A Market for Company Incorporations in the European Union?—Is *Überseering* the Beginning of the End?

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I. INTRODUCTION

In November 2002 the European Court of Justice (ECJ) gave its decision in Case C-208/00 *Überseering BV v. Nordic Construction Co. Baumanagement GmbH (NCC)* (*Überseering*).[1] This decision could bring the European Union closer to a situation in which there is competition between legal orders.[2] Until now, such a situation has been impossible and unwanted in the European Union. It has been impossible mainly because of the choice of law rules that are applied by the Member States, and it has been unwanted because of a fear that competition between Members would lead to a "race to the bottom," as Member States compete to offer the most permissive company law.[3]

European scepticism about regulatory competition has primarily been expressed by reference to the so-called "Delaware effect" or the "Delaware syndrome."[4] These terms have been widely used in the European debate to refer to an undesirable situation in the development in the United States where, throughout the twentieth century, U.S. corporation law was competitively deregulated by states attempting to attract corporations to their own jurisdictions.[5] Despite its small size, the

1. Case C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC) (*Überseering*), 2002 E.C.R. I-9919.

2. Another development in European company law that is likely to change the market for company incorporations is the creation of the SE Company (Societas Europaea or the European Company). *See* Council Regulation 2157/2001/EC, 2001 O.J. (L 294) 1 (Statute for a European company (SE)) [hereinafter SE Regulation]. It is beyond the scope of this Article, however, to assess the implications of this corporate form for company law forum shopping.

3. Karsten Engsig Sørensen & Mette Neville, *Corporate Migration in the European Union: An Analysis of the Proposed 14th EC Company Law Directive on the Transfer of the Registered Office of a Company from One Member State to Another with a Change of Applicable Law*, 6 COLUM. J. EUR. L. 181, 186 (2000).

4. *See* Hanne Søndergaard Birkmose, *The Fear of the Delaware-Effect—The American Demon*, *in* THE INTERNATIONALISATION OF COMPANIES AND COMPANY LAW 243 (Mette Neville & Karsten Engsig Sørensen eds., 2001); Sørensen & Neville, *supra* note 3, at 183, 186.

5. *See* Karsten Engsig Sørensen, *Prospects for European Company Law After the Judgment of the European Court of Justice in* Centros Ltd., 2 CAMBRIDGE Y.B. OF EUR. L. STUD. 203, 222-26 (Alan Dashwood & Angela Ward eds., 1999); Eva-Maria Kieninger, *Niederlassungsfreiheit als Rechtswahlfreiheit*, 5 ZEITSCHRIFT FÜR UNTERNEHMENS & GESELLSCHAFTSRECHT 724, 747 (1999).

state of Delaware is considered the winner of this competition because the vast majority of U.S. companies have been incorporated there.[6]

The debate on competition between legal orders is closely related to the debate on the freedom of establishment and corporate mobility. The right to set up a company in the state that offers the most favourable legal regime and the right to reincorporate an existing company are both preconditions for regulatory competition. However, from the very beginning, there has been a fear in the European Union that freedom of establishment and freedom of movement for European companies would have unwanted consequences, that is, competition between the Member States for company incorporations and a race to the Member State with the most lenient law. This fear was expressed very clearly by Clive M. Schmitthoff in 1973:

> First, unless the national company laws in the Community are identical in all essential aspects, a movement of companies to the state with the laxest company law will take place in the Community. If it may be said without giving offence to our friends in the U.S.A., the Community cannot tolerate the establishment of a Delaware in its territory.[7]

Freedom of establishment for natural and legal persons is one of the fundamental rights guaranteed by the Treaty Establishing the European Community (EC Treaty).[8] But these provisions must be understood in conjunction with article 44 EC, which concerns the implementation of the right of establishment.[9] On the basis of article 44(2)(g) EC, a number of company law directives have been implemented in the national laws of the Member States.[10] These directives can be seen as an attempt to eliminate the risk of the Delaware effect in the European Union.[11] As

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6. Approximately fifty percent of the companies listed on the New York Stock Exchange are incorporated in Delaware, as are nearly sixty percent of the companies that make up the Fortune 500. *See* Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. OF COLO. L. REV. 497, 498 (2000); *see also* Web site of the State of Delaware, *at* http://www.state.de.us/corp/index.htm.

7. Clive M. Schmitthoff, *The Future of the European Company Law Scene*, *in* THE HARMONISATION OF EUROPEAN COMPANY LAW 3, 9 (Clive M. Schmitthoff ed., 1973).

8. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) 33 (2002), *available at* http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf [hereinafter CONSOLIDATED EC TREATY]. "EC Treaty" will be used in this Article to refer to the Treaty Establishing the European Community as amended by the Treaty of Amsterdam.

9. *Id.* art. 44.

10. *Id.* art. 44(2)(g).

11. *See* Jan Wouters, *European Company Law:* Quo Vadis*?*, 37 COMMON MKT. L. REV. 257, 268-70 (2000); Charlotte Villiers, *Harmonisation of Company Laws in Europe—With an Introduction to Some Comparative Issues*, *in* EUROPEAN BUSINESS LAW 169, 177 (Geraint G. Howells ed., 1996); Christiaan W. A. Timmermans, *Die Europäische Rechtsangleichung im*

long as companies are subject to equally onerous provisions in all Member States,[12] it becomes less attractive for companies to forum shop and less likely that the Member States will relax their company laws in an attempt to attract a larger number of incorporations.[13]

On one hand, European companies were guaranteed the right of establishment, but on the other hand, the European Community wanted to make sure that this right did not result in the creation of a European Delaware and the relaxation of national corporate laws.[14] In this way, harmonisation can be seen as the price which some Member States demanded for accepting the right of establishment for companies.[15]

The harmonisation program has been less extensive than was originally intended, and there is serious doubt about whether the corporate law directives that were implemented have had a genuine effect on the restriction of corporate mobility.[16] National choice of law rules have been far more effective in restricting corporate mobility. But, given the recent decisions of the ECJ, this situation may be about to change. In light of *Überseering*, the aim of this Article is to analyse whether a market for business incorporations in the European Union has in fact been established,[17] thereby opening up competition between company law regimes.

