

The Free Movement of Companies¹

The ‘real seat doctrine’ is dead – Long live the ‘incorporation state doctrine’!

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In its decision of 5th November 2002, in Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919, and its decision of September 30th 2003, in Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art ltd* [not yet reported] the European Court of Justice has definitively rejected the ‘real seat’ doctrine (sometimes known as the ‘head office’ doctrine, or ‘Sitztheorie’ in German) as a means for determining the nationality of a company, in respect of companies which are established in accordance with the laws of a Member State, and whose registered office, head office or main place of business are situated within the European Union. The Court has therefore confirmed its decision of 9th March 1999 in Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] I-1459. The *Centros* judgment has been one of the most debated decisions of the European Court ever. In its decision of 13th March 2003, the German Federal Supreme Court has changed its practice, so that the incorporation state doctrine is now regarded as applicable in German private international law for determining the nationality of a company. These decisions are of great practical importance for European Companies. It is unlikely that thousands of foreign incorporations will be used as shells for commercial undertakings, which have their head offices in Denmark. However, a number of undertakings will make use of the new opportunities in the EU, following the *Centros*, *Überseering*, and *Inspire Art* cases. In any case, the European Court’s interpretation of the scope of the right of establishment for companies will have a significant effect on the application of the law in all 25 Member States in coming years. The consequences of the Court’s case law will be felt by all the actors in the business world, including legislators, business undertakings, professional advisers, public authorities and the courts.

¹ This Article was first published (in Danish) in *Nordisk Tidsskrift for Selskabsret* (NTS) 2003/4 under the title “Selskabernes fri bevægelighed”. It has been translated into English by Stephen Harris.

1 Obituary of the Real seat Doctrine

1.1 Prologue

Let us suppose that a person who has previously been working in the field of company law has been away for 5 years, travelling round the world, and that he now returns to Europe to pick up where he left off; he will be confronted with a number of surprises. In the last few years, company law has developed with a rapidity which few would have believed possible. And there is nothing to indicate that this rate of change will be any slower in the coming years. This development has primarily been the result of legal 'globalisation'. The Council of the EU has adopted a number of pieces of legislation, which will have a great influence on European business life. On 8th October 2004 the Statute for a European Company (SE) enters into force.² For financial years starting from 1st January 2005, listed companies must use the International Accounting Standards as the basis for their consolidated accounts.³ The proposed Company Law Directive on takeover bids has not yet been adopted by the Council, but the proposals have led to wide debate since the draft adopted by the Council was rejected by the European Parliament in 2001. A Danish consequence of the globalisation of company law has been the adoption of Law No. 303 of 30th April 2003, authorising Danish companies to hold general meetings via the internet.⁴

While the Council has played a significant role in the development of European company law, the decisions of the Court of Justice have led to even greater changes. On 9th March 1999, the Court, in plenary session, gave its decision in Case C-212/97 *Centros*. The precise significance of this judgment has been subject to lengthy dispute. However, with the subsequent decisions of the Court in *Überseering and Inspire Art*, it is now clear that 9th March 1999 should be considered a historic landmark for the development of company law at the European level.⁵

² See Council Regulation (EC) No. 2157/2001 of 8th October 2001.

³ See Regulation (EC) No 1606/2002 of 19th July 2002 (OJ 2002 L 243/1).

⁴ It had been the prevailing view among legal writers that it was not possible for shareholders to take part in a general meeting via the internet under the previous Danish rules, *Cf.* for example, Søren Friis Hansen, *Selskabsretlige aspekter af elektronisk kommunikation*, Nordisk Tidsskrift for Selskabsret. (NTS) 2001, at 58-75. With the adoption of Act No. 303, of 30th April 2003 there is now clear authority for this procedure in Danish public limited companies.

⁵ For example, see Wymeersch, in Hopt, Baums and Horn (Eds.) *Festschrift für Buxbaum, Corporations, Capital Markets and Business in the Law*, 2000, at 629: "There is no doubt that this judgement will belong to the leading cases affecting company law in the second half of the twentieth century".

1.2 *The Significance of the Centros case for International Company Law*

On the question of determining the nationality of a company, private international law has hitherto been divided between two mutually incompatible theories.⁶ However this schism has not always been clear cut, since each of the theories has spawned a number of variations.⁷ The *incorporation state doctrine* determines the applicable company law by reference to the country in which a company was incorporated (and registered), while the *real seat doctrine* determines the applicable company law by reference to the country in which a company has its actual head office.

The decision in the *Centros* case is one of the most hotly debated decisions of the Court of Justice; it raises a number of key questions about EU law in general and company law in particular. The most important question arising from the judgment is the extent to which it affects national rules on the question of a company's nationality.

The aim of the real seat doctrine has traditionally been to prevent the avoidance of national company law rules. Traditionally, a company, which was registered in one state and moved its actual head office to a real seat doctrine state, was denied recognition as a legal person. This has had important civil and tax law consequences for the shareholders of such a company. Already prior to the *Centros* decision, some writers had questioned the compatibility of the real seat doctrine with the EC Treaty rules on the right of establishment of companies (Article 43 and 48 EC).⁸ The decision of the Court in the *Daily Mail* case in 1988 was interpreted by a majority of, primarily German writers, as evidence that the real seat doctrine did not constitute a violation of community law (see Section 2.3 below).

⁶ In Danish law, see in particular Mette Neville, *Aktieselskabers tilknytning*, Juristen 1997, at 145-173 and Alan Philip, *Studier i den internationale selskabsrets teori* (1961), at 83-126.

⁷ See Zimmer, *Ein Internationales Gesellschaftsrecht für Europa*, *Rabels Zeitschrift für das internationale Privatrecht (RabelsZ)* 2003, at 299-306, which analyses different variants of the two theories in a number of existing and coming Member States of the EU.

⁸ See Ebenroth & Eyles, *Der Betrieb (DB)* 1989, at 417. See also Eidenmüller & Rehn, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 1997, at 89-114. The authors review a long series of practical consequences of the German law. Under the now abandoned German case law a foreign company with its head office located in Germany was not recognised as an independent legal person. On this basis the authors asked (p. 114): "Es bleibt daher die Frage, ob die Interessen des deutschen Rechtsverkehrs nicht durch die Anwendung der Gründungstheorie mit der Folge der Wirksamkeit der von der ausländischen Kapitalgesellschaft abgeschlossenen Rechtsgeschäfte besser gedient wäre". See also, in particular, Zimmer, *Internationales Gesellschaftsrecht* (1996), at 206 et seq., which argues: "Nur das Herkunftsprinzip - das im Beschränkungsverbot seinen Ausdruck findet - kann auf Dauer dem Ziel eines von Hemmnissen befreiten Gemeinsamen Marktes gerecht werden". On this basis the author concludes that the principle of incorporation state control must apply in the area of company law, and that this principle can only be derogated from if this can be justified on the basis of one of the four conditions which, according to the case law of the Court, must be satisfied in order to justify national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty. It must be admitted that Zimmer was prescient on this point.

