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Summary

Through a recent line of landmark judgments, the European Court of Justice has widened the scope of application of the freedom of establishment under the EC Treaty. It is now clear that the said freedom does not only convey upon undertakings the right to form subsidiaries or branches abroad; it also gives them the right to incorporate in one Member State only to conduct all their business and place their actual centre of administration in another one. Not only does the latter Member State have to accept the ‘incoming’ head office and recognise the legal personality of such a company in line with the law of its state of incorporation – it has recently been clarified that the referral to the law of the latter state shall serve to govern all questions of legal capacity, disclosure and directors’ liability concerning the company at hand. In effect, the liberal case law referred to – specifically *Centros*, *Überseering* and *Inspire Art* – has opened up the possibility for enterprises to incorporate freely in the Member State whose company law order appears the most attractive, only to carry out all their activities elsewhere; i.e. to engage in *jurisdiction shopping*.

While the Court has progressed the potential for economic integration in the EU through what could be described as a call for a competition of legal orders, the Community legislator remains on the path of harmonisation set out decades ago. Notably, this has been expressed through the recent creation of a new, Community wide business form, the *European Company* (in Latin the *Societas Europaea*, hence the abbreviation *SE*). Originally intended to be a supranational means of conducting business on a European level, the Regulation on the Statute for a European Company (the *Statute*) that was eventually adopted after more than 30 years of discrepancies between the Member States regrettably contains numerous referrals to the national company law of the state of registration of the SE.

There is, however, a much more disturbing aspect to the Statute. Through its requirement that the *registered office* and the *head office* of an SE must be situated in the same Member State, the Statute denies the European Company the opportunity to engage in company law shopping that the Court has recently guaranteed national company forms. It is the view of the author that this regime is nonetheless not contrary to primary law, basically because the Court has not yet expressly overruled its *Daily Mail* judgment of 1988, where it was held that the freedom of establishment does not entail a right to transfer a head office *out of* a Member State. Nevertheless, the effects of the Statute may be detrimental to the prospects of corporate mobility within the EU, which is quite contrary to the objectives of this partially supranational company form. As a matter of uncertainty, there is an obvious need for a clarification by the ECJ whether the Statute is in breach of the Treaty, or, if not, whether the *Daily Mail* doctrine should be overruled once and for all, making the right of jurisdiction shopping unconditional for all limited liability companies, including the European Company.

Preface

Being particularly interested in the field of European integration, corporate mobility is to me a vastly appealing topic. In a continent characterised by globalisation, corporations rather than governments have (in my view) taken the lead in integrating the once strictly divided European markets, through inventive solutions and sometimes stunning resourcefulness. This is exceedingly true in the field of free movement – especially since Community measures intended to enhance corporate mobility have been scarce during the last few decades. The European Company (the *SE*) is an exception from the previous statement that caught my attention due to the inspired lectures given by Dr Thomas Ratka at the University of Vienna.

I would like to express my gratitude to him for providing me with a comprehensive understanding of European company law – although our views may not always coincide, as will be seen in my analysis. Further thanks to my supervisor Xavier Groussot for his encouragement.

Rickard Haglund,

Lund 26th of January 2007

Abbreviations

AG	Advocate General (of the European Court of Justice)
BV/BVBA	Besloten Vennootschap met beperkte aansprakelijkheid (NL/B)
DG	Directorate General
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
EC	(Treaty establishing the) European Community
ECJ	European Court of Justice
ECR	European Court Reports
GmbH	Gesellschaft mit beschränkter Haftung (D, A)
JZ	Juristenzeitung
Ltd.	Limited Company (UK)
OJ	Official Journal of the European Union
PLC	Public Limited Liability Company (UK)
SCE	Cooperative European Society
SE	Societas Europaea
SMEs	Small and Medium-sized Enterprises
SPV	Special Purpose Vehicle
SvJT	Svensk Juristtidning
ZIP	Zeitschrift für Wirtschaftsrecht

1 Introduction

The *European Company* (in Latin the *Societas Europaea*, hence the abbreviation *SE*) is a fairly new, partly supranational company form introduced by the Community legislator with the ultimate aim of enhancing the global competitiveness of European enterprises, by the true realisation of the common market. In order to fulfil this aim, it was originally intended that a leading European business, in the form of an *SE*, should be no more restricted in enjoying the concept of *corporate mobility* throughout the EU than its American competitors are in their home market. Whether this new creature of Community law is likely to succeed is very much open to debate. Arguably, the *SE* is not the most radical improvement when it comes to free movement for businesses in the EU. In contrast, the European Court of Justice (the *ECJ*), through its recent case law on freedom of establishment for national company forms, is the driving factor *par excellence* of the current rather dramatic momentum for change in European company law.¹

Hence, my intention with this thesis is to provide an analysis of the prospects of corporate mobility within the EU – on the one hand for national company forms, and on the other hand for the *SE*.

Before proceeding into detail, some essential terminology needs to be explained. For the purpose of this thesis, the term *corporate mobility* is employed in order to illustrate cross-border relocation (or migration) of a company in a broad sense. Thus, it includes both the ‘formal’ transfer of seat, which takes place through the registration of a company in its new domicile, and the ‘informal’ transfer of seat, which may be the outcome of a systematic relocation of a company’s activities in favour of e.g. a cross-border branch. The informal variant may not always result from a conscious choice on behalf of the company, as the centre of its managerial functions may very well follow that of its business activities in a gradual pattern. As far as the *transfer of seat* is concerned, this term is preferably used to depict a corporate change of domicile which does not lead to a loss of legal personality.² Such a transfer may (at least in theory) include either the head office or the registered office of a company, or both offices simultaneously, resulting in the complete change of domicile.

When referring to the state where a company was formed, the terms *home state* and *state of incorporation* are used. Conversely, the term *host state* is employed in order to illustrate the state where a company exercises its

¹ Radwan, 25 ‘Thoughts on European Company Law in the EU of 25’, *EBLR* 2006, p. 1170.

² Where a transfer necessitates the dissolution and subsequent reincorporation of a company, it is not a transfer of seat in the strict sense of the word, but a formation of an entirely new legal person. Compare the German term *identitätswahrende Sitzverlegung*.

freedom of establishment through the setting up of a branch, or to which it transfers its seat in the abovementioned manner.

A matter of great practical importance, which the reader should keep in mind throughout the reading of this thesis, is the concept of *jurisdiction* (or *corporate law*) *shopping*. For the purpose of this thesis, this term indicates the ability for a corporation to choose the company law order which it finds most attractive for matters of corporate governance etc., regardless of where the company at hand is to carry out its business. In theory, this choice of company law may take place either through original incorporation, i.e. when the company is first formed, or through reincorporation, i.e. a transfer of the registered office.

Where the incorporation of a company in a certain Member State is for jurisdiction shopping purposes only, the registered office is placed in the said state of incorporation (the home state), whereas the (*de facto*) head office is set up in the Member State where the company intends to carry out its business (the host state).³ A similar separation of the registered office and the head office may naturally take place through the transfer of the latter out of the state of incorporation.⁴ Although such a transfer is presumably rather the effect of the circumstances and practical needs of an existing corporation than an example of jurisdiction shopping, it nevertheless requires a legal environment where companies enjoy a right of placing their entire business including the head office in a state other than that where the incorporation first took place. Whether such a right exists in the EU, especially with a view to the European Company (the *SE*), is the central topic of this thesis.

It follows from the reasoning above, that jurisdiction shopping and the transfer of seat are two sides of the same coin; a fact that the reader should definitely keep in mind.

1.1 Purpose and delimitation

Two general questions serve as a basis for this thesis. First, I aim to examine just how far-reaching the prospects of corporate mobility, along with the provisions on freedom of establishment in the Treaty are, in respect of national company forms. This especially calls for an answer to the question whether there is a right, under Community law, to move the head office of a company out of its state of incorporation, while retaining its legal status as a company under the law of the home state. Second, there is the question of the role of the European Company in the sphere of free movement. Does the

³ Such was the case in C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 and C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, discussed under 2.3 below.

⁴ Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919 serves as an example of such a separation. See 2.3 below.

SE enhance corporate mobility – as was originally envisaged – or does the Regulation of the Statute for a European Company in fact restrict the freedom of establishment in a way incompatible with primary law?

The answer to the latter question is hence dependent on the result of the analysis under the first question. In order to establish whether the SE improves or restricts the prospects of corporate mobility, it is of course necessary to first establish the present reach of the freedom of establishment for companies under Articles 43 and 48 EC, and compare the conclusions to the provisions of the Regulation governing the SE. The related topic of the overall attractiveness of the SE will also be touched upon, as to provide a sense of whether this imagined ‘flagship’ of European company law is more likely to become just another ghost ship – sharing the (arguable) fate of the Cooperative European Society (the *SCE*) before it.

Corporate mobility is a multifaceted phenomenon, touching upon numerous different areas of law. Evidently, a cross-border merger or transfer of seat may entail consequences in various fields of law, such as tax, competition, labour and company law. Furthermore, there is often the need to apply national law and Community law simultaneously. As hinted above, this thesis focuses on EC company law. Nevertheless, several excursions into various neighbouring fields of law are indispensable. For instance, cases dealing mainly with taxation are discussed, and there are continuous references to international private law, as the latter is of crucial importance to questions regarding legal personality in cases of cross-border migration.

1.2 Method and material

As my topic implies descriptive as well as analytical efforts, an examination of a broad array of sources is needed. Naturally, a large number of EC law sources are used, ranging from acts of primary and secondary law to the case law of the ECJ, as well as reports and preparatory works from the Commission and other organs. Furthermore, numerous books and articles from a number of legal journals are consulted, *inter alia* in order to provide a basis for the analytical parts and help in interpreting certain fairly obscure concepts of Community law.

Some purely descriptive parts of a clearly empirical character are to be found in the thesis, whereas the various analytical sections are dealt with in a more normative manner, occasionally expressing my own views. In order to attempt to answer the questions posed above, a traditional *legal dogmatic method* is employed, which entails the description and analysis of the various sources of law mentioned above. To a certain extent the analysis also entails elements that may fall under the *legal comparative method*. Such is the case where various national company law orders are compared to the regime established by the SE Statute.

1.3 Outline

To provide some solid ground for the eventual discussion, I head off with some mainly descriptive parts. First, in chapter 2, I aim to describe the freedom of establishment of the Treaty (which is currently the fundamental legal framework for any corporate mobility to take place within the EU). Since the relevant Treaty provisions at hand have been the subject of a partially unclear line of ECJ rulings, causing subsequent disparate interpretations in the literature, the said chapter also contains significant elements of an analytical nature. Five cases of paramount importance are presented rather extensively, whereas other rulings are only referred to in brief.

In chapter 3, the European Company is described. Those aspects of the company form that are merely remotely or not at all relevant to my purpose are dealt with briefly, whereas other areas, e.g. regarding the transfer of seat, are attended to in greater detail. Naturally, some analytical segments need to be included here as well.

To conclude, chapter 4 contains the final discussion on the European Company's prospects of engaging in corporate mobility as the latter concept has evolved with regard to national company forms. In particular, this discussion includes the application of the conclusions from chapter 2 on the rules surrounding the European Company. The analysis focuses on the transfer of seat, as part of the broader topic of corporate mobility and specifically the chances of jurisdiction shopping.

2 Corporate mobility within the EU – legal basis

Until recently, a company willing to change its domicile from one Member State to another could do so only by relying on the freedom of establishment, as provided in Articles 43 and 48 EC. As we shall see, these provisions do not by any means convey a clear right to act in such a way, but are still, at least to some extent, very much open to interpretation. A new creature of Community law – the European Company (SE) – does clearly provide European businesses with an alternative solution through its legal framework on the transfer of seat. However, while the Member States were constantly busy trying to reach the compromise that is the SE, the ECJ, through a number of arguably groundbreaking judgments, took matters in its own hands. Through developing corporate mobility by means of new interpretations of primary law, the ECJ has put the legislative efforts⁵ of the other institutions in an awkward position. Ever since the *Centros*⁶ case, there has been a discussion on whether the rules on the transfer of seat of an SE in fact constitute a restriction of the freedom of establishment, in breach of primary law. There is perhaps no given answer to this question, but the very existence of the debate is a clear sign of a lack of clarity that could be to the detriment of Community law, whatever its eventual outcome. Nevertheless, a discussion on the topic is needed, and could, in my opinion, serve to increase legal certainty by equipping concerned parties with persuasive arguments.

For such a discussion to be meaningful, one needs a thorough understanding of the characteristics of, on the one hand, the freedom of establishment as construed by the ECJ, and on the other hand the SE Statute.

In this chapter, I intend to present the freedom of establishment as provided by the EC treaty, focusing on the question of transfer of seat. This naturally calls for an analysis of the ECJ case law, but the Community's strivings for harmonisation of national company laws will of course not be ignored. Due to the objectives of this essay, the presentation will focus mainly on the freedom of establishment as it applies to legal persons, but some outlooks into the sphere of natural persons should definitely be included. This is, firstly, since natural persons seem to have been what the Community legislator initially had in mind when laying down the freedom of establishment, and, secondly, since the ECJ has repeatedly referred to its rulings concerning natural persons when applying the relevant Treaty provisions to legal persons.

⁵ I.e. the SE Regulation (2157/2001) and the proposed 14th Directive on company law, both measures of secondary legislation.

⁶ C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

2.1 Freedom of establishment – Articles 43 and 48 EC

As regards legal persons, the basic rules on freedom of establishment are provided by Articles 43 and 48 EC. These provisions are to be found under Title III of the EC Treaty, the objective of which is to ensure the free movement of persons, services and capital. Thus, the rules on the right of establishment are closely connected to the other chapters on free movement, all of which may be derogated from the principle of equal treatment on grounds of nationality, which is expressed in Article 12 EC.⁷

Three criteria serve to characterise the freedom of establishment. Firstly, only economic activities are contained within the ambit of the right at hand. Secondly, a cross-border element is needed. Thirdly, the needed temporal factor serves to exclude short-term activities from the scope.⁸ Concerning both natural and legal persons, especially the relationship between the right of establishment and the freedom to provide services may appear somewhat vague. Clearly, the temporal factor is decisive, the existence of an ‘establishment’ being characterised by its stable and continuous basis whereas the providing of services is an activity pursued on a temporary basis. These two types of activities should, however, largely be treated in a similar way, especially when it comes to assessing the legality of restrictions.⁹ Article 43, which is the basis for both the primary and the secondary freedom of establishment (these terms will be clarified below), provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.

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

According to Article 48 EC, the freedom granted ‘nationals’ in Article 43 EC shall apply similarly to ‘companies or firms’, given that these are formed in accordance with the law of a Member State and have their ‘registered office, central administration or principal place of business’ within the Community.¹⁰ ‘Companies or firms’, along with the second paragraph of Article 48 EC, include all profit-making undertakings set up

⁷ Craig/De Búrca, *EU Law – Text, Cases and Materials*, p. 766 with further references.

⁸ Eyles, U, *Das Niederlassungsrecht der Kapitalgesellschaften in der Europäischen Gemeinschaft*, pp. 39-41.

⁹ See Case C-55/94 *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paras. 25-27, 37.

