



FACULTY OF LAW  
Lund University

Sandra Burkhardt

# Corporate Migration and its Implications for the Protection of Creditors

Recent Developments in the Case Law  
of the European Court of Justice

Master thesis  
15 credits

Supervisor:  
Sanja Bogojevic

Master's Programme in European Business Law

Spring 2012

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>3</b>
<b>ABBREVIATIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>5</b>
<b>2 THE PROTECTION OF CREDITORS</b>	<b>7</b>
2.1 What Does Creditor Protection Encompass?	7
2.2 Opposing Interests	8
2.3 The Freedom of Establishment	9
<b>3 THE POINT OF DEPARTURE: THE EARLY CASE LAW</b>	<b>11</b>
3.1 Method of Review	11
3.2 Analysis of the Cases	12
3.2.1 <i>Daily Mail (Case 81/87)</i>	12
3.2.2 <i>Centros (Case C-212/97)</i>	13
3.2.3 <i>Überseering (Case C-208/00)</i>	15
3.2.4 <i>Inspire Art (Case C-167/01)</i>	18
3.3 The Ensuing Debate	20
<b>4 SUBSEQUENT DEVELOPMENT OF THE CASE LAW</b>	<b>22</b>
4.1 Method of Review	22
4.2 Analysis of the Cases	22
4.2.1 <i>SEVIC Systems (Case C-411/03)</i>	22
4.2.2 <i>Cartesio (Case C-210/06)</i>	24
4.2.3 <i>VALE (Case C-378/10)</i>	25
4.3 Synoptic Examination	28

<b>5</b>	<b>THE CURRENT STATE OF CREDITOR PROTECTION</b>	<b>29</b>
5.1	The Minimum Capital Requirement	29
5.2	Disclosure of Information	33
5.3	“Vanishing” Companies	35
5.4	Will There Be A “Race to the Bottom”?	36
<b>6</b>	<b>CONCLUSION</b>	<b>41</b>
	<b>BIBLIOGRAPHY</b>	<b>42</b>
	<b>TABLE OF CASES</b>	<b>46</b>

# Summary

This thesis addresses the correlation between creditor protection and the cross-border seat transfer of companies in the light of the case law of the European Court of Justice concerning the freedom of establishment of undertakings.

After the restrictive outcome of *Daily Mail*, the judgment of the European Court of Justice in *Centros* took the legal community by surprise. The following cases of *Überseering* and *Inspire Art* intensified the ensuing debate even further. The issues brought up as possible consequences of the free choice of applicable company law included, in particular, concerns regarding the circumvention of national provisions for protecting creditors as well as a potential “race to the bottom”.

The central theme of this thesis is to which extent the state of creditor protection resulting from these cases was modified by the subsequent cases of *SEVIC Systems*, *Cartesio* and *VALE*.

In order to answer this question, the abovementioned cases are analysed with respect to their relevance for the protection of creditors. Subsequently, the current situation of creditor protection based on the case law is assessed, focussing on certain issues, which arose during the previous analysis.

Regarding a minimum capital requirement, the result is reached that it may help to increase the degree of protection, but does not provide a cure-all solution. Furthermore, a distinction is drawn between the legislation for creditor protection and the area of responsibility of the creditor.

The disclosure obligation imposed on the company in *Inspire Art* is found to miss the point. In this area, the Eleventh Council Directive provides a certain degree of harmonisation.

Concerning the issue of “vanishing” companies as caused by *Cartesio*, the judgment in *VALE* could provide a solution, if the Court decides to follow the Advocate General’s opinion.

Furthermore, the occurrence of a “race to the bottom” with respect to creditor protection is found to be unlikely.

Accordingly, this thesis establishes that the case law of the European Court of Justice regarding corporate migration has various implications for the protection of creditors. Yet, some of them are found to have a lesser effect than anticipated.

A higher degree of harmonisation would be desirable, so that consumers and other small creditors are enabled to comprehend the system and to take their decisions consciously.

# Preface

My thesis treats the current case law of the European Court of Justice regarding the freedom of establishment of undertakings under Articles 49 and 54 TFEU from the perspective of creditor protection.

This area of law awakened my interest for the first time during my studies at Bucerius Law School in Hamburg, where I focussed on the subject of corporate law during my later years of study. The topic caught my attention again in the case seminar on *Cartesio* within the Internal Market Law course in the first term of my master's programme in European Business Law here in Lund.

For many years, there has been a debate among legal scholars with regard to the aforementioned case law and how it affects the protection of creditors. The subject is very interesting and multifaceted, because it is continually kept current by the constant stream of case law by the European Court of Justice. Each case is capable of adding a new aspect to the present legal situation. This is the reason why I am so fascinated by the topic. The possibility to write this master's thesis enabled me to pursue an in-depth study in this subject area.

I would like to thank Sanja Bogojevic for her friendly supervision and advice during the writing of my thesis.

Sandra Burkhardt

Lund University, May 2012

# Abbreviations

AG	Advocate General
EC	Treaty establishing the European Community
ECJ	(European) Court of Justice
EEC	Treaty establishing the European Economic Community
EU	European Union
Para.	Paragraph(s)
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

# 1 Introduction

Articles 49 and 54 TFEU<sup>1</sup> grant companies and self-employed individuals the right to pursue economic activities through fixed establishments in other Member States without being exposed to unjustified restrictions.<sup>2</sup> Regarding the freedom of establishment of companies, the European Court of Justice<sup>3</sup> has developed an extensive body of case law over the last approximately 15 years.

Some of the judgments entailed serious potential risks for creditors. In particular, the cases of *Centros* (1999)<sup>4</sup>, *Überseering* (2002)<sup>5</sup> and *Inspire Art* (2003)<sup>6</sup> stirred up a profound debate among legal scholars.

The cross-border seat transfer of companies can have various effects – for example, it can lead to the circumvention of legal provisions of one Member State, which have as their purpose the protection of creditors.

After a few years, the discussion subsided, even though the ECJ continued to deliver further judgments concerning corporate migration.

This paper is seeking to answer the question in what way the more recent case law of the ECJ regarding the cross-border seat transfer of undertakings has affected the current status of creditor protection and whether or not it provides a good approach for this subject.

---

<sup>1</sup> The numbering of the Articles throughout the different Treaties was changed from Articles 52 and 58 EEC, to Articles 43 and 48 EC, and then to Articles 49 and 54 TFEU. All the while, their content remained essentially unchanged.

<sup>2</sup> Articles 49 and 54 TFEU; Barnard, *The Substantive Law Of The EU – The Four Freedoms*, 2010, page 295.

<sup>3</sup> Officially named “Court of Justice” since the Treaty of Lisbon, which entered into force in 2009. This paper will refer to it as “European Court of Justice” or “ECJ” for better distinctness, which court is being referred to.

<sup>4</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459 (in the following referred to as “*Centros*”).

<sup>5</sup> Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-09919 (in the following referred to as “*Überseering*”).

<sup>6</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* [2003] ECR I-10155 (in the following referred to as “*Inspire Art*”).



Naturally, the protection of creditors cannot be treated as the only and highest legally protected good in the assessment. It has to be reconciled with other legal interests, such as the economic interests and rights of the companies. This paper intends to look at the topic from a realistic perspective and strike a balance between the opposing legal interests.

The second chapter describes in which ways creditors need to be protected and which specific interests are involved. It also connects the protection of creditors with the freedom of establishment. The third chapter contains an overview over the early case law, including the above-mentioned cases, and the debate which resulted. In the fourth chapter, an analysis of the newer case law in view of creditor protection takes place, which is being evaluated in the fifth chapter. Finally, a conclusion is reached.

# 2 The Protection of Creditors

## 2.1 What Does Creditor Protection Encompass?

This chapter provides an overview of the protection of creditors. The meaning and significance of creditor protection are examined, as well as which circumstances can pose a threat to it. This is vital, as it provides the starting point for the following case law analysis.

First of all, it has to be established what exactly is meant by the term “creditor”. The Oxford Dictionaries define a creditor as “a person or company to whom money is owing.”<sup>7</sup> Thus, generally speaking, a creditor is someone who has some kind of claim against somebody else. This claim can, for example, be based on a contract (as will be the most frequent case). Consequently, both consumers buying products from a company as well as banks financing a company come under “creditors”.