1.3 *Different Interpretations of Centros*

The *Centros* case originated in Denmark in 1991, when the Danish Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen*) refused to register a Danish branch of an English private company, Centros Ltd. On the basis of a referral from the Danish Supreme Court, the European Court of Justice, in plenary session, gave judgment on 9th March 1999. This is not the place for a detailed review of the case.⁹ It is sufficient to note that the Danish authorities had refused to register a branch of Centros Ltd on the grounds that the branch structure was chosen with a view to evading the Danish rules on minimum capital for private companies. The Court of Justice rejected all the arguments of the Danish Government so that the Commerce and Companies Agency was required to register the branch of Centros Ltd, even though it was established that a UK private company had been chosen as the corporate structure for carrying on business in Denmark in order to evade the capital requirements applicable to Danish private companies. If a person establishes a company in one Member State with a view to carrying on business through a branch of the company in that person's home state, this can constitute a connecting factor (sometimes referred to as an "U-turn").¹⁰

1.4 *Is the Real seat Doctrine Dead?*

Very early on, some legal writers put forward the 'extreme view' that as a consequence of *Centros* there is an unconditional requirement for *all* Member States to recognise any company which is validly incorporated in a Member State as a legal person, even though the company's actual head office (real seat) was relocated to another Member State.¹¹ To the extent that this interpretation was found to be correct, the real seat doctrine used primarily in French and German law could no longer be used to deny recognition of a company, which is covered by the Treaty rules on freedom of establishment. This argument is based on the idea that the rights, which Centros Ltd has in Denmark, according to the

⁹ For a review of the case *see*, for example, Søren Friis Hansen & Jens Valdemar Krenchel, *Lærebog i selskabsret I*, (1999), at 104-115.

¹⁰ *Cf.* Søren Friis Hansen & Jens Valdemar Krenchel, *Lærebog i selskabsret I*, (1999), at 104.

¹¹ *Cf.* for example, Lutter & Hommelhoff, GmbHG (15. Aufl 2000), at 225 (at note 15) and at 554, as well as Lutter, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2000, at 13, and Curt Christian von Halen, *Das Gesellschaftstatut nach der Centros-Entscheidung des EuGH*, (2001), at 116. One of the leading 'opponents' of the real seat doctrine is Peter Behrens, who in *European Business Organization Law Review* 1 (2000), at 125-146 (at 139 et seq.), argues that Art. 48 EC must be regarded as a general provision, which governs legal conflicts in company law. For a reference to the debate in Denmark, *see* Søren Friis Hansen, *Nekrolog over hovedsædeteorien?*, *Juridisk Institut, Julebog* 1999, at 143 et seq., and *Nordisk tidsskrift for selskabsret (NTS)* 2000, C-212 og L 212, at 45-64, as well as Erik Werlauff, *Udenlandsk selskab til indenlandsk aktivitet*, *Ugeskrift for retsvæsen (UfR)* 1999B, at 163 et seq. and *Hovedsædekriteriet i ny skikkelse*, *Ugeskrift for retsvæsen (UfR)* 2000B, at 465 et seq. For a Swedish perspective, *see* Maria Nelson, *Überseeringdommen utgör ingen ändring av EG-domstolens praxis*, *Nordisk tidsskrift for selskabsret (NTS)* 2002, at 417-438, as well as Mathias Fors, *Europarättsligt Tidsskrift* 2002, at 261-279 (at 275).

Court's interpretation of the Treaty, would apply equally if Centros Ltd had instead chosen to register a branch in Germany or Austria, for example. This argument is best expressed by Puzskajler, who has written:¹²

Dem unbefangenen Leser drängt sich die Interpretation auf, dass in einem gemeinsamen Markt einer englischen Gesellschaft nicht in Deutschland verboten werden kann, was ihr in Dänemark erlaubt ist.

1.5 *Is the Real seat Doctrine Still Alive?*

A narrow majority of legal writers, most of them coming from Germany, rejected this interpretation of the *Centros* case, as they continued to consider that the real seat doctrine was compatible with Community law. Section 2 below reviews some of the principal arguments made in favour of the idea that in some Member States, even after the *Centros* case, the enforceability of the real seat doctrine would still be compatible with Community law.

2 Arguments for Maintaining the Real seat Doctrine

2.1 *Private International Law is 'Immune' from EU law*

In support of the real seat doctrine it has been argued that Art. 48 EC (Ex Art. 58) implicitly recognises the real seat doctrine, since all the original Member States used this doctrine in 1957, when the Treaty was agreed.¹³ However, the Netherlands already adopted the incorporation state doctrine in 1959.¹⁴ Meanwhile, a more detailed analysis has shown that in both the Netherlands and in Germany there are doubts about which theory should be regarded as having been applicable in 1957.¹⁵ Thus, the Treaty itself cannot be taken as evidence that the real seat doctrine should be given special status in Community law.

Some authors have challenged the view that the private international law of the Member States, and thus international company law, is covered by the EC Treaty, so the European Court of Justice does not have authority to intervene on

¹² Cf. IPRax 2000, p.80.

¹³ See, for example, Hopt, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 1992, at 279, and Kienninger, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 1999, at 733.

¹⁴ See Luca Cirioni, *International and Comparative Corporate Law Journal*, 2000, at 166.

¹⁵ The historical argument is analysed by Harald Haldhuber in his excellent Ph.D. thesis: *Limited Company statt GmbH?*, 2001, at 106-112. On the basis of his research into the older legal literature, Haldhuber concludes that: "Die historisch argumentierte Kritik an Centros kehrt sich also gegen die Kritiker. Der EuGH hat nicht den Vertrag in einer Weise ausgelegt, die zum Zeitpunkt der Gründung der EWG 'doch sehr fernelegen haben dürfte', sondern den Anwendungsbereich der Niederlassungsfreiheit gerade so bestimmt, wie er schon in den ersten Jahren der Gemeinschaft und wohl auch von den Gründern verstanden wurde". See Søren Friis Hansen, *Juridisk Institut, Julebog* 1999, at 148, which documents that the real seat doctrine was only finally established in German legal practice towards the end of the 1960s.

these questions. International company law should thus be ‘resistant’ to Community law.¹⁶ Roth uses a variant of this argument when he says that the rules of private international law should not be subject to review under Community law, since it should only be *substantive national rules* which could be made subject to such review.¹⁷

It has also been argued that a general rejection of the real seat doctrine would constitute a breach of the principle of subsidiarity.¹⁸ As a last, desperate attempt to justify the real seat doctrine, Roth argues that a change in the practice of the European Court in relation to the *Daily Mail* case (see Section 2.3 below) is basically a political decision, which ought not to be taken by the Court, but by other EU institutions.¹⁹

2.2 *The Centros case Involved two ‘Incorporation Doctrine’ States*

A number of writers have argued that the *Centros* decision concerned two Member States which both applied the incorporation state doctrine. The *Centros* decision should therefore only be understood as meaning that, it should be possible for a company from one incorporation state to move its real seat to a

¹⁶ See, for example, Kindler, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 1999, at 1993 and Sonnenberger/Grosserichter, *Recht der Internationalen Wirtschaft (RIW)* 1999, at 726.

¹⁷ See, for example, W.H. Roth, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2000, at 311-338. Here Roth states that (at 323): “Wenn die in Art. 48 EGV genannten Anknüpfungen trotz ihrer die Niederlassungsfreiheit behindernden Wirkungen nicht auf ihre Rechtfertigung überprüft werden sollen, wird nicht etwa ein ‘Vorrang’ des internationalen Privatrechts postuliert, sondern schlicht die sachliche Reichweite des Verbottatbestandes konkretisiert - mit der Folge dass sich das nationale Gesellschaftskollisionsrecht *insoweit als unangreifbar* erweist” (the author’s own emphasis). This argument is rightly rejected by Schön, *Cf. Festschrift für Marcus Lutter* (2000), at 701.

¹⁸ Cf. Kindler, *Recht der Internationalen Wirtschaft (RIW)* 2000, at 649-653, who, in his discussion of the reference by the German Federal Supreme Court in the *Überseering* case, argued (at 652): “Das Subsidiaritätsprinzip (Art 5 EG) verbietet eine Gründungsanknüpfung durch das Primärrecht (Vorlagefrage zu 1). Eine solche Kollisionsnorm würde einen unverhältnismässigen Eingriff in die mitgliedstaatlichen Kompetenzen darstellen, da hiervon auch integrationsindifferente - oder jedenfalls weniger integrationsrelevante - Ausschnitte des Gesellschaftsstatuts betroffen wäre”.