¹⁰ These connecting factors will be discussed in greater detail below.

under civil or commercial law and governed by public or private law. In the discussion to follow, the term *home state* will be used when referring to the state where a company was first incorporated (or, concerning natural persons, the state corresponding to the nationality of the person at hand). As regards the state where a legal or natural person chooses to establish itself, the term *host state* will be used.

Two distinct forms¹¹ of establishment are identifiable under Article 43 EC: the primary¹² and the secondary¹³ establishment. The term primary establishment is used to describe the formation and governance of an undertaking, which constitutes the centre of the economic activities engaged in by the legal or natural person at hand. It is of no importance whether these economic activities were initially started after the cross-border establishment, or merely moved from one Member State to another. An essential prerequisite for any primary establishment is however that the economic activities in the home state are either abolished or of a minor nature. For legal persons, the secondary forms of establishment are still usually of greater practical importance. These include the setting up of branches, agencies and subsidiaries in the host state.¹⁴ The thorough change of domicile of a company, i.e. the complete cross-border transfer of seat, which is central to the topic of this thesis, is naturally an example of a primary form of establishment.¹⁵

2.1.1 Prohibition of discrimination

It is clear from the wording of Article 43 EC that discrimination (direct as well as indirect) on grounds of nationality is prohibited.¹⁶ The said Article should however not be seen as a mere repetition of Article 12 EC. In fact, Article 43 appears to reach further, in that it does not only target discriminatory measures. On the contrary, the provision is likely to include all restrictions on the freedom of establishment, whether or not they are discriminatory.¹⁷ Such an interpretation of Article 43 EC does not seem to contradict the wording of the Treaty, and would clearly be in line with the ECJ case law on the free movement of workers and the freedom to provide services.¹⁸ Thus, even (host state) restrictions of the freedom of

¹¹ On this issue, see Eyles pp. 41-43.

¹² Primäre Niederlassung, établissement principal.

¹³ Sekundäre Niederlassung, établissement secondaire.

¹⁴ As exemplified in Article 43 (1) point 2 EC.

¹⁵ The legality of such an act will be dealt with below.

¹⁶ Eyles, p. 40.

¹⁷ De Búrca, 'The Role of Equality in European Community Law', in Dashwood/O'Leary (Eds.), *The Principle of Equal Treatment in E.C. Law*, pp. 21-22.

¹⁸ *Ibid.* De Búrca draws this conclusion on the basis of the cases C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL and others v Bosman and others* [1995] ECR I-4921 and C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, as well as C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, which, as mentioned above, seems to suggest that freedom to provide services and freedom of establishment are to be treated in a similar way.

establishment that are equally disadvantageous to all could in principle be challenged under Article 43 (1) EC due to their alleged infringement of Community law. As a result, the Member State of establishment cannot defend itself by relying on its equal treatment of all EU nationals in accordance with Article 43 (2) EC. Interestingly enough, this could at least in theory lead to cases of reverse discrimination¹⁹, since Article 43 (1) EC only targets restrictions on the establishment of nationals of a Member State in the territory of *another* Member State. Consequently, in practice a Member State may be able to treat its own nationals less favourably than it is required to treat nationals of other Member States, when acting as the state of establishment. This is possible since, although Article 43 (2) calls for equal treatment of all EU nationals, only those who establish themselves in the territory of another Member State will be able to rely on Article 43 (1) EC in the first place. Article 43 (2) EC is, in my view, a mere definition of what constitutes ‘freedom of establishment’ as granted in Article 43 (1) EC.²⁰ In this respect, reverse discrimination is consequently a question that can only be assessed under national law²¹, at least where the situation is wholly internal to the state in question.²² Thus, in the absence of a cross-border element it is not possible to invoke Article 43 (2) as the basis for any substantial rights against one’s own Member State.

The discussion above must however not be misunderstood. Clearly, Article 43 EC may be invoked against one’s home state (i.e. the state of incorporation) as soon as the establishment at hand has a cross-border character. Such was the case in *Kraus*, where a German national was subjected to restrictions when establishing himself in Germany after having obtained a Master of Laws degree in Scotland.²³ Furthermore, you may naturally invoke the right of establishment against your home state when seeking to leave the very same. As the ECJ has stated, the freedom of establishment would be rendered meaningless if no one was ever allowed to leave his or her home state in order to establish oneself somewhere else.²⁴

¹⁹ On reverse discrimination, see White, *Workers, Establishment and Services in the European Union*, p. 58.

²⁰ White (*ibid*) may disagree. My conclusion should however be in line with De Búrca’s reasoning. In order for her to conclude that even non-discriminatory measures may be targeted by Article 43 EC, she must let Article 43 (1) (actual right of establishment, *par se*) EC in a way override Article 43 (2) EC (equal treatment).

²¹ Eyles, p. 58, with further references.

²² White, p. 42.

²³ Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663. The restrictions at hand, consisting in the need for an administrative authorisation before practicing law, were however accepted by the ECJ. See para. 42 of the judgment.

²⁴ Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, para. 16, which makes it clear that Article 43 EC does not merely target discriminatory measures, but all restrictions of the freedom of establishment. The case will be discussed in detail below.

2.1.2 Articles 45-46 EC: Measures exempt from the scope of Article 43 EC

Article 45 EC provides that activities which in any given Member State are connected, even occasionally, with the exercise of official authority shall fall outside of the scope of application of the right of establishment. What constitutes official authority is a matter not defined by Community law, which gives the Member States a certain margin of appreciation. The ECJ has however provided some guidelines as to the interpretation of the exemption possibility. For instance, Article 45 EC may only be used to exempt certain activities from the right of establishment; not entire professions.²⁵

Furthermore, Article 46 EC states that foreign nationals (including legal persons in accordance with Article 48 EC) may be refused equal treatment on grounds of *public policy, public security or public health*. Such potentially discriminatory measures may be based on laws, regulations or 'administrative action'. As is the case concerning 'official authority', the three grounds mentioned above are not defined in the Treaty, but offer the Member States a wide margin of appreciation, firstly as to what constitutes a national interest and secondly as to the reaction when such an interest has been established.²⁶ According to Article 46 (2) EC, the Council may issue directives for the coordination of the measures indicated Article 46 (1) EC. This has been done with regard to natural persons²⁷, the treatment of whom is also subject to a Commission Communication²⁸ that offers guidelines on the application of the exceptions in the light of the introduction of EU citizenship. As far as legal persons are concerned, it is up to the national courts to determine what constitutes a sufficient ground for an exception, in accordance with the principle of proportionality and subject to the guidance of the ECJ.²⁹

Surprisingly, it seems that even private parties (possibly only organisations exercising 'semi-public regulatory functions') may rely on the exceptions provided in Article 46 EC in order to seek to justify discriminatory practices.³⁰

There is a broad body of ECJ case law as to what could constitute a ground of public policy in the meaning of Article 46 EC. In the *Boucherau*³¹ case, the Court made recourse to this ground subject to the existence of "... a

²⁵ Schnichels, *Reichweite der Niederlassungsfreiheit*, pp. 97-98, with further references.

²⁶ Schnichels, p. 99.

²⁷ Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (repealing Directive 64/221/EEC).

²⁸ Commission Communication to the Council and the European Parliament on the Special Measures concerning the Movement and Residence of Citizens of the Union which are Justified on Grounds of Public Policy, Public Security or Public Health. COM(1999) 372.

²⁹ Schnichels p. 99.

³⁰ White, p. 88 with further references.

³¹ Case 30/77 *Regina v Bouchereau* [1977] ECR 1999, see para. 18.

genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society”. Furthermore, in the *Van Duyn*³² case the Court held that grounds of public interest may vary from one Member State to another, and change considerably over time. It then went on to declare a straightforward discrimination (through exclusion) on grounds of nationality as exempted under Article 46 EC, although host state members of the ‘socially harmful’ organisation (the scientologists) were in no way restricted. This position was shortly thereafter somewhat modified, in that a Member State may only exclude or expel a national of another Member State owing to conduct contrary to public policy when the same conduct on behalf of a host state national would at least have been subjected to repressive measures intended to combat it.³³ Apparently, grounds of public policy are better suited for natural than for legal persons; expulsion as a consequence of a criminal offence seems to be one of the most common measures seeking justification on this ground.³⁴

Public security as a ground for exemptions under Article 46 has not yet been the subject of any ECJ jurisprudence, but is generally held to relate to the protection of Member States from activities capable of destabilising the state, such as terrorism, espionage and serious crime.³⁵ The third ground mentioned in the Article, public health, is nearly obsolete due to the present state of integration in the EU. However, Member States are entitled to adopt measures in case of diseases ‘with epidemic potential’: in the case of legal persons, such epidemic potential must clearly be attributable to members of the managerial organs of the company.³⁶ Clearly, measures based on the grounds provided under Article 46 are generally poorly suited for application on legal persons.

2.2 Incorporation contra real seat

For most of the judgments discussed below to make any sense, a basic understanding of two theories of international private law is needed. In short, some Member States (e.g. the UK) are traditionally in favour of the *incorporation theory*³⁷ when it comes to the choice of connecting factors in order to determine the law governing the legal personality and internal regime of a company (the *lex societatis*) as well as its fiscal residence. This theory is fairly uncomplicated to apply, as the nationality of a company is a direct result of its state of incorporation, i.e., using the terminology of the

³² Case 41/71 *Van Duyn v Home Office* [1974] ECR 1337, paras. 18, 24.

³³ Joined cases 115/81 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, para. 8.

³⁴ White pp. 90-92, who notes that in such cases, only the personal conduct of the individual can be taken into account, as opposed to general prevention.

³⁵ *Ibid.*

³⁶ White p. 93, Schnichels p. 100.

³⁷ Also known as the ‘registered office criterion’, German ‘Gründungstheorie’. Other adherents are the Netherlands and Ireland, as well as (in a modified version) Sweden, Finland and Denmark. See Rammeloo, *Corporations in Private International Law – A European Perspective*, p. 33, fn. 117.

Article 48 EC and the SE Statute, the state where the registered office of the company is situated.

At least prior to the accessions of 2004, all of the other Member States (notably including Germany, France and Austria) adhered to the *real seat theory*, to variable degrees.³⁸ According to this doctrine, the nationality and fiscal residence of a company follows from the law of the state where the head office³⁹ is situated, given that this is also the state of incorporation. Since an appraisal of factual circumstances is necessary in order to determine the location of a head office, this theory is presumably more complicated to apply.⁴⁰

In principle, the incorporation theory implies that a company may choose to place its head office outside its state of incorporation, given that the chosen *host state* also adheres to the incorporation theory. Reversely, a company whose home state adheres to the real seat theory would lose its legal personality, were it to move its head office out of this state, no matter which theory its host state applies. If a company transfers its head office to a state which adheres to the real seat theory, there is the risk that its legal personality will not be recognised in the host state, without reincorporating itself. At first glance, the real seat theory appears to be in evident breach of Articles 43 and 48 EC, since these provisions seem to suggest that a company incorporated under the laws of one Member State should be able to place its head office in another.⁴¹ As one might suspect, that is not all there is to it.

2.3 ECJ jurisprudence

As hinted above, Member States (in their home or host state capacities) seeking to limit corporate mobility do not normally base their arguments on the exception possibilities of the Treaty. In contrast, reliance upon the ‘mandatory requirements doctrine’ established by the ECJ in its *Cassis de Dijon*⁴² judgment is far more common. According to this doctrine, the requirement invoked as a ground for restricting the free movement by a Member State must be objectively justified, non-discriminatory and proportionate. Those criteria will be returned to below, in relation to the broad array of grounds relied upon by Member States that are displayed in the Court’s jurisprudence. For the sake of clarity, case law regarding home

³⁸ Also known as the ‘Head office criterion’, ‘company seat principle’, German ‘Sitztheorie’, French ‘Siège Réel’. Rammeloo pp. 32-33.

³⁹ ‘Head office’ is a term used by the SE Statute, that is thought to serve as a synonym to the tax law concept of the ‘place of central management and control’ as well as Article 48 EC’s ‘central administration’ and ‘principal place of business’. See chapter 3.3.1 below for a further discussion. Following the example of the SE Statute, I will use the terms ‘registered office’ and ‘head office’ to the greatest extent possible.

⁴⁰ On the two theories, see Cheffins, *Company Law*, pp. 429-431.

⁴¹ *Ibid.*

⁴² Case 120/78 *Rewe Zentral AG v Bundesmonopolverwaltung für Branntwein* [‘*Cassis de Dijon*’] [1979] ECR I-649.

state and host state measures will be dealt with separately. Furthermore, the cases will not be discussed in a strictly chronological order, but in line with their subject matter.

2.3.1 Zuzug: treatment in the *host* state

It should be pointed out that all cases discussed under this heading, as far as legal persons are concerned, relate to the treatment of secondary establishments, mainly branches and subsidiaries. However, as will be shown, the distinction between primary and secondary establishments may be a complicated one, especially where a company conducts all of its economic activities through a secondary establishment in the host state, the only connection to the home state consisting in a registered office in the shape of a letterbox.⁴³

2.3.1.1 Case C-212/97 Centros

Such a letterbox setting serves well to describe the scenario in the *Centros*⁴⁴ case, where two Danish nationals formed a British private limited company in order to establish a branch in Denmark, through which they were to carry on all their business activities. The connection with the UK was confined to a registered office situated at the home of a friend of the couple. On the grounds that Centros Ltd did not trade in the UK, the Danish Erhvervs- og Selskabsstyrelsen (the ‘Trade and Companies Board’, ‘the Board’) refused to register the branch. According to the Board, the establishment was in fact not a branch but a principal establishment, the purpose of which was to circumvent the national rules on the paying-up of minimum capital fixed at DKK 200,000 (about €25,000); under UK law the company was not obliged to pay up anything at all. Centros Ltd appealed against the decision, claiming that the refusal was contrary to EC law, since the company was lawfully formed in the UK and therefore enjoyed the right set up a branch in Denmark pursuant to Articles 43 and 48 EC. The Board, on the other hand, held that the refused registration was not contrary to the said Articles, as the branch at hand seemed to be a way of avoiding the national rules on the required minimum share capital. Furthermore, the Board meant that the refusal was justified by the need to protect private or public creditors and other contracting parties, as well as the need to try to prevent fraudulent insolvencies.⁴⁵ Once the case reached the Højesteret (the Danish Supreme Court), the matter was referred to the ECJ for a preliminary ruling.

The question posed to the ECJ was in effect whether the refusal to register a branch of a company formed in accordance with the legislation of another Member State is contrary to EC law where the company intends to carry on its business exclusively through the said branch, the purpose of which was clearly to avoid the more restrictive (in terms of share capital) host state

⁴³ German “Briefkastengesellschaft”.

⁴⁴ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

⁴⁵ *Ibid* paras. 1-12.

rules on the formation of companies.⁴⁶ As noted by the ECJ and acknowledged by the Danish authorities, a national practice that refuses the registration of a branch of a company formed in accordance with the law of and having its registered office in another Member State constitutes an obstacle to the freedom of establishment under Articles 43 and 48 EC. However, according to the Board, such measures are exempt where the sole purpose of the branch is to circumvent national rules on the formation of companies, i.e. an ‘abuse of the freedom of establishment’.⁴⁷ The ECJ concurs in one respect: Member States are allowed to take measures entitled to prevent improper circumvention of national law or fraudulent reliance on EC law, but only under specific circumstances. Thus, national courts may only take account of abuse or fraudulent behaviour on the basis of objective evidence, and that conduct must be assessed in the light of the EC provisions relied upon by the company.