A Member State may be a creditor as well, for example with regard to the payment of taxes. However, taking into consideration all conceivable types of claims a Member State might have against an undertaking would be too wide a subject in this context. Therefore, the considerations in this thesis will be limited to private creditors.

In their legal transactions, the aforementioned group of persons (or companies) can encounter various risks that are connected with the seat transfer of the company. These include, in particular, the risk of the creditor not to be able to recover the debt. This can be based upon incomplete information or misinformation, e.g. regarding the financial standing, which the creditor received before he entered into a contract with the company. It can also be

---

<sup>7</sup> Oxford Dictionaries (Online Edition), search term “creditor”.

related to an unfavourable decrease in the company's capital or to the circumstance that, after a transfer of its seat, the company proves to be simply untraceable.

It has to be considered, however, that creditors can vary in their commercial relevance. For instance, large companies and banks may often have the market power to require the debtor to provide a security. As a result, their risk of irrecoverable debts is lower than that of consumers.

To address all conceivable risks of creditors would lead too far. Therefore, this thesis will concentrate on the risk to be incompletely informed or misinformed as well as the risk of an adverse development of the company's capital.

The EU and its Member States have enacted several legal provisions which have as their objective to protect the creditor from the risks mentioned above. Particularly relevant for the subject at hand are the rules requiring companies to pay up a certain minimum capital upon incorporation and provisions regarding the disclosure of certain circumstances.

## **2.2 Opposing Interests**

Naturally, the protection of creditors cannot be regarded in isolation from the other legal interests involved.

From the companies' perspective, it is of importance that they can freely shape the structure and organisation of their company so as to suit their needs. For this, it is of particular interest to be able to freely choose the legal system applicable to the company, in order to choose the set of company law rules which is the most favourable to them (e.g. with respect to tax rates).

On the part of the Member States, the fulfilment of public responsibilities has to be ascertained. Under certain circumstances, it might occur that a

Member State pursues a public policy interest which counteracts the protection of creditors, such as the promotion of economic growth.

From the EU's point of view, all that is necessary for the unobstructed functioning of the internal market is important. For instance, a high degree of mutual recognition of undertakings incorporated in different Member States is desirable.

When assessing the state of creditor protection, these opposing interests have to be reconciled.

## 2.3 The Freedom of Establishment

The freedom of establishment, as laid down in Article 49 TFEU, entitles self-employed persons to pursue economic activities through fixed establishments in other Member States. The right of primary establishment covers the initial formation of a place of business, whereas the right of secondary establishment concerns the creation of further places of business. Specifically the setting-up of agencies, of branches and of subsidiaries are mentioned by the Treaty.

Article 54 TFEU grants the same right to undertakings which were formed under the law of a Member State and have their real seat, registered seat or principal place of business within the Union.<sup>8</sup>

Articles 49 and 54 TFEU prohibit restrictions of the freedom of establishment. The wording of the Articles and the early case law of the ECJ refer only to the equal treatment with nationals<sup>9</sup> – however, Articles 49 and 54 TFEU also preclude any impediment of the exercise of the right conceded.<sup>10</sup>

---

<sup>8</sup> Articles 49, 52 and 54 TFEU; Barnard, *The Substantive Law Of The EU – The Four Freedoms*, 2010, page 295 ff.

<sup>9</sup> See, for example, *Daily Mail*, para. 17, and *Centros*, para. 19.

<sup>10</sup> See, for example, Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECR 00000 (in the following referred to as “*National Grid Indus*”), para. 35, with further references.

This freedom can only be restricted when the restriction is justified according to Article 52 TFEU.<sup>11</sup>

And also beyond that, the scope of protection has been gradually shaped by the European Court of Justice.

Creditor protection frequently appears in the context of justification of restrictions of the freedom of establishment. It is one of the concepts which can constitute imperative reasons of overriding public interest.<sup>12</sup>

However, the argumentation of the European Court of Justice regarding the freedom of establishment does not always explicitly refer to the protection of creditors. Nevertheless, when a judgment shapes the general conditions within which undertakings may transfer their seat, it is able to affect the situation of the creditors.

The next chapters analyse the relevant cases with respect to aspects of creditor protection, as knowledge of these is required in order to understand their relevance for the opening question.

In the process, particular attention has to be paid to the difference between the registered seat and the real seat of a company. Whereas the real seat describes the main place of the company's administration, the registered seat refers to the place which appears in the company's entry in the commercial register and which has to be situated within the Member State of incorporation.<sup>13</sup> Confusing these two concepts may lead to inappropriate results, as happened for example in the course of *Cartesio*.<sup>14</sup>

---

<sup>11</sup> See, for example, *National Grid Indus*, para. 42, with further references.

<sup>12</sup> See, for example, *Überseering*, para. 92.

<sup>13</sup> Ringe, *The European Company Statute in the Context of Freedom of Establishment*, *Journal of Corporate Law Studies*, Vol. 7, October 2007, page 188.

<sup>14</sup> In its submission to the court, the Irish Government, relying on an incorrect English translation, referred to the transfer of the registered seat, whereas the case actually concerned a transfer of the real seat. See Case C-210/06 *Cartesio Oktató és Szolgáltató bt.* [2008] ECR I-000 (in the following referred to as "*Cartesio*"), para. 41-53; Gerner-Beuerle, Schillig, *The Mysteries of Freedom of Establishment After Cartesio*, *International & Comparative Law Quarterly*, Vol. 59, No. 2, 2010, pages 5-6.

# 3 The Point of Departure: The Early Case Law

## 3.1 Method of Review

This chapter considers the legal debate that took place after the judgment in *Centros*. First, the relevant cases – *Daily Mail*<sup>15</sup>, *Centros*, *Überseering* and *Inspire Art* – are examined in chronological order and afterwards the arguments of the discussion are summarised.

The cases are analysed with the protection of creditors in mind. Particular attention is given to the risks and scenarios mentioned in the previous chapter.

Each of the following subsections starts with a short summary of the most important facts of the case. This summary is not all-encompassing; it is reduced to those facts and referred questions which are relevant to the protection of creditors.

The summary of the case facts is based on the presentation of facts in the judgment. For reasons of clarity and comprehensibility, the names of the companies involved are shortened in a reasonable way. The full company name can usually be inferred from the case citation.

Thereafter, the argumentation in the judgment are examined and the Court's findings are summarized with reference to the respective paragraph of the judgment.

---

<sup>15</sup> 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 (in the following referred to as “*Daily Mail*”).

## 3.2 Analysis of the Cases

### 3.2.1 Daily Mail (Case 81/87)

*Daily Mail*, a tax law case from 1988, is typically the first case mentioned in the context of corporate migration.

The British company Daily Mail intended to move its place of central management from the UK to the Netherlands in order to avoid the higher tax rates in the UK. British company legislation permitted companies to transfer their real seat while keeping their legal personality and continuing to be incorporated in the UK. The UK tax legislation, however, relied on the real seat of a company and would, thus, cease to be applicable in the case of a seat transfer abroad.

One of the UK tax law provisions required the consent of the Treasury, should a company wish to cease being a UK resident under the UK tax regime. Daily Mail applied for the consent to move its administrative seat, and, subsequently, opened its new management office in the Netherlands without waiting for the Treasury's reply.

The Treasury then refused permission for the transfer of seat and Daily Mail initiated legal proceedings, basing its argumentation on Articles 52 and 58 EEC. The competent British court turned to the ECJ, asking whether the requirement of prior consent was, under the given circumstances, contrary to the freedom of establishment.

The ECJ began its analysis by stating that, in general, Articles 52 and 58 EEC grant companies established under one Member State's company law the right to establish themselves in another Member State. Otherwise, these Articles would be devoid of meaning since the Member States would be able to prohibit seat transfers abroad.<sup>16</sup>

However, the Court found that "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of

---

<sup>16</sup> *Daily Mail*, para. 16.

national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.”<sup>17</sup>

Therefore, the questions, which circumstances are required as a connecting factor and whether the registered or real seat may be transferred into another Member State, fall into the scope of national law.<sup>18</sup> Consequently, Articles 52 and 58 EEC do not grant companies the right to transfer their administrative seat to another Member State while continuing to be subject to the company law of the first Member State.<sup>19</sup>

### **3.2.2 Centros (Case C-212/97)**

The *Centros* case from 1999 concerns an inbound scenario. It deals with the potential circumvention of national provisions regarding the paying-up of the minimum capital of a company.