¹⁹ Cf. *International and Comparative Law Quarterly* 49 (2003), at 190 et seq. where, at 192, it is stated: “Given this state of law in European Company law, it would amount to a highly problematic decision taken by the court of Justice to change its interpretation of Article 48 EC, as set forth in *Daily Mail*, and to introduce a rule of preference vis-à-vis one of the connecting factors listed therein. Such a policy decision should be left to the Community legislature. Overruling *Daily Mail* with regard to this point would, moreover, entail another delicate issue which has not yet been discussed in depth: whether the rules dealing with the transfer of seat in the regulations on the European Economic Interest Grouping and on the European Company might contravene freedom of establishment”. To my great surprise, I find myself agreeing with one of Roth’s arguments. It is not to be taken for granted that the restrictions which are built into the Regulation on the SE Company on the coincidence of a company’s place of incorporation and its actual domicile comply with the Treaty provisions on the right of establishment. It is possible that this will give rise to questions about the hierarchy of laws within Community law.

branch in another incorporation state.²⁰ According to this argument, *Centros* did not affect Member States whose international company law was based on the real seat doctrine.²¹ The basis for this was supposedly that, since a real seat doctrine state did not recognise the status of a foreign registered company, which moved its real seat to the state in question, this did not concern a company covered by the right of establishment under Art. 48 EC. It requires rather obscure reasoning to reach such a conclusion.²² An example of this argument is delivered by *Bungert*, who noted that *Centros* concerned two incorporation states,²³ and thereafter stated:

Bei strikter Abstimmung des US-amerikanischen Grundsatz der *Stare Decesis* beschränkt sich der Leitsatz der Entscheidung damit auf diese Situation...

Es erscheint angesichts der Tendenz des EuGH, nur die konkrete Vorlagefrage in ihrem konkreten Sachverhalt mit tendenziell pragmatischen Ansatz zu entscheiden, zu gewagt us der Entscheidung zu folgern, dass das Recht des effektiven Verwaltungssitzes nicht mehr auf alle anderen Massnahmen und Inhalte angewendet werden kann, die dem Gesellschaftsstatut unterfallen.

However, this argument was significantly weakened shortly after the *Centros* judgment. In two parallel decisions in July 1999, the Austrian Supreme Court (ÖOGH) held that after *Centros*, the real seat doctrine could not be used to deny registration of an Austrian branch of a UK company.²⁴ The facts of the case were identical to those of the *Centros* case, apart from the fact that the application for registration was made in Austria rather than Denmark. Even though the decision of the Austrian Supreme Court seems to have been fully justified, it has been severely criticised. It has been argued that the facts of the two cases were totally dissimilar, since Austria uses the real seat doctrine to determine the nationality of a company, unlike Denmark.²⁵

²⁰ See, for example, Hanne Søndergaard Birkmose, *Nordisk tidsskrift for selskabsret (NTS)* 2000, at 291-313 (at 300 et seq.).

²¹ See, for example, Ebke, *Juristenzeitung (JZ)* 1999, at 658, and Kindler, *Neue Juristische Wochenschrift (NJW)* 1999, at 1997.

²² For example, see W.H. Roth, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2000, at 311-338. On at 327 Roth argues as follows: “Centros” unterscheidet sich von ‘Segers’ weder in der Frage, was als Zweigniederlassung anzusehen ist, noch in der Bestimmung der Reichweite der unmittelbaren Anwendbarkeit des Art. 43 Abs. 1 Satz 2 EGV, sondern allein in seinem Tenor. Folgt man den hergebrachten Grundsätzen und interpretiert den Tenor aus den Gründen der Entscheidung und - im Verfahren nach Art 234 EGV - als Antwort auf die Vorlagefrage, drängt sich Folgerung auf, dass kollisionsrechtliche Probleme nicht entschieden werden sollten. *Vielmehr ist die Tenor als Antwort für ein Gericht zu lesen, dessen Kollisionsrecht der Inkorporationstheorie folgt.* Dann aber ist der Tenor für nichtdänische Gerichte wie folgt zu lesen: ‘ein Mitgliedstaat, der der Inkorporationstheorie folgt...’. Die mit dem Tenor verbundenen weitreichenden Folgerungen erwiesen sich dann als Spekulation” (My emphasis, SFH). To such an ‘interpretation’ of the Court’s decision might well add the comment: “Keine Hexerei, nur Behändigkeit!”

²³ Cf. *Bungert*, *Der Betrieb (DB)* 1999, at 1841.

²⁴ One of the decisions is reported in *EuZW* 2000.156.

²⁵ See Nemeth, *Common Market Law Review* 2000, at 1281, where it is stated that: “With this statement the ÖOGH [Austrian Supreme Court] misjudged the situation completely”.

In *Centros*, the Court did not take a view on the merits of the real seat doctrine or the incorporation state doctrine. The purpose of allowing national courts to refer cases to the Court of Justice for a preliminary ruling is to ensure that Community law is uniformly applied in all Member States. Since an assumption that a decision of the Court should only apply to some Member States, and not others, would be contrary to the fundamental principles of Community law and Art. 234 EC, this argument must be dismissed as mistaken.²⁶ Just like all other decisions of the Court of Justice, the *Centros* decision is binding on all Member States. As a point of interest, it is worth noting that the argument that the *Centros* judgment should not apply to real seat doctrine states, since it concerned two incorporation doctrine states, is often made by writers who equally determinedly argue that the *Daily Mail* case on the other hand should be seen as an expression of the Court's endorsement of the real seat doctrine. The *Daily Mail* case, however, also concerned two Member States (the United Kingdom and the Netherlands), both of which use the incorporation state doctrine!

2.3 *Daily Mail* “is still good law”

The most common argument, and the most plausible one, against considering the Court's decision in the *Centros* case to be relevant to the real seat doctrine has been that in the *Centros* case the Court did not refer to its judgment in the earlier *Daily Mail* case.²⁷ Adherents of the real seat doctrine believed that the Court's decision in the *Daily Mail* case meant that the Court confirmed that this doctrine is compatible with Community law.²⁸

Following the *Centros* decision, supporters of the real seat doctrine argued that as a consequence of the failure of the Court to refer to the *Daily Mail* in its decision in *Centros*, *Daily Mail* was “still good law”, and since *Daily Mail* had approved the real seat doctrine under Community law, this doctrine was still to be regarded as compatible with Art. 43 and Art. 48 EC.²⁹ This argument has been put forward even after the *Überseering* case.³⁰ In its judgment in

²⁶ Cf. Curt Christian von Halen, *Das Gesellschaftstatut nach der Centros-Entscheidung des EuGH* (2001), at 111.

²⁷ Case 81/87, *R v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483.

²⁸ See, for example, Ebke, *Zeitschrift für Unternehmens und Gesellschaftsrecht (ZGR)* 1997, at 245 et seq., and Grossfeld, *IPRax* 1986, at 351 et seq.

²⁹ Cf. for example, Görk, *GmbH-Rundschau (GmbHR)* 1999, at 796, Ebke, *Juristenzeitung (JZ)* 1999, at 660, Kindler, *Recht der Internationalen Wirtschaft (RIW)* 2000, at 652, and W.H. Roth, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2000, at 311-338 (at 325-327). From a Danish point of view, see also Karsten Engsig Sørensen, *Nordisk tidsskrift for selskabsret (NTS)* 1999, at 92 et seq. (at 102), Mette Neville, Karsten Engsig Sørensen & Niels Winther Sørensen, *Free Movement of Companies under Company Law, Tax Law and EU Law*, in *The Internationalisation of Company Law* (Eds. Mette Neville & Karsten Engsig Sørensen, 2001), at 222. See also Nemeth, *Common Market Law Review* 2000, at 1281 et seq., and Anne Looijenstijn-Clearie, *International and Comparative Law Quarterly* 49 (2000), at 621-643 (at 635 and 637).