In this case, those provisions grant companies formed in accordance with the law of one Member State the right to pursue activities in another, using e.g. a branch. Simply relying upon that right cannot in itself constitute an abuse of the right of establishment.⁴⁸

Finally, the Court proceeds to assess whether the refusal to register the branch might not be justified on other grounds, i.e. the ‘mandatory requirements doctrine’. According to the Danish authorities, the paying up of a considerable share capital was an imperative requirement in the general interest, as it pursued the objective of reinforcing the ‘financial soundness’ of companies to the benefit of their creditors; an objective that apparently could not be fulfilled by any less restrictive means. Before assessing this argument, the Court emphasises the criteria of the said doctrine – measures liable to restrict the fundamental freedoms of the Treaty must be applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable for attaining the pursued objective and not going beyond what is necessary to attain it.⁴⁹ These criteria were not fulfilled in the case at hand. On the one hand, Centros Ltd did not expose its Danish creditors to any larger risks than any other British company trading through a branch in Denmark. According to the Danish authorities, the registration of the branch would have been approved had Centros Ltd only carried on any business in the UK – a fact that, from the creditors’ perspective, is of course irrelevant. Furthermore, in the view of the Court, there are less restrictive means of protecting creditors, such as different forms of guarantees. Lastly, combating fraud is hardly a good excuse for refusing to register a branch of a company having its registered office in another Member State.⁵⁰ Consequently, the ECJ answered the question posed by Højesteret as follows:

⁴⁶ *Ibid* paras. 13-14.

⁴⁷ *Ibid* paras. 21-23.

⁴⁸ *Ibid* paras. 24-27.

⁴⁹ *Ibid* paras. 31-34.

⁵⁰ *Ibid* paras. 35-38.

“... it is contrary to Articles 43 and 48 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital ...”⁵¹

Besides clarifying the criteria of the ‘mandatory requirements doctrine’, in terms of corporate mobility, the importance of *Centros* resides in the confirmation of on the one hand the free choice between branches and subsidiaries for the purpose of a secondary establishment, and on the other hand, that economic activity in the home state is not a prerequisite for setting up a branch in the host state.

Neither of these statements should come as a shock. As Article 48 EC places the registered office, the central administration and the principal place of business on an equal footing as connecting factors for determining the scope of application of Article 43 EC, a call for economic activities in the home state would be hard to align with the Treaty. This was also the conclusion in the *Segers*⁵² case, nearly fifteen years earlier, where the fact that a company had its registered office in the UK but carried on all its activities through a branch in the Netherlands could not serve to exclude the director of the company from the national sickness insurance scheme, since that would be in breach of Articles 43 and 48 EC.⁵³ Similarly, the ECJ has emphasised the importance of not subjecting branches to discriminatory treatment in cases such as *Avoir fiscal*⁵⁴, where the French tax rules were held as indirectly instructing foreign companies to choose the form of a subsidiary rather than a branch for their establishments.⁵⁵

But what implications, if any, does *Centros* have on the application of the real seat theory? This question has been fiercely debated ever since the ECJ delivered its judgment. The answer clearly depends on how one chooses to define the term ‘head office’ (or ‘real seat’, ‘central place for management and control’ etc.). If one adopts the view that the Danish branch was in fact a head office, the judgment apparently confirms the right, from a host state perspective, to separate the (*de facto*) head office from the registered office, which arguably was already the case after *Segers*. This would mean that a company may choose to incorporate in the Member State which it considers the most advantageous, albeit having all their governmental functions and economic activities in another state. Hence, in practice, a host state adhering to the real seat theory would have to apply the incorporation theory as far as ‘incoming’ head offices are concerned. If, on the other hand, the Danish branch is seen as a branch – no more and no less – the real seat theory

⁵¹ *Ibid* para. 39.

⁵² Case 79/85 *Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

⁵³ *Ibid* paras. 16-17.

⁵⁴ Case 270/83 *Commission v France* [*Avoir fiscal*] [1986] ECR 273.

⁵⁵ *Ibid*, para. 18.

would not have been affected at all, as the repercussions of the judgment would be limited to the treatment of secondary establishments.⁵⁶

2.3.1.2 Case C-208/00 *Überseering*

Even if *Centros* did leave the real seat theory intact, this certainly was not the case with *Überseering*⁵⁷. As mentioned above, the traditional approach of real seat theorists when encountering a company which has moved its head office out of its state of incorporation is to either liquidate the company (where the real seat theorist is the home state) or to refuse to recognise its legal capacity (where the real seat theorist is the host state). The latter goes for *Überseering*, where the central place of business of a Dutch limited-liability company was transferred to Düsseldorf after all the shares had been sold to German nationals. As this meant that, under German law, the ‘actual centre of administration’ was now in Germany, the Dutch company’s legal capacity had to be determined under German law. Subsequently, *Überseering BV*, which had not reincorporated itself in such a way as to acquire legal capacity in Germany, was refused the right to bring legal proceedings against the Nordic Construction Company Baumanagement GmbH (‘NCC’) due to the latter’s deficient fulfilment of contractual obligations. Interestingly enough, parallel proceedings *against Überseering BV* concerning the payment of architects’ fees were not held as inadmissible.⁵⁸

The Bundesgerichtshof, which considered that the present situation had yet not been dealt with by ECJ case law, chose to refer two clear-cut questions on the legality of host state application of the real seat theory to the Court. In effect, the first question was whether Articles 43 and 48 EC preclude the application of the law of the state where the ‘actual place of administration’ of a company incorporated in another Member State on the question of its legal capacity, where this application leads to the denial of the right to bring legal proceedings based on contractual obligations. If this question was to be answered in the affirmative, the Bundesgerichtshof further enquired whether Articles 43 and 48 EC require that the legal capacity and the capacity to be a party to legal proceedings should be determined according to the law of the state of incorporation.⁵⁹ In actual fact: whether the incorporation theory was to replace the real seat theory as far as host state recognition of legal capacity is concerned.

When answering the first question, the Court states at the outset that the prevailing view in Germany at that time, i.e. that any company incorporated in another Member State had to reincorporate itself in Germany in order to

⁵⁶ Johnson regards the post-*Centros* considerations that Member States now have to allow transfers of the head office as ‘slightly bizarre’. See ‘Does Europe still need a 14th Company Law Directive?’, *Hertfordshire Law Journal* 3 (2) 2004, p. 23. Compare 2.3.1.4 below.

⁵⁷ Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

⁵⁸ *Ibid* paras. 1-12.

⁵⁹ *Ibid* para. 21.

gain the capacity to bring legal proceedings was “... tantamount to outright negation of freedom of establishment.”⁶⁰ Accordingly, the Court answers the first question as follows:

“... 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 ...”⁶¹

In the case at hand, such a restriction cannot be justified under the mandatory requirements doctrine. The Court then proceeds to answer the second question, too, in the affirmative. Thus, a host Member State is required to recognise the legal capacity and the capacity to be a party to legal proceedings which a company exercising the freedom of establishment enjoys according to the law of its home Member State.⁶² In this respect, the immediate effect of *Überseering* is naturally that Member States can no longer apply the real seat theory in the stringent German fashion with regard to companies incorporated in other Member States, but are compelled to comply with the incorporation theory as far as legal capacity and the capacity to bring legal proceedings are concerned. Interestingly enough, through answering the second question in the affirmative, the Court goes further than suggested by AG Colomer, who holds in his opinion that the matter at hand is for national law to deal with.⁶³

2.3.1.3 Case C-167/01 Inspire Art

Centros stresses that a company, albeit not conducting any economic activities in its state of incorporation, should be able to rely on its original *lex societatis* even where it carries on business exclusively in the host state of its secondary establishment. The *Inspire Art*⁶⁴ case deals with just how far this referral to the law of the home state reaches. In the Netherlands, which is an adherent to the incorporation theory, a law⁶⁵ was adopted in 1997 with the aim of subjecting ‘formally foreign companies’ to various obligations concerning registration, disclosure, minimum share capital, personal liability for directors, as well as an obligation to indicate the company’s status as a formally foreign company in all documents produced by it. A ‘formally foreign company’ was defined as a capital company with legal personality formed under the law of but lacking any ‘real connection’

⁶⁰ *Ibid* paras. 93 and 81.

⁶¹ *Ibid* paras. 94 and 82.

⁶² *Ibid* para. 95.

⁶³ Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 4 December 2001 (Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919), paras. 63-71.

⁶⁴ Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

⁶⁵ ‘WFBV’, *Wet op de Formeel Buitenlandse Vennootschappen* of 17 December 1997, see *ibid* para. 39.

to a state other than the Netherlands, where it carries on its activities entirely or almost entirely in the latter state.⁶⁶

Inspire Art Ltd was formed in the UK with the purpose of trading with “objets d’art” in the Netherlands, mainly through a branch in Amsterdam. Its sole director, who was authorised to act alone and independently in the name of the company, resided in The Hague. As Inspire Art Ltd was not too keen on being branded as a formally foreign company, it opposed the insertion of such a statement in the commercial register, *inter alia* on the grounds that the Dutch law (the ‘WFBV’) was contrary to Articles 43 and 48 EC. In the proceedings that followed, the Kantongerecht te Amsterdam chose to refer two questions to the ECJ. Firstly, were the said Articles to be construed as to preclude the Netherlands from maintaining the requirements found in the WFBV with regard to branches of companies formed in the UK only to evade the stricter NL rules on formation of companies and payment for shares? Secondly, if the WFBV should be in breach of the said Articles, could it nonetheless be justified on the basis of Article 46 EC?⁶⁷

When answering the questions, the Court states as a preliminary point that the matter of disclosure concerning branches formed in accordance with the Treaty have been thoroughly regulated through the 11th Company Law Directive⁶⁸, which the WFBV provisions on disclosure were in evident breach of.⁶⁹ Hence, the requirements regarding minimum share capital and directors’ liability are the most crucial when assessing the existence and possible justification of a restriction of the freedom of establishment.

Recalling its reasoning in *Segers* and *Centros*, the Court first states that the fact that a company was formed in one Member State only to conduct all of its business in another is entirely immaterial to the application of Articles 43 and 48 EC, whatever the company’s reasons for this regime may be, save in the case of fraud.⁷⁰ Keeping this in mind, there is no questioning the fact that Inspire Art Ltd enjoys the freedom at hand to the same extent as any other company formed under the law of a Member State. As follows perfectly clear from *Überseering*, in such cases the host state should consult the law of the state of incorporation at least in all matters of legal capacity.⁷¹ Through the WFBV, the Netherlands (although normally adhering to the incorporation theory) in effect sought to impose certain provisions of its national law on a company exercising its right of secondary establishment.

⁶⁶ *Ibid* paras. 22-25.

⁶⁷ *Ibid* paras. 34-39.

⁶⁸ 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, OJ 1989 L 395 p. 36.

⁶⁹ Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, paras. 71-72, 106, 143.

⁷⁰ *Ibid* paras. 95 and 105, Case 79/85 *Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen* [1986] ECR 2375 para. 16, Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, paras. 17-18.

⁷¹ Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919, para. 95.

Whilst the relevant provisions of national law, on share capital and directors' liability, evidently serve to impede the exercise of the freedom of establishment as granted by the Treaty, the Court adopts the view that there had been a restriction of the said freedom.⁷²

According to the Court, a restriction of this kind cannot be justified on the basis of Article 46 EC, indicating a negative answer to the second question of the *Kantongerecht te Amsterdam*. In contrast, the grounds for justification put forward by the Netherlands Government were all designed to be assessed under the mandatory requirements doctrine.⁷³ Those grounds, including the protection of creditors, the combat against improper recourse to the freedom of establishment, the safeguarding of fairness in business dealings and the efficiency of tax inspections, were nevertheless unable to justify the restrictions at hand.⁷⁴ Apart from reaffirming the breach of the 11th Company Law Directive, the Court eventually answers the questions posed as follows:

"It is contrary to Articles 43 EC and 48 EC for national legislation such as the WFBV 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."⁷⁵

It then goes on to recall that the right of establishment is in no way affected by the fact that a company carries on all or nearly all of its activities in the host state, nor do the grounds for the formation of such a company in another Member State make any difference, save in cases of abuse. The cited part may at any rate be considered the essence of the judgment, since it further widens the scope of the referral to the law of the state of incorporation of a company.

2.3.1.4 Host state treatment: concluding remarks

In *Überseering*, the Court makes clear that the law of the home state shall always be applied when confronting a question relating to the legal capacity of a company which is deemed to have established its actual centre of administration (or indeed its head office) in the host state. In *Inspire Art*, the present state of Community law is further clarified: the host state may not even attempt to *partially* subject such a company to the company law of the state of establishment. In any case, this goes for matters regarding disclosure, minimum capital requirements and liability. As far as other aspects of the protection of creditors are concerned, some commentators are of the view that in exceptional cases, e.g. where the law of the state of incorporation does not provide any adequate instruments to secure the interests at hand, the host state may subject companies to provisions of its

⁷² Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, paras. 101 and 104.

⁷³ *Ibid* paras. 131-134.

⁷⁴ *Ibid* paras. 135-142.

⁷⁵ *Ibid* para. 143.

national company law.⁷⁶ Such national measures would of course have to be aligned with the legal framework offered by *Centros* and *Inspire Art*.

Through these judgments, the ECJ has made clear that the creditors are to be safeguarded by means of information rather than assimilation on behalf of the ‘foreign’ company.⁷⁷ The reasoning of the Court in these cases does appear logical enough. As mentioned above: in *Centros*, the Danish authorities would have registered the branch if had there only been any business activities in the UK. Similarly, in *Inspire Art*, the Dutch law on ‘formally foreign companies’ would not have been applicable had the company traded in its home state too. In neither case did the national authorities question the aptness of the rules that they would have applied if confronted with a foreign company that was not merely ‘formal’; i.e. the (rather stringent) UK rules on disclosure as well as the 4th and 11th Company Law Directives.⁷⁸ As the Court notes, regardless of any ‘real’ connection to the home state, anyone trading with the branch would be alerted by the label “Ltd”, which clearly suggests that the Dutch or Danish company laws may not apply in full.⁷⁹

It remains to be seen whether provisions of national company law on employee involvement in corporate governance may have an overriding effect on the application of the home state law. From a German perspective, such aspects may be likely to fulfil the criteria of the mandatory requirements doctrine.⁸⁰ Whether the ECJ would let such interests affect the host state application of the now firmly established incorporation theory is, in my view, highly dubious. The High Level Group of Company Law Experts, which delivered its final report in 2002, suggests a few useful guidelines to the application of the mandatory requirements doctrine as regards employee participation. According to the report, such interference on behalf of the host state law should only be possible where at least 50 % of the company’s employees are employed in that state, and the company should always be granted sufficient time and opportunity to respond to the host state requirements consistently with its home state law. A compulsory reconstruction through liquidation and reincorporation is an ultimate step, which is, in most cases, clearly disproportionate.⁸¹

⁷⁶ Eidenmüller, ‘Mobilität und Restrukturierung von Unternehmen im Binnenmarkt’, JZ 1/2004 p. 28.

⁷⁷ Ziemons, ‘Freie Bahn für den Umzug von Gesellschaften nach Inspire Art?!’, ZIP 42/2003, p. 1916.