Centros Ltd was a private limited company registered in England and Wales, whose shares were held by two Danish nationals residing in Denmark. The company’s registered office was in London.

In 1992, Centros’ director requested the Danish Trade and Companies Board (“the Board”) to register a branch in Denmark. The Board, however, denied the request, arguing that Centros was actually intending to form a principal establishment in Denmark, since it had not been engaged in business in the UK so far. By carrying out the registration, the Danish rules regarding the paying-up of minimum capital amounting to 200 000 DKK would be circumvented.

Centros then instituted legal proceedings, claiming that, due to its lawful formation in the UK, the Board’s refusal to register a branch in Denmark was contrary to Articles 52 and 58 EEC. The Board argued that its refusal

---

<sup>17</sup> *Daily Mail*, para. 19.

<sup>18</sup> *Daily Mail*, para. 23.

<sup>19</sup> *Daily Mail*, para. 24, 25.



was justified by the need to protect private and public creditors and other contracting parties as well as by the aim of preventing fraudulent insolvencies.

The first instance court confirmed the Board's decision, the second instance court referred the question of compatibility with Articles 52 and 58 EEC to the ECJ.

The Court began by rejecting the submission of the Danish Government, which had argued that the scenario at hand constituted a purely internal situation. It found Centros' lack of intent to conduct business in the UK to be immaterial.<sup>20</sup>

Regarding the question referred, it stated that Articles 52 and 58 EEC gave companies, *inter alia*, the right to set up branches in other Member States, and that the refusal to register such a branch prevented the companies from exercising their freedom of establishment.<sup>21</sup>

The Danish authorities claimed that Centros' course of action constituted an abuse of its rights conferred by Articles 52, 58 EEC and that, consequently, Denmark was entitled to prohibit the abusive conduct.<sup>22</sup>

The Court clarified that a Member State is indeed authorised to prevent abuse of national or Community law, but the situation has to be assessed whilst taking into account the objectives of those provisions.<sup>23</sup> The Danish provisions in question concern the formation of companies. The freedom of establishment, however, applies to undertakings which are already incorporated.<sup>24</sup>

---

<sup>20</sup> *Centros*, para. 16-18, referring to Case 79/85 *Segers v Bedrijfsvereniging voor Bank- en Verzekeringwegen, Groothandel en Vrije Beroepen* [1986] ECR 2375 (in the following referred to as "*Segers*"), para. 16.

<sup>21</sup> *Centros*, para. 19-22.

<sup>22</sup> *Centros*, para. 23.

<sup>23</sup> *Centros*, para. 24-25.

<sup>24</sup> *Centros*, para. 26.

Furthermore, the Court stated that a national of a Member State was free to choose to incorporate its company in the Member State whose company law regime appeared the most favourable to him. The exercise of this free choice of company law could, therefore, not be considered as abusive.<sup>25</sup> Consequently, under the given circumstances, the refusal to register Centros' branch in Denmark was contrary to Articles 52 and 58 EEC.<sup>26</sup>

The Danish government argued that its restriction of the freedom of establishment was justified by reasons of creditor protection and the financial soundness of the undertakings.<sup>27</sup> The ECJ found, however, that the refusal to register Centros' branch in Denmark was not suitable for protecting creditors, since, had Centros conducted business in the UK before, its branch would have been registered in Denmark nonetheless, even though creditors would have been affected in the same way. Therefore, the criteria for a justification of the restriction of Articles 52, 58 EEC were not met.<sup>28</sup>

Finally, the Court was of the opinion that it was apparent for creditors that the company at hand was incorporated in the UK. By this, they were informed that the company was governed by different laws than those applicable in Denmark.<sup>29</sup>

### **3.2.3 Überseering (Case C-208/00)**

The *Überseering* case from 2002 addressed the issue of the connecting factor for the legal capacity of a company.

Überseering, a company incorporated in the Netherlands, purchased a piece of land in Germany. It then engaged the German company NCC to refurbish

---

<sup>25</sup> *Centros*, para. 27.

<sup>26</sup> *Centros*, para. 30.

<sup>27</sup> *Centros*, para. 32.

<sup>28</sup> *Centros*, para. 35.

<sup>29</sup> *Centros*, para. 36.

some of the buildings on the site. NCC carried out the work insufficiently and Überseering brought proceedings against NCC before a German court.

According to the German Code of Civil Procedure, in order to bring legal proceedings, a company is required to have legal capacity. In its settled case law, the German Federal Court of Justice (Bundesgerichtshof) applied the real seat principle, which draws upon the place of actual administration for determining the applicable law.

Between placing the order with NCC and the beginning of the court proceedings, all of Überseering's shares had been acquired by two German individuals. For this reason, the court considered that the company had moved its administrative seat to Germany. Consequently, German law was found to be applicable. Under German law, however, Überseering did not have legal capacity, since it was founded in the Netherlands. The courts in first and second instance dismissed the action and Überseering appealed to the Federal Court of Justice, which then referred to the ECJ. It explained its view on why the real seat principle should be seen as the appropriate solution and asked, when a company was lawfully incorporated under the law of one Member State and subsequently moved its administrative headquarters to another Member State, according to which Member State's law the company's legal capacity would have to be determined in order to be compatible with Articles 43 and 48 EC.

The ECJ found that it could not rely on its judgment in *Daily Mail* for solving the case at hand, since *Daily Mail* concerned an outbound scenario and the requirements for keeping a certain Member State's company law as applicable law.<sup>30</sup> The Dutch law, however, allowed the transfer of the administrative seat to another Member State and Überseering was still validly incorporated there.<sup>31</sup>

---

<sup>30</sup> *Überseering*, para. 62, 65-66.

<sup>31</sup> *Überseering*, para. 63.

Instead, the Court referred to its argumentation in *Centros* and stated that a company had to be treated equal to a natural person being a national of Member State, when the company was validly incorporated in one of the Member States and had its registered seat, real seat or principal place of business within the Union. Thus, it found that *Überseering* could rely on its freedom of establishment.<sup>32</sup>

Under German law, a company such as *Überseering* would be forced to reincorporate in Germany in order to judicially enforce claims against other German companies.<sup>33</sup> The Court found this to be equivalent to an “outright negation” of the rights granted by Articles 43, 48 EC, and thus to be incompatible.<sup>34</sup>

The German government argued that the German rules were set up to, inter alia, protect creditors and improve legal certainty. As an example, the government mentions the fixed minimum share capital.<sup>35</sup> Under certain conditions, it is possible for restrictions of the freedom of establishment to be justified by overriding requirements of the general interest, e.g. the protection of creditors, minority shareholders, employees and taxation authorities.<sup>36</sup> However, the capacity to bring legal proceedings before a court has such a fundamental meaning that would entirely negate the freedom of establishment of companies.<sup>37</sup>

Therefore, the Court found that in a situation where a company, which was validly incorporated under the law of one Member State and has its registered office in this Member State, moves its administrative headquarters to another Member State, this second Member State is precluded from refusing to recognise the company’s legal capacity. The company has to be capable

---

<sup>32</sup> *Überseering*, para. 75-76, referring to *Centros*, para. 19.

<sup>33</sup> *Überseering*, para. 79.

<sup>34</sup> *Überseering*, para. 81-82.

<sup>35</sup> *Überseering*, para. 87.

<sup>36</sup> *Überseering*, para. 92.

<sup>37</sup> *Überseering*, para. 93.

of bringing proceedings before a court in the Member State where it has its administrative seat.<sup>38</sup>

### **3.2.4 Inspire Art (Case C-167/01)**

The *Inspire Art* case from 2003 concerned obligations of disclosure and minimum capital imposed by a Dutch law.

Inspire Art Ltd, a company incorporated under the law of England and Wales, applied for registration of a branch in the Dutch commercial register. Dutch law required companies incorporated outside the Netherlands to include a description as “formally foreign company” in their entry in the Dutch commercial register and to indicate this description in the documents used in their business transactions, in case they carried on their business solely or almost solely in the Netherlands. Since Inspire Art conducted its business entirely in the Netherlands, the Dutch authorities imposed a corresponding obligation on the undertaking.

The same law also required the company’s subscribed capital to be at least 18 000 EUR, which is the same as for a Dutch limited company. The directors of the company were subject to personal liability until the capital had been paid up as well as in the event that, during the company’s activities, the capital fell below that amount.