Gesellschaftsrecht: Eine Integrations- und Rechtspolitische Analyse, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES & INTERNATIONALS PRIVATRECHT 1, 14 (1984); KARSTEN ENGSIG SØRENSEN & POUL RUNGE NIELSEN, EU-RETTEN 2, 27 (1999). *But see* Harm-Jan de Kluiver, *European and American Company Law: A Comparison After 25 Years of EC Harmonization*, 1 MAASTRICHT J. EUR. COMP. L. 139, 152 (1994).

12. *See* Bernard Gomard, *Selskabsretten i den Europæiske Union*, *in* NORDISKT LAGSTIFTNINGSSAMARBETE I DET NYA EUROPA 99, 106 (Ulf Bernitz & Ola Wiklund eds., 1996).

13. In this context, the term "forum shopping" covers the practice of choosing a country for the incorporation or reincorporation of a company on the basis of which country's company law is the most favourable.

14. Originally, the Netherlands in particular was considered a potential European "Delaware." *See, e.g.*, Timmermans, *supra* note 11, at 14; Wouters, *supra* note 11, at 268-70.

15. *Cf.* Christiaan Timmermanns, *Methods and Tools for Integration*, *in* EUROPEAN BUSINESS LAW 129, 132 (Richard M. Buxbaum et al., eds., 1991).

16. Whether or not harmonisation will have any effect on forum shopping depends on the areas covered by the directives. Only if those areas are of importance to the chosen state of incorporation can the directives be expected to have an effect. This does not seem to be the case. *See* HANNE SØNDERGAARD BIRKMOSE, KONKURRENCE MELLEM RETSSYSTEMER-DELAWARE-EFFEKTEN I ET EUROPÆISK SELSKABSRETLIGT PERSPEKTIV 227 (2004).

17. For a market for business incorporations to be established, it must be possible for a number of states to compete by offering a company law regime that is attractive to the decision-makers of the companies. Additionally, it must be possible for companies to choose freely between the different corporate law regimes offered by the states, regardless of whether the company conducts any economic activity in the state of incorporation or where its central administration is located. *See infra* Part III.

After this introduction, Part II will explain why it is feared that competition could have negative consequences for national corporate laws in the European Union. Assuming that it becomes possible for Member States to compete for business incorporations, then the European Union and the United States will, on the face of it, have several things in common, making it obvious to look to U.S. experience in order to predict the outcome of this competition between Member States. However, in most of the Member States it is not merely relationships between shareholders and the company that are regulated by company law. The interests of creditors and employees are also protected, and in particular, it is the protection of these interests that could suffer if the European Union experiences such competition between the Member States.

Part III analyses why there has not been, until now, competition between the Member States in the European Union. This is mainly due to the widespread use of the real seat (*siège réel*) doctrine, by which a company must be incorporated in the state in which it has its central administration (seat of management).[18] Because the company must be incorporated in the same state that the central administration is located, it is impossible to choose the state of incorporation independently of where the central administration is located.[19] It is not only the choice of law rules which prevent companies from forum shopping; it is also generally assumed that the right of establishment given by the Treaty of Amsterdam does not include a right for an existing company to transfer itself to become subject to another Member State's corporate law.[20] Therefore, it is assumed that for a company to reincorporate itself, it must be granted that right by national law.[21]

Recent decisions by the ECJ have severely limited the effect of the national choice of law rules on corporate mobility. The first case to have this effect was *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*.[22] The

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18. The term "central administration" is used in this Article to refer to the factor that is crucial to the choice of law according to the real seat doctrine. The Member States which apply this doctrine disagree on the exact interpretation of the term, but it is usually understood as being the seat of the management. Sørensen & Neville, *supra* note 3, at 184; *see also* BIRKMOSE, *supra* note 16, at 57. The terms "principal place of business" and "head office" are sometimes used to describe the same concept.

19. *See* Sørensen & Neville, *supra* note 3, at 184 ("[A] corporation is subject to the laws of the country in which it has its de facto head office; the corporation is further required to register in that country in order to acquire legal personality.").

20. *See id.* at 185 ("A transfer of the head office requires dissolution of the corporation in the state of departure . . . and reincorporation in the state of arrival.").

21. *Id.*

22. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459.

second was *Überseering*.[23] The importance of *Überseering* for corporate mobility in the European Union is analysed in Part IV. The analysis concludes that the *Überseering* case has severely restricted the negative effect of the real seat doctrine on corporate mobility in the European Union. The ECJ has imposed a duty on Member States to recognise a company that has been formed in accordance with the law of another Member State, even when the company's central administration is situated in a different Member State and the state of incorporation was chosen in order to avoid certain rules on the formation of companies in the state in which it has its central administration.[24] In other words, the right of establishment guaranteed by the Treaty overrides national choice of law rules.

Part IV analyses the significance of *Überseering* on the establishment of a market for company incorporations as well. The analysis shows that even though there is no doubt that *Überseering* has severely restricted the negative effect of the real seat doctrine on corporate mobility in the European Union,[25] it cannot be concluded that a market for company incorporations has been established. It can be argued that the European Union is very close to establishing a market for incorporations, but it is still not possible to reincorporate an existing company. Therefore, the European situation is still far from being the same as that in the United States. Part V comments on the latest decision of the ECJ, in the case of *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art* (*Inspire Art*).[26] Part VI sets out the conclusions of this study.

II. THE FEAR OF A DELAWARE EFFECT

The reason why European legal scholars refer to developments in the United States is that the European Union and the United States seem to have a lot in common with regard to the regulation of companies. First, the regulation of corporations in the United States is conducted at the state level, so that each state has its own corporate laws. This is very similar to the situation in the European Union where, in the absence of harmonisation, the power to regulate companies is vested in the Member

23. *See Überseering*, 2002 E.C.R. I-9919.
24. *Id.*
25. *Id.*
26. Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art, 2003 E.C.R. I-10155.

States.[27] Secondly, the conflict of laws rules in the United States allow competition. U.S. states apply the internal affairs doctrine, whereby a corporation is governed by the law of the state in which it is incorporated; it is immaterial whether the corporation conducts any economic activity there or where its central administration is located.[28] This "incorporation state" doctrine is applied in a number of the Member States in the European Union, and it has been debated whether the other main doctrine, the real seat doctrine, is incompatible with the Treaty of Amsterdam.[29] If it is, this would mean that the incorporation state doctrine would prevail in the European Union.