⁷⁸ The Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3) of the Treaty on the annual accounts of certain types of companies, OJ 1978 L 222 p. 11, and the Eleventh Council Directive 89/666/EEC concerning disclosure requirements in respect of branches, discussed above.

⁷⁹ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para. 36, Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, para. 135.

⁸⁰ Eidenmüller pp. 28-29.

⁸¹ Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, pp. 103-105.

Under the incorporation theory, a host state would generally recognise the legal personality of a foreign company in line with the home state law even after it has transferred its *de facto* head office to the host state.⁸² On the basis of the presentation above, this also appears to be the effect of the freedom of establishment. One may however hold that no head offices were actually transferred in *Centros* and *Überseering*.⁸³ Although this view is understandable, one cannot help but wondering – who is in the position to draw such a conclusion? As already mentioned, the real seat theory requires an assessment of numerous factual circumstances in order to establish where a head office is situated. In *Überseering*, such an assessment, when conducted by the German authorities, resulted in the conclusion that the Dutch company had indeed moved its head office. The ECJ did not deal with this question, simply since it is one of national legislation. Whereas Community law as of today lacks any definition of terms like ‘head office’, ‘central place of business and management’ (or indeed, naturally, the correlating German term ‘actual centre of administration’), any claim that the German authorities erred in assessing the actual connecting factors in *Überseering* is one which must be based on national law. The need for an appraisal of facts, which is a fundamental element of any real seat regime, is clearly also one of the theory’s gravest drawbacks.⁸⁴

To conclude: Germany held the view that *Überseering* BV had transferred its head office. On these premises, the Court ruled that Germany had to accept the regime brought about by the Dutch company, in accordance with the incorporation theory.⁸⁵ Hence, the question whether the Düsseldorf office was a *de facto* head office is one of national law, which must be immaterial to the host state application of the incorporation theory. Thus, and this is a view shared by numerous commentators⁸⁶, the real seat theory is obsolete to the extent that a host state must now not only accept ‘incoming’ head offices, but also continue to treat the companies at issue in accordance with their home state law, all in compliance with the incorporation theory.⁸⁷ Clearly, one cannot find support in the judgment at hand for the conclusion⁸⁸ that after *Überseering* all transfers of the registered office as well as the head office are possible.

Interestingly enough, Belgium (albeit adhering to the real seat theory) accepts formal transfers of head offices from the UK and the Netherlands

⁸² See chapter 2.2 above.

⁸³ Johnson, ‘Does Europe still need a 14th Company Law Directive?’, *Hertfordshire Law Journal* 3 (2) 2004, pp. 22-23.

⁸⁴ Rameloo pp. 13-15.

⁸⁵ One should keep in mind that, in proceedings under Article 234 EC (preliminary rulings), any assessment of the facts of the case is a matter for the national court. See e.g. case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l’Économie, des Finances et de l’Industrie* [2004] ECR I-2409, para. 41.

⁸⁶ See e.g. Ziemons p. 1917, Eidenmüller p. 30.

⁸⁷ This view finds further support in the Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, p. 102.

⁸⁸ Garcia-Riestra, ‘The Transfer of Seat of the European Company v Free Establishment Case-Law’, *EBLR* 15 (6) 2004, p. 1318.

since 1959, under certain criteria laid down in the *Lamot doctrine*.⁸⁹ The criteria include the legality of the transfer in the home state, the fundamental compatibility of the company structure with the requirements of Belgian law as well as the absence of fraud. In practice, the incoming company has to amend its articles of association in order to adopt the form of a Belgian BVBA. After *Inspire Art*, this could be contrary to Articles 43 and 48 EC.

2.3.2 *Wegzug*: treatment in the home state

Articles 43 and 48 EC primarily aim at granting rights in the host state to companies making use of the freedom of establishment. As noted above, such rights would be of little value if the home state were free to stop anyone intending to make use of them. In the *ICI* case, the ECJ declared that even though the wording of the said Articles particularly seeks to ensure non-discriminatory treatment in the host state, the Articles also prohibit the home state from hindering its nationals as well as companies formed under its law from establishing themselves in another Member State.⁹⁰

2.3.2.1 Case 81/87 Daily Mail

Contrary to the cases discussed under the chapter on host state treatment, the *Daily Mail*⁹¹ case concerned a *conscious* attempt to transfer the head office, i.e. a primary establishment.

In 1984, Daily Mail and General Trust PLC, an investment holding company incorporated in the UK, sought to transfer its central management and control (i.e. its head office) to the Netherlands, whilst remaining incorporated in the UK. With both Member States adhering to the incorporation theory, such a move was in principle allowed, from a home state as well as a host state perspective. However, under the relevant national tax legislation, any cross-border relocation of the head office was dependent on the consent of the Treasury, since it implied the cessation of the company's residence in the UK for tax purposes.⁹² It was common ground that the reason for the transfer in this case was to circumvent the obligation to pay taxes on accrued capital gains after selling off the company's non-permanent assets in the UK for the purpose of using the profits to buy its own shares. After applying for the consent of the Treasury, no agreement was reached. This led to the initiation of proceedings before the High Court of Justice, Queen's Bench Division, where Daily Mail and General Trust PLC claimed that Articles 43 and 48 EC stipulated the right to

⁸⁹ Rammeloo, pp. 279-282

⁹⁰ Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695, para. 21.

⁹¹ Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483.

⁹² *Ibid* paras. 2-6.

transfer the head office out of the home state without prior consent (or the right to obtain such consent unconditionally).⁹³

The High Court of Justice decided to stay the proceedings and refer four questions to the ECJ for a preliminary ruling, the most important of which was:

“(1) Do Articles 43 and 58 of the EC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where:

(a) payment of tax upon profits or gains which have already arisen may be avoided;

(b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?”⁹⁴

Hence, the ECJ was confronted with the task of assessing firstly, whether the freedom of establishment implies a right for companies to transfer their head office out of the state of incorporation, and, secondly, whether that right (should there be one) could be made subject to the consent of national authorities based on the company’s tax position. Before answering the question cited above, the Court stresses the freedom of establishment’s position as one of the fundamental principles of Community law, and further asserts that this freedom would be rendered meaningless if the home Member State were free to prohibit undertakings from leaving in order to establish themselves in another Member State. The Court then exemplifies how companies generally exercise the said freedom: “... by the setting up of agencies, branches or subsidiaries” as expressly provided for in Article 43 EC.⁹⁵ Further, companies may take part in the incorporation of a new company in another Member State.

In the view of the Court, the UK law at issue did not in any way impose restrictions on the abovementioned types of cross-border establishments, neither concerning secondary establishments, nor primary establishments (through the transferring of activities from a UK company to a company incorporated in the Netherlands). All that was restricted through the obligation to obtain the consent of the Treasury was the case where a company wishes to move its head office out of the UK, while maintaining its legal personality and its status as a company of the said state.⁹⁶

⁹³ *Ibid* paras. 6-7.

⁹⁴ *Ibid* para. 9. Secondly, the High Court of Justice enquired whether Council Directive 73/148/EEC could convey upon companies the right to transfer their head offices, which certainly was not the case, that Directive being applicable only on natural persons. The third and fourth questions will not be cited here, as they follow from the first question and are not dealt with separately by the Court.

⁹⁵ *Ibid* paras. 15-17.

⁹⁶ *Ibid* para. 18.

As a preliminary point, the Court notes that companies, unlike natural persons, are *creatures of the law*, and exist only by virtue of the national legislation determining their incorporation and functioning. Whereas that national legislation differs to a considerable extent from one Member State to another, the Treaty places several connecting factors on an equal footing rather than imposing common grounds for the application of the freedom of establishment on companies; something that it leaves to the Member States to agree upon through negotiation.⁹⁷ Since no conventions or other coordinating measures have yet been adopted by the Member States, the Court finds that the question at hand can only be answered through an interpretation of Articles 43 and 48 EC, the transfer of seat being a problem which “must be dealt with by future legislation or conventions”. Thus, the Court holds that:

“Under those circumstances, Articles 43 and 48 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their [head office] to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.”⁹⁸

Consequently, the main question referred by the High Court of Justice was answered in the negative. In contrast to the judgments discussed with regard to host state treatment, one should remember that in *Daily Mail*, there had been no restriction at all of the freedom of establishment; simply since that freedom does not confer a right on companies to transfer the head office out of the home state. This naturally means that there is no need to discuss possible justifications for the UK law.

2.3.2.2 Case C-2/02 Lasteyrie

Even though the Court far from overrules *Daily Mail* through the *Lasteyrie*⁹⁹ judgment, the latter case nonetheless clarifies under which circumstances a home state is prohibited to prevent its nationals from making use of the freedom of establishment. Just like *Daily Mail*, *Lasteyrie* concerns home state measures in case of a transfer of the residence for tax purposes. Unlike the previous case, however, the latter concerns a natural person (Mr de Lasteyrie), whose move from France to Belgium gave rise to taxes charged due to an unrealised increase in the value of securities. Under French tax law (the ‘CGI’)¹⁰⁰, taxpayers intending to transfer their residence for tax purposes were to be subject to immediate taxation of all latent increases in value, whereas those staying in France were not taxed until the actual realisation of the profits. There was a way of suspending the tax

⁹⁷ *Ibid* paras. 19-21, referring to Article 293 EC, which states that “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: ...//... the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another ...”.

⁹⁸ *Ibid* para. 24, compare para. 25.

⁹⁹ Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l’Économie, des Finances et de l’Industrie* [2004] ECR I-2409.

¹⁰⁰ Code Général des Impôts, see *ibid* paras. 4, 15-16.

payment after a transfer, but this called for a considerable constraint through the setting up of guarantees. Having moved to Belgium in order to carry on his profession there (which constitutes an exercise of the freedom of establishment) Mr de Lasteyrie appealed against the taxes charged, arguing that the relevant provisions of the CGI were in breach of Article 43 EC.¹⁰¹ This caused the Conseil d'État to ask the ECJ whether Article 43 EC precludes a Member State from introducing arrangements for taxing capital gains in the case of transfer of tax residence for the purpose of preventing the risk of tax avoidance, in the manner described above.¹⁰²

After reaffirming the general applicability of the freedom of establishment from a home state perspective, the Court states that direct taxation, albeit not as such falling within the scope of the Community's jurisdiction, is a Member State competence which must be exercised in compliance with Community law.¹⁰³ The Court then goes on to assess whether the provisions of the CGI were liable to hinder the exercise of the said freedom. Here, it should be noted that the said provisions did not prevent French taxpayers from exercising the freedom of establishment, but they nonetheless subjected those wishing to transfer their tax residence to disadvantageous and discouraging treatment in comparison with those remaining in France. Furthermore, the possibility to benefit from suspension of payment in itself constituted a restriction because of the strict conditions as to the setting up of guarantees. Clearly, the provisions of the CGI were such as to hinder or make less attractive the freedom of establishment, calling for an evaluation under the mandatory requirements doctrine.¹⁰⁴

According to the French Government and others, the objectives pursued by the provisions of the CGI were, firstly, to prevent tax avoidance. Although legitimate, that objective cannot, according to the Court, justify provisions that "assume an intention to circumvent French tax law on the part of every taxpayer who transfers his tax domicile outside France", since this greatly exceeds what is necessary in order to achieve the aim pursued.¹⁰⁵ Neither can a Member State, as suggested by the Danish Government, justify a restriction of the freedom of establishment by referring to the prevention of fiscal erosion, i.e. the diminution of tax receipts.¹⁰⁶ Eventually, after rejecting further similarly unfounded arguments on behalf of various Member State governments, the Court proceeds to answer the question posed by the Conseil d'État as follows:

¹⁰¹ *Ibid* para. 20, compare 2.1 above.

¹⁰² *Ibid* para. 18.

¹⁰³ *Ibid* paras. 42 and 44.

¹⁰⁴ *Ibid* paras. 45-49.

¹⁰⁵ *Ibid* paras. 50-52. Compare with case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, discussed above (an intention to prevent "abuse" of Article 43 EC may only be relied upon by Member States on the basis of objective evidence on a case-by-case basis).

¹⁰⁶ Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, paras. 59-60.

“... the principle of freedom of establishment laid down by Article 43 of the Treaty must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing latent increases in value such as that laid down by [the CGI], where a taxpayer transfers his tax residence outside that State.”¹⁰⁷

Undoubtedly, the application of the mandatory requirements doctrine on a *home* state measure liable to restrict the freedom of establishment is a matter of great principal significance following from *Lasteyrie*. Further, it is now clear that the Court regards taxation of latent capital gains by reason of a transfer of the residence for tax purposes as a restriction of the freedom of establishment. This, in effect, calls for total tax neutrality in the event of a change of residence.¹⁰⁸

2.3.2.3 Home state treatment: concluding remarks

In *Daily Mail*, the ECJ recognises that home state as well as host state measures may be such as to restrict the freedom of establishment in a way that infringes the Treaty. However, concerning companies, that freedom does not comprise the right to transfer the head office out of the state of incorporation, mainly since companies are creatures of national law, and the transfer of seat is a problem that has yet to be dealt with through conventions or legislation.

Lasteyrie illuminates that a national attempt to make the transfer of the tax residence subject to the payment of taxes on latent capital gains may very well constitute a restriction of the freedom of establishment that cannot be justified under the mandatory requirements doctrine. Possibly, the Court would have ruled in a similar fashion in *Daily Mail*, if Article 43 EC had been interpreted as conveying upon legal persons the right to transfer a primary establishment. However, one should not draw too far-reaching conclusions as to the repercussions of *Lasteyrie* for legal persons.¹⁰⁹ As long as *Daily Mail* is not expressly overruled, the only safe interpretation of Articles 43 and 48 EC is that the freedom of establishment still does not require *home* Member States to allow a corporate transfer of a primary establishment.

In 2000, *HSB-Wohnbau*¹¹⁰ faced the ECJ with a question referred for a preliminary ruling that resembled *Daily Mail* to a certain extent, namely the attempted, conscious, transfer of a primary establishment. Surely, this would have given the Court the opportunity to reassess the scope of application of Articles 43 and 48 EC in the light of its ruling in *Centros*. The reference

¹⁰⁷ *Ibid* para. 69.

¹⁰⁸ Gutmann, ‘The Transfer of the Registered Office of a European Company. Some Tax Thoughts from a French Perspective’, *International Tax Review* 34:5 2006, p. 258.

¹⁰⁹ See Gutmann, *ibid*, who adopts the view that Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l’Économie, des Finances et de l’Industrie* [2004] ECR I-2409 could be applied on companies through an analogy, pp. 258-259, and Ratka, ‘... und primärrechtswidrig ist er doch?’, *Ecolex* 2006, Heft 11, p. 8.

¹¹⁰ Case C-86/00 *HSB-Wohnbau GmbH* [2001] ECR I-5353, Order of the Court 10 July 2001.

concerned HSB-Wohnbau GmbH, a German company that, after all shares had been transferred to a Spanish company, decided to move all activities to Spain along with its registered office as well as the head office, whilst retaining its identity. After receiving the amended articles of association in order for the transfer to be entered in the German commercial register, the Amtsgericht Heidelberg was seemingly confused.