Inspire Art did not meet the obligation to indicate in the commercial register that it was a “formally foreign company” and the Chamber of Commerce initiated legal proceedings. The competent court turned to the ECJ and asked whether Dutch legislation was allowed to attach additional conditions to a company registering a branch in the Netherlands, in order to take advantage of the more favourable UK company law while avoiding the application of the more restrictive Dutch company law.

---

<sup>38</sup> *Überseering*, para. 94-95.

Regarding the obligation to indicate its status as a “formally foreign company”, the ECJ based its argumentation on the Eleventh Council Directive<sup>39</sup>. This Directive laid down certain disclosure obligations, which did not, however, include the abovementioned description.<sup>40</sup> The Directive was enacted with the objective to harmonise disclosure required by branches in order to avoid restrictions of the freedom of establishment caused by excessive requirements. This goal could not be attained if the list of disclosure requirements in the Directive was not exhaustive.<sup>41</sup> Consequently, the Directive precluded suchlike provisions that were not stated in the list.<sup>42</sup>

Concerning the capital requirement, the ECJ stated, relying on *Centros*<sup>43</sup> and *Segers*<sup>44</sup>, that the circumstance, that Inspire Art was incorporated in the UK, even though it intended to carry on its business in the Netherlands, was irrelevant for the application of Articles 43, 48 EC, even if the sole purpose was to avoid Dutch company law.<sup>45</sup>

The Dutch law in question applied mandatorily to companies which were incorporated in other Member States and conducted their business in the Netherlands. When such a company planned to register a branch in the Netherlands, it had to fulfil the obligations imposed by the Dutch law. Therefore, the company’s exercise of its freedom of establishment was impeded.<sup>46</sup>

Considering a possible justification of the restriction, the Court found that the possible creditors of Inspire Art were sufficiently notified about its

---

<sup>39</sup> Eleventh Council Directive 89/666/EEC of 21 December 1989, OJ 1989 L 395.

<sup>40</sup> *Inspire Art*, para. 65.

<sup>41</sup> *Inspire Art*, para. 68-69.

<sup>42</sup> *Inspire Art*, para. 71-72.

<sup>43</sup> *Centros*, para. 17-18.

<sup>44</sup> *Segers*, para. 16.

<sup>45</sup> *Inspire Art*, para. 95-96, 98.

<sup>46</sup> *Inspire Art*, para. 100-101, 104-105.

incorporation outside the Netherlands, since the company held itself out as a company being subject to the law of England and Wales.<sup>47</sup>

Furthermore, as the British Government and the Commission argued, the Dutch law in question does only apply to companies conducting their entire or almost entire business in the Netherlands. Had Inspire Art carried out even minor business activity in another Member State, it would not have been subject to the provision, although the risk for the creditors would have been the same.<sup>48</sup>

Consequently, the ECJ reached the result that the restriction of the freedom of establishment of companies could not be justified.<sup>49</sup>

### 3.3 The Ensuing Debate

The judgments in *Centros*, *Überseering* and *Inspire Art* sparked an extensive debate among legal scholars. The discussion focussed mainly on two central issues: first, the statement made by the ECJ that a company was free to choose the Member State of incorporation with the most favourable company laws, and second, the possibility for the companies to evade national provisions, for example those requiring a certain minimum capital.

Originally, in some of the Member States, the law was based on the so-called real seat theory, whose application had entailed that undertakings had to comply with the standards set out by the company law of the Member State in which they had their administrative seat.<sup>50</sup> Naturally, this constituted an obstacle to cross-border seat transfers of companies. Therefore, in

---

<sup>47</sup> *Inspire Art*, para. 135.

<sup>48</sup> *Inspire Art*, para. 126.

<sup>49</sup> *Inspire Art*, para. 142.

<sup>50</sup> Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 4-7; Sturmfels, "Pseudo-Foreign Companies" in Germany – *The Centros, Überseering and Inspire Art Decisions of the European Court of Justice*, Key Aspects of German Business Law, 2009, page 60.

*Überseering*, the ECJ found the application of the real seat theory to be contrary to the freedom of establishment. This opened the doors for companies taking advantage of the full range of corporate law regimes of the Member States and choosing the system they deemed the most favourable. The ECJ had already clarified in *Centros* that this behaviour did not constitute an abuse of the freedom of establishment of undertakings.<sup>51</sup>

The aim of the real seat theory had been to impose national standards of a Member State, regarding for example the protection of creditors, on so-called “pseudo-foreign companies” – companies, which were incorporated in one Member State, but had their principal place of business in another.<sup>52</sup> Consequently, there was great concern that, due to the circumvention of national provisions such as the minimum capital requirements, creditors might be placed in a disadvantageous position.<sup>53</sup>

Some authors also feared that, following *Centros*, legislative competition between the Member States could arise. This situation could lead to a so-called “race to the bottom” under which public policy standards of the Member States might suffer even more.<sup>54</sup>

The outcome of these issues, taking account of the recent case law, will be addressed in chapter 5.

---

<sup>51</sup> *Centros*, para. 27.

<sup>52</sup> Bachner, *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse*, 2009, page 3; Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 8.

<sup>53</sup> See, for example, the concerns expressed by the German Federal Court of Justice (Bundesgerichtshof) in *Überseering*, para. 13 ff., esp. para. 16.

<sup>54</sup> *Geltung der Sitztheorie nach der Centros-Entscheidung des EuGH*, DNotZ 2000, pages 785-786; Ryan, *Will There Ever Be a “Delaware of Europe”?* Columbia Journal of European Law, Vol. 11, pages 199-200. Sceptical: Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 34-35.



# 4 Subsequent Development of the Case Law

## 4.1 Method of Review

In this chapter, the newer cases of *SEVIC Systems*<sup>55</sup>, *Cartesio* and *VALE*<sup>56</sup> are analysed, following the same scheme as above. All of these cases are relevant in their own way to corporate migration and the protection of creditors.

After this, a synoptic assessment of the cases is given. Detailed considerations based on the case law will be presented in the following chapter.

## 4.2 Analysis of the Cases

### 4.2.1 SEVIC Systems (Case C-411/03)

The *SEVIC Systems* case from 2005 concerned a cross-border merger between a German and a Luxembourgian company.

*SEVIC Systems*, a company incorporated in Germany, and *Security Vision*, a company established in Luxembourg, had agreed to merge and *SEVIC Systems* applied for registration of the merger in the German commercial register. However, the German law on the transformation of companies only encompassed rules for mergers between German companies and accordingly the application was rejected. *SEVIC Systems* instituted legal proceedings and the competent court turned to the ECJ, asking whether the refusal to

---

<sup>55</sup> C-411/03 *SEVIC Systems AG* [2005] ECRI-10805 (in the following referred to as “*SEVIC Systems*”).

<sup>56</sup> C-378/10 *VALE Építési kft.*, judgment not delivered yet (in the following referred to as “*VALE*”).

register the merger, on the basis that German law did not provide for cross-border mergers, was contrary to Articles 43, 48 EC.

The ECJ found that, since German law provided for mergers between national companies, but not cross-border mergers, there was a difference in treatment.<sup>57</sup> Referring to the wording of the second paragraph of Article 43 EC, it held that the freedom of establishment also applied to cross-border mergers.<sup>58</sup> Cross-border mergers facilitate the access to other Member States and thus represent a particular way of exercising the right of establishment.<sup>59</sup>

The merger agreement between SEVIC Systems and Security Vision stipulated the absorption of Security Vision and its dissolution without liquidation. The Court found this to be an effective method of merging the undertakings without interruption of the business operations, as would have occurred if Security Visions had been dissolved first and a new company had been founded, to which, then, the assets would have been transferred.<sup>60</sup> Therefore, the difference in treatment between national and cross-border mergers was contrary to the freedom of establishment.<sup>61</sup>

Compared to mergers between companies within one Member State, cross-border mergers entail specific challenges.<sup>62</sup> Therefore, it is conceivable that imperative reasons of overriding public interest, e.g. the protection of creditors, may be able to justify such a restriction.<sup>63</sup> However, in Germany, the registration of a cross-border merger in the commercial register is generally refused, irrespective of whether or not public interests are affected. This

---

<sup>57</sup> *SEVIC Systems*, para. 13-14.

<sup>58</sup> *SEVIC Systems*, para. 16-17.

<sup>59</sup> *SEVIC Systems*, para. 18-19.

<sup>60</sup> *SEVIC Systems*, para. 21.