Even though the European and the American situations are similar in some ways, they differ in other respects. In the American debate, the main focus has been on the interests of the shareholders. The leading opinion is that the corporate laws should primarily regulate the relationships between the shareholders and the directors.[30] The interests of other stakeholders are not dealt with in the corporate laws, but are addressed in other ways. This is in contrast to the European approach where the prevailing opinion, at least in continental Europe,[31] is that company law should regulate more than just the relationships between directors and shareholders; it should also be concerned with the interests of creditors and employees.[32] This approach is also reflected in EU law, because the EU regulation of companies can, to a certain degree, be seen as a compromise accepted by the different Member States out of regard

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27. In this respect, the European Union may be compared with the United States to some extent, as the harmonisation may be compared with the federal regulation in the United States. Whereas there is some harmonisation of company law in the European Union there are no federal laws on this subject.

28. The U.S. states have traditionally respected this, even in cases where the law of the state of incorporation is more lenient than the law in the states in which the economic activity is carried on. *See* P. John Kozyris, *Corporate Wars and Choice of Law*, 1 DUKE L.J. 3, 15-30 (1985). There are exceptions, however, as a few states intervene in the internal affairs of foreign corporations. *See id.* at 55-76.

29. The "incorporation state" doctrine is applied by the United Kingdom, Ireland, the Netherlands, and Denmark among others, while Germany, Belgium, Austria, and France among others apply the real seat doctrine.

30. Some opponents of the race to the bottom theory have argued that the responsibility of the management is wider than merely the interests of the shareholders and that the corporate laws must reflect this. *See, e.g.*, Donald E. Schwartz, *Towards New Corporate Goals: Co-Existence with Society*, 60 GA. L. REV. 57-109 (1971); RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 8-9 (1976).

31. *See* Hanno Merkt, *Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs" der Gesetzgeber*, 59 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES & INTERNATIONALES PRIVATRECHT 545, 557 (1995).

32. Marcus Lutter, *Das Europäische Unternehmensrecht im 21. Jahrhundert*, 1 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 1, 1 (2000).

for the superior goals of the Union. Therefore, the EU regulation reflects the national interpretations of corporate law and what is taken into consideration by the national laws.[33]

To some extent, the company law directives reflect these different considerations. For example, the protection of creditors is secured by the capital requirements which are the main aim of the Second Company Law Directive.[34] According to this Directive, a public limited liability company is required to have a minimum capital of €25,000 at the time of its incorporation.[35] Further, other directives also consider the interests of creditors, though not to the same extent as the Second Company Law Directive, where it is the main focus. The Third and the Sixth Company Law Directives, concerning mergers and divisions of public limited companies respectively, both mention the protection of creditors in their preambles.[36] Other company law directives mention the interests of third parties without defining this concept.[37]

The interests of the employees are included in the national regulation of companies in a number of countries,[38] but they have not yet

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33. For example, German law influenced the first company law Directives, while Anglo-Saxon law has inspired, for example, the Thirteenth Company Law Directive on takeovers. *See* Gisbert Wolff, *The Commission's Programme for Company Law Harmonisation: The Winding Road to a Uniform European Company Law?*, *in* E.C. FINANCIAL MARKET REGULATION AND COMPANY LAW 19, 25-26 (Mads Andenas & Stephen Kenyon-Slade eds., 1993).

34. Council Directive 77/91/EEC, pmbl., 1977 O.J. (L 26) (Second Company Law Directive) 1 [hereinafter Second Directive].

35. *Id.* art. 6(1), at 3. Some Member States, for example, Denmark, have more strict capital requirements. In Denmark an *aktieselskab* must have a minimum capital of not less that DKr 500,000 (€66,667). *See Aktieselskabsloven* § 1(3), *available at* http://www.eogs.dk/graphics/selskaber/AS_en.html (last visited Feb. 4, 2005) [hereinafter Danish Public Companies Act]. The Second Company Law Directive only applies to public limited liability companies such as the Danish *aktieselskab*, the German *Aktiengesellschaft*, the French *société anonyme*, the Dutch *naamloze vennootschap* or the English *public limited company*. Second Directive, *supra* note 34, pmbl. at 1. Because of this, there are greater differences in the national capital requirements for private limited companies. In the United Kingdom, for example, there are none, while an *anpartsselskab* incorporated in Denmark must have capital of not less than DKr 125.000 (€16,667) at the date of incorporation. *See Anpartsselskabsloven* § 1(3), *available at* http://www.eogs.dk/graphics/selskaber/APS_en.html (last visited Feb. 4, 2005) [hereinafter Danish Private Companies Act].

36. Council Directive 78/855/EEC, pmbl., 1978 O.J. (L 295) 36; Council Directive 82/891/EEC, pmbl., 1982 O.J. (L 378) 47.

37. Third parties are generally anyone who has contact with the company other than the shareholders. In some places though, third parties are only understood to be the creditors. *See* Jürgen Hahn, *Corporate Mobility in the European Community. What Happens in Practice: Gaps in Community Law?*, *in* ACTS OF THE SINGLE CONFERENCE ON COMPANY LAW AND THE SINGLE MARKET 39, 40 (European Commission 1997); Christiaan Timmermanns, *Harmonization in the Future of Company Law in Europe*, *in* CAPITAL MARKETS AND COMPANY LAW 623, 628 (Klaus J. Hopt & Eddy Wymeersch eds., 2003).

38. See Eddy Wymeersch, *A Status Report on Corporate Governance Rules and Practices in Some Continental European States*, *in* COMPARATIVE CORPORATE GOVERNANCE 1045, 1134-48

been embodied in a general company law directive.[39] Denmark, the Netherlands, Austria, and Germany have rules on employee representation in their company laws.[40] In Denmark, where a company has had at least thirty-five employees on average over the last three years, the employees of the company are entitled to elect from among themselves a number of members of the supervisory board.[41] Employee representtatives must constitute up to half the members of the supervisory board, who are elected in accordance with section 49(3) of the Danish Public Companies Act, provided there are no fewer than two members.[42] In the Netherlands, it is mandatory for large companies to have employee representation on the supervisory board.[43] This representation is indirect and is based on the co-option of members of the board who, without being employee representatives, enjoy the confidence of the employees.[44]

Germany is one of the leaders in establishing employee representation. In German companies with more than 500 employees, the employees can elect one third of the members of the supervisory board (the *Aufsichtsrat*).[45] If a company has more than 2000 employees, the employees can elect half of the supervisory board.[46] The German system includes a mix of direct and indirect representation, where the indirect representatives are representatives of the unions represented in the company.[47]

Thus, the situation feared in the European Union is one in which the establishment of a market for company incorporations will have negative

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(Klaus J. Hopt et al. eds., 1998) for a short introduction to the rules in the different Member States.