Normally, the Court would have applied the real seat theory, which would have meant that a transfer of a company's registered office (or its head office) necessitates its dissolution and liquidation, i.e. the loss of legal personality in Germany and the subsequent formation of a new company abroad. However, as the German court found the ECJ case-law on the applicability of Articles 43 and 48 EC obscure (*Daily Mail* and *Centros* in particular), it chose to refer the question whether those Articles require Germany to accept a complete transfer of seat of a GmbH without the subsequent loss of legal personality.¹¹¹

Regrettably, the ECJ found that the Amtsgericht Heidelberg was performing non-judicial functions in the case at hand, which led the Court to conclude that it lacked the jurisdiction to adjudicate.¹¹² A clarifying judgment on behalf of the ECJ would of course have been most welcome. It is not entirely unlikely that the Court would have changed its *Daily Mail* doctrine due to the current state of economic integration in the EU. This would not necessarily mean a complete recognition of HSB-Wohnbau's transfer as the exercise of the right of establishment. One must not forget that the company wished to transfer its registered office whilst maintaining its legal personality (as a GmbH?), a complex move, support for which can hardly be found in any case-law or legislation, at least not until the 14th Company Law Directive is adopted.¹¹³

2.4 Home state v host state – a suitable distinction?

It follows from the discussion above that there is still nothing to suggest that either the home state or the host state is obliged under the freedom of establishment to allow a transfer of the registered office of a company, as far as national company forms are concerned. When the transfer only comprises the head office ('the central management and control', 'the actual centre of administration' etc.), there is however reason to differentiate between home state and host state treatment.

¹¹¹ *Ibid* paras. 8-9.

¹¹² *Ibid* paras. 10-17.

¹¹³ The Fourteenth Company Law Directive on Transfer of Registered Office, COM XV/6002/97, a proposal dating back to 20 April 1997 which has apparently been put on hold. The provisions of the proposal are in effect largely identical to those on transfer of seat in the SE Statute (discussed below). On the proposal, see Stork, *Sitzverlegung von Kapitalgesellschaften in der Europäischen Union*, pp. 77-82, and Johnson, 'Does Europe still need a 14th Company Law Directive?', *Hertfordshire Law Journal* 3 (2) 2004.

Host Member States are currently (post-*Centros/Überseering/Inspire Art*) under a clear obligation to accept ‘incoming’ *de facto* head offices in compliance with the incorporation theory. This inevitably means that not only the transfer of a *de facto* head office, but also that of a ‘real’ head office has to be accepted by the host state, as a direct consequence of the absence of a definition of the term ‘head office’ in Community law. As maintained above regarding *Überseering*: since Member States are free to apply their own definitions of the term ‘head office’, Community law simply *has* to oblige them to accept any incoming head offices – otherwise, a Member State could freely restrict the *secondary* freedom of establishment by claiming that a branch etc. is in fact a *primary* establishment, i.e. a head office. This is exactly what happened in *Überseering*. In the light of that judgment, one can hardly imagine a case where the Court would approve of host state measures seeking to restrict the primary establishment of a company – as long as the registered office remains in the home state.

So, is a home Member State similarly obliged to let its companies leave? Presumably not, until *Daily Mail* is eventually overruled. Of course, this divergence is disturbing, and may well result from the Court’s unwillingness (in *Centros*) to place itself at odds with the former judgment. This appears to be the view of AG Colomer, who in his *Überseering* opinion criticises the Court for basing its reasoning in *Centros* on the hypothesis that “for the purposes of Community law, *Centros* was seeking to exercise the secondary form of freedom of establishment”.¹¹⁴ To differentiate between host and home states as to the legality of restrictions on the freedom of establishment is, according to the AG, an artificial distinction intended to justify diverging judicial results, lacking any express foundation in the judgments.¹¹⁵

As true as that may be, one must not forget the fact that *Daily Mail* is about the scope of the actual *right* of establishment, whereas the cases on host state treatment all concern *restrictions* of the said right. Furthermore, there are arguments in favour of demanding more from host states than from home states in terms of allowing relocation of head offices. In particular, there is the Court’s statement in *Daily Mail* that companies are “creatures of national law”, existing “only by virtue of the varying national legislation which determines their incorporation and functioning”.¹¹⁶ On the one hand, this stipulates that it should fall within the competence of the home state to liquidate legal persons incorporated in that state, save where Community law expressly puts a stop to such acts. On the other hand, however, it also

¹¹⁴ Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 4 December 2001 (Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919), paras. 35-36.

¹¹⁵ *Ibid* para. 37.

¹¹⁶ Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, para. 19. This view is confirmed in Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919, paras. 67 and 81.

means that Member States are not permitted to deny the *existence* of a company duly incorporated in another Member State.¹¹⁷

In one aspect, the scope of application of *Daily Mail* has changed due to the seemingly more liberal approach of the Court in the more recent cases discussed concerning *host* state treatment. Apparently, German courts in the pre-*Centros* era adopted the rather enthusiastic view that the ECJ through its *Daily Mail* judgment did not only clarify the scope of application of Articles 43 and 48 EC, but actually approved of the real seat theory in full. Not only did this misinterpretation ignore the fact that both the UK and the Netherlands are incorporation theorists. It also resulted in the Bavarian Supreme Court approving an upfront refusal to register a branch of a British Ltd. solely on the ground that the company in question did not conduct any business in the UK – a refusal which was evidently in breach of the *Segers* judgment.¹¹⁸

Fortunately, after *Centros* and the subsequent ECJ rulings there should be no uncertainty whatsoever concerning host state treatment of secondary establishments. This assumption finds support in a later judgment from the German Bundesgerichtshof¹¹⁹, where the Karlsruhe court held that the question of directors' liability regarding a British Ltd. with its head office in Germany was to be considered in accordance with English law (and thus the incorporation theory). The company's failure to register the head office (even as a branch) could not alter this, which should be consistent with the *Inspire Art* judgment.

Until this point, the discussion under this heading has been *de lege lata*. If one adopts a *de lege ferenda* perspective, it would be nothing but logical to regard *all* home state measures capable of hindering a transfer of the head office as restrictions of the freedom of establishment, which must be assessed under the mandatory requirements doctrine.¹²⁰ Since, as held above, Member States must now accept 'incoming' head offices, the consistency and coherence of Community law demands a change of the *Daily Mail* doctrine so as to place 'outgoing' head offices, too, within the scope of application of the freedom of establishment as expressed in Articles 43 and 48 EC. Although certainly an appealing scenario, this is not the case under Community law just yet.¹²¹

Nevertheless – in practice, corporate mobility within the EU has truly evolved during the last few years. One must not forget that it is now, in accordance with the case law discussed, possible for an entrepreneur to choose to form a company in the Member State whose legislation suits him

¹¹⁷ Rammeloo p. 54. Compare with the discussion on Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919 above.

¹¹⁸ Case BayObLG of 26 August 1998, DB 1998 2318 et seq. For a discussion on how the German approach changed almost instantly after C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, see Rammeloo pp. 188-191.

¹¹⁹ BGH, judgment of 14 March 2005, II ZR 5/03.

¹²⁰ Ziemons p. 1919.

¹²¹ Eidenmüller p. 30 et seq.

or her best¹²², only to carry on all business activities somewhere else in the EU. Apart from the registered office (which may be in the shape of a letterbox), there is no need for any connection at all to the Member State of incorporation – whose law will nonetheless apply to all questions regarding legal capacity, formation and liquidation of the company as well as liability issues etc., all in compliance with the now judicially enforced incorporation theory.¹²³

Having regard to the discussion above, one could hold that the new possibility of jurisdiction shopping has led to the verge of a competition of legal orders that may eventually result in a European *Delaware effect*¹²⁴, i.e. a regulatory competition with a single winner. For such regulatory competition to take place, two basic conditions must be fulfilled. First, there has to be an appropriate legal environment, i.e. the legislation of the states concerned has to allow the free choice of jurisdiction.¹²⁵ Arguably, this condition is sufficiently fulfilled in the EU today. Although it is true that not all Member States allow the migration of primary establishments, enough of them (including the UK, the Netherlands etc.) do for there to be a number of real alternatives as to the place of incorporation when forming a new company – and all Member States have to accept incoming companies. The second condition for any market for incorporations is the existence of a *supply* side and a *demand* side, where supply consists in those Member States engaging in the competition through strivings to design their company legislation in order to attract incorporation business. The demand side of the market exists if an appreciable number of companies find the benefits of incorporating abroad greater than the costs.

Even though Europe is by all means still far from Delaware – mainly because a single Member State assuming the role of the American counterpart can hardly be imagined – there has been a shift of the major integration model in European company law, from the traditional *harmonisation* approach towards regulatory competition. This is primarily evident from the vast number of incorporations in the UK that, following the example set by *Centros*, aim only at circumventing the stringent capital requirements in Member States such as Germany and France: states currently engaging in the regulatory competition through attempts to make their own company laws more attractive.¹²⁶ In my view, this surely has more of a ‘race to the top’ than a ‘race to the bottom’ ring to it.

¹²² C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para. 27.

¹²³ Or the ‘European State of Formation Rule’, see Tröger, ‘Choice of Jurisdiction in European Corporate Law’, EBOR (6) 2005, pp. 5-7.

¹²⁴ In the US, Delaware, due to its elaborated body of corporate law, has achieved a quasi-monopoly in the market for incorporations, providing a corporate domicile for a very considerable share of the largest companies. Tröger pp. 8-12.

¹²⁵ Cheffins pp. 427-431.

¹²⁶ Tröger pp. 43-50, Ziemons p. 1920.

3 The European Company (SE)

3.1 Background

The European Company – the *Societas Europaea* in Latin, hence the abbreviation *SE* – was first drafted as early as 1959, as a purely supranational company form.¹²⁷ The initial suggestions, originating in France and the Netherlands, soon triggered the Commission's interest. A group of experts was appointed, which delivered a draft proposal in 1966. Four years later, on the 30th June 1970, a proposal¹²⁸ for a regulation embodying a Statute for the European Company, was submitted to the Council. This proposal entailed rules intended to govern all aspects of corporate governance and establishment, including relevant rules on tax law and employee representation.

After basically favourable opinions by the Economic and Social Committee¹²⁹ and the European Parliament¹³⁰, an amended proposal¹³¹ was lodged with the Council on 30 April 1975. Here, things were brought to a standstill. Most Member State governments regarded the proposal as far too radical, and in 1982 a working group set up in 1976 in order to resolve the diverging opinions was blocked, once again by the Council.¹³²

Despite the obstructions, the Commission never lost interest in the establishment of a European Company. A new proposal was lodged with the Economic and Social Committee and the European Parliament in 1989, and, after amendments, submitted to the Council in 1991. This time the proposal was twofold, consisting in a Regulation¹³³ on the statute for a European Company and a Directive¹³⁴ on the involvement of employees in the SE. Once again, the member states could not agree on all aspects, resulting in the stalling of the adoption of the proposal in 1993, due to the differing views on employee involvement.¹³⁵

The Commission, of course, was not easily scared off. Adopting the proposal reappeared on the agenda after the *Ciampi Report*¹³⁶, which was

¹²⁷ Da Costa & Bilreiro, *The European Company Statute*, p. 1. Suggestions regarding a supranational form of limited liability company were however put forward even earlier, at the 'Deutscher Juristentag' in Cologne, 1926. Theisen & Wenz (Eds.), *Die Europäische Aktiengesellschaft*, pp. 27-29.

¹²⁸ COM (1970) 600 final, OJ C 124, 10 October 1970, p.1.

¹²⁹ OJ C 131, 13 December 1972.

¹³⁰ OJ C 93, 7 August 1974.

¹³¹ COM (75) 150 final.

¹³² Da Costa & Bilreiro, p. 3.

¹³³ OJ C 176, 8 July 1991, p.1.

¹³⁴ OJ C 138, 29 May 1991, p. 8.

¹³⁵ Da Costa & Bilreiro, p. 5-6.

¹³⁶ Competitiveness Advisory Group, *Enhancing European Competitiveness – First Report*, Luxembourg, 1995, p. 9.

the result of an advisory group set up in order to evaluate how to improve European competitiveness. The advisory group estimated that the introduction of the SE could potentially save €30 billion (notably in legal costs) for companies within the single market, making the European economy more efficient. Another report - the *Davignon Report*¹³⁷ - was the result of a group of experts set up by the Commission, and dealt with the much debated issue of employee involvement in the governance of the SE. This report was the basis for a compromise agreed upon in 1998 by all Member States except Spain (who finally gave in two years later).¹³⁸

Eventually, the Regulation¹³⁹ and the Directive¹⁴⁰ were both adopted, and the European Company Statute entered into force in the autumn of 2001. In its current form, the Regulation is far from identical to the aforementioned Commission proposal of 1989: the 137 proposed Articles were cut down to a mere 70¹⁴¹, leaving out numerous of the originally intended provisions with regard to taxation, labour, social, competition, insolvency and intellectual property law, among other things.¹⁴² As we shall see, these areas of law were not simply ignored – the Regulation makes use of a referral technique, leading to the applicability of national law in a vast number of aspects. It should be noted at this early point that relevant Member State laws have been harmonised to a large extent.

3.2 Objectives

A prerequisite for the completion of the internal market is that companies are able to overcome both the legal and the psychological obstacles facing them in their efforts to restructure and cooperate on a European level.¹⁴³ Since free movement of natural persons is an objective long since (more or less) achieved, the structures of production themselves are clearly next in line. National legal orders naturally being of a limited character, the company forms created on this basis are subject to inherent problems of non-recognition. Harmonisation measures aside: in a European Union of twenty-five or more Member States, obstacles (of a psychological or legal character) will probably remain for quite some time to come, hampering companies from acting ‘truly internationally’.¹⁴⁴ Presumably, such obstacles may to a large extent be attributable to the deficient mutual knowledge

¹³⁷ *European Systems of Worker Involvement*, final report of the group of experts, DG Employment and Social Affairs, the European Commission, 1997.

¹³⁸ Theisen & Wenz, pp. 33-35.

¹³⁹ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294, 10 November 2001, p. 1.

¹⁴⁰ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294, 10 November 2001, p. 22.

¹⁴¹ The 1975 proposal was even more extensive, with more than 400 Articles. COM (75) 150 final.

¹⁴² See recitals 20-21 of the Statute.

¹⁴³ Recitals 1-7 of the Statute, Murray in *Corporate Law: The European Dimension* p. 41.

¹⁴⁴ Werlauff, *SE – The Law of the European Company*, p. 3.

between the legal orders of the EU, among practitioners and national authorities.¹⁴⁵ The overall aim of the introduction of the SE may be summarised through a system of objectives comprising in four different levels.¹⁴⁶ First, there is the EC Treaty objective to complete the internal market, enhancing efficiency and competitiveness. Second, as a means of assuring the said objective, a supranational legal framework (the SE) should be created in order to adapt the order of company law to the single market. Third, this leads to the deduction of further broad objectives to be fulfilled by the SE, including the abolishment of psychological barriers, the free movement and the freedom of establishment, a competitive system of corporate governance as well as the attraction of investments from third states. Fourth, these objectives emerge in a number of concrete provisions regarding the recognition of legal personality, cross-border transfer of seat and merger and worker influence, as well as (less concrete) notions on 'European corporate identity', 'culture' and 'goodwill'.