<sup>61</sup> *SEVIC Systems*, para. 22.

<sup>62</sup> *SEVIC Systems*, para. 27.

<sup>63</sup> *SEVIC Systems*, para. 28.

practice goes beyond what would be necessary to attain the objective.<sup>64</sup> Therefore, the general refusal to register in the commercial register the cross-border merger applying a method which would be allowed between national companies was contrary to Articles 43 and 48 EC.<sup>65</sup>

#### **4.2.2 Cartesio (Case C-210/06)**

In the *Cartesio* case from 2008, Cartesio, a company formed under Hungarian law, planned to transfer its place of central administration (i.e. its real seat) to Italy while continuing to be subject to Hungarian company law. Therefore, it applied to the Hungarian authorities for registration of its new seat in Italy in the commercial register. The application was rejected on the basis that Hungarian law, regarding companies incorporated in Hungary, did not provide for seat transfers into other Member States while preserving the applicable law. Hungarian law, which was based on the real seat theory, required a company, wishing to transfer its administrative seat abroad, to dissolve and to re-incorporate under the company law of the new place of establishment.

Cartesio appealed to the competent Hungarian Regional Court, which then referred the underlying question, whether the refusal to register Cartesio's new seat was contrary to the freedom of establishment, to the ECJ.

The Court began its analysis by referring to its judgment in *Daily Mail* and stated that "companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning".<sup>66</sup> The Court found that the question whether a company is protected by the freedom of establishment is a preliminary issue and therefore has to be

---

<sup>64</sup> *SEVIC Systems*, para. 29-30.

<sup>65</sup> *SEVIC Systems*, para. 31.

<sup>66</sup> *Cartesio*, para. 104, referring to *Daily Mail*, para. 19.

treated by the respective national law. It compared the matter to the nationality of individual persons, which is regulated by national law as well.<sup>67</sup>

Thus, the freedom of establishment only applies to companies which are validly formed in accordance with the law of a Member State. The Member State is free to define the requirements for the incorporation of a company as well as for the maintaining of its status. Should a company wish to move its administrative seat abroad, thereby breaking the connecting factor stipulated under the law of incorporation, then the Member State, in which the company is incorporated, has the power to require the company to dissolve.<sup>68</sup>

Consequently, the Court held that Articles 43 and 48 EC did not preclude national legislation which prohibits transfers of a company's real seat into another Member State while continuing to be subject to the law of the Member State of incorporation.<sup>69</sup>

### **4.2.3 VALE (Case C-378/10)**

The *VALE* case is currently pending before the ECJ. The final judgment has not yet been delivered, but Advocate General Jääskinen has given his opinion in December 2011. Therefore, the case summary and legal issues involved will be presented on the basis of this opinion.<sup>70</sup>

The Italian company VALE intended to move its administrative seat from Italy to Hungary and applied for cancellation of its entry in the Italian commercial register. The Italian authorities carried out the request and noted in

---

<sup>67</sup> *Cartesio*, para. 109.

<sup>68</sup> *Cartesio*, para. 110.

<sup>69</sup> *Cartesio*, para. 124.

<sup>70</sup> AG Jääskinen's Opinion of 15th December 2011 is published at:

<http://eur-lex.europa.eu/Notice.do?val=628567&checktexts=checkbox>

At present, the document is not available in English. The following assessment is based on a translation of the German version by the author.

the company's register entry that VALE had moved its seat to Hungary. Subsequently, a new Hungarian company named VALE was founded and an application was filed for registration in the Hungarian commercial register, in combination with a statement about the Italian VALE company as the Hungarian VALE's legal predecessor. The request was rejected on the grounds that Hungarian law did not provide for entries in the commercial register to name another company as legal predecessor, if this other company was incorporated outside Hungary.

VALE appealed, but the Hungarian court confirmed the refusal. The company appealed again and the second-instance court referred to the ECJ, asking, in particular, whether, in the circumstances at hand, the protection of Articles 43 and 48 EC applied and if yes, whether this precluded national legislation which prevented the seat transfer from the Member State of origin, where the company was legally established, into the host Member State, where the company wished to continue its economic activity.

Regarding the applicability of Articles 43 and 48 EC, the AG stated that the focus should not merely be on the fact that the Italian VALE company had already been deleted from the commercial register. Instead, the associates' wish to exercise their freedom of establishment should be treated as the determining factor.<sup>71</sup>

The cross-border refounding of a company, in combination with a change of the applicable law, is a specific form of exercising the freedom of establishment. Such a refounding therefore falls into the scope of protection of Articles 43 and 48 EC.<sup>72</sup>

In *Cartesio*, the ECJ had made the conversion into a corporate form of the host Member State conditional on whether or not this state's national law provided for this. Hungarian law offered only companies incorporated in

---

<sup>71</sup> Opinion of AG Jääskinen in *VALE*, para. 48-50.

<sup>72</sup> Opinion of AG Jääskinen in *VALE*, para. 68-69.

Hungary to transfer their seat and to change their corporate form. However, from the principle of non-discrimination set out in *SEVIC Systems* it follows that the Member State is not allowed to apply different rules based on where the company in question is established. Therefore, the host Member State may require a company to fulfil any legal prerequisites that national companies would also have to fulfil, and it may refuse the transfer in individual cases due to overriding reasons of public interest, but it is not allowed to prohibit a transfer of the seat and a conversion into a national corporate form entirely.<sup>73</sup>

According to the AG, the question whether a company can demand that a company of another Member State is being noted as its legal predecessor in the commercial register, has to be answered in the affirmative, insofar as the legal succession is permissible under the law of the Member State of origin.<sup>74</sup> Jääskinen also recommended the recording of the legal predecessor for reasons of creditor protection.<sup>75</sup>

An all-encompassing transfer of rights and obligations from the old to the new company – as envisioned in the case at hand – is not possible, however, if the preceding company already lost its legal personality. Consequently, VALE cannot ask the Hungarian authorities to note its legal predecessor in the commercial register, unless it requests the Italian authorities first to revoke the deletion from the Italian commercial register.<sup>76</sup>

---

<sup>73</sup> Opinion of AG Jääskinen in *VALE*, para. 70-74.

<sup>74</sup> Opinion of AG Jääskinen in *VALE*, para. 77.

<sup>75</sup> Opinion of AG Jääskinen in *VALE*, para. 78.

<sup>76</sup> Opinion of AG Jääskinen in *VALE*, para. 79.

## 4.3 Synoptic Examination

The cases have shown that corporate migration covers various concepts, such as transfers of seat, cross-border mergers or the foundation of subsidiaries and branches.<sup>77</sup>

The case of *SEVIC Systems* concerned the entry of a cross-border merger in the commercial register. With the Court's clarification on the principle of non-discrimination, this case laid a potential foundation for *VALE* and later cases.

*Cartesio* dealt with a transfer of the real seat from Hungary to Italy with a preservation of the applicable company law. Although the case does not explicitly mention creditor protection, it is relevant nonetheless. A side note of the ECJ allowed companies to basically "vanish", thus rendering it more complicated for creditors to trace their debtor.

The *VALE* case, finally, is still an unknown quantity, since the ECJ has not delivered its judgment yet. At first view, the case facts seem to be opposite to those in *Cartesio* – a company moving its seat from Italy to Hungary, instead of the reverse. However, the cases differ insofar as *Cartesio* planned to keep the Hungarian company law as applicable law, while *VALE* intended to re-incorporate under Hungarian law, thereby raising different legal questions. It will be interesting to see whether or not the Court will follow AG Jääskinen's recommendation.

The next chapter will address the specific issues brought up by both the older and the newer cases.

---

<sup>77</sup> As summarised by AG Jääskinen in his opinion in *VALE*, para. 53.

# 5 The Current State of Creditor Protection

## 5.1 The Minimum Capital Requirement

*Centros* and *Inspire Art* conveyed, in particular, that Member States were not allowed to impose their national minimum capital requirements on companies incorporated in other Member States. Regarding this issue, the newer case law did not bring about any change. In order to assess the current situation, a realistic examination is necessary.

First of all, it has to be addressed, to which extent the provisions regarding a certain minimum capital would have been suitable at all.

