available. On the other hand, these alternative mechanisms contain a reasonably high level of protection for shareholders, creditors and perhaps other interests. These protections are built into the scheme of arrangement provisions.[126] When the liquidation mechanism is used, the assets of the company are valued at the time of transfer and that value is paid by the new company to the former owner, thus protecting both existing shareholders and existing creditors. The transferring company's creditors are protected because the English company will have the proceeds of the sale against which they can assert their claims, and the liquidation gives the shareholders of the transferring company an exit route from the company and some assurance that the transferring company's assets have been properly valued.

However, it is difficult to believe that adequate protection for members and creditors could not be provided through a set of rules applying to a simple transfer of the registered office. The Company Law Review proposed such a scheme,[127] which was based on that laid down in the European Company Statute,[128] for the SE is empowered to move its registered office from one EU State to another. However, the CLR proposals envisaged the possibility of transfer of the registered office outside the European Community and also within the United Kingdom (which is not a matter for Community regulation). The basis of the proposal was that transfer in principle should be permitted (i.e. the opposite of the present law) but subject to adequate safeguards for shareholders and creditors. The main elements of protection for members would be the requirement that the board draw up a detailed proposal about the transfer, that the proposal should require approval by special resolution of the shareholders (thus requiring a three-quarters majority approval) and that dissenting members should have the power to apply to the court which might order such relief as it thought appropriate. Thus, for shareholders, the protective techniques invoked were disclosure, supermajority approval and court control. For the protection of creditors, it was additionally proposed that the directors would have to declare the company to be solvent and able to pay its debts as they fell due for the twelve months after emigration, the creditors would have the right to apply to the court to challenge the proposal and the company would have to accept service in the United Kingdom even after

[125] On schemes of arrangement see Ch.29. Cross-border mergers are discussed below at para.6–24.

[126] See Ch.29 below.

[127] Completing, paras 11.54–11.70 and Final Report I, Ch.14.

[128] Reg.2157/2001/EC, art.8.

emigration in respect of claims arising from commitments incurred before emigration.[129]

Transfer would have been permitted, on compliance with these rules, to any EU or EEA Member State, but transfer to a non-EU state would be dependent upon the Secretary of State having approved that state for this purpose, the criteria for approval being related mainly to levels of creditor protection, especially for creditors resident outside the state. Finally, for transfer within the United Kingdom a less detailed proposal would need to be developed by the board and the right of dissenting shareholders to apply to the court would be removed. The full range of creditor protections, however, would apply since there are significant differences in security and property law between the three jurisdictions.[130] However, the Government rejected the CLR's proposals for international migration, on grounds of feared loss of tax revenues.[131]

Community law: initial incorporation

6–20 Corporate mobility is an area where Community law has had a significant impact, but, unusually for company law, Community law developed by the Court of Justice rather than the Community legislature has been the driver of reform to date. The court has proceeded mainly on the basis of its interpretation of the freedom of establishment provisions of the Treaty, as set out in para.6-2 above. The Commission has from time to time mooted the adoption of a directive dealing with corporate mobility and it may be that, after a period of not being interested in the topic, it is about to return to the Commission's agenda.[132] There is a strong case for a Directive, since the Court of Justice has not been able to resolve all the issues surrounding corporate mobility. To put it briefly, the Court has established freedom for the founders to choose the applicable corporate law at the point of incorporation but has not yet established clearly corporate mobility thereafter. Since UK domestic law already provided choice of law at the point of incorporation, the impact of the

[129] If the company, after emigration, maintained a place of business in the United Kingdom it would become subject to the information provision rules for overseas companies (above); if not, it would in any event have to file with Companies House contact details relating to its new jurisdiction.

[130] Immigration would also be permitted but there the regulatory burden would fall mainly on the former state of registration. The British requirements would parallel those for a domestic company which re-registers: Final Report I, para.14.12 and above, paras 4–20ff.

[131] Modernising, pp.54–55.

[132] The Commission has a long-standing proposal for a Fourteenth Directive in the company law harmonisation series on the transfer of the registered office, on which work has been intermittent. It ceased most recently in 2007 (Commission Staff Working Document, *Impact Assessment on the Directive on the cross-border transfer of registered office*, SEC (2007) 1707, December 12, 2007). However, the consultation referred to in fn.116 above asks the question whether such a directive should be proposed.

Court's rulings to date has been to benefit founders who wanted to operate in other Member States of the European Union through companies incorporated in one of the United Kingdom jurisdictions rather than entrepreneurs who wanted to operate in the United Kingdom through a company incorporated elsewhere.