39. A major breakthrough in the development of European company law occurred with the adoption of the SE Regulation. SE Regulation, *supra* note 2. Beginning October 8, 2004, it became possible to set up a European limited liability company (*Societas Europea* or SE) within the European Union. SE Regulation, *supra* note 2, arts. 1(1), 70 at 3, 18. As a supplement to the Regulation, provisions on employee representation were laid down in Directive 2001/86 of 8 October 2001, 2001/86/EC, 2001 O.J. (L 294) 22 (supplementing the Statute for a European Company with Regard to the Involvement of Employees).

40. Wymeersch, *supra* note 38.

41. *See* Danish Public Companies Act, *supra* note 35, § 49(3); Danish Private Companies Act, *supra* note 35, § 22(1).

42. Danish Public Companies Act, *supra* note 35, § 49(3).

43. A company is considered to be large if it meets certain requirements concerning its own funds and the number of its employees. *See* Wymeersch, *supra* note 38, at 1144-48.

44. *Id.*

45. *Betriebsverfassungsgesetz* of 11 October 1952. These rules apply to all undertakings with more than 500 employees, except undertakings belonging to a single natural person or to a partnership of natural persons.

46. Mitbestimmungsgesetz 1976 (German Co-Determination Act 1976), v. 4.5.76, English-German Text (Hannes Schneider & David J. Kingsman eds., 1976). These rules apply to all undertakings regardless of their legal form.

47. For an introduction to the German system, see Wymeersch, *supra* note 38, at 1142-44.

consequences for the protection of the interests of shareholders, creditors, and employees. This could be the case if the Member States were to deregulate their existing company laws in order to make them more attractive for incorporation.

III. THE MARKET FOR COMPANY INCORPORATIONS IN THE EUROPEAN UNION UP TO 2002

The introduction stated that regulatory competition has not only been unwanted in the European Union, but it has been impossible. A situation where Member States can compete to attract incorporations requires a market for company incorporations. For such a market to exist, two conditions must be fulfilled.

First, Member States must be able offer competitive company law regimes that are attractive to the decision-makers in companies. As mentioned above, it is the individual Member State that drafts and adopts its company laws. The Member States are free to pursue their own aims in their laws as long as they comply with the company law directives adopted by the European Union. Therefore, it is also possible for an individual Member State to adopt a law which it believes will attract as many companies to it as possible. However, where important issues either have been harmonised or will be harmonised, the scope for competition is limited, and competition will ultimately be eliminated.

Second, it must be possible for companies to choose freely between the different company laws offered by the Member States, regardless of whether the company conducts any economic activity in the state of incorporation or where its central administration is located.[48] That is, companies must be able to choose their state of incorporation on the basis of which state seems to have the most advantageous company law. This means that it must be possible to separate the central administration from the registered office, and this is not always possible in the European Union.[49] This is partly due to the use of the real seat doctrine in a number of Member States and partly due to the fact that companies do not enjoy full freedom of establishment.

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48. The term "central administration" is used throughout this Article to describe the connecting factor used in the real seat doctrine. The term is not interpreted in the same way in all Member States, and will be discussed *infra* Part III.A.2. Other terms describing the same are "head office" or "principal place of business."

49. The registered office will always be located in the state of incorporation because the registration of a company is an integral part of the incorporation of a private or public limited company in all of the Member States. *See* ERIK WERLAUFF, EU-COMPANY LAW: COMMON BUSINESS LAW OF 28 STATES 209 (2003).

It should be remembered that even if these conditions are not fulfilled, it is still possible for a European market for company incorporations to be established and for competition to occur. The consequences will be that the European market will not be fully comparable with the American market for incorporation, and it will not be possible to predict the outcome of European regulatory competition by reference to the U.S. situation.

It is assumed that the first condition is fulfilled and that the Member States can compete to attract company incorporations by adopting favourable corporate laws.[50] This condition will not be discussed further. The second condition will be examined next. It is generally assumed that the conflict of laws rules applied in the European Union restrict the freedom of establishment for companies. As a result, companies have not been able to choose freely between the different company law regimes offered by the Member States, regardless of where their central administrations are located.

A. Conflict of Laws Rules in the European Union

Unlike the United States where all states apply the internal affairs rule, two different conflict of laws rules are applied in the European Union. One is the real seat doctrine; the other is the incorporation state doctrine, which is very similar to the internal affairs rule.[51] These conflict of laws rules are important to the extent they affect corporate mobility and the ability of companies to forum shop. The implications of the real seat doctrine have been widely discussed and will be presented here only briefly along with a presentation of the incorporation state doctrine.[52]

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50. It has always been possible for Member States to compete to attract companies, but because of the widespread use of the real seat doctrine, in most cases it has not been possible to incorporate a company in one Member State and locate it in another. Therefore, the entire company should be placed in the state of incorporation. This means that company law is not the only parameter of competition. For a Member State to attract a large number of companies, it must also offer favorable tax laws, labour laws, environmental laws, etc. The fact that no Member State seems actively to have attempted to attract a great number of incorporations in the past could indicate that they will not enter into competition and alter their company laws to make them more attractive. *See* BIRKMOSE, *supra* note 16.

51. Sørensen & Neville, *supra* note 3, at 183-84.

52. *See id.* at 185-90.