German company law and the case law of the German Federal Court of Justice (Bundesgerichtshof) have the reputation to be very strict regarding the paying-up and maintenance of capital.<sup>78</sup> There are specific rules concerning the initial paying-up of the minimum capital, including for example how the minimum capital has to be made available to the company and how, in formations by non-cash capital contribution, the value of the object that is brought into the company has to be assessed.<sup>79</sup> The company is not allowed to reimburse the money paid or the item contributed.<sup>80</sup>

---

<sup>78</sup> Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 8; Sturmfels, “Pseudo-Foreign Companies” in Germany – *The Centros, Ueberseering and Inspire Art Decisions of the European Court of Justice*, Key Aspects of German Business Law, 2009, page 63.

<sup>79</sup> §§ 30, 31 GmbHG; for formations by non-cash capital contribution, see §§ 5 (4), 9 GmbHG.

<sup>80</sup> Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 8; Sturmfels, “Pseudo-Foreign Companies” in Germany – *The Centros, Ueberseering and Inspire Art Decisions of the European Court of Justice*, Key Aspects of German Business Law, 2009, page 63.



Furthermore, the members of the company will be personally liable in case they did not pay up their share or already used a part of the company's money until the date on which the company is registered.<sup>81</sup> When the company is bankrupt, the manager has to file for insolvency immediately, otherwise he would be personally liable.<sup>82</sup>

However, even these restrictive rules are far from being a guarantee that creditors can recover their debts.

To begin with, the concept of minimum capital merely means that, when the company was incorporated, it had a certain amount of capital at its disposal. In the course of the company's existence, this capital can diminish, since it is possible for the company to incur financial losses. Therefore, at a later point, the capital may not be available to the company any more.

Moreover, a company's capital does not necessarily correspond with money or objects. It can also consist of claims against other natural or legal persons. When a claim turns out to be irrecoverable, the capital lying therein is lost. This can be abused by two or more fraudulent undertakings working together. The undertakings enters into a contract, but the second undertaking deliberately fails to fulfil its obligation. The claim of the first undertaking then becomes irrecoverable and the company's capital decreases. The second undertaking then transfers the money to a safe place outside the EU. In this way, the first company can avoid the provisions regarding the maintenance of capital and the individuals behind the companies can make a profit at the creditors' cost, whose claims cannot be fulfilled any more, since the capital is no more available.

The provisions and case law also include rules leading to the personal liability of the manager of the undertaking. However, if the manager happens to live abroad, he is hard to prosecute. This means that, if a company is interested in abusing the limitation of liability, it has ways and means to

---

<sup>81</sup> § 11 (2) GmbHG.

<sup>82</sup> § 15a InsO.

ensure that the money will be gone and there will not be anyone left who could be held liable.

Naturally, not all limited liability companies pursue fraudulent motives. However, this example underlines that a required minimum capital is not a cure-all solution.

Nevertheless, relatively strict rules regarding the minimum capital can be useful. In the *Centros* case, the share capital of GBP 100 had never even been paid up.<sup>83</sup> Of course, *Centros* would have had the possibility to chose GBP 1 as its share capital instead, which would not have made any difference in the company's actual capital – however, interested future creditors inspecting the commercial register would have been informed, while in the case of the GBP 100, they would have to assume that the capital initially had been made available to the company.

Therefore, a provision requiring the actual paying-up of the share capital would be expedient, in that it would ensure that the information in the company's entry in the commercial register and the initial company capital correspond.

Another relevant aspect is the creditors' level of knowledge. In its judgments in *Centros* and *Inspire Art*, the ECJ was of the opinion that, since the companies indicated their corporate form, it was apparent for creditors that they were incorporated in the UK and, thus, were governed by different laws than those applicable in Denmark and the Netherlands.<sup>84</sup>

In practice, however, a great number of creditors have little or no conception of the meaning of the different corporate forms. This concerns, in particular, consumers or private persons who are interested or who were persuaded to invest their money in an undertaking. From a lawyer's or businessman's point of view, the corporate form allows conclusions regarding the inner structure and the minimum capital of the undertaking as well as to which

---

<sup>83</sup> *Centros*, para. 3.

<sup>84</sup> *Centros*, para. 36; *Inspire Art*, para. 124.

extent and under which circumstances its members can be held liable. This is not the case for the average consumer, though. Consumers and other small private creditors often are entirely unsuspecting with regard to the meanings of the different corporate forms of their own Member State, and even more so concerning the corporate forms of other Member States. Consequently, they are unaware of the potential risks that could result from entering into business relations with such an undertaking.

Yet, the provisions regarding the protection of creditors cannot have the objective to eliminate every single type of potential risk, especially not those risks falling into the area of responsibility of the creditor himself. This, of course, gives rise to the question, which level of knowledge can be demanded of the creditor. It seems appropriate to ask for a certain personal responsibility.

When a creditor decides to enter into a contract entirely uninformed, then this is his own decision. The general rule should be that every economic participant bears his own risk. If, for instance, an individual decides to become an investor in a smaller undertaking, seeking legal consultation is advisable. In *Inspire Art*, the ECJ found that “creditors must take some measure of responsibility for their own actions. If the assurances given them by the law of England and Wales do not satisfy them, they can either insist on additional security or refuse to conclude contracts with a company governed by foreign law.”<sup>85</sup> However, often, securities or information about the future debtor are not accessible for smaller creditors due to their limited market position. In this respect, the ECJ’s opinion on the creditors protecting themselves is unrealistic.<sup>86</sup>

Particularly those risks on which the creditor has no influence, should be protected against to a reasonable extent. From this, it follows that creditor protection should have the purpose to eliminate not only those risks that

---

<sup>85</sup> *Inspire Art*, para. 125.

<sup>86</sup> See also Adensamer, Bervoets, *Nationaler Gläubigerschutz auf dem Prüfstand – Die Entscheidung des EuGH in der Rs „Inspire Art“*, RdW 11/2003, article no. 538, chapter 3, especially the last paragraph.

result, for example, from an undertaking not indicating its corporate form, but also to a certain extent those risks that are caused, for example, by a severe undercapitalisation of the undertaking, since this falls outside the creditor's sphere of influence.

Especially consumers are often not in a position to inquire into the company's financial status, before they decide whether or not to conclude a contract with the company. In many cases, they have no other choice but to hope that the outcome of the transaction is positive. Naturally, a certain minimum capital is useful in this situation, because it entails that, at least upon incorporation of the company, a certain capital was available.

Consequently, a minimum capital requirement is not the perfect solution for all conceivable types of problems, but it does improve the situation of creditors to a certain extent. However, creditors should always aim for protecting themselves as well as possible in order to increase their chances to recover a claim.

## 5.2 Disclosure of Information

Another issue is the disclosure of information, particularly in the commercial register.

In *Inspire Art*, Dutch law required the company to indicate its status as a “formally foreign company” in its entry in the commercial register and in the documents used in its business transactions, since it carried on its business exclusively within the Netherlands, but was incorporated in another Member State. The Court referred to the Eleventh Council Directive<sup>87</sup> and found the obligation to be contrary to the freedom of establishment of undertakings, as it was not specified therein.<sup>88</sup> The Directive contains an exhaustive list of disclosure obligations of undertakings and, thereby,

---

<sup>87</sup> Eleventh Council Directive 89/666/EEC of 21 December 1989, OJ 1989 L 395.

<sup>88</sup> *Inspire Art*, para. 65.

provides a certain harmonisation in this area of law.<sup>89</sup> However, it only applies to branches and its objective is to avoid restrictions of the freedom of establishment.<sup>90</sup> Therefore, it is rather protecting undertakings against excessive disclosure obligations of Member States, than actually protecting creditors.

But also apart from this, the choice to indicate the company's status as a "formally foreign company" was unfortunate. When this description is used in the company's business documents, unsuspecting creditors either will not draw any conclusion at all – or they will assume that the fact that the undertaking is required to disclose this circumstance indicates its "dangerousness". A possible consequence could therefore be that consumers learn to generally avoid foreign companies, which is not what was intended.

The difficulties are not primarily caused by the fact that the undertaking is subject to the rules of another Member State, since this does not necessarily entail that the standard of creditor protection is lower. Instead, it is of importance that creditors take their decisions consciously and based on the individual circumstances.

The topic was brought up again in *VALE*, where Hungarian law did not provide for entries in the commercial register to indicate the legal predecessor of a company, if the predecessor company was incorporated outside Hungary. The issues occurring in this context will be addressed in the next subsection.