³⁰ Cf. W.H. Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law and Community Law*, *International and Comparative Law Quarterly* 49

Überseering, the Court went to great lengths to explain the difference between, on the one hand, the *Daily Mail* case which concerned *primary establishment* and, on the other hand, the *Centros* and *Überseering* cases which concerned *secondary establishment* (see Paragraphs Nos. 61-73 of the *Überseering* judgment).

Harald Haldhuber has made a thorough analysis of the “*Daily Mail*-argument” in his 2001 thesis. His conclusion is that, the theory that the *Daily Mail* case acquits the real seat doctrine in comparison with the incorporation state theory does not hold water.³¹ It is especially noted that, while German legal writers quickly locked onto a particular interpretation of the *Daily Mail* decision, the reactions in the other Member States did not express an unreserved ‘acquittal’ of the real seat doctrine. Since the *Daily Mail* case cannot be regarded as ‘rubber stamping’ the real seat doctrine, the absence of any references to the case in the *Centros* judgment can even less be regarded as meaning that the real seat doctrine should be exempt from examination as a restriction on the right of establishment. Another argument against distinguishing between real seat doctrine states and incorporation doctrine states is that, if this argument were valid, Denmark would be able to refuse to register a branch of *Centros* by introducing the real seat doctrine by legislation.

The most weighty argument for not ascribing significance to the failure of the Court to refer to the *Daily Mail* case in the *Centros* judgment is given by the Court itself, cf. Section 3.2 below. The *Daily Mail* case and the *Centros* case simply concerned different situations.

2.4 *Überseering would be Ascribed Legal Capacity as a Partnership in Germany*

Shortly after the German Federal Supreme Court (BGH) had referred the *Überseering* case to the European Court of Justice for a preliminary ruling, the BGH was criticised for having based its referral on an ‘extreme’ version of the ‘Sitztheorie’.³² In a ruling dated 1st July 2002,³³ the German Federal Supreme

(2003), at 190.

³¹ See Harald Haldhuber, *Limited company statt GmbH?*, 2002, at 27-56. He concludes at 55: “Wie ich oben dargestellt habe, ist der Entscheidung [Daily Mail] eine derartige europarechtliche ‘Absagung’ der Sitztheorie durch den EuGH bei erster Lektüre nicht zu entnehmen. Die einschlägigen Stellungnahmen in der Literatur erweisen sich als Resultate von Missverständnissen, Verallgemeinerungen und Fehlübersetzungen. Eine nochmalige gründliche Untersuchung nicht nur der entschiedenen Rechtsfrage, sondern auch des Wortlauts der Entscheidungsgründe bestätigte den ersten Eindruck, dass aus Daily Mail die europarechtskonformität nicht abgeleitet werden kann. Nachdem praktisch alle ursprünglichen Reaktionen auf Daily Mail im Sinne einer Bestätigung der Sitztheorie verstanden hatten, übernahmen spätere Aufsätze, Kommentare und Urteile dieses Verständnis. Daily Mail wurde als Beweis für die europarechtliche Zulässigkeit der Sitztheorie kanonisiert und damit kritischer Überprüfung oder Neubeurteilung entzogen.” Haldhuber emphasises that the fact that even critics of the real seat doctrine agreed with the prevailing view, helped to confirm the mistaken interpretation of the Court’s decision in the *Daily Mail* case.

³² See, for example, *Meilicke*, *GmbH-Rundschau (GmbHR)* 2000, at 693-698. Meilicke argues

Court modified its practice on the recognition of the legal capacity of foreign companies before German courts. The case in question concerned a private limited company, which was incorporated in Jersey, but which, according to German law, was considered to have its head office in Germany. Under the previous German practice this would have meant that a case against the company in a German court would have been dismissed since the company, as a non-registered German company, did not have the capacity to be a party to legal proceedings before a German court. Instead, the BGH now regarded the foreign private limited company as a German BGB company (i.e. a civil partnership). According to recent German case law on BGB companies, they are now recognised, as separate legal entities, distinct from their members.³⁴ The BGH thus found that the company incorporated in Jersey could be a party to legal proceedings before the German courts, but it was accepted to appear before the German court only in the form of a German partnership.

Since the *Überseering* case concerned a Netherlands private company's legal capacity before the German courts, some writers noted that, with the introduction of this 'modern' version of the real seat doctrine, there was no longer any basis for the referral to the European Court of Justice in the *Überseering* case.³⁵ However, even after judgment had been given in the *Überseering* case, Roth argued that the Court had misunderstood German law.³⁶ It is however, not the Court but Roth who is guilty of a misunderstanding. The interpretation of the provisions of the EC Treaty is exclusively a matter for the Court of Justice, and such interpretation is independent of the case law of the national courts prevailing at the given time. It is thus irrelevant to the determination of Community law that the German Federal Supreme Court may have moderated its case law. It is also possible that, when the storm had passed, the BGH could have reverted to its previous case law on foreign companies.

Following *Überseering*, it is now clear that re-classifying a foreign limited liability company as a national partnership does not accord with Community law.³⁷ A foreign company, which is covered by the Treaty rules on the right of establishment, must be recognised 'as such', in other words, in accordance with the national rules, which constitute the basis for its incorporation, wherever the

(at 693): "Bemerkenswert ist ferner, dass der BGH ausdrücklich die extremste Variante der Sitztheorie durchboxen will, vonach den nach ausländischem Recht gegründeten Gesellschaft mit inländischer Hauptverwaltung die Rechtsfähigkeit und Parteifähigkeit schlechterdings aberkannt wird. Eine moderate Variante der Sitztheorie würde lediglich die ausländische Rechtswahl nicht anerkennen und die Gesellschaft als inländische oHG oder GBR qualifizieren mit dem Ergebnis, dass nicht die Rechts- und Parteifähigkeit, sondern lediglich die Parteibezeichnung berichtigt wird".

³³ The ruling is reported in *Betriebs Berater* (BB) 2002, at 2031.

³⁴ See the BGH judgment of 29th January 2001, reported in *Neue Juristische Wochenschrift* (NJW) 2001, at 1056, and the procedural consequences of this in Wertensbruch, *Neue Juristische Wochenschrift* (NJW) 2002, at 324-329.

³⁵ Cf. Lutter, *Betriebs Berater* (BB) 2003, at 8, who argues that the BGH could have revoked its reference to the EC Court.

³⁶ Cf. *International and Comparative Law Quarterly* 2003, at 177-208 (at 297).

³⁷ Cf. Zimmer, *Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH*, *Betriebs Berater* (BB) 2003, 1-110 (at 5), and correspondingly Geyrhalter & Gänsler, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2003, at 411.

company may be established. Even after *Überseering*, some writers did see a possibility for re-classifying foreign companies as German companies. Roth thus argues that it would be possible to re-classify a foreign limited company as a German private company (GmbH) by analogous use of the German Umwandlungsgesetz.³⁸ There seems little likelihood that, following the BGH decision of 13th March 2003 and the decision by the Court in *Inspire Art*, any German court will venture to take such a course.

3 The *Überseering* case

3.1 *The Need for a New Case*

Because of the widespread debate, which had been triggered by *Centros*, it is difficult to form a clear view of the many different reactions of legal writers. With the considerable degree of uncertainty about the extent of applicability of the *Centros* decision, it soon became clear that it would be necessary to make a new reference to the Court of Justice in order to clarify the fate of the real seat doctrine. After *Centros*, a number of cases were referred to the Court of Justice on questions concerning the determination of the nationality of a company.³⁹ The most important of these was a reference made by the German Federal Supreme Court (BGH) on 30th March 2000. This became Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919, in which judgment was given by the Court of Justice, in plenary session, on 5th November 2002.