6–21 The starting point for the Court's development of the law was its decision in the *Centros* case.[133] In *Centros*, the Court held that Denmark had infringed a company's freedom of establishment, when that company was incorporated in England, but carried on all its business in Denmark and the Danish authorities refused to register its Danish operations as a branch. It was clear that the British incorporation had been effected in order to avoid the Danish minimum capital requirements. However, the Danish position was perhaps weakened by the fact that the Danish authorities admitted that the branch would have been registered, if the company had carried on some business in the United Kingdom, even though its main business was in Denmark, Denmark being an incorporation theory state. This reduced the force of the argument that the minimum capital rules were a necessary protection for Danish creditors. More important was the decision in *Inspire Art*,[134] also involving an incorporation theory state, the Netherlands. Dutch law thus had no difficulty about recognising the existence of a company incorporated in another Member State (again the United Kingdom) and so did not refuse to register its branch. However, Dutch law did apply to "pseudo-foreign" companies (i.e. those incorporated elsewhere but for the purpose of doing business wholly in the Netherlands) certain rules of Dutch law, notably its minimum capital rules. The ECJ held that creditor protection did not justify the imposition of requirements additional to those imposed by the State of incorporation: creditors were sufficiently protected by the fact that the company in question did not hold itself out as a Dutch company but as one governed by English law.

These two decisions had a substantial impact in practice. Entrepreneurs from other Member States, not intending to do business in the United Kingdom, may choose to incorporate in the United Kingdom in order to avoid minimum capital requirements and expensive formation formalities in their home jurisdictions; and this produced the expected response in the shape of other Member States seeking to reduce or remove their minimum capital requirements for

[133] Case C-212/97 *Centros Ltd v Erhverus-og Selkabsstyrelsen* [1999] E.C.R. I-1459. For an earlier and under-appreciated decision going in the same direction see Case 79/85, *Segers v Bestuur Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] E.C.R. 2375.

[134] *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] E.C.R. I-10155.

private companies.[135] This was a clear case of corporate mobility leading to regulatory arbitrage by companies to which the Member States affected responded by harmonising their laws on the British model, at least in the narrow area of legal capital and, perhaps, formation procedures.

A particularly interesting aspect of the *Inspire Art* decision was the implication that the Eleventh Directive on branches[136] determined the maximum level of regulation a Member State was permitted to impose on companies incorporated in other member states—subject, however, to one important exception. Restrictions of freedom of establishment by national legislatures are permitted, provided they meet the "*Gebhard* test",[137] that is, they are non-discriminatory, pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective and do not go beyond what is necessary to attain it. This is the general formula used by the Court to determine the extent to which Member States may constrain the fundamental free movement provisions of the Treaty. The test, it can be seen, sets out very general standards and it is not clear how much freedom it gives to Member States to impose national rules on pseudo-foreign companies. Would it be lawful, for example, for the German legislature to require a pseudo-foreign company to abide by its domestic rules on mandatory representation for workers on the boards of large companies?

Community law: subsequent re-incorporation

6–22 The Court of Justice has not had to decide squarely a case involving post-incorporation transfer of the registered seat. All the litigation to date has involved companies which transferred their headquarters or central administration to another jurisdiction but did not want to change their applicable law. So, these were not corporate mobility cases as we have used that term in this chapter. *Uberseering*[138] involved the transfer by a company of its centre of administration from an incorporation theory State (in this case the Netherlands) to a real seat theory State (in this case Germany). The German courts refused to recognise the company's legal personality and so it could not sue to enforce its contractual rights in a German court. The ECJ held that this was a clear infringement of the Dutch company's freedom of establishment. Since the company was still validly incorporated under Dutch law, German law was obliged to recognise

[135] See M. Becht, C. Mayer and H. Wagner, *Where Do Firms Incorporate? Deregulation and the Costs of Entry*, ECGI Working Paper Series in Law, No 70/2006; Bratton, W., McCahery J. and Vermeulen, E. "How Does Corporate Law Mobility Affect Lawmaking? A Comparative Analysis" (2009) 57 *American Journal of Comparative Law* 347.

[136] Above para.6–3.

[137] Case C–55/94, [1995] E.C.R. 1–4165.