1. The Incorporation State Doctrine

The incorporation state doctrine is used in a minority of the Member States.[53] These States consider a company to be subject to the corporate law of the state in which it has been incorporated and from which it derives its legal personality.[54]

The incorporation state doctrine is related to the registration state doctrine. According to the latter doctrine, a company is subject to the law of the state in which it is incorporated and has its registered office.[55] For a number of corporate forms, including the public limited liability company, it is a requirement that a company, as part of its incorporation, register in the state of incorporation.[56] For these companies, the result will be the same whether the incorporation doctrine or the registration doctrine is applied. It is generally assumed that the Nordic countries use the registration doctrine.[57]

The primary advantage of the incorporation state doctrine is that it is easy to determine the jurisdiction to which a company is subject. It is not necessary to make a factual evaluation of the location of any of the business activities; where a company is incorporated can be easily and objectively established. This also means that it is possible for a company to choose its state of incorporation, irrespective of where the activities of the company will take place. The most favourable company law regime can be identified, and the company can be incorporated in that state. On the other hand, it is questionable whether it is appropriate for a company

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53. The incorporation state doctrine has a number of different variations. With these variations, this doctrine applies in the United Kingdom and other English common law-based jurisdictions, the Netherlands, Scandinavia, and Germany. *See* WERLAUFF, *supra* note 49, at 4; AXEL STEIGER, GRENZÜBERSCHREITENDENDE FUSION UND SITZVERLEGUNG VON KAPITALGESELLSCHAFTEN INNERHALB DER EU NACH SPANISCHEM UND PORTUGIESISCHEM RECHT 168 (1996); Peter Behrens, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, *in* HACHENBURG 52 (1992).

54. *Cf.* ALLAN PHILIP, STUDIER I DEN INTERNATIONALE SELSKABSRETS TEORI 92 (1961).

55. *Id.* at 115.

56. Under the First Company Law Directive, a company must be registered in the state of incorporation. Council Directive 68/151/EEC, 1968 O.J. (L 65).

57. *See, e.g.*, Gaute Simen Gravir, *Conflict of Laws Rules for Norwegian Companies after the* Centros *Judgement*, EUR. BUS. L. REV. 146, 146-47 (July/Aug. 2001); Anders Eckhoff & Gudmund Knudsen, *Transfer of the Central Administration Function of a Norwegian Public Limited Company or Private Limited Company from Norway to Another Country*, *in* INTERNATIONALISATION OF COMPANIES AND COMPANY LAWS 229, 229-30 (Mette Neville & Karsten Engsig Sørensen eds., 2001); Rolf Skog, *Kan aktiebolag emigrera?*, BALANS 20, 20 (1997); SØRENSEN & NIELSEN, *supra* note 11, at 1, 456 n.82; Paul Krüger Andersen & Karsten Engsig Sørensen, *Free Movement of Companies from a Nordic Perspective*, 6 MAASTRICHT J. OF EUR. COMP. L. 47, 55 (1999). In the following, no distinction will be made between the incorporation state theory and the registration state theory, as the consequences of the two are the same in relation to competition between legal orders.

to be incorporated in a Member State with which it has no connection other than its incorporation. In particular, this could lead to a situation where the state of incorporation is chosen primarily to circumvent certain mandatory company law rules in the state in which the company has its main economic activities. This particular consequence of the use of the incorporation state doctrine has been the principal criticism of it in the European debate on competition between legal orders.[58]

The use of the incorporation state doctrine does not restrict freedom of establishment in any way because the company is free to locate its registered office in the state that seems most advantageous. It is also possible to transfer the central administration out of the state of incorporation because the decisive factor is whether the company has been formed in accordance with the legal requirements of that state, and the company will still be subject to the laws of that state after the transfer of its central administration.

2. The Real Seat Doctrine

The other conflict of laws rule applied in the European Union is the real seat doctrine, which is applied in most of the continental European Member States.[59] The doctrine was developed in Belgium and France in the nineteenth century, and according to it, a conflict of company laws must be settled in accordance with the law of the state in which the central administration is located.[60] The doctrine is traditionally considered protective because the main philosophy behind it is that a company must be subject to the law of the state in which its corporate centre of gravity is located.[61] This is because it is assumed that the

58. *See, e.g.*, Bernhard Großfeld, *Internationales Unternehmensrecht*, *in* KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZ ¶ 52, at 12 (1998); Peter Kindler, *Gründungstheorie*, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH ¶ 265, at 89 (1999); Behrens, *supra* note 53, at 52.

59. The real seat doctrine can also take a number of forms. Member States which recognise the real seat doctrine in different variations are Belgium, Germany, France, Luxembourg, Portugal, and Austria. *See, e.g.*, WERLAUFF, *supra* note 49, at 6; Kindler, *supra* note 58, at 130.

60. For the origin of the real seat doctrine, see Otto Sandrock, *Sitztheorie, Überlagerungstheorie und der EWG-Vertrag: Wasser, Öl und Feuer*, *in* RECHT DER INTERNATIONALEN WIRTSCHAFT 505, 505 (1989). *Cf.* Kindler, *supra* note 58, at 101.

61. *See, e.g.*, Inne G.F. Cath, *Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market*, 6 Y.B. EUR. L. 249, 250 (1987); Sandrock, *supra* note 60, at 505; Peter Behrens, *Niederlassungsfreiheit und Internationales Gesellschaftsrecht*, 52 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES & INTERNATIONALES PRIVATRECHT 498, 512-17 (1988); VIOLA KRUSE, SITZVERLEGUNG VON KAPITALGESELLSCHAFTEN INNERHALB DER EG: VEREINBARKEIT DER EINSCHLÄGIGEN REGELUNGEN DES DEUTSCHEN SACH- UND KOLLISSIONSRECHTS MIT DEM EG-VERTRAG 7 (1996).

majority of the corporate stakeholders will be located there.[62] Such stakeholders include shareholders, creditors, employees, and suppliers. It is also assumed that societal interests are best served when a company is subject to the law of the state where its central administration is located.