3.3 Regulation 2157/2001

Certainly, the European Company Statute (hereinafter *the Statute*) is far from the most beautiful piece of legislation adopted by the Council. On the contrary, this body of law may be described as the insufficient product of simply too many compromises, imposed through the strains of an exceptionally long and painful birth. Arguably, the SE of today is nothing like the one imagined in the original draft suggestions of 1959. Contrary to the original intentions, numerous core characteristics of the SE with regard to legal personality, relations towards the business environment, the shareholders and stakeholders as well as the transferability of shares are now identical to those of a public limited-liability company incorporated in the same Member State. As described above, the attempts of harmonisation, or indeed unification of the said core characteristics regarding the SE eventually failed entirely, after delaying the adoption of the legal instruments at hand for some 30 years.¹⁴⁷

Such a grim view may not, however, be entirely justified. Certainly, there are aspects adding to the attractiveness of the European Company, including the restructuring possibilities, the ability to transfer the seat of a company without a subsequent loss of legal personality, and the freedom of choice when it comes to corporate governance.

Together with the Council Directive 2001/86/EC on employee involvement, Council Regulation (EC) No 2157/2001 provides a legal framework for the

¹⁴⁵ Western Europe's knowledge of the legal systems of the new Central European Member States has been described as most modest. Things are allegedly better the other way around. See Radwan, '25 Thoughts on European Company Law in the EU of 25', EBLR 2006, pp. 1174-1177.

¹⁴⁶ The system of objectives is drawn up in Theisen/Wenz pp. 39-42.

¹⁴⁷ Wenz, Martin, 'The European Company (Societas Europaea) – Legal Concept and Tax Issues' in European Taxation, January 2004, pp. 4-11.

European Company. The Statute deals with certain areas, e.g. regarding the formation of an SE, in some detail, whereas in other cases it simply refers to the jurisdiction within which the registered office of the SE is situated.

In order to identify the applicable law regarding a certain aspect of the governance of an SE, one should consult Article 9 of the Statute. This provision provides that where the Statute itself does not deal with the matter at hand, the statutes of the SE shall apply, albeit only when expressly authorised by the Statute. Where a matter is not regulated at all or only to a certain extent by the Statute, the SE act of the Member State where the registered office of the SE is situated shall apply. If necessary, the provisions governing national public limited-liability companies in that Member State shall apply, or, once again, the provisions of the statutes of the SE – provided that the said law on national public limited-liability companies provides for this concerning such companies. Furthermore, if the business conducted by the SE is subject to specific provisions of national law, those provisions shall apply in full.¹⁴⁸ This is often the case in areas such as banking and insurance. At this point, the non-discrimination clause in Article 10 of the Statute should be mentioned. This provision provides that (subject to the Statute) an SE shall be treated in each Member State as if it were a public limited-liability company formed in accordance with the law of its state of incorporation.

In short, the SE is a European public limited-liability company, enjoying legal personality independent of its shareholders.¹⁴⁹ Its name must be preceded or followed by the abbreviation *SE*.¹⁵⁰ The minimum subscribed share capital is set to €120 000, unless the activity carried on by the SE is subject to greater requirements due to the law of the Member State where the registered office is situated.¹⁵¹

There are four *primary* ways of forming an SE, found in Article 2 of the Statute.¹⁵² Notably, an ‘ordinary’ incorporation through the mere investment of capital is not possible, which marks a clear difference from national limited-liability companies. A prerequisite for the formation of an SE is, basically, the existence of at least two companies of different nationalities (i.e. a cross-border element). According to Article 2, an SE may be incorporated through the merger¹⁵³ of companies from different Member

¹⁴⁸ Article 9, para. 3 and Recital 26 of the Statute.

¹⁴⁹ Article 1, paras. 1-3 of the Statute. Article 1 para. 2 states that “No shareholder shall be liable for more than the amount he has subscribed”, which is clearly a typographical error. As with most national limited-liability companies, shareholders are never liable for anything, save in extreme cases. See Schröder in Manz/Mayer/Schröder (Eds.), *Europäische Aktiengesellschaft SE*, pp. 52-53.

¹⁵⁰ Article 11 of the Statute.

¹⁵¹ Article 4, paras. 1-3 of the Statute.

¹⁵² Compare Recitals 10-11 of the Statute.

¹⁵³ Articles 2 (1), 17-31 of the Statute. Article 17 (2) refers to the *Third Council Directive* (on company law, 78/855/EEC), allowing for merger by acquisition (in which case the acquiring company shall take the form of an SE) or merger by the formation of a new company (in which case the newly formed company shall be an SE).

States, through the creation of a *holding SE*¹⁵⁴ by companies from different Member States, or through the formation of a joint subsidiary¹⁵⁵ in the form of an SE by companies (or other legal persons carrying on economic activities) from different Member States. Lastly, a national public limited-liability company may transform¹⁵⁶ itself into an SE, given that the company has had a subsidiary in a Member State other than that of its registered office for at least two years.

Furthermore, the Statute offers a *secondary* means of forming an SE: any existing European Company may freely form subsidiaries in the form of SEs.¹⁵⁷ Since Article 10 of the Statute requires the Member States to treat SEs equally to national public limited-liability companies (a non-discrimination clause), other secondary means of formation are most likely to exist. For instance, an SE should be able to split, creating new SEs. Also, two or more SEs must be able to merge.

The *numerus clausus* and the relative restrictiveness of the (primary) methods of incorporation can best be explained as the result of a Member State fear that a more liberal view would lead to numerous national companies transforming themselves into SEs in order to avoid more stringent national rules on e.g. employee representation.¹⁵⁸ However, the effectiveness of the restrictive means of formation is unclear. Firstly, the cross-border element required for the transformation of a national limited-liability company into an SE (i.e. a subsidiary in another Member State since two years) is likely to be fulfilled by a vast number of enterprises, making one wonder whether this requirement makes any difference at all. Secondly, the ease with which an existing SE can form subsidiary SEs may result in ‘off-shore’ SEs being offered for sale to those who want to use this company form without having fulfilled the abovementioned requirements.¹⁵⁹

Contrary to what is generally the case for national company forms, the SE allows for freedom of choice with regard to the basic system of corporate governance.¹⁶⁰ The founder of a European Company may choose to make use of either the one-tier (or *board*) system, i.e. governance by a single administrative organ consisting of both executive and non-executive members, or the two-tier (*dual*) system, i.e. a management organ supervised by a supervisory organ.¹⁶¹ This possibility is, as many other aspects of the

¹⁵⁴ Articles 2 (2), 32-34 of the Statute.

¹⁵⁵ Articles 2 (3), 35-36 of the Statute.

¹⁵⁶ Articles 2 (4), 37 of the Statute.

¹⁵⁷ Article 3 (2) of the Statute.

¹⁵⁸ Schröder in Manz/Mayer/Schröder (Eds.), *Europäische Aktiengesellschaft SE*, pp. 65-66.

¹⁵⁹ *Ibid* and Werlauff p. 39.

¹⁶⁰ Article 38 of the Statute.

¹⁶¹ The United Kingdom is a typical adherent of the one-tier system, and Germany of the two-tier system. In Scandinavia, the solution adopted for national limited-liability companies falls somewhere in between: the system is dual, but the supervisory organ also has managerial powers, and gives directions to the management organ. See Werlauff pp.73-75.

SE, rather a result of the Member States' inability to coalesce than that of any conscious design. However, it does provide for an interesting competition of the two types of board structures within each Member State.¹⁶²

3.3.1 Cross-border activities

As already mentioned, the possible transfer of seat and formation through a cross-border merger are two of the features making the SE a, until this day, unique form of company. Before I describe how these features are regulated, some terminology must be dealt with. Articles 7 and 8 of the Statute make use of the terms *registered office* and *head office*. This sounds clear enough, but is in fact not quite the terminological standard. As mentioned above¹⁶³, the Treaty does on the one hand speak of the *registered office*, but on the other hand it besides that mentions the *central administration* and the *principal place of business* as connecting factors when determining the nationality of companies, Article 48 EC. In tax law, the term *central management and control* is often used to describe, in principle, the head office of a company. It is tempting to assume that all these terms, except the registered office, mean more or less the same thing. However, the term head office is a new concept of Community law, which has yet to be defined.¹⁶⁴ The Statute neither provides a definition of the concept, nor a referral to e.g. the law of the SE's state of incorporation. In practice, Member State authorities are likely to either apply their locally used criteria or invent new ones. Either way, an interpretation in the form of a preliminary ruling from the ECJ under Article 234 EC would be most welcome to avoid inconsistencies.

In spite of its unclear meaning, I will of course stick to the terminology of the Statute to the greatest extent possible, under the presumption that the head office is where the daily decisions for running the business are taken, i.e. where the management board etc. conducts its activities.¹⁶⁵ Clearly, the terminological confusion is a result of the two theories of international private law discussed above: the incorporation theory and the real seat theory.

3.3.1.1 Transfer of seat of an SE – legal basis

An SE may, at any time, transfer its seat from one Member State to another. The transfer of seat stipulated in the Statute (Article 8, compare Article 7) comprises both the head office and the registered office, meaning a complete change of domicile. This is in accordance with the real seat arrangement adopted by the Statute, which requires the head office to be

¹⁶² Winter, Jaap, 'EU Company Law at the Cross-Roads' in Ferrarini, Hopt, Winter & Wymeersch (Eds.) *Reforming Company and Takeover Law in Europe*, pp. 4-7.

¹⁶³ See 2.1 above.

¹⁶⁴ Werlauff pp. 113-115.

¹⁶⁵ *Ibid.*

situated in the state of registration.¹⁶⁶ If, e.g. by reason of a transfer of seat, the head office and the registered office were suddenly to be found in different Member States, measures have to be taken to adjust the situation. Where the head office has been transferred independently of the registered office, those measures could consist in the re-establishment of the head office in the state of registration or in the transfer of the registered office to the Member State where the head office has already been placed. If the SE does not comply with the obligation to “regularise its position” in the given manner, it will be liquidated.¹⁶⁷ Since the home state of an SE might not always take notice of the (informal) transfer of the head office of an SE, the authorities of the new host state are under an obligation to inform the home state authorities of such a breach if it were to come to their knowledge.¹⁶⁸ This real seat regime, possibly incompatible with primary law (the freedom of establishment, Articles 43 and 48 EC) will be discussed in greater detail later on. For now, suffice it to present the rules on transfer of seat provided in the Statute.

Article 8 of the Statute provides SEs with an extensive instruction on how to transfer their seats without being wound up or having to create a new legal person in the new host state.

A transfer is initiated by the drawing up and publication of a transfer proposal by the management or administrative organ (depending on whether the SE has chosen the one-tier or the two-tier system, as described above). The proposal shall state, among other things, the suggested new location of the registered office, the proposed changes to the statutes of the SE, the possible implications on employee involvement, a proposed transfer timetable and any rights provided for the protection of shareholders and creditors.¹⁶⁹ After the publication of the proposal, a report shall be drawn up, where the legal and economic aspects of the transfer are explained and justified, alongside the implications for shareholders, creditors and employees.¹⁷⁰ These documents shall be obtainable free of charge for shareholders and creditors at the registered office.¹⁷¹

The Member States may adopt provisions ensuring appropriate protection for minority shareholders opposing the transfer.¹⁷² Germany has issued such provisions in the form of cash reimbursement for those minority shareholders who oppose the transfer¹⁷³, whereas other Member States, e.g. Sweden, found such measures unnecessary due to the international character of the SE: shareholders should be aware of the possibility that ‘their’ SE might eventually transfer its seat to another Member State.¹⁷⁴

¹⁶⁶ Article 7 and recital 27 of the Statute.

¹⁶⁷ Articles 7 and 64 (1-2) of the Statute.

¹⁶⁸ Articles 7 and 64 (4) of the Statute.

¹⁶⁹ Article 8 (2) of the Statute.

¹⁷⁰ Article 8 (3) of the Statute.

¹⁷¹ Article 8 (4) of the Statute.

¹⁷² Article 8 (5) of the Statute.

¹⁷³ Wenz in Theissen/Wenz p. 232.

¹⁷⁴ Lindstrand, ‘Flyttning av europabolags säte’, SvJT (4) 2004 pp. 399-400.

When two months have expired since the publication of the transfer proposal, the general meeting may decide on the transfer with a two-thirds majority of the votes cast, unless the SE act of the Member State at hand requires (or permits) a larger majority. A Member State may also, however, prescribe that a simple majority is enough where at least half of the SE's subscribed capital is represented.¹⁷⁵

After fulfilling these formal conditions, the SE shall be handed a certificate from the competent authority (e.g. a court or notary) of its state of registration, to be submitted to the registry in the new domicile. Such a certificate may only be issued once the SE has assured adequate protection in respect of liabilities arising prior to the publication of the transfer proposal with regard to creditors and other right-holders (e.g. public bodies), in accordance with the (possible) requirements of the state of registration.¹⁷⁶ This certificate, along with evidence that the formalities in the new state of registration have been completed, is a prerequisite for the new registration in the said state. Once the registration has been effected, the new registry notifies the old registry, and the old registration is deleted.¹⁷⁷ The deletion of the old registration and the subsequent new registration shall be publicised in the concerned Member States, and the date of publication determines when the new registered office can be relied upon by third parties.¹⁷⁸

3.3.1.2 Possible restrictions of the transfer of seat

Article 8 (14) of the Statute empowers Member States to authorise their competent authorities through legislation to oppose, and thereby prevent, a transfer of seat leading to a change of the law applicable on an SE. The criterion demanding a change of the law applicable has been considered unnecessary, since every transfer must include both the registered office and the head office, and a transfer of the registered office always presupposes a change of the *lex societatis*.¹⁷⁹ This is however not quite true, since transfers within the same Member State may very well lead to a change of the law applicable, as is the case with transfers between e.g. England and Scotland.¹⁸⁰ One should keep in mind that Article 7 of the Statute allows the two offices to be separated as long as they remain within a single Member State.

The opposition, or veto, provided for in Article 8 (14) of the Statute may be based solely on *grounds of public interest*, and must be issued within a two-month period following the publication of the transfer proposal. A judicial review must also be possible. As it seems, no Member State has yet made

¹⁷⁵ Articles 8 (6) and 59 of the Statute.

¹⁷⁶ Article 8 (7-9) of the Statute.

¹⁷⁷ Articles 8 (10-11) and 12 of the Statute.

¹⁷⁸ Articles 8 (12-13), 13 (which refers to Directive 68/151/EEC, *The First Company Law Directive*), and 14 (on publication in the OJ for information purposes) of the Statute.

¹⁷⁹ Garcia-Riestra, 'The Transfer of Seat of the European Company v Free Establishment Case-Law', *European Business Law Review* 2004, pp. 1319, 1323.

¹⁸⁰ Schröder in Manz/Mayer/Schröder p. 142.

use of this authorisation to restrict the possibility to transfer the registered office of an SE, although the UK has considered it.¹⁸¹ Authorities responsible for areas such as tax, competition and administration could however be of relevance.¹⁸² Certain authorities, however, enjoy this right of opposition without a prior authorisation through a Member State law. Such is the case where an SE is under the supervision of a national supervisory authority, according to Community legislation.¹⁸³ Financial authorities supervising credit institutions etc. in accordance with Directives 92/37/EEC and 95/26/EEC are clearly within this scope.