[138] Case C-208/00, *Uberseering BV v Nordic Construction Company Baumanagement GmbH* [2002] E.C.R. I-9919.

its existence, even though the company did not meet the standards for recognition under German law.[139]

Although not a case about transfer of the registered office, *Uberseering* does establish the proposition that, provided a company acts in compliance with the rules of its state of incorporation, it has a Community law, right to transfer its headquarters to another state within the European Union. For UK courts, the significance of the proposition is limited, since in a United Kingdom jurisdiction transfer of the headquarters would not cast doubt on the validity of the incorporation in the United Kingdom. The importance of the proposition is that the state receiving the headquarters must continue to recognise the validity of the United Kingdom incorporation.[140] However, even in the United Kingdom the requirement that the company transferring its headquarters must act in accordance with the law of its state of incorporation is significant. UK company law places no obstacles in front of transfer of the headquarters but what about tax law? An early decision of the European Court suggested that the transferring state had considerable freedom in this regard. In *Daily Mail*[141] an English-incorporated company wished to transfer its central administration outside the United Kingdom, whilst keeping its registered office in the United Kingdom, but was discouraged from doing so by a swingeing domestic tax demand. The domestic restrictions were upheld. Although some doubt on the validity of exit taxes under the Treaty provisions on freedom of establishment was generated in cases subsequent to *Daily Mail*,[142] that decision has not been overruled.

6–23 Some people hoped that Community law on both the transfer of the seat and on exit taxes would be clarified in *Cartesio*. Like *Uberseering* this was a case where the company transferred its headquarters (from Hungary to Italy) but did not want to change its applicable law. Unlike *Uberseering* the question for the Court was the validity of the company's continued incorporation in the transferring state (Hungary), not the transferee state. Equally, unlike in *Uberseering*, the transfer of the headquarters out of Hungary did affect the validity of its incorporation in Hungary, whose officials refused to continue the company's registration in that state. The Court (Grand Chamber) upheld the Hungarian decision, on the grounds that the determination of the factors required for the validity or continued validity of incorporation in a Member State was a matter for that

[139] "The requirement of reincorporation of the same company in Germany is tantamount to outright negation of freedom of establishment." (at para.81.)

[140] If the transferring state is a real seat state, then of course moving the headquarters to another state does cast doubt on the validity of the company's incorporation in the transferring state and Community law does not seek to alter that result. See *Cartesio* below.

[141] Case C-81/87, *Daily Mail and General Trust* [1988] E.C.R. 5483.

[142] Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Economie, des Finances et de l'Industrie* [2004] ECR I-2409; Case C-196/04 *Cadbury Schweppes Plc v Commissioners of Inland Revenue* [2006] ECR I-4585.

state, not for Community law.[143] Only once a company is validly established in a Member State—or continues to be—may it benefit from the Community right to freedom of establishment. Thus, without infringing Community law, a real seat state may maintain that rule as against companies claiming to be validly incorporated in that state but having their headquarters elsewhere (but not, of course, against incoming companies claiming to be validly incorporated in an incorporation theory state—see *Uberseering*).

However, the court did go out of its way to address the situation which was not before it, i.e. where the company wishes to transfer its registered office in order to change the applicable law. Here, by contrast, the Courts approach was different. The *Cartesio* facts were to be "distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved." Here the Court's view was that the national legislation of the transferor state was not justified "by requiring the winding up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so."[144]

Two things can be observed about this view. First, the effectiveness of the transfer of the registered office (and the attendant change in the applicable law) now appears to turn on the law of the transferee state. Only "to the extent that it is permitted under that law to do so" can there be a transfer of the seat to the other state. Some Member States, for example, Spain[145] do permit a transfer in of the registered office, but most, including the United Kingdom, do not. The Community freedom of establishment is again constrained by national law. Second, whilst the Court is clear that that the transferring state cannot

[143] "Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation." (para.110)

[144] See paras 111–112. The court will have the opportunity in the near future to reaffirm this approach in a case involving a transfer from Italy to Hungary in which the transferring company wished to transfer its activities and the registered office to Hungary. Case C-378/10, VALE. On December 15, 2011 the Advocate General issued an opinion in favour of the view that Hungary was in breach of Community law by refusing to register the formerly Italian company under Hungarian law. Even if this view is upheld by the court, it would appear to leave a real seat state in a position to require the incoming company to have its headquarters in the transferee seat.

[145] See art.94 of the Ley 3/2009 de Modificaciones estructurales de las sociedades mercantiles (LME) and art.309 of the Reglamento del Registro Mercantil (RRM).

impeded a transfer of registered office permitted by the transferee jurisdiction by requiring the transferring company to be dissolved, it is far from clear what other impediments to a transfer are ruled out. In particular, the Court cast no further light on the legitimacy of exit taxes imposed by the transferring state.