3.2 *The Facts of the Überseering case*

Überseering BV was incorporated under Netherlands law and registered in August 1990. In the same year the company acquired a piece of land in Düsseldorf, which it used for business purposes. In 1994, two German nationals residing in Düsseldorf acquired all the shares in *Überseering*. In 1996 *Überseering* brought an action before the Landgericht (Regional Court), Düsseldorf, against Nordic Construction Company Baumanagement GmbH (NCC). The case concerned defective maintenance work, which had been carried out on the property owned by *Überseering*. The Regional Court dismissed the action on the grounds that *Überseering* had transferred its actual centre of administration to Düsseldorf once its shares had been acquired by two German nationals resident in Düsseldorf. Since the current German practice did not recognise the legal capacity of the company, it could not be a party to legal

³⁸ Cf. *International and Comparative Law Quarterly* 2003, at 208.

³⁹ See, for example, Case C-447/00 *Holto Ltd*, which was referred to the Court by the Landesgericht Salzburg. In a ruling on 22nd January 2002, the Court of Justice refused to hear the case on the grounds that in the actual case the Landesgericht Salzburg was not acting in the capacity of a 'court' within the meaning of Art. 234 EC, in the case in question, but rather as a registration authority.

proceedings before the German courts. The Higher Regional Court in Düsseldorf upheld the decision to dismiss the action. The case was then appealed to the BGH, and the BGH referred the following question to the European Court of Justice:

1) Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another state to which the company has moved its actual centre of administration, where, under the law of that second state, the company may no longer bring legal proceedings there in respect of claims under a contract?

2) If the Court's answer to that question is affirmative: Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the state where the company is incorporated?

A number of Governments intervened in the case in support of the NCC argument, including the German and Spanish Governments. The United Kingdom Government intervened in support of the Überseering argument. It is notable that the Commission also intervened in support of the Überseering argument.

The Court started by stating (Paragraph 52 of the judgment) that contrary to the submissions of, among others, the German Government, a case like that before the Court, where the shares in a company which is validly incorporated in one Member State are transferred to nationals of a different Member State, the company does not, as Community law now stands, fall outside the scope of the Community provisions on the right of establishment. The Court also stated that a necessary precondition for the right of the freedom of establishment is the recognition of such companies by any Member State in which they wish to establish themselves (Paragraph 59).

The Court used a disproportionate amount of time to explain why the decision in *Daily Mail* was *not* relevant to the case before it. It is made clear, in Paragraph 62, that *Daily Mail* concerned a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the state of incorporation.⁴⁰

By contrast, *Überseering* concerned the refusal by one Member State to recognise a company incorporated under the law of another Member State. *Daily*

⁴⁰ Such a procedure can be referred to as a 'subsequent primary establishment', Cf. Søren Friis Hansen & Jens Valdemar Krenchel, *Lærebog i selskabsret I* (1999), at 119. The possibility to transfer the seat of a company might give rise to tax problems, as the Member state which the company transfers out of might consider the transfer grounds for liquidation under tax law. A 'new Daily Mail-case' might be under way from the Dutch supreme court concerning the possibility of A Member State to levy exit tax on a company which has transferred its seat out of the Netherlands, Cf. Dennis Weber, *Exit Taxes on the Transfer of Seat and the Applicability of the Freedom of Establishment after Überseering*, *European Taxation* 2003 at 350-354 (at 353).

Mail thus concerned subsequent primary establishment, while *Überseering* concerned secondary establishment. The Court also noted (Paragraph 63) that *Überseering*'s existence had never been called into question in the Netherlands.

In Paragraph 73, the Court stated that there are no grounds for concluding from *Daily Mail* that the question of recognition of a company's legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment.

The Court also considered whether the German court's refusal to recognise a company which, had been legally incorporated in another Member State constitutes a restriction on freedom of establishment. The following is stated in Paragraphs 81 and 82 of the judgment:

Paragraph 81

Indeed, its very existence is inseparable from its status as a company incorporated under Netherlands law since, as the Court has observed, a company exists only by virtue of the national legislation which determines its incorporation and functioning (see, to that effect, *Daily Mail and General Trust*, paragraph 19). The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment.

Paragraph 82

In those circumstances, the refusal by a host Member State ('B') to recognise the legal capacity of a company formed in accordance with the law of another Member State ('A') in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that state residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

Thereafter, the Court considered whether the restriction, which had been found to exist, could be justified. The German Government sought to argue that the restriction could be justified on the grounds that the real seat doctrine protects the company's creditors, minority shareholders and employees (Paragraphs 87, 88 and 89).⁴¹

⁴¹ The attentive reader will note that the arguments put forward to justify the restriction in *Überseering* were almost identical to the arguments put forward by the Danish Government to justify the refusal to register a company branch in *Centros*. It is even more remarkable that the identical arguments, which had twice been rejected by the Court, were again been put forward by Germany and the Netherlands in the *Inspire Art* case (Case C-167/01, *Kamer van Koophandel v Inspire Art Ltd*). The arguments put forward by Germany and the Netherlands did provoke an unprecedentedly sharp rebuke from Advocate-General Alber, Cf. Søren Friis Hansen, *Men så en dag blev det generaladvokaten for meget*, Skattepolitisk Oversigt (SpO) 2003 No. 5, at 275-288.

3.3 *The Findings of the Court of Justice*

Given the importance of this case, it is worth reproducing the conclusions of the Court in full:

Paragraph 90

Finally, any restriction resulting from the application of the company seat principle can be justified on fiscal grounds. The incorporation principle, to a greater extent than the company seat principle, enables companies to be created which have two places of residence and which are, as a result, subject to taxation without limits in at least two Member States. There is a risk that such companies might claim and be granted tax advantages simultaneously in several Member States. By way of example, the German Government mentions the cross-border offsetting of losses against profits between undertakings within the same group.

Paragraph 91

The Netherlands and United Kingdom Governments, the Commission and the EFTA Surveillance Authority submit that the restriction in question is not justified. They point out in particular that the aim of protecting creditors was also invoked by the Danish authorities in *Centros* to justify the refusal to register in Denmark a branch of a company which had been validly incorporated in the United Kingdom and all of whose business was to be carried on in Denmark but which did not meet the requirements of Danish law regarding the provision and paying-up of a minimum amount of share capital. They add that it is not certain that requirements associated with a minimum amount of share capital are an effective way of protecting creditors.

Paragraph 92

It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.

Paragraph 93

Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.

On this basis, the Court concluded:

Paragraph 94

Accordingly, the answer to the first question must be that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43

EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

Paragraph 95

It follows from the answer to the first question referred to the Court for a preliminary ruling that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its state of incorporation ('A').

3.4 Summary

Following *Überseering*, it is clear that the real seat doctrine can no longer be used in its previous form to deny the legal capacity of foreign companies which can claim a right of establishment under Art. 48 EC. The question is whether the use of cross-border connecting factors has finally been legalised. On the face of it, it seems difficult to reach any other conclusion than that cross-border connecting factors can now be regarded as being protected by the right of establishment within the EU, and that the freedom of choice of law in the area of company law is now proved to be a reality.⁴²

After *Überseering* some writers still maintained that, within the framework of Community law, a Member State could require foreign companies to comply with certain national mandatory company law rules.⁴³ This possibility has, however, been finally rejected by the Court with its judgement in the *Inspire Art* case (see below section Section 4.3).

Another question which is prompted by *Überseering* is how comprehensive is the duty to recognise foreign companies as having independent legal capacity.⁴⁴

⁴² See Claus Gulmann, *Lidt om selskabers etableringsret i lyset af Centros- og Überseering-dommene*, in *Hyldestskrift til Jørgen Nørgaard*, 2003, at 901, where Gulmann comments on the Judgement by the Court in *Überseering*: "It is difficult to understand the judgment other than as building on the interpretation that the rules on establishment are intended to give those who set up a company the right to choose the Member State under whose laws they want the company to operate, and that the rules on establishment can therefore be relied upon to the usual extent so that the company can be subject to the laws of the chosen Member State, even if the only connecting factor is that it is the Member State in which the company is incorporated."