Having affirmed the possibility for national authorities to restrict the transfer of seat of an SE, it becomes all the more important to evaluate the meaning of the term *grounds of public interest*, another term whose definition is not included in the Statute. A brief historical outlook could be appropriate at this point. In the UK, the Treasury was empowered to oppose a transfer of the ‘place of central management and control’ of a public limited-liability company prior to 1988 (Spain had similar rules). Albeit heavily criticised and eventually abolished because of a lack of proportionality and a large amount of discretion on behalf of the authorities, the British provision found acceptance in the ECJ¹⁸⁴, as mentioned above. This has led to the common conclusion in the literature¹⁸⁵ that the freedom of establishment as guaranteed by Articles 43 and 48 EC cannot affect the treatment of a company in its state of incorporation, but only in the state where it wishes to establish itself, through a transfer of seat, the setting up of a branch or subsidiary etc. This view has already been discussed. For now, suffice it to state that Article 8 (14) of the Statute shares some traits with Article 46 EC, which allows for limitations of the freedom of establishment on grounds of *public policy, public security or public health (ordre public)*. It has been suggested that the two terms pursue the same objectives, which would call for a very restrictive interpretation of what amounts to ‘grounds of public interest’, subject to the principle of proportionality.¹⁸⁶ Other voices, however, put the similarities aside and regard the opposition clause of the Statute as a new and independent ground capable of limiting the right of establishment.¹⁸⁷ If one adopts this view, criticising the Community legislator for not requiring more compelling reasons on behalf of the national authorities in order to restrict a transfer, such as ‘an overriding public concern’, might be reasonable.

¹⁸¹ United Kingdom Department of Trade and Industry, Corporate Law and Governance Employment Relations, *Implementation of the European Company Statute: The European Public Limited-Liability Company Regulations 2004* (Consultative Document Oct 2003) 15.

¹⁸² Wenz in Theissen/Wenz pp. 246-247.

¹⁸³ Article 8 (14) of the Statute.

¹⁸⁴ Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483.

¹⁸⁵ See e.g. Schröder in Manz/Mayer/Schröder pp. 142-143.

¹⁸⁶ *Ibid.* Compare chapter 2.1.2 above.

¹⁸⁷ Werlauff pp. 128-131.

As we have seen in the *Lasteyrie*¹⁸⁸ case, recent developments suggest that the freedom of establishment of today works effectively in both ways, offering protection against restrictions in the home state as well as in the host state. If this is (by means of an analogy) the case for legal persons as well, as suggested by some commentators¹⁸⁹, it would be nothing but logical to regard home state measures according to the same restrictive criteria as those applied on host state measures after *Centros*, given that the wording of Article 48 EC is not obsolete. An appraisal of asserted ‘grounds of public interest’ in accordance with the freedom of establishment would follow the mandatory requirements doctrine established by the ECJ case law, which has been discussed above. Consequently, a restriction of the freedom of establishment must be applied in a non-discriminatory manner, it must be justified by imperative requirements in the general interest, it must be suitable for securing the attainment of the objective which it pursues, and it must not go beyond what is necessary in order to attain it.¹⁹⁰ If one recalls the discussion in chapter 2 above, a fundamental weakness with the reasoning at hand appears, since the latter presupposes that the transfer of the registered office of an SE constitutes an exercise of the freedom of establishment. This is, along with the reasoning of the Court in *Daily Mail*, far from certain.

However, this does not exclude the application of the test at hand, which was originally elaborated for restrictions of the free movement of goods.¹⁹¹ Hence it could suit the empowerment provided for in Article 8 (14) of the Statute well, and might prevent e.g. tax authorities from being authorised to oppose any transfer of seat that would render a reduction in tax revenue, affecting the public interest in the Member State at hand. Such a practice would indeed jeopardise the entire regime for corporate mobility introduced by the Statute¹⁹², but is at the same time highly unlikely to survive an assessment under the mandatory requirements doctrine.¹⁹³ It cannot be held for implausible that this test is exactly what the ECJ would apply, if asked for a preliminary ruling in accordance with Article 234 EC.¹⁹⁴

Article 8 (15) of the Statute states that an SE may not transfer its seat if proceedings for winding up, liquidation, insolvency or suspension of payments (or other similar proceedings) have been brought against it. This provision could be considered redundant, as Article 8 (7-9) requires the

¹⁸⁸ Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, see 2.3.2.2 above.

¹⁸⁹ See e.g. Ratka, ‘... und primärrechtswidrig ist er doch?’, *Ecolex* 2006, Heft 11, pp. 7-8.

¹⁹⁰ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para. 34.

¹⁹¹ Case 120/78 *Rewe Zentral AG v Bundesmonopolverwaltung für Branntwein* [‘*Cassis de Dijon*’] [1979] ECR I-649.

¹⁹² Sánchez/Fluxá, ‘The Transfer of Seat of and the Freedom of Establishment for Companies in the European Union: An Analysis of ECJ Case Law and the Regulation on the Statute for a European Company’, *European Taxation*, June 2005, p. 229.

¹⁹³ See case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409 paras. 59-60.

¹⁹⁴ Interestingly enough, the option to oppose a transfer on grounds of public interest has been left out in the proposed 14th Directive, which will be discussed beneath.

competent authorities in both states concerned to assure the protection of right-holders such as creditors before a new registration can take place. Article 8 (15) nonetheless stresses the need to ensure that no company may escape its responsibilities.

There has been a discussion as to the chronological range of this legal barrier, due to linguistic discrepancies based on presumably incorrect translations.¹⁹⁵ However, having regard to the English, French and German versions, the said provision is probably only meant to deal with ongoing proceedings for suspension of payments etc., meaning that as soon as the proceedings have been cancelled (without leading to a liquidation, naturally), the SE is free to once again attempt to move its seat.¹⁹⁶ It would of course be utterly senseless and by all means disproportionate to penalise a company that is now solvent, but was once struggling with the said measures. Although feared by some commentators, this cannot possibly be the result sought by the Community legislator.

To prevent the creditors of an SE from disadvantageous effects by reason of a transfer of seat, Article 8 (16) of the Statute introduces the possibility of relying on a ‘fictitious seat’. This means that, in respect of any cause of action arising prior to a cross-border transfer (i.e. prior to the new registration) the SE shall be considered as having its registered office in the Member State where it was registered before the transfer, even if it is sued after the new registration. Thus, regarding causes of action that arose before the new registration, one should act as if the transfer never took place. This leads to a prolonged application of Article 10 of the Statute, and hence the national rules governing public limited-liability companies in the home state. There are no limitations as to the point in time, meaning that the relevant creditors are free to sue the SE in its previous *forum domicili*.¹⁹⁷ As the Statute is without prejudice to certain rules of international private law¹⁹⁸, notably Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the jurisdiction clause found in Article 8 (16) can hardly be the basis of any widespread forum shopping. For example, a procedure regarding certain assets will normally have to be initiated where those assets happen to be located.

Similar to Article 8 (15), Article 8 (16) of the Statute has also been subjected to criticism based on an alleged lack of clarity inherent in the words “any cause of action arising prior to the transfer”. Despite further dubious translations, it should be clear from the wording of the three working languages that this means that for instance claims based on contracts, including claims for compensation due to lacking fulfilment of

¹⁹⁵ For example, the Swedish translation meant to correspond with “if proceedings ... have been brought against it” is, in effect, “an SE, which has been subject to proceedings...” (Swedish “Europabolag som har varit föremål...”). See Lindstrand p. 396.

¹⁹⁶ Schröder in Manz/Mayer/Schröder pp. 144-145.

¹⁹⁷ *Ibid.*

¹⁹⁸ See recital 25 of the Statute.

contractual obligations, arise when the contracts are entered into.¹⁹⁹ Claims for non-contractual damages arise when the event causing damage occur, and so on. The jurisdiction clause is one of the areas that will be reviewed by the Commission in 2009 at the latest, which may lead to amendments in the light of Regulation 44/2001.²⁰⁰

3.3.1.3 Cross-border mergers

As already mentioned, an SE may be formed through the merger of at least two national public limited-liability companies residing in different Member States.²⁰¹ Until the implementation of the 10th Company Law Directive²⁰² is concluded, the regime offered by the Statute is in fact the only model for merging companies of different nationalities to be found in EC law. However, since the said Directive will soon offer a similar body of company law for those companies who prefer merging into a national company form rather than into an SE, this particular feature of the Statute will shortly lose its original exclusivity. Because of this, I will not discuss the formalities of the merger process in too much detail, but try to focus on areas of special interest for the SE.

The formation through merger as stated in the Statute shows certain significant similarities to the transfer of seat as described above. Since any merger with a cross-border element in practice implies at least one transfer of seat, this is hardly surprising. For creditors, employees and authorities, it seldom makes a difference if a company moves out of the state on grounds of a transfer of seat or because of a merger; the result may be more or less the same. Thus, regarding the obligation for merging companies to draw up 'draft terms of merger', the requirements as to publication and appropriate protection for minority shareholders, and the subsequent issuing and submitting of a certificate attesting to the completion of certain formalities, the merger rules remind of those concerning transfer of seat to a large extent.²⁰³ Furthermore, Article 19 of the Statute empowers the Member States to authorise their competent authorities to oppose a merger on grounds of public interest. This provision is similar to Article 8 (14) of the Statute, which has been discussed above. As to what could constitute grounds of public interest, I would like to refer to the said discussion. An interesting difference between these two provisions is that under Article 8 (14) some national authorities (i.e. national supervisory authorities) are entitled to oppose a transfer on the direct basis of the Community law, whereas under Article 19 an express authorisation through national legislation is always needed. It seems unclear whether this inconsistency is

¹⁹⁹ Werlauff pp. 127-128. The Danish version seems to suggest that it is not enough that a cause of action has arisen before the new registration: an actual claim has to have been made, through the bringing of an action or otherwise. As Werlauff points out, this variant deprives the provision of all meaning.

²⁰⁰ Article 69 (c) of the Statute.

²⁰¹ Articles 2 (1), 17-31 of the Statute.

²⁰² Directive 2005/56/EC of 26 October 2005 on cross-border mergers of public limited companies, the transposition of which should be finished by December 15, 2007.

²⁰³ Articles 20-26 of the Statute.

intentional or not. A further difference is that, while a general meeting decision to transfer the registered office requires a two-thirds majority according to Articles 8 (6) and 59 of the Statute, the absence of a referral to the latter provision in Article 23 seems to suggest that the Statute does not provide for any specific requirements as to the necessary majority in case of a decision to merge.

Provided that a company taking part in a merger has employees, Directive 2001/86/EC provides for extensive negotiations as to the impact on employee involvement of a merger. Such negotiations may be a time-consuming element designed to constrain merging companies from resorting to the formation of an SE, relying on the pending 10th Directive instead for their restructuring purposes. In spite of its numerous referrals to Directive 2001/86/EC on employee involvement, the 10th Directive is in some regards considerably more liberal when it comes to employee influence in respect of a merger. E.g., when all merging companies have fewer than 500 employees each, Article 16 of the 10th Directive provides for the application of the law of the state of registration of the emerging company with regard to employee involvement. When this state has a restrictive view on worker influence, like for instance the UK, this possibly hindering aspect of the merger could, in practice, be ignored altogether. On the other hand, as soon as at least one of the merging companies has more than 500 employees, the rules on employee involvement apply similarly, without prejudice to the company form chosen (i.e. an SE or a national company form). Having corroborated the similarities, what incitement is there still for companies willing to merge to choose the SE over a national public limited-liability company? This question will be discussed below, in a broader context.

3.3.2 Main attractions of the SE

As described above, in the present state of Community law, the SE provides the only legal framework there is for companies seeking a cross-border transfer of seat or merger without being struck by a loss of legal personality (after the liquidation in the home state and the subsequent re-incorporation in the host state) and tax setbacks. These possibilities may constitute the most appealing aspects of the SE.²⁰⁴ A public limited-liability company with a large number of subsidiaries in different Member State could find an incorporation into an SE advantageous from several points of view. Such a company may choose either to form an SE through a merger with its subsidiaries, or to first reincorporate itself into an SE, and merge with its subsidiaries later on. Either way, the new business structure, with a network of branches instead of subsidiaries, could prove cost saving with regard to administrative costs as well as taxes. Although tax law is outside the primary scope of this essay, another brief excursion should nonetheless be made at this point. In the 1989 proposal for a Regulation on the Statute for a

²⁰⁴ Winter, Jaap, 'EU Company Law at the Cross-Roads' in Ferrarini, Hopt, Winter & Wymeersch (Eds.) *Reforming Company and Takeover Law in Europe*, p. 6.

European Company, a provision was included that would allow an SE to deduct losses originating in permanent establishments against profits in the fiscal residence.²⁰⁵ This beneficial tax regime was not included in the eventually adopted Statute. However, due to recent ECJ case law²⁰⁶, it seems that the regime may nonetheless apply – concerning branches. As for subsidiaries, Member States are allowed, under the freedom of establishment, to make such deductions subject to restrictions. The expected tax advantages form a clear incitement for companies conducting business on the European level to reorganise their nets of subsidiaries into a system of branches, which is exactly what the major Austrian road-builder Strabag, the first larger company to reincorporate itself into an SE, is doing. In a way, this is also the reason why Allianz, the sizeable German insurance corporation, recently reincorporated itself into an SE, by means of merger. By merging with its Italian 55.4%-owned subsidiary RAS, the latter was integrated in Allianz in the allegedly least painful way possible, avoiding the strict German takeover laws.²⁰⁷

Strabag and Allianz aside, most of the SEs that have been registered so far are ‘special purpose vehicles’ (SPVs), i.e. companies used to carry out business related to a specific transaction. The SE is considered an ideal corporate form for fulfilling these purposes, partly thanks to the possible transfer of seat without negative tax consequences.²⁰⁸ One should however bear in mind that some factors effectively work to deter especially small and medium-sized enterprises (SMEs) from incorporating into SEs. As mentioned above, subscribed capital requirements are high, and numerous companies lack the trans-national element needed to incorporate at all. Due to their relatively uncomplicated systems of production and management and generally small numbers of employees, such companies could in fact be the most likely to move between Member States.²⁰⁹ For those seeking to abolish constraints within the common market, this is clearly regrettable.

²⁰⁵ COM 89/0268, Article 133.

²⁰⁶ Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty’s Inspector of Taxes)* [2005] ECR I-10837.

²⁰⁷ ‘Limited appeal; Pan-European companies’, *The Economist*, Sep. 17, 2005, p. 72.

²⁰⁸ Van Gerven/Janssens, ‘Benelux: Euro vision’, *The Lawyer*, Feb. 20, 2006, p. 30.

²⁰⁹ Johnson, ‘Does Europe still need a Fourteenth Company Law Directive?’, *Hertfordshire Law Journal* 3 (2) 2004, pp. 32-33.

4 The freedom of establishment applied to the European Company

4.1 Enhancing corporate mobility?

One could say that the SE Statute gives with one hand, and takes away with the other. When comparing the legal regime created by the Statute to the case law on the application of Articles 43 and 48 EC regarding national company forms, one must not forget the true novelties introduced along with the European Company: the cross-border merger and the transfer of the registered office, i.e. the thorough change of corporate domicile. Such acts are, as of today, not yet possible for national company forms. On the other hand, in line with the case law discussed above, the said national company forms enjoy the right of free movement in another shape: the possibility to incorporate in one Member State only to conduct all business and place all managerial functions in another Member State. Regarding SEs, this is expressly forbidden under Article 7 of the Statute, which requires the registered office and the head office of an SE to be situated within the same Member State.