Community law: alternative transfer mechanisms

6–24 If direct transfer of the registered office to another Member State is available only to the extent that the transferee state permits this change, are there other mechanisms available to a company which wishes to effect this manoeuvre? The obvious alternative technique—though it is rather more costly—is to form a subsidiary in the jurisdiction of choice and merger the existing company into it. Unlike for the transfer of a registered office, Community law does now provide a mechanism for a cross-border merger.[146] This is potentially significant. For example, in the United States the standard mechanism for transferring incorporation to the state of Delaware is the merger of the existing company into a Delaware corporation. The cross-border merger is considered further in Ch.29. However, the crucial point to be made here is that the company resulting from the merger (whether a new company or an existing one) must be validly incorporated in the jurisdiction of choice and the Directive, following the policy of the Court of Justice, leaves criteria for valid incorporation to be determined by the member states.[147] Consequently, a real seat state may continue to insist that, for valid incorporation in that state, the headquarters of the resulting company be located in that state. This reduces the attraction of the merger mechanism if what the company seeks to achieve is a simple change in the applicable law—unless it is prepared to incur the potentially substantial additional costs of moving the company's headquarters to the jurisdiction of the resulting company. By contrast, the cross-border merger directive does facilitate the choice by a company of the law of an incorporation theory state

A further mechanism which Community law makes available is the European Company (SE).[148] The companies which found an SE may choose any member state in which to incorporate the new entity, whether or not any of the founding companies operated in that jurisdiction.[149] Furthermore, the SE does benefit from a Community mechanism for the simple transfer of its registered office to another member state after formation.[150] However, as with the resulting company in a cross-border merger, the SE is currently required to

[146] Which was required to be transposed by the Member States by the end of 2007.

[147] Directive 4.1(b) and Recital (3).

[148] See para.6–13 above.

[149] SE reg. art.7

[150] Ibid., art.8. See para.6–19 above for some of the details of this process.

have its headquarters in the same jurisdiction as its registered office,[151] thus reducing its attractiveness as a mechanism changing the applicable company law alone. If this ceases to be the case, the state of registration must take steps to require the SE either to move its head office back to the state of registration or to move its registered office to the State where its head office now is; failing either of these things, the state of registration must have the SE wound up.[152] The SE Regulation requires the Commission to report on the functioning of the SE statute after five years of operation and in particular on the appropriateness of maintaining this requirement,[153] and that process is currently underway.[154] Even if this restriction were removed, the costs of establishing a SE simply for the purposes of changing the applicable law might deter significant use of this mechanism.

Finally, and most obviously, the Community might act to require all member states to amend their laws so as to provide to all companies a simple mechanism for the transfer of their registered office. Thus, the law of the state of current incorporation would have to permit the transfer of the registered office to transferee state[155] and the law of the transferee state would have to permit re-incorporation, in both cases without the company in question being wound up, but subject to appropriate safeguards for minority shareholders, creditors and employees. This is quintessentially a cross-border issue where the Community could act without any suspicion of infringement of the subsidiarity provisions of the Treaty. Indeed, as long ago as 1997 the Commission produced an informal draft of a Fourteenth Directive in the company law series, dealing with this issue, and the High Level Group[156] made this proposal one of its high priorities. However, in December 2007 the Commission stopped further work on the proposal, though recently an independent group appointed by the Commission recommended the proposal as a priority.[157] There is thus considerable uncertainty whether the Commission will bring forward a legislative proposal in this area.

Conclusion

6–25 The changes in the rules governing corporate freedom to move the registered office have produced regulatory competition at the level of

[151] Ibid., art.7.
[152] art.64, implemented by the Insolvency Act 1986 s.124B.
[153] Ibid., art.69(a).
[154] The Commission's report might be said to favour the arguments for removing the restriction, but the Commission does not positively recommend this course of action: *Report from the Commission . . . on the application of Council Regulation 2157/2001 on the Statute for a European Company (SE)*, SEC(2010) 1391, November 17, 2010, 4.2.
[155] Something the dicta of the Court of Justice in *Cartesio* suggest the Treaty already requires: see para.6–23.
[156] Above fn.91, Ch.VI.
[157] Report of the Reflection Group on the Future of EU Company Law, Brussels, April 5, 2011, Ch.2.

company formation.[158] Whether providing an equivalent level of corporate freedom at the stage of re-incorporation would generate the same level of regulatory competition among states and regulatory arbitrage by companies is much less clear. Even if a convenient legal mechanism for transfer were provided, would states compete for re-incorporations and would companies wish to transfer their registered offices? The particular revenue gains from reincorporation which the state of Delaware obtains in the United States are simply not available in the European Union, though there may be other incentives for states to attract re-incorporations.[159] As for the companies themselves, the incentives for mature companies to change jurisdictions will be very different from those operating at the time of initial incorporation of small companies. They may not wish to litigate their corporate law matters in a jurisdiction with which they are not otherwise connected or, alternatively, have the courts of their headquarters jurisdiction apply a foreign law with which those courts may be unfamiliar.