⁴³ See Karsten Engsig Sørensen, *EF-Domstolens seneste praksis om selskabsret*, *Nordisk Tidsskrift for Selskabsret (NTS)* 2002, at 405-416 (at 410).

⁴⁴ See Michael Bogdan, *Svensk Juristtidning (SvJT)* 2001, at 345, who assumes that recognising that a company is a legal person is necessary for that company to enjoy the right of establishment. He goes on: "Such an implied Community law conflict of laws rule, which displaces the Member States' private international law rules on this point, can however merely concern recognition of legal personality for the purposes of establishment, and should not be extended to questions of the law of associations in general, for example concerning the

Ultimately, one can ask: What is company law? Here, it should merely be argued that recognition of a company must be assumed to include all questions concerning its internal organisation. For example, if a Member State refuses to recognise a general meeting held on that state's territory in accordance with the rules which are applicable under the law of the state where the company is registered, this would mean that the company's annual report, properly approved by the general meeting, would not be regarded as valid by the host state.

With *Überseering*, it is clearly established that it is irrelevant to the right of establishment whether a national rule is categorised as a substantive rule or a rule of private international law. In private international law there are a number of measures, which can be used against attempts to avoid national laws. For example, this applies to the conflict of laws concept of 'public policy'. With the decision of the Court of Justice in the *Überseering* case, Art. 48 EC must be regarded as an independent conflict of laws rule governing the recognition of foreign companies, which are formed in accordance with the law of a Member State. Thereafter, national private international law rules can no longer be applied to such foreign companies in order to prevent circumvention of the company law of the Member State of establishment.⁴⁵ On the other hand, Member States are still free to apply their rules of private international law to companies, which are incorporated in a country outside the EU or EEA.⁴⁶

In the wake of *Centros*, it was proposed by German writers that private companies should be made subject to the capital requirements of the Second Company Law Directive. In the wake of *Überseering*, Zimmer has proposed that there should be a harmonisation of the Member States' private international rules on companies by means of a directive.⁴⁷ According to this suggestion, a company's nationality should be determined according to the country in which it is registered (Art. 1). Zimmer suggests, however that, in line with the rules governing the European Company (Article 7 of the SE Regulation, that all limited companies should be required to maintain their head office in the same Member State as the one where their registered office is located. This rule should be supplemented by provisions containing sanctions against companies which would not comply with this requirement. There is a similar proposal for a directive made by Kersting.⁴⁸

Zimmer's proposal has significant points of similarity with a theory, which he proposed even before the *Centros* decision under the heading "Die Kombinationslehre".⁴⁹ The proposed directive is presented as a 'compromise' between the real seat doctrine and the incorporation state doctrine. This is,

internal matters of companies."

⁴⁵ Cf. correspondingly Paefgen, *Auslandsgesellschaften und Durchsetzung deutscher Schutzinteressen nach Überseering*, Betriebs Berater (BB) 2003, 487-492 (at 488 et seq).

⁴⁶ See for example the ruling of the Commercial Appeals Tribunal (*Erhvervsankenævnet*) on 17th September 1999, where the practice which had been rejected in the *Centros* case was maintained in relation to a company incorporated in Delaware.

⁴⁷ Cf. Rabels Zeitschrift für das internationale Privatrecht (RabelsZ) 2003, at 310-315.

⁴⁸ Cf. Neue Zeitschrift für Gesellschaftsrecht (NZG) 2003, pp 11-13.

⁴⁹ Cf. Zimmer, *Internationales Gesellschaftsrecht*, (1996), at 232.

however misleading. It would merely amount to a reintroduction of the real seat doctrine in a new guise.⁵⁰

It is unlikely that the proposal made by Zimmer will gain political backing in the United Kingdom. In this context it is worth to note that The Commission since *Überseering* has favoured the idea of competition between the Member States in the area of company law.

Another more striking argument against the proposal by Zimmer is that the Court has based its rulings concerning the free movement of companies on the provisions in the *EC Treaty* (Articles 43 and 48). Because of the legal hierarchy between the EC Treaty and Regulations or Directives approved by the Council the Member States cannot limit the right of establishment of companies, which is derived directly from the EC Treaty. It is now clear that the fact that a company carries on its activities exclusively or almost exclusively in the Member State of establishment, does not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case- by-case basis, (*Inspire Art*, Paragraph 105). It is thus not possible for the Member States to introduce a Directive, which provides that the registered office and the head office of a company must be located in the same Member State.

Following this line of reasoning it would even seem questionable whether Article 7 of the SE Regulation is in accordance with community law. A SE will (from October 8th 2004) be a company, which is formed in accordance with the law of a Member State. This means that a SE will shall enjoy the same rights to establish itself in other Member States that an ordinary limited company formed in accordance with the law of a Member State enjoys.

4 Developments since *Überseering*

4.1 *The Decision of the German Federal Supreme Court of 13th March 2003*

Following *Überseering* it was clear, even in Germany, that the real seat doctrine could not be maintained in its existing form,⁵¹ The first decision, by a German court to deal with the recognition of a foreign company came from the Provincial Court of Appeal in Bavaria. This case concerned a United Kingdom private company, which had transferred its real seat to Germany. In connection with a registration of title, the local Registrar required the UK company to show that its head office was not situated in Germany. The Regional Court in Bavaria directed the Registrar to make the registration, since such evidence could not be required of a foreign company, formed in accordance with the law of a Member State.⁵²

⁵⁰ The 'Kombinationslehre' of Zimmer has thus already been rejected as being in conflict with Community law by Curt Christian von Halen, *Das Gesellschaftstatut nach der Centros Entscheidung des EuGH*, (2001), at 228. Similarly, see Behrens, IPRax 1999, at 325.

⁵¹ See Ebke, *Betriebs Berater* (BB) 2003, at 1, Paefgen, *Der Betrieb* (DB), 2003, at 487, and similarly Eidenmüller, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2002 at 2242.

⁵² The decision is reported in *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2003, at 290, and

The fate of the ‘Sitztheorie’ in German law was however, sealed by an important decision from the German Federal Supreme Court (BGH) on 13th March 2003. With this decision, the BGH has taken an important step towards the liberalisation of German company law.⁵³

The BGH decision of 13th March 2003

A Dutch private company (BV), which had been incorporated in 1990, entered into an agreement in 1992 with a German company for painting and decorating work. In the view of the company, the work was poorly carried out. At the lower court the case was dismissed on the grounds that in 1994 the Dutch company had moved its head office to Germany so that, under the German practice, which then applied, the company could not have capacity to be a party to legal proceedings before a German court. The BGH found that the European Court of Justice’s interpretations of Art. 43 and Art. 48 EC required it to apply the law so as not to restrict the right of establishment of the Dutch company. In the view of the BGH, it was not enough to recognise the Dutch company as a civil partnership with the capacity to be a party to legal proceedings. Under the right of establishment guaranteed by the Treaty, the company sought to assert its rights as a Dutch company, and it should be recognised as such by the German courts. In the view of the BGH, ‘recognition’ as a civil partnership would be contrary to the right of establishment, as expressed by the decision of the Court of Justice in the *Überseering* case. The BGH thus concluded (emphasis in the original):

“Die Klägerin muss in der Lage versetzt werden, nach einer Verlagerung ihres Verwaltungssitzes in die Bundesrepublik Deutschland ihre vertraglichen Rechten als niederländische BV geltend machen zu können. Das erfordert es *die Klägerin nach deutschem internationales Gesellschaftsrecht hinsichtlich ihrer Rechtsfähigkeit dem Recht des Staates zu unterstellen, in dem sie gegründet worden ist.*“

Since, in this case, there was no doubt that the company was validly registered in the Netherlands, it was consequently recognised as a dutch BV which had the right to be a party to legal proceedings before a German court. The question of whether the painting work had been properly carried out was referred back to the lower court for substantive consideration.