This raises two issues, which will be dealt with below. First, are the relevant provisions of the Statute in actual breach of the Treaty? Second, why did the Community legislator not let the Statute reflect the more liberal case law of the Court? In order to answer the first question, it first needs to be assessed whether the requirements concerning the transfer of seat in the Statute constitute a restriction of the freedom of establishment. If that would be the case, one has to consider whether there is any justification for such a restriction, in the Treaty or under the mandatory requirements doctrine.

4.2 As to the conformity with the Treaty

Two arguments in favour of the conformity of Article 7 of the Statute with the Treaty may be rebuffed at once. First, if Article 48 EC is interpreted restrictively, one could hold that only purely national company forms fall within its scope, whereas the SE, as a supranational creature, would not at all enjoy the benefits of freedom of establishment. The more reasonable interpretation of Article 48 EC is nevertheless that the SE, despite its supranational elements, is a company formed in accordance with the law of a Member State.²¹⁰ Secondly, it has been suggested that since the formal requirements regarding the transfer of seat of an SE that may cause its

²¹⁰ Eidenmüller p. 31.

liquidation in the home state would not imply any discrimination based on the nationality of the SE, there could be no violation of the freedom of establishment.²¹¹ This view is apparently unfounded, since it should be most clear by now that a measure does not have to be discriminatory in order to constitute a restriction of the freedom of establishment.²¹² Furthermore, since host states are under an obligation to, in effect, commence the proceedings that may lead to the liquidation of an SE that has transferred solely its head office to the host state's territory by notifying the home state of the SE, the Statute actually requires them to treat a foreign SE differently than they would a domestic one.²¹³

In short, the question of whether the Statute prescribes an unacceptable restriction of Articles 43 and 48 EC is directly dependent on how one interprets the case law on freedom of establishment. That interpretation will then have to be applied to a scenario where an SE has transferred its head office from its home state to another Member State, leaving its registered office in the Member State of incorporation, in breach of Article 7 of the Statute. To stay in touch with the structure used in the case law analysis above, a few statements should be made regarding the effects of the said Article in the host state and the home state respectively. This is in line with my previous conclusion that the freedom of establishment as it stands reaches further when it comes to host state treatment than it does on the home state stage. When making the analysis set out above, the home state's application of Articles 7 and 64 of the Statute in the said scenario provides a good starting point. This would consist in measures aimed at obliging the SE to 'regularise its position' through either the re-establishment of the head office in the home state or the transfer of the registered office to the host state in accordance with Article 8 of the Statute. Where these measures are without effect, the home state is obliged to liquidate the SE.

Among the commentators holding the view that this cannot possibly be aligned with the freedom of establishment, there seems to be the common standpoint that the ECJ has overruled *Daily Mail*, perhaps not expressly, but nevertheless in practice, along with the view that it would be artificial to distinguish home state measures from host state measures. Some good points have been made in this respect. For instance, it is not completely obvious that the liquidation is a mere home state measure – the measure is in any case of a mixed character, taking place when the head office has already been moved.²¹⁴ Where the cause of the liquidation is an informally transferred head office resembling the one in *Überseering*, or, for that matter, in *Centros*, it could be problematic indeed to uphold that the establishment of the 'actual centre of administration' etc. does not fall within the scope of Article 43 EC. Further attention has been drawn to the measures aimed at 'regularising the position' of the SE in the scenario at hand, where a subsequent transfer of the registered office to the state where

²¹¹ Fuchs in Manz/Mayer/Schröder pp. 120-121.

²¹² 2.1.1 above.

²¹³ Ratka p. 5.

²¹⁴ Ratka pp. 8-9.

the head office has been established implies the adoption of the SE law of the host state, which may be in conflict with *Inspire Art.*²¹⁵

If, on the other hand, one regards *Daily Mail* as a genuine home state case and *Centros/Überseering/Inspire Art* as equally genuine host state cases, the real seat regime adopted by the Statute would be left untouched by the freedom of establishment, since the host state cases have no overruling implications for the home state treatment of an SE.²¹⁶ Given that home Member States are free to define the conditions for the cancellation of the legal personality as regards national company forms, they should be similarly free to let Articles 7 and 64 of the Statute define the legal status of an SE, all in line with *Daily Mail*, which was confirmed in *Überseering* in this respect.²¹⁷ The Community legislator must reasonably be able to use the same tools as the Member States of incorporation have at their disposal when it comes to questions concerning the cancellation of legal personality.²¹⁸

Another way of defending the Statute against allegations about non-compliance with primary law is to simply draw a different conclusion as to the range of the freedom of establishment on the host state level. All commentators referred to above agree with my previous conclusion that the host state – at the very least – has to accept ‘incoming’ head offices, in compliance with *Überseering*. As hinted in the case law analysis above, there are also those who mean that *Daily Mail* is still the only case that actually deals with a primary establishment, meaning that not even host states are obliged to allow the transfer of a head office to their territory.²¹⁹ If one adopts such a perspective, there would of course be nothing to suggest that the Statute could be contrary to primary law, since the latter would not allow for anything that is not accepted under the former.

Recalling the case law analysis above, I lean towards supporting the middle path, i.e. that the real state regime of the Statute is, as far as it aims at home state measures, not in actual breach of primary law. This is not to say that the real seat regime is not problematic, and the commentators alleging non-conformity do present some strong arguments. On the other hand, sustaining my previous conclusions as to the case law also implies that any *host* state measures serving to uphold the Statute’s request for non-separation of the head office and the registered office have to be assessed under the mandatory requirements doctrine. Some commentators hold that problems on the host state level are unlikely to occur, e.g. since the question of recognition that arose in *Überseering* simply would not arise in the host

²¹⁵ Ziemons p. 1918.

²¹⁶ Thömmes, ‘EC Law Aspects of the Transfer of Seat of an SE’, *European Taxation*, January 2004 p. 27.

²¹⁷ Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, para. 19, Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919, paras. 67 and 81, compare 2.4 above.

²¹⁸ Eidenmüller p. 31.

²¹⁹ E.g. Johnson p. 23, compare p. 29.

state in respect of an SE. This is while that company would already have been required to ‘regularise its position’ or, when failing to do so, would have been liquidated by its home state.²²⁰ Albeit not amounting to non-recognition, the role of the host state under Article 64 of the Statute should nevertheless not be thoroughly neglected. Article 64 (4) of the Statute provides that “[w]here it is established ... that an SE has its head office within the territory of a Member State in breach of Article 7, the authorities of that Member State shall immediately inform [the home Member State]”. The latter state shall then commence the regularisation procedure. Clearly, the host Member State may thus play an active role in limiting the free movement of an SE. Whether the notification at hand is such as to constitute a restriction of the freedom of establishment is however uncertain.²²¹

One remarkably unintelligible effect of the Statute is, as noted in the *Winter Report*²²², the enforcement of a real seat arrangement on incorporation theory states. Banning the transfer of a head office between two incorporation theorists that would normally allow such a move is a “wholly unnecessary interference with the freedom of movement” attributable to the Community legislator, the reasons for which are not at all obvious.

Even though the Statute, in my view, is not in actual fact contrary to primary law, its real seat regime is nonetheless incredibly problematic. Whereas national company forms are today in the position to choose freely where to incorporate on the basis of e.g. favourable company legislation or tax planning purposes, the SE is compelled to keep its head office in its state of incorporation. Hence, the Statute effectively hinders any jurisdiction shopping and removes major incentives for corporate mobility. In reality, this deters companies from engaging in just too extensive cross-border activities. In my view, removing the requirement in Article 7 of the Statute is more or less a necessity if the SE is to stand a chance in the competition against national company forms, especially since the latter will probably be able to enjoy the same features placing the SE in a, until this day, unique position within a few years. With its most important main attractions eventually commonplace due to the 10th and 14th Company Law Directives, the success of the SE as a company form is all the more uncertain since its creator has chosen to treat it in an exceedingly disadvantageous manner.

4.3 The Fear of Delaware

Abstaining from reflecting the recent liberal practice of the ECJ with its steady encouragement of the incorporation theory when drafting the SE Statute was naturally not the result of a mere coincidence. There are a few

²²⁰ Thömmes p. 27.

²²¹ Ratka (p. 5) may regard the information requirement as a (further) restriction of the freedom of establishment, but this must be seen in the light of his scepticism towards any home state/host state distinction.

²²² Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, p. 102.

more or less credible explanations for the adoption of real seat regime in respect of the Statute. Firstly, opting for a concurrent placement of the registered office and the head office was surely a convenient way of resolving any threatening conflict between the two theories of international private law (the incorporation and real seat doctrines), since the nationality of the SE is now the same no matter which theory one applies.²²³ Simply opting for a full implementation of the incorporation theory would of course have been equally effective in order to avoid conflicts in the field of international private law, but that was clearly more than the Member States could consent to. On the other hand, something they could all agree to was to seek to prevent a European Delaware effect, seemingly at any cost.

Regulatory competition, i.e. the competition of legal orders, has ever since the early years of the EEC been looked upon with the utmost suspicion from most Member States' perspective. Naturally, harmonisation is the convenient alternate path.²²⁴ If – and this is highly likely – avoiding regulatory competition was a fundamental objective, the fulfilment of which was obligatory for the SE Statute ever to be adopted, there were in my view basically two options at the disposal of the Community legislator. First, and this would have been most preferable, the SE could have been designed as a purely supranational company form, in line with the original ideas. With identical rules on taxation, corporate governance and legal capacity etc. throughout the Union, there would have been little room for Member States to try to play the role of Delaware (with an Irish or Lithuanian accent), and thus, similarly, little incentive for an SE to engage in jurisdiction shopping. Regrettably, those Member States who regarded an EU-wide company form as a means of escaping their own stricter national company laws systematically blocked this option.²²⁵

Second, the Community legislator had the option to ignore the recent ECJ case law opening the market for incorporations for national company forms within the EU, and simply deny the SE the possibility to truly engage in free corporate mobility by demanding that the registered office and the head office must always be situated within the same Member State. This road was finally agreed upon by the Member States. As an ironical result of the lacking supranational elements and the many referrals to national company law, there actually is some room for the different jurisdictions to try to engage in regulatory competition.²²⁶ On the other hand, the European Companies can hardly go 'company law shopping', as the Statute forbids them to incorporate in one Member State only to run their entire business elsewhere. The 'compensation'²²⁷ for this restriction, i.e. the possibility to transfer the registered office, as well as the option to choose the Member

²²³ Thömmes pp. 22-23. Compare Recital 27 of the Statute.

²²⁴ Compare 2.4 above.

²²⁵ McCahery/Vermeulen, 'Does the European Company Prevent the 'Delaware Effect'?', *European Law Journal* 11 (6) 2005, pp. 788, 797.

²²⁶ It is however unclear whether any Member States have yet engaged in competition-based lawmaking regarding SEs, see *ibid* p. 799.

²²⁷ Werlauff (p. 19) writes (ironically?) that the transfer of seat possibilities of the Statute are "meant to compensate" for the strictness of Article 7 of the Statute.

State where a new SE formed through merger shall have its seat, is at any rate costly and time-consuming.²²⁸

4.4 Some thoughts *de lege ferenda*

In a perfect world, the SE would be a purely supranational company form, with an exclusively European legal personality and the ability to make the most of corporate mobility throughout the EU. As should be clear from the presentation above, this is not the case. All is not lost, however. There is a good chance that the SE will, in the near future, be subjected to a far more liberal regime in terms of free movement. To conclude this essay, I will now present just how this might happen.

Being a Community law concept lacking a definition in the Statute, the term 'head office' may well be the subject of a question referred to the Court for a preliminary ruling under Article 234 EC. This would be most exciting, as it would also imply a clarification of the recent ECJ case law. For example, imagine a hypothetical case where an SE is formed in the UK only to conduct all its business and managerial functions through a branch in Denmark, just as *Centros Ltd.* did. It is likely that both Denmark and the UK would regard that SE as having moved its head office out of its state of incorporation, and if the SE then refuses to 'regularise its position', the UK would be obliged to liquidate it, subject to a right of judicial review for the SE under Article 64 (3) of the Statute. In the proceedings of that judicial review, the SE would probably argue that its Danish establishment is in fact not a head office, but a mere secondary establishment. This would allow, or eventually require the UK court to refer a question on the interpretation of the Statute's term 'head office' to the ECJ, as this question is neither *acte clair* nor *acte éclairé*. Since the ECJ did not once in *Centros* refer to the freedom of primary establishment, and in *Überseering* obviously left the Member States to define what constitutes a head office as regards national company forms, the outcome of such a preliminary ruling would be most captivating. Let us say that the UK court would refer the following questions to the ECJ.

(1) Does the place where the daily operating decisions are made and the managerial organs of an SE discharge their responsibilities for the company, in this case the branch situated in Copenhagen, Denmark, amount to the 'head office' under Article 7 of the Statute?

(2) If the answer to the first question is in the affirmative, do Articles 43 and 48 of the Treaty nonetheless preclude UK authorities from upholding the requirements of Articles 7 and 64 of the Statute, in the light of the Court's judgments in *Centros*, *Überseering* and *Inspire Art*?

If the Court were to follow the example set in *Centros* and answer the first question by stating that the branch was, regarding the SE as well, merely a secondary establishment, the effect would be that a 'head office' under the

²²⁸ Compare Tröger, pp. 57-58.

Statute is nothing more than a letter box (and hence identical to the registered office). Surely, such an outright brainless reading of the term can hardly be what the Community legislator had in mind, although it would have the positive effect of opening up the possibilities of jurisdiction shopping for SEs.

If the term ‘head office’ is, on the other hand, considered to relate to the place where the daily operating decisions are made and the managerial organs of the SE discharge their responsibilities (in line with various national definitions of the term), this would mean that the SE in the fictitious case at hand had moved its head office to Denmark. Thus, and I am quite sure of this, the first question would be answered in the affirmative. The second question is far more exciting, in that it would oblige the Court to specify whether the freedom of establishment grants companies the right to transfer the head office out of the state of incorporation, and decide whether to overrule *Daily Mail* or not. My belief is that, even though the *Daily Mail* doctrine is still a valid option, the Court would choose to set in on a new path. Letting the home state treatment (in line with *Lasteyrie*) reflect the more liberal practice on host state treatment would be most welcome in order to safeguard the right of free movement for companies, hence improving the prospect for corporate mobility throughout the EU. In addition, such a ruling would fundamentally improve the prospects of success for the SE as a company form, since it would no longer be placed at a disadvantage vis-à-vis national company forms regarding the cross-border transfer of the head office.

Even if the “*Centros II*” case envisaged above were never to occur, there still is the promissory provision in Article 69 (a) of the Statute, which places the requirement of concurrent placement of the registered office and the head office among the aspects of the Statute which will be reviewed by the Commission. The review will be submitted in the form of a report, at 8 October 2009 at the latest, and shall contain a recommendation as to whether it would be appropriate to permit the SE to have its head office and its registered office located in different Member States. It is my sincere expectation that Article 7 of the Statute will be changed. The European Company, as the flagship of EC company law, should of course be able to benefit from the freedom of movement and the right of establishment in their least limited forms, securing the ability to conduct its business, restructure and cooperate on a truly European level.

I am convinced that the SE could play an important role in raising the level of economic integration in the EU, and hence improving European competitiveness. However, for that scenario to come true, the deterring provision of Article 7 of the Statute has to be removed, thereby adding to the attractiveness of the European Company and improving its chances of long-term success.

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