However, it is not clear that either of these points is a strong argument against permitting freedom to transfer the registered office by way of re-incorporation. On the contrary, if Member States, when reforming corporate law, are influenced mainly by a desire to provide efficient company law to their "own" companies rather than to attract re-incorporations of foreign companies, then this suggests that no element of "corporate dumping" is involved when a company does decide to move to the law of another member state. Equally, if companies weigh all the relevant factors before deciding to re-incorporate, this suggests that the choice which is ultimately made will be the appropriate one.

6–26 The contrary argument to those put forward in favour of regulatory competition, and which constitutes the basis of the real seat theory, is that to allow a company to choose a jurisdiction for incorporation, even though it carries on no substantial economic activities in that state or perhaps even no economic activities at all, weakens the power of the state where those activities are carried on to impose mandatory rules on companies for the benefit of members, creditors or employees. If a company does not like the rules of the state where it has based its operations, it will simply choose the law of

[158] See para.6-21.
[159] J. Armour, above, fn.121. Whilst not disputing that the revenue-raising incentives operating on the state of Delaware have no counterpart in the case of the United Kingdom, he sees the incentive as located with the "magic circle" law firms based in London, which would pressurise the government to provide laws which encourage re-incorporations.

another Member State for its incorporation.[160] What will then ensue is a "race to the bottom" among the Member States of the Community as they compete to provide company laws which companies find attractive.

Although these fears are not fanciful, they can be exaggerated and may even be misplaced. First, as a result of the Community's initial company law harmonisation programme (discussed above in this Chapter), there are minimum standards in place below which no Member State's company law can go. Secondly, and most importantly, competition does not necessarily result in a reduction of protection. In the case of financial markets, competition among stock exchanges for investors' funds has led to a raising of standards, especially in areas such as insider dealing, market abuse and corporate governance. The crucial question is who decides on the distribution of the good (in this case, the incorporation decision) for which the competition exists. In the United States, where incorporations are a matter for each State, where the incorporation theory prevails and where a high proportion of public companies choose to incorporate in Delaware, even though their businesses may have no connection with Delaware, the argument that this situation has produced a race to the bottom seems to be based on the proposition that re-incorporations are in practice the result of a board decision, so that Delaware has a strong incentive to produce a corporate law which is too favourable to management and which provides too little protection for shareholders and creditors.[161] One way of addressing this problem is not to make the re-incorporation decision a purely managerial one. It is relatively easy to build into the re-incorporation decision a substantial role for shareholders, creditors and employees, as the cross-border mergers Directive does. Moreover, in the case of listed companies, it is probably the rules and mechanisms of the exchange which are more important for the protection of shareholders than the provisions of company law as such.

[160] Of course, this is an existing risk for incorporation theory States whose company law contains some feature which incorporators do not like and which some other available jurisdiction does not insist on. See the *Inspire Art* case, above, fn.134. Real seat theory states seek to protect themselves against competitive pressures through a private international law rule, whereas incorporation theory States will have to use some other technique to address the threat, such as a "pseudo-foreign" company statute.

[161] It is much controverted whether the Delaware law maximises managerial freedom or shareholder value. For a convenient short account of the, now very large, literature, see Romano, R., *The Foundations of Corporate Law* (New York: Oxford University Press, 1993), pp.87–99.

Conclusion

6–27 British company law has traditionally adopted a welcoming stance towards companies incorporated elsewhere. This is shown both by the limited extent to which it applies the provisions of the British Act to such companies and its acceptance of incorporation as the connecting factor in its private international law rules. It has preferred the goals of maximising freedom of movement and promoting a degree of competition among jurisdictions as against ensuring that those dealing with foreign companies do so on the basis of a framework of law with which they are familiar. Within the European Community these two objectives have been reconciled to some degree through the programme for the harmonisation of company laws, though that initiative never achieved all its promoters wished and expected of it. However, free movement and jurisdictional competition cannot be achieved by one state alone, since the migrating company is dependent also on the laws of the country to which or from which it moves. For this reason, corporate migration is undoubtedly a proper subject for the attention of the Community legislator, or failing that, of the European Court of Justice.