Even though this judgment of the BGH does not clarify all the questions to which use of cross-border connecting factors can give rise, it should be recognised that, not least in the light of the widespread debate which followed the *Centros* decision, one can literally detect the march of history when reading the decision.

discussed by Leible & Hoffmann, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2003, at 259-261.

⁵³ See Forsthoff, *Internationales Gesellschaftsrecht in Umbruch*, *Der Betrieb* (DB) 2003, at 979-981.

4.2 *Inspire Art (Case C-167/01)*

In its decision in the *Überseering* case, the Court of Justice did not formally and expressly decide whether it would still be possible for a Member State to enforce national company law on a company which is formed in accordance with the law of another Member State, if the company has transferred its head office to the Member State of the secondary establishment. Some authors did assume that, even after *Überseering*, it would in some cases be possible to compel foreign companies to comply with national company law,⁵⁴ since this would be necessary to prevent the abuse of such rules.⁵⁵ This question has now been finally settled with the judgement of the Court in the *Inspire Art* case.

Inspire Art was formed on July 28th 2000 in the legal form of a private limited company under the law of England and Wales. The registered office of the company was located in Folkestone, but the domicile of the company's sole director was the Haque, and the company began trading in Amsterdam through a branch on 17th August 2000. The form of a British private limited company for the business was chosen because of the fact that Netherlands law imposed stricter rules with regard to the setting-up of companies, and payment for shares.

In an order of 5th 2001 the Kantonengerecht of Amsterdam decided that *Inspire Art* was a formally foreign company within the meaning of a Dutch Act from 1997 (the 'WFBV'), and that the company would therefore have to meet the conditions set up under that Act. The Kantonengerecht of Amsterdam on 19th April 2001 referred two questions to the European Court of Justice (cf. Art. 234 EC), and the case was given the number C-167/01.

Advocate-General Alber presented his opinion in the *Inspire Art* case on 30th January 2003. I shall not go into this opinion in detail here,⁵⁶ but the Advocate General strongly argued that it was unlawful to impose Netherlands company

⁵⁴ See, for example, *Karsten Engsig Sørensen*, *Nordisk tidsskrift for selskabsret (NTS)* 2002, 405-416 (at 410 et seq.), where it is assumed that foreign companies can be required to comply with certain provisions which protect creditors, minority shareholders and employees, as long as the four conditions listed in Paragraph 34 of the *Centros* judgment, for justifying restrictions on the exercise of fundamental freedoms guaranteed by the Treaty, are satisfied.

⁵⁵ See *Forsthoff*, *Der Betrieb (DB)* 2003, at 981, who was critical of Advocate-General Alber's opinion in the *Inspire Art* case. He argued as follows: "Zusammenfassend ist festzuhalten, dass die Sichtweise des Generalanwalts Alber nicht zu überzeugen vermag und der Gerichtshof ihr vorraussichtlich nicht folgen wird. Stattdessen ist damit zu rechnen, dass sich sei es aufgrund der Entscheidung der Rechtsache *Inspire Art* oder auch erst durch weitere Judikate des EuGH und der nationalen Gerichte eine *moderate Form der Gründungstheorie* durchsetzen wird. Das heisst also, dass grundsätzlich von der Gründungstheorie auszugehen ist, dass aber für einzelne Sachbereiche eine Sonderanknüpfung nationaler Vorschriften zulässig sein wird. Bereiche in denen eine Sonderanknüpfung vorstellbar ist, sind etwa Regelungen über das Mindestkapital und damit einhergehend, Regelungen über eigenkapitalersetzende Darlehen und die Durchgriffshaftung. Eine Sonderanknüpfung für die unternehmerische Mitbestimmung wird hingegen europarechtlich nicht zulässig sein." (my emphasis, SFH). The author seems to overlook the fact that the incorporation state doctrine is not 'moderate', but by its very nature absolute. After the judgement by the Court in *Inspire Art* there is no room for the application of national company law rules on a foreign company

⁵⁶ For a review of the Advocate-General's opinion in Case C-167/01 *Inspire Art*, see Søren Friis Hansen, *Skattepolitisk Oversigt (SpO)* 2003 No. 5, at 275-288.

law on a British private limited company because of the fact that the company's activities exclusively were placed in the Netherlands.⁵⁷ Judgment in the *Inspire Art* case was given by the Court of Justice, in plenary session, on 30th September 2003. This date has become another landmark in the history of European Company law.

The Court initially concluded that it is immaterial with regard to the application of the rules on freedom of establishment, that the company was formed in one Member State *only for the purpose* of establishing itself in a second Member State, where its main, or indeed entire business is to be conducted. Furthermore *the reasons* for which a company chooses to be formed in a particular Member State are, save in the case of fraud, *irrelevant* with regard to application of the rules of establishment (paragraph 95).

The Dutch government had argued that since a formally foreign company was not denied access to Holland, and since such a company was fully recognised as legal person in Holland, the Dutch Act of 1997 did not infringe in any way the right of establishment for such companies. This argument was however, not accepted by the Court, which concluded:

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The effect of the WFBV is, in fact, that the Netherlands company-law rules on minimum capital and directors' liability are applied mandatorily to foreign companies such as *Inspire Art* when they carry on their activities exclusively, or almost exclusively, in the Netherlands.

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Creation of a branch in the Netherlands by companies of that kind is therefore subject to certain rules provided for by that State in respect of the formation of a limited-liability company. The legislation at issue in the case in the main proceedings, which requires the branch of such a company formed in accordance with the legislation of a Member State to comply with the rules of the State of establishment on share capital and directors' liability, has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty

The Court next concluded that its decision in *Daily Mail* concerned a case of primary establishment, the present case concerned a question relating to secondary establishment. Hereafter the Court concluded:

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It follows from the foregoing that the provisions of the WFBV relating to minimum capital (both at the time of formation and during the life of the company) and to directors' liability constitute restrictions on freedom of establishment as guaranteed by Articles 43 EC and 48 EC.

⁵⁷ See, correspondingly, Kersting, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2003, at 11, who expected that the Dutch legislation would be found to constitute an infringement of community law.

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It must therefore be concluded that Articles 43 EC and 48 EC preclude national legislation such as the WFBV which imposes on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.

The Court found that none of the arguments put forward by the Netherlands Government with a view to justifying the legislation at issue, fell within the ambit of Art. 46 EC, (paragraph 131). The Court then restated the four conditions that must be fulfilled if a national measure, which hinders or makes less attractive the exercise of fundamental freedoms guaranteed by the treaty is going to be justified (*Centros* paragraph 34, *Inspire Art* paragraph 133). The Court stated that it is clear from settled case law that the fact that a company does not conduct any business in the Member state in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct (paragraph 139).

Finally the Court concluded:

1. It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the *Wet op de Formeel Buitenlandse Vennootschappen* (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

2. It is contrary to Articles 43 EC and 48 EC for national legislation such as the *Wet op de Formeel Buitenlandse Vennootschappen* to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where the existence of an abuse is established on a case-by-case basis

4.3 *Consequences of the Judgement in Inspire Art*

With its decision in the *Inspire Art* the Court of Justice has definitively put an end to the debate over the fate of the real seat doctrine or *Sitztheorie*. A company formed in accordance with the law of a Member state which has its registered office, central administration or principal place of business within the Community, must be recognised as such in all other Member States, regardless of the place of its head office.

Unless an abuse can be established on a case-by-case basis, the Member state of establishment cannot invoke its domestic company law on a company formed in accordance with the law of another Member State. With regard to incorporations of companies there is now a completely free *competition among rules* between the 28 Member States of the European Union and the EEA.