As a conclusion, it can be said that the EU and the Member States are responsible for ensuring that certain relevant information is disclosed by the undertakings in their business dealings or in their entry in the commercial

---

<sup>89</sup> *Inspire Art*, para. 66-70; Adensamer, Bervoets, *Nationaler Gläubigerschutz auf dem Prüfstand – Die Entscheidung des EuGH in der Rs „Inspire Art“*, RdW 11/2003, article no. 538, chapter 2.3, with further references.

<sup>90</sup> Fifth recital in the the preamble of the Eleventh Council Directive; *Inspire Art*, para. 68.

register. However, it falls into the area of responsibility of the creditor to draw the conclusions from it.

### 5.3 “Vanishing” Companies

In *Cartesio*, the ECJ acknowledged that the situation of an undertaking moving to another Member State with a change of the applicable law has to be treated differently from the situation that the undertaking wishes to keep the applicable law when moving its seat (as was the case in *Cartesio*).<sup>91</sup> The power of the Member State to determine the connecting factor required for acquiring and maintaining the status of being incorporated under the law of that Member State, does not give the Member State the right to require the winding-up or liquidation of the undertaking, should it intend to move its seat abroad and change the applicable law in the process, if the law of the second Member State allows the conversion.<sup>92</sup> Any requirement to such an extent would be contrary to Article 43 EC, unless the restriction can be justified in the specific case.<sup>93</sup>

The result of this was that an undertaking could move its seat from one Member State to another, without – depending on the law of the Member State – possibly any information in its entry in the commercial register regarding which new company in the other Member State became its legal successor. In this way, creditors could be faced with the problem that their debtor simply “vanished”. If the commercial register of neither the old nor the new Member State indicated the legal successor respective predecessor of the company, the company would be basically untraceable.

---

<sup>91</sup> *Cartesio*, para. 111.

<sup>92</sup> *Cartesio*, para. 110, 112; Biermeyer, Holtrichter, *Opinion of Advocate General Jääskinen in Case C-378/10 VALE, delivered on 15 December 2012, not yet reported. The missing puzzle in judge-made European law on corporate migration?* 18 *Columbia Journal of European Law*, F. 52 (2011), chapter IV 2); regarding the difficulties of this legal reference see Gerner-Beuerle, Schillig, *The Mysteries of Freedom of Establishment After Cartesio*, *International & Comparative Law Quarterly*, Vol. 59, No. 2, 2010, pages 5-6.

<sup>93</sup> *Cartesio*, para. 113, with further references.

This issue came up in the recent *VALE* case. The entry in the Italian commercial register merely indicated that VALE had moved its seat to Hungary, while Hungarian law did not provide for indication of a non-Hungarian company as legal predecessor in the commercial register. In this situation, creditors of VALE would have no reliable possibility to find out the whereabouts of the undertaking.

In his opinion in *VALE*, AG Jääskinen recognised the problem and advised the Court to rule that it must be possible to indicate companies incorporated in other Member States as legal predecessor as well.<sup>94</sup>

Accordingly, if the Court decides to follow AG Jääskinen in its judgment, this gap in the law will be closed.

## 5.4 Will There Be A “Race to the Bottom”?

After the *Centros* judgment was rendered, one of the subjects of the resulting debate was whether there would be a “race to the bottom” regarding the company law in Europe. Several legal scholars feared that a so-called “Delaware effect” would occur, meaning that, after a period of legislative competition between the Member States, the place with the lowest standards within Europe would emerge as the preferred place for company formations.<sup>95</sup>

To enlarge upon this whole debate would lead too far. Therefore, and with respect to the subject of this thesis, the question at this point will be whether there is a risk for a “race to the bottom” specifically with regard to the protection of creditors.

---

<sup>94</sup> Opinion of AG Jääskinen in *VALE*, para. 78.

<sup>95</sup> *Geltung der Sitztheorie nach der Centros-Entscheidung des EuGH*, DNotZ 2000, pages 785-786; Ryan, *Will There Ever Be a “Delaware of Europe”?* Columbia Journal of European Law, Vol. 11, pages 199-200. Sceptical: Baelz, Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, German Law Journal (2002), para. 34-35.

Naturally, undertakings are attracted by company laws requiring only a low minimum capital for a limited liability company. In this way, the owners are more flexible with regard to the amount of the company's capital and to which extent the profits should be distributed or kept within the company. However, it must be assumed that undertakings base their decision primarily on other criteria, rather than specifically on a low standard of creditor protection. Another significant factor are the applicable tax rates, particularly in view of the fact that some legal scholars are of the opinion that the secret of Delaware's success does not consist in its company law, but rather in its low tax rates.<sup>96</sup>

Beyond that, statistics exist, which show that a high standard of creditor protection is a determining factor for low rates of interest, that are asked for by financiers.<sup>97</sup> Accordingly, it might not be beneficial for an undertaking to specifically choose a country with a low standard of creditor protection.

This holds particularly true for undertakings which are dependent on financial support by external investors. Since, commonly, smaller companies are to a greater extent financially dependent than bigger companies<sup>98</sup>, it is even more relevant for these to ensure adequate creditor protection.

This implies that, should a "race to the bottom" regarding the applicable company law occur, a low standard of creditor protection is unlikely to be the crucial factor.

Moreover, in general, it can be said that companies pursue diverse interests and as a consequence, different company law rules are perceived as advantageous.

---

<sup>96</sup> Wymeersch, *Centros: A landmark decision in European Company Law*, 1999, para. 22.

<sup>97</sup> Fischer, *Economic Performance, Creditor Protection and Labor Inflexibility*, 2008, page 11, with further references.

<sup>98</sup> Fischer, *Economic Performance, Creditor Protection and Labor Inflexibility*, 2008, page 11, with further references.



Another relevant aspect that individuals interested in founding a “brass plate company” have to consider is that legal advice, specialized on the company law of the Member State of incorporation, will cause additional costs.<sup>99</sup>

However, it is indeed noticeable that the number of British Limited Companies (Ltd.)<sup>100</sup> being active in other Member States is significant. This outcome reveals that the British Limited Company seems to be a corporate form which is particularly favoured by a certain category of business people – apparently due to its non-existent minimum capital requirements and the absence of personal liability.

Nevertheless, the argument that the increased number of Limiteds is disadvantageous for the protection of creditors became less important during the last years. Germany, for example, has responded to this development by creating a new corporate form.<sup>101</sup> Starting in November 2008, interested parties were able to found a so-called “Unternehmergeellschaft (haftungsbeschränkt)” with the abbreviation of “UG (haftungsbeschränkt)”.<sup>102</sup> This corporate form equals the Limited in that it does not require a certain minimum capital and that there is no personal liability.<sup>103</sup>

The formation of a company of this new type is attractive in that the time-consuming accounting obligations and correspondence with the British authorities are no longer required. On these grounds, owner of British Limiteds, which were founded for the sole purpose of conducting business

---

<sup>99</sup> Sturmfels, “Pseudo-Foreign Companies” in Germany – *The Centros, Überseering and Inspire Art Decisions of the European Court of Justice*, Key Aspects of German Business Law, 2009, page 63.

<sup>100</sup> The full designation under British company law is “private company limited by shares”.

<sup>101</sup> The German Federal Ministry of Justice, *Schwerpunkte des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)*, 2008.

<sup>102</sup> In English, this means “entrepreneurial company with limited liability”. In the strict sense, the “UG (haftungsbeschränkt)” is not a new corporate form in itself, but a variant of the “Gesellschaft mit beschränkter Haftung” (GmbH) with a shortened minimum capital and a modified legal form suffix. The previous form of the GmbH continues to exist in parallel. For details, see the aforementioned *Schwerpunkte des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)*.

<sup>103</sup> § 5a GmbHG.

in Germany, might be motivated to convert their undertaking from a Limited to a UG (haftungsbeschränkt).

A disadvantage resulting from this might be that the number of companies without an obligatory minimum capital is likely to increase. However, the introduction of the new corporate form might also entail an improvement of creditor protection “through the back door”: The UG (haftungsbeschränkt) involves that at least 25% of the profit earned every year have to be kept within the company as a reserve. By this, the capital of the company slowly increases, which in turn makes it safer for creditors to enter into business relations with the company.

Besides, since the abbreviation of the legal form suffix still leaves the word “haftungsbeschränkt” (limited liability) visible, even creditors with limited knowledge about company law are informed of the absence of personal liability.