These assumptions seem to be somewhat outdated. Information technology now makes it possible for management to be located geographically somewhere other than where the economic activity of a company is centred, and the members of the supervisory board do not have to be in the same country when meeting. Many companies do a great deal of business outside the state of incorporation, and creditors, suppliers, and investors today are spread over many countries. At the same time, it must be recognised that it is probably easier for the state in which a company has its central administration to ensure that it complies with its law. It might be harder for a state in which a company is incorporated but in which it has no economic activity to have the necessary insight into the affairs of the corporation to maintain the same level of control. There is also a risk that such a state will not have any particular interest in companies that only keep their registered office in the state, and therefore, it will not allocate the resources necessary to maintain control.[63]

First, the real seat doctrine is criticised because the use of the central administration ("corporate seat") as the decisive factor gives rise to a number of problems. When the central administration is used as the connecting factor, it is of great importance to determine where it is located. Therefore, it must be possible to unambiguously establish *what* constitutes the central administration or corporate seat and *where* it is located.[64] Today there is no general agreement about how to interpret the concept of the "central administration."[65] In most cases, it is defined as

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62. *See, e.g.*, Kindler, *supra* note 58, at 102; Behrens, *supra* note 53, at 44.

63. *See, e.g.*, KARSTEN ENGSIG SØRENSEN, SAMARBEJDE MELLEM SELSKABER 73, 77 (1993); Bernhard Großfeld, *Die Anerkennung der Rechtsfähigkeit Juristischer Personen*, 31 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1, 30 (1967); RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. 227 (1988).

64. Mette Neville et al., *Free Movement of Companies Under Company Law, Tax Law and EU Law*, *in* THE INTERNATIONALISATION OF COMPANIES AND COMPANY LAWS 181, 184-87 (2001); Neville & Sørensen, *supra* note 3, at 184. In French law there seems to be a wider view of what constitutes the corporate seat. *See* JENS POHLMANN, DAS FRANZÖSISCHE INTERNATIONALE GESELLSCHAFTSRECHT 49 (1988); STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE 195-96 (2001).

65. DANIEL ZIMMER, INTERNATIONALES GESELLSCHAFTSRECHT: DAS KOLLISIONSRECHT DER GESELLSCHAFTEN UND SEIN VERHÄLTNIS ZUM INTERNATIONALEN KAPITALMARKTRECHT UND ZUM INTERNATIONALEN UNTERNEHMENSRECHT 234 (1996).

the management of the company. However, this raises the questions of who the management is and where it can be said to have its seat.[66] It seems to be generally recognised that the management is the board of directors of a company or management board[67] and not the person who has de facto control and influence, such as a controlling shareholder or a parent corporation.[68]

Second, the doctrine is criticised because of its implications on freedom of establishment.[69] In all Member States, a national company is required to have its registered office within the state of incorporation. This means that when a state that applies the real seat doctrine, such as Germany, finds that a company must comply with German law because its central administration is located there, it will require that company to have its registered office in Germany as well. Because of this, it is not possible to separate the central administration from the registered office. Therefore, the widespread application of the real seat doctrine severely restricts the scope for forum shopping.

3. Corporate Mobility and the Real Seat Doctrine

In the United States, where all states apply the internal affairs rule, it is possible to forum shop and set up a corporation in the state that offers the most favourable corporate law, regardless of whether management is located in one state while its economic activities are located in different states. Due to the widespread use of the real seat doctrine, this would only be possible in a very limited number of situations in the European Union. This can be illustrated by a few examples.

When a company is incorporated in a Member State that applies the incorporation state doctrine, it can locate its central administration in a Member State other than the incorporation state. In this case, it makes no difference to the incorporation state that the central administration is in another state because, according to the incorporation theory, the connecting factor is the incorporation itself. If the central administration is located in a Member State (the receiving state) that also applies the incorporation state doctrine, this will not in any way affect the legal

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66. Neville et al., *supra* note 64, at 184-87; Neville & Sørensen, *supra* note 3, at 184. Again, in French law there seems to be a wider view of what constitutes the corporate seat. POHLMANN, *supra* note 64, at 49; RAMMELOO, *supra* note 64, at 195-96.

67. *See* Sørensen & Neville, *supra* note 3, at 184.

68. *See* Großfeld, *supra* note 58, at 59.

69. *See, e.g.*, Behrens, *supra* note 53; Großfeld, *supra* note 58, at 11; Sørensen & Neville, *supra* note 3, at 184.

status of the company in the state of incorporation. The receiving state will consider the company to be a national of the incorporation state because it is incorporated there.

But if the company locates its central administration in a Member State which applies the real seat doctrine, this receiving state will consider the company to be subject to its laws because of the location of the central administration. Because the company was not incorporated under the law of the receiving state, its legal personality will not be recognised there, and the shareholders will not be able to claim limited liability.[70] In Germany, for example, such a company has traditionally been considered an invalidly incorporated company, and if Germany were the receiving state, the company would have to be incorporated under German law to gain legal personality.[71]

If, instead, a company is incorporated in a state which applies the real seat doctrine, and it locates its central administration outside the incorporation state, the result is that the state of incorporation will no longer consider the company to be subject to its laws and will consider it subject to the corporate law of the receiving state. In Germany, for instance, this would result in the compulsory winding up of the company.[72]

The consequences are not the same in all Member States which apply the real seat doctrine, however. In some Member States, a company can transfer its central administration out of the Member State if this is followed by a change of nationality of the company.[73] For example, Portugal, a Member State which applies the real seat doctrine, links the central administration to corporate nationality.[74] Therefore, when the central administration of a company is no longer in Portugal, it cannot be a Portuguese company.[75] This means that a corporation can only transfer the central administration out of Portugal if the receiving Member State can "adopt" the Portuguese company by entering it into its

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70. *See* Großfeld *supra* note 58, at 146; Kindler, *supra* note 58, at 143; KRUSE, *supra* note 61, at 72; Behrens, *supra* note 53, at 72; Sørensen & Neville, *supra* note 3, at 185; *see also* Neville et al., *supra* note 64, at 229-42. Winding up also seems to be the consequence in Belgium. *Cf.* Carsten Thomas Ebenroth & Uwe Eyles, *Die innereuropäische Verlegung des Gesellschaftssitzes als Ausfluss der Niederlassungsfreiheit (Teil I)*, 7 DER BETRIEB 368 (1989). In Germany, winding up has also been imposed by the courts. *See, e.g.*, OLG Hamm, Decision of 30.4.1997 (printed in ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS 1696 (1997)); OLG Hamm, Decision of 1.2.2001 (printed in DER BETRIEBS-BERATER 744-45 (2001)).