This competition among rules apply to all types of enterprises and companies that fall within the scope of Art. 48 EC. This is of course the case for public and private limited companies, but the free movement of companies also apply to partnerships and limited partnerships.

As a national consequence of *Inspire Art*, the Danish rules on the provision of security upon registration with the Danish tax authorities, which were introduced in response to the *Centros* decision, are almost identical to the Dutch rules, which were the subject of the *Inspire Art* case. It must therefore be concluded that the Danish Act on this subject constitutes a clear violation of current Community law. Consequently the Danish Government will be obliged to repeal the provisions on giving security when registering with the tax authorities, in § 11a of the Act on the recovery of debts, and to refund the sums which have been paid as deposits in accordance with this provision.⁵⁸

4.4 *Putting it in Perspective*

Until now, most Danish professional advisers (and presumably also most professional advisers elsewhere), do not seem to have taken the right of cross-border establishment seriously. This is presumably due to a number of factors. First, it is something about which there has been a good deal of uncertainty, cf. the debate referred to in Section 2 above. Second, it has been argued that if a client cannot find DKK 125,000 for setting up a Danish private company, then the client is not serious, and may even be dubious. With the decisions in

⁵⁸ Cf. Søren Friis Hansen in Skattepolitisk Oversigt (SpO) 2003, at 287 et seq. The question whether § 11a of the Act on the recovery of debts (*oprkrævningsloven*) constitutes an infringement of Community law has been answered in the affirmative by Henrik Dam & Søren Friis Hansen, *Sikkerhedsstillelse med garanti for problemer*, Ugeskrift for Retsvæsen (UfR) 2000B at 352-359 and the same authors in *Festskrift til Bernhard Gomard*, 2001, at 73-98. See also Søren Friis Hansen, *C-212 and L 212 - Centros ltd revisited*, European Business Organization Law Review (EBOR) 2 [2001], at 141-157. In support of this argument, see Erik Werlauff, *EU-Selskabsret* (Ed. 3) 2002, at 8 et seq., who describes the introduction of the tax-based capital requirement in the wake of the *Centros* judgement as “a desperate and, as far as can be judged, a mistaken attempt to introduce Danish minimum capital requirements by the back door.”

Überseering and *Inspire Art*, these arguments must be regarded as obsolete. In the European Union, it is quite legitimate to choose the form of incorporation on the basis of that national company law which best suits the needs of the shareholders. Professional advisers must take this fact into account when advising businesses.

In Denmark more than 60.000 private limited companies are incorporated under the Act on private limited companies (anpartsselskaber). It is unlikely that the Danish private limited company will be competed out of existence as a result of this access to cross-border establishment. For most people who carry on business in Denmark, the Danish private limited company will still be the best legal framework for their business. The use of a cross-border connection with a foreign company will involve additional costs for the company. Among other things, this will mean that the annual accounts must be presented in accordance with the rules in the Member State of incorporation. Professional advisers must adapt their advice to these new possibilities. No professional adviser can be expected to be familiar with the company laws of 15 Member States, let alone 25. Those advisers who have special links with or who co-operate with foreign advisers will naturally be in a better competitive position than those who do not have such links.

For well-established businesses the use of cross-border connections will mean that trading partners will, to a higher degree than hitherto, be foreign companies. This could have practical consequences for such questions as right to sign on behalf of the company or powers of attorney, liability and the insolvency of trading partners.

The use of cross-border connections will also make different demands on the Danish authorities. It will be necessary for civil servants to be trained for the new conditions. For example, in some Member States private companies are exempted from the requirement of an official audit of the annual accounts. The Danish tax authorities must thus be prepared to accept that there may not necessarily be an auditor's report in every case, even though the business may be carried on in Denmark. A person can be disqualified from setting up a company or from being a director of a company, cf. § 79 of the Criminal Code. The provision in § 79 of the Criminal Code was inserted with a view to combating economic crime and the exploitation of bankruptcy provisions. Disqualification under § 79 of the Criminal Code is not binding on foreign company law authorities. If, in an actual case, it can be shown that cross-border connections are being used with a view to evading disqualification, it is clear from the judgments in both *Centros* and *Überseering* that the authorities of the host state are entitled to step in. Such steps will often require co-operation between the Danish authorities and the authorities of the state of incorporation.

For legislators, cross-border connections raise certain questions. In preparing future companies legislation, national legislators, including Danish legislators, must bear in mind that the implementation of company law provisions which impose unreasonable burdens on law-abiding businesses, or which make significant restrictions on freedom of contract, will result in a number of these law-abiding businesses choosing to 'flag out', through the use of cross-border connections. With the adoption of the new rules on electronic general meetings,

the Danish Government seems to be aiming to be competitive against other jurisdictions.

The use of cross-border connections is only relevant to the *company law aspects* of the undertaking in question. A consumer, who buys goods from such a company is protected by the national consumer protection laws of the Member State of establishment. Likewise, the law on the protection of the environment and employees of the Member State of establishment that apply to the company, regardless of its state of incorporation. This applies equally to the general business law rules (contract law etc.), which apply in the Member State of establishment. On tax, a foreign registered company, which has its real seat in Denmark, will be considered as fully liable to tax in Denmark, cf. § 1.6 of the Corporation Tax Act (*Selskabsskatteloven*). This means that any income which is generated in Denmark will be taxed in Denmark under Danish tax law.

The establishment of companies using cross-border connections will probably continue to meet resistance from administrative authorities and legislators, who will undoubtedly look for new ways to combat the avoidance of national rules, which the authorities believe are important. However, under the case law which has been established by the European Court of Justice in this area, the Member States will only very seldom be successful in forcing foreign companies to comply with national company law rules.

4.5 *Summary*

On the basis of the analysis made above, the following results can be deduced from the case law of the ECJ with regard to the free movement of companies:

1. If a company is formed in a Member State with a view to carrying on business activities through a branch in another Member State (a connecting factor), so that the company law of the incorporation state applies to the company rather than the company law of the Member State of the establishment, this is neither an abuse of Community law, nor an unlawful evasion of national company law (*Centros*). The establishment of a branch in another Member State shall continue to be regarded as *secondary establishment*, regardless of whether the company carries on its activities exclusively or almost exclusively in the Member State of establishment, and regardless of the reasons for which the company was formed in the Member State of incorporation. An exception to this rule applies only where abuse is established on a case-by-case basis by the Member State of establishment (*Inspire Art*).

2. A Member State can no longer use the real seat doctrine as a legal instrument for denying recognition to a foreign company which is formed in accordance with the law of a Member State, and which meets the criteria set up in Article 48 EC (*Überseering*).

3. A Member State may continue to apply elements of the real seat doctrine to its own companies, so that a company, which is incorporated under the laws of a Member State can be regarded as having been wound up if the company moves

its head office or registered to another Member State (*Daily Mail*). Thus, for ordinary national public and private limited companies, the right of establishment only refers to *secondary establishment*. A right for a company to change the company law applicable to it is secured in the Statute for the European Company, although the rule as written does not allow for a separation of the registered office and the head office (SE Regulation, Article 7). Ordinary limited companies cannot at present change the company law applicable to them. Such a transfer of nationality for a limited company must await the adoption of the 14th Company Law Directive.

4. If, by *general and abstract* legislation, a Member State imposes on companies formed in accordance with the law of another Member State a duty to comply with mandatory company law rules of the Member State of establishment, this involves an *unjustifiable restriction* on the companies in question (*Inspire Art*). Such a procedure is therefore an infringement of the right of establishment. *Only in those cases* where the existence of *an abuse is established on a case-by-case basis*, can a Member State deprive a foreign company of the right to invoke the freedom of establishment, which is otherwise guaranteed by the Treaty, or impose a duty on the foreign company to comply with company law rules of the Member State of establishment.