But the provisions regarding the UG (haftungsbeschränkt) have yet another twist: In order to avoid the obligation to keep parts of the annual profit as a reserve, the company can decide, once its reserve has reached 25.000 EUR, to “upgrade” itself into a full “Gesellschaft mit beschränkter Haftung” (GmbH)<sup>104</sup> – a limited liability company, which requires 25.000 EUR as minimum capital<sup>105</sup>. As a result, the profit earned by the company can be used in full, which makes it tempting to convert the company into a GmbH. To a GmbH, however, the extensive case law of the German Federal Court of Justice (Bundesgerichtshof) regarding the protection of the company’s capital – and thus the protection of creditors – applies.

Statistics reveal that, already within the first year after the introduction of the “UG (haftungsbeschränkt)”, almost 20.000 entrepreneurs chose this

---

<sup>104</sup> § 5a (5) GmbHG.

<sup>105</sup> § 5 (1) GmbHG.

corporate form.<sup>106</sup> Therefore, the objective of improving the standard of creditor protection has been increasingly attained.

This shows that, even when some Member States seem to offer more favourable conditions for companies, it is open to the other Member States to introduce strategies against this, as long as their approach is compatible with Articles 49, 54 TFEU.

Consequently, as these considerations show, based on the current situation, a significant EU-wide decline in the standard of creditor protection seems unlikely.

---

<sup>106</sup> See for example the publication of the University of Jena, *Forschungsprojekt Unternehmergesellschaft*, which obtained its information from the electronic commercial register.

## 6 Conclusion

To conclude, it can be said that the case law of the ECJ regarding corporate migration is influencing the situation of the creditors in various ways. Yet, as can be seen in the previous chapter, some of the risks anticipated in the debate that followed *Centros* have actually less significance than suspected. The minimum capital requirement, for example, is helpful for increasing the actual capital that is available for the satisfaction of creditors, but not as omnipotent as it was praised.

When examining questions of creditor protection, it is necessary to distinguish between those risks that fall into the creditors' own area of responsibility and those risks that go beyond. Especially for the latter group of risks, such as the non-registration of the legal predecessor in *VALE*, the EU and the Member States have to provide rules protecting the creditors.

Several Council Directives have already brought a certain degree of harmonisation.<sup>107</sup> However, with regard to the issues addressed in the previous chapter, except for the disclosure of information, the topic is still open.

The higher the degree of harmonisation is, the more can we expect consumers and other small creditors to be familiar with the meaning of the different corporate forms of undertakings and to increasingly take personal responsibility. The current solution to demand a high degree of self-responsibility in a rather complex field rather leads to a certain economic reluctance vis-à-vis foreign undertakings. If we aim for undertakings to pursue their business all across the European Member States, then we have to enable consumers and other small creditors to be aware of their own rights and risks.

A common standard would also be of advantage from the perspective of the undertakings since it renders the interaction with creditors and Member State authorities more predictable.

---

<sup>107</sup> See for example as an overview *Inspire Art*, para. 7 ff.

# Bibliography

## Articles and Books

The entries are ordered alphabetically by the author's last name:

- Adensamer, Nikolaus & Bervoets, Cécile *Nationaler Gläubigerschutz auf dem Prüfstand – Die Entscheidung des EuGH in der Rs „Inspire Art“*  
RdW 11/2003, article no. 538, available at  
<http://www.wu.ac.at/privatrecht/start-projekt/glaebiger-schutzrdw.pdf> (last accessed: 19. May 2012).
- Bachner, Thomas *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse*  
April 2009, the first ten pages are available at  
<http://www.cambridge.org/9780521895385>  
(last accessed: 19. May 2012)
- Baelz, Kilian & Baldwin, Teresa *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*  
German Law Journal (2002), available at  
<http://www.germanlawjournal.com/index.php?pageID=11&artID=214> (last accessed: 19. May 2012)
- Barnard, Catherine *The Substantive Law of the EU – The Four Freedoms*  
Third Edition 2010, Oxford University Press

- Biermeyer, Thomas & Holtrichter, Thore *Opinion of Advocate General Jääskinen in Case C-378/10 VALE, delivered on 15 December 2012, not yet reported. The missing puzzle in judge-made European law on corporate migration?*  
18 Columbia Journal of European Law, F. 52 (2011), available at [http://www.cjel.net/online/18\\_1-biermeyer](http://www.cjel.net/online/18_1-biermeyer) (last accessed: 19. May 2012)
- Fischer, Ronald *Economic Performance, Creditor Protection and Labor Inflexibility*  
September 2008, available at <http://ideas.repec.org/p/edj/ceauch/250.html> (last accessed: 19. May 2012)
- Gerner-Beuerle, Carsten & Schillig, Michael *The Mysteries of Freedom of Establishment After Cartesio*  
International & Comparative Law Quarterly, Vol. 59, No. 2, 2010, available at <http://ssrn.com/abstract=1340964> (last accessed: 19. May 2012)
- Ringe, Wolf-Georg *The European Company Statute in the Context of Freedom of Establishment*  
Journal of Corporate Law Studies, Vol. 7, October 2007, pages 185-212, available at <http://ssrn.com/abstract=998315> (last accessed: 19. May 2012)
- Ryan, Patrick S. *Will There Ever Be a “Delaware of Europe”?*  
Columbia Journal of European Law, Vol. 11, Winter 2004/2005, pages 187-200, available at <http://ssrn.com/abstract=763164> (last accessed: 19. May 2012)

Sturmfels, K. F.                    *“Pseudo-Foreign Companies” in Germany – The Centros, Überseering and Inspire Art Decisions of the European Court of Justice*  
Key Aspects of German Business Law, 2009, pages 59-64,  
available at <http://www.springerlink.com/content/w22715k4t4221w13> (last accessed: 19. May 2012)

Wymeersch, Eddy                    *Centros: A landmark decision in European Company Law*  
October 1999, available at  
<http://ssrn.com/abstract=190431> (last accessed: 19. May 2012)

## Other Publications

The entries are ordered alphabetically by the name of publishing institution:

Deutsche Notar-                    *Geltung der Sitztheorie nach der Centros-Entscheidung*  
Zeitschrift                            *des EuGH*  
October 2000, DNotZ 2000, pages 782-787, available at  
<http://beck-online.beck.de.ludwig.lub.lu.se/Default.aspx?typ=reference&y=300&z=DNOTZ&b=2000&s=782&n=1>  
(last accessed: 19. May 2012)

The Federal Republic                *Gesetz betreffend die Gesellschaften mit beschränkter Haf-*  
of Germany (Bundes-                *tung (GmbHG)*  
republik Deutschland)                Available at <http://www.gesetze-im-internet.de/gmbhg/>  
(last accessed: 19. May 2012)

The Federal Republic                *Insolvenzordnung (InsO)*  
of Germany (Bundes-                Available at <http://www.gesetze-im-internet.de/inso/>  
republik Deutschland)                (last accessed: 19. May 2012)

- The German Federal Ministry of Justice (Bundesministerium der Justiz) *Schwerpunkte des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)*  
26. June 2008, available at [http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Schwerpunkte\\_des\\_Gesetzes\\_zur\\_Modernisierung\\_des\\_GmbH\\_Rechts.html](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Schwerpunkte_des_Gesetzes_zur_Modernisierung_des_GmbH_Rechts.html) (last accessed: 19. May 2012)
- Oxford Dictionaries *Oxford Dictionaries (Online Edition)*  
Up-to-date version, available at <http://oxforddictionaries.com> (last accessed: 19. May 2012)
- University of Jena *Forschungsprojekt Unternehmersgesellschaft*  
Available at [http://www.rewi.uni-jena.de/Forschungsprojekt+Unternehmersgesellschaft\\_p\\_15113.html](http://www.rewi.uni-jena.de/Forschungsprojekt+Unternehmersgesellschaft_p_15113.html) (last accessed: 19. May 2012)



# Table of Cases

The cases are ordered alphabetically by their name:

Case C-210/06 *Cartesio Oktató és Szolgáltató bt.* [2008] ECR I-000

Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459

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

Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECR 00000

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

Case C-411/03 *SEVIC Systems AG* [2005] ECRI-10805

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

Case C-378/10 *VALE Építési kft.* – judgment not delivered yet. AG Jääskinen's Opinion of 15th December 2011 is available at:  
<http://eur-lex.europa.eu/Notice.do?val=628567&checktexts=checkbox>  
(last accessed: 19. May 2012)

Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-09919