71. KRUSE, *supra* note 61, at 37; *cf.* Großfeld, *supra* note 58, at 154.

72. KRUSE, *supra* note 61, at 37; *cf.* Großfeld, *supra* note 58, at 154.

73. KRUSE, *supra* note 61, at 37; *cf.* Großfeld, *supra* note 58, at 154.

74. KRUSE, *supra* note 61, at 37; *cf.* Großfeld, *supra* note 58, at 154.

75. KRUSE, *supra* note 61, at 37; *cf.* Großfeld, *supra* note 58, at 154.

companies register under its law.[76] Otherwise, the company would be stateless after the transfer.[77] Winding up the company also does not seem to be the consequence in France, Greece, Italy, or Luxembourg.[78]

If the company locates its central administration in a Member State which applies the real seat doctrine, neither the receiving state nor the state of incorporation will consider the company to be validly incorporated, and the corporation will lose its legal personality. The result would be the same if the company located its central administration in a Member State which applies the incorporation doctrine. The receiving state would consider it a national of the state of incorporation but, as just described, this state will consider it to be a national of the receiving state, due to the location of its central administration.

This means that only in *one* situation will the real seat doctrine not have consequences for a company formed in the Member State that offers the most favourable company law regime with its central administration located in a different Member State.[79] That situation is when both Member States apply the incorporation state doctrine, which is comparable to the U.S. example. The consequence of the application of the real seat doctrine in a number of Member States is, therefore, that corporate mobility in the European Union is severely restricted. This has implications for the establishment of a market for business incorporations; as long as the real seat doctrine is applied, it will not be possible to forum shop and take advantage of the most favourable company law regime except in very few situations.

B. The Right of Establishment Granted in the EC Treaty

Despite the apparent intent of the EC Treaty[80] regarding the right of establishment, it is usually assumed that this right does not apply fully to

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76. *Cf.* STEIGER, *supra* note 53, at 263.

77. *Id.* It is very seldom that national law allows for such an "adoption" of a foreign company. Therefore, even though it is theoretically possible under Portuguese law to transfer the central administration, it will not be practically possible because very few Member States will adopt the company.

78. *See* European Commission publication carried out by KPMG European Business Centre, with Commission of European Communities Study on Transfer of the Head Office of a Company from One Member State to Another, 10 (1993); Neville & Sørensen, *supra* note 3, at 191; Ebenroth & Eyles, *supra* note 70, at 368; RAMMELOO, *supra* note 64, at 214-17, 232-35.

79. The situation will be the same as described above if, after its incorporation, a company moves its central administration out of the incorporation state. *See* Neville & Sørensen, *supra* note 3.

80. "EC Treaty" is used in this Article to refer to the Treaty Establishing the European Community as amended by the Treaty of Amsterdam. *See supra* note 8 and accompanying text.

companies because of the consequences of the real seat doctrine for corporate mobility. Therefore, there has been extensive discussion about whether the doctrine should be seen as a restriction on the right of freedom of establishment for corporations described in articles 43 EC and 48 EC of the EC Treaty. Article 43 EC 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.[81]

Article 48 EC extends the freedom of establishment to corporations:

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.[82]

From the beginning, the intention of the European Union has been to establish a single market with no internal barriers to establishment, and the wording of articles 43 EC and 48 EC indicate that companies as well as nationals of Member States are guaranteed the right of establishment.

Article 43 EC clearly grants nationals of a Member State the right to incorporate in another Member State.[83] This is known as primary establishment.[84] Article 43 EC also grants a company or a firm the right

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81. CONSOLIDATED EC TREATY, *supra* note 8, art. 43.

82. *Id.* art. 48.

83. *Id.* art. 43.

84. EU law makes a distinction between primary and secondary establishment. Primary establishment constitutes the situation in article 43 EC where a person takes up and pursues activities as a self-employed person or sets up and manages undertakings, in particular companies or firms. When an existing company makes a primary establishment, it transfers all or the main part of its activities to another Member State, or it starts up new business activities in another Member State. Transfer of the central administration, transfer of the registered office, or a cross-

to set up agencies, branches, or subsidiaries in a Member State other than the state in which the company or firm is formed.[85] However, the extent to which the EC Treaty grants an existing corporation the right of primary establishment is not immediately clear. It is unclear whether a corporation has a right to establish itself in another Member State by means of a cross-border merger, by transferring its registered office (a change of nationality), or by transferring its central administration.[86]

Whether the EC Treaty grants companies the right of primary establishment is an issue of crucial importance to the establishment of a market for company incorporations in the European Union. The importance of the right to transfer the central administration to a state different from the state of incorporation has already been discussed. If the EC Treaty does grant companies this right, the conflict of laws rules lose their importance in relation to the debate on corporate mobility. So far, only incorporation has been discussed. But if it is possible to transfer the registered office or participate in cross-border mergers, it will also be possible for a company to be reincorporated.[87]

The extent of the right of establishment for companies has been determined by the ECJ. At this point only two cases will be presented. The first is the *Daily Mail* case.

1. *The Queen v. Treasury & Commissioners of Inland Revenue (Daily Mail)*[88]

Many believed that *Daily Mail* settled the discussion in Europe on whether or not the EC Treaty granted companies the right of primary establishment. In this case, the ECJ stated that there is a difference between natural and legal persons and that legal persons as opposed to natural persons in a Member State do not have a right of primary establishment under the EC Treaty.[89] The right of establishment for a

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border merger are usually considered to be forms in which a company can make a primary establishment. Secondary establishment includes the setting up of an agency, a branch, or a subsidiary by an existing establishment that remains where it is. *See, e.g.*, Neville et al., *supra* note 64, at 213-14; ANTHONY ARNULL, ALAN DASHWOOD, MALCOM ROSS & DERRICK WYATT, WYATT & DASHWOOD'S EUROPEAN UNION LAW 431 (4th ed. 2000); PAUL CRAIG & GRÁINNE DE BÚRCA, EC LAW: TEXTS, CASES & MATERIALS 733, 755-56 (1998).

85. CONSOLIDATED EC TREATY, *supra* note 8, art. 43.

86. If one of the Member States involved applies the real seat doctrine, this will result in a change of nationality.

87. *See also infra* Part IV.F.

88. Case 81/87, The Queen v. Treasury Comm'rs of Inland Revenue (*Daily Mail*), 1988 E.C.R. 5483.

89. *Id.* at 5511.

company only includes secondary establishment, but there can be different provisions under national regulations.[90]

Under U.K. law, foreign companies subject only to tax on income arising in the United Kingdom are those defined as having central management and control outside of the United Kingdom.[91] Daily Mail was a U.K. company which wished to transfer its residence to the Netherlands and set up a subsidiary or branch in the United Kingdom as a foreign company.[92] The Treasury had to give permission to make such a transfer; it denied it, and Daily Mail challenged the requirement for permission, arguing that since the transfer constituted a transfer of establishment, the requirement was a restriction on its freedom of establishment.[93]

The ECJ stated that, "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of national legislation which determines their incorporation and functioning."[94] Further, the ECJ noted that

> the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another.[95]

The general opinion was that the ECJ had accepted the use of different choice of law rules even though the use of the real seat doctrine

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90. *Id.*
91. *Id.* at 5507.
92. *Id.*
93. *Id.* at 5507-08.
94. *Id.* at 5511.
95. *Id.*

restricts the right of establishment for companies.[96] Whether or not a company could transfer its seat was seen as dependent on the private international law rules in the state of incorporation and in the state of establishment.

Consequently, the *Daily Mail* case did not make any difference to the establishment of a market for company incorporations. As long as it was possible for a Member State to require that the head office of a company be placed in the registration state, under the real seat doctrine, it would not be possible for companies to forum shop.

2. *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*[97]

For ten years after the decision in *Daily Mail* in 1988, nothing really happened in this area of European company law. However, the *Centros* case once again put the debate about corporate mobility on the European agenda in 1999.

In *Centros*, the Danish Commerce and Companies Agency (the Agency)[98] allegedly restricted the freedom of movement of a company by refusing to register a branch of a pseudo-foreign company, that is, a company conducting no real economic activity in the state of incorporation.[99]

In *Centros*, a Danish couple had bought an English private limited liability company and requested the Agency to register a branch of the company in Denmark.[100] The Agency refused registration on the grounds that, inter alia, because it did not trade in the United Kingdom, Centros Ltd. was not actually seeking to establish a branch in Denmark, but rather trying to make a primary establishment to circumvent the national Act No. 886 of 21 December 1991, which fixed the minimum capital required by a corporation at DKr 200,000.[101] Centros Ltd. brought an

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96. *See, e.g.*, Wulf-Henning Roth, „Centros*": Viel Lärm um Nichts*, 2 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 311, 321-22 (2000); Bernhard Großfeld & Claus Luttermann, *Zur Verlegung des Gesellschaftssitzes von einem Mitgliedsstaat an den anderen*, 8 JURISTENZEITUNG 384, 387 (1989); Bernhard Großfeld & Thomas König, *Das Internationale Gesellschaftsrecht in der Europäischen Gemeinschaft*, 38 RECHT DER INTERNATIONALEN WIRTSCHAFT 433, 433 (1992); Werner Ebke, *Das Schicksal der Sitztheorie nach dem* Centros-*Urteil des EuGH*, 13 JURISTENZEITUNG 656, 660 (1999); Ebenroth & Eyles, *supra* note 70, at 417; Otto Sandrock & Andreas Austmann, *Das Internationale Gesellschaftsrecht nach der* Daily Mail-*Entscheidung des Europäischen Gerichtshof: Quo Vadis?*, 4 RECHT DER INTERNATIONALEN WIRTSCHAFT 249, 250 (1989); Sørensen & Neville, *supra* note 3, at 189.

97. 1999 E.C.R. I-1459.

98. The Agency is the administrative body responsible for the incorporation and registration of companies in Denmark.

99. *Centros*, 1999 E.C.R. at I-1487.

100. *Id.*

101. *Id.* at I-1488.

action against the Agency for refusing registration, arguing that it satisfied the conditions of the law on private limited liability companies relating to the registration of a branch of a foreign company.[102] Since Centros Ltd. was lawfully incorporated in the United Kingdom, it argued that it was entitled to establish a branch in Denmark in accordance with articles 43 EC and 48 EC.[103]

The Danish Supreme Court decided to stay proceedings and asked the ECJ for a preliminary ruling on the interpretation of articles 43 EC, 46 EC, and 48 EC (former articles 52, 56, and 58).[104] By its question, the national court was, in substance, asking whether it is contrary to articles 43 EC and 48 EC for a Member State to refuse to register a branch of a company incorporated in accordance with the laws of another Member State in which the company has its registered office but where it does not carry on any business.[105] Further, the Danish Supreme Court asked whether a company may incorporate in the state where its registered office is located and conduct its economic activities in another state if the purpose of the branch is to enable the company concerned to carry on all of its economic activities in the state in which that branch is to be set up, while avoiding the formation of a company in that state, to evade the rules, more restrictive minimum paid-up share capital governing the formation of companies in that state.[106]

The ECJ held that, "when a company is formed in accordance with the law of a Member State in which it has its registered office," and "it desires to set up a branch in another Member State," it

> falls within the scope of Community law. In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business, is to be conducted.[107]

As to the question of "whether the refusal to register the branch in Denmark under these circumstances constitutes an obstacle to freedom of establishment," the ECJ held:

> [I]t must be borne in mind that at freedom, conferred by Article 52 [(now article 43 EC)] of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid

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102. *Id.*
103. *See id.*
104. *Id.* at I-1489.
105. *Id.*
106. *Id.*
107. *Id.* at I-1490.

> down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 [(now article 48 EC)] of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.
>
> The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person.[108]

The Court further held:

> In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.
>
> That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.[109]

On these grounds, the ECJ concluded that

> it is contrary to Articles 52 and 58 [(now articles 43 EC and 48 EC, respectively)] 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

108. *Id.* at I-1491.
109. *Id.* at I-1493.

> minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.[110]

By finding the practice of the Agency to be contrary to EU law, the ECJ no doubt opened new doors to cross-border activity. But the impact of the decision of the ECJ was not absolutely clear, and an intense legal debate on the interpretation and implications of the decision followed *Centros*.

Centros did not concern conflicting choice of law rules. Denmark as well as the United Kingdom apply variants of the incorporation state doctrine, and there was no doubt that Centros Ltd. was a validly incorporated U.K. private limited liability company.[111] Despite this, some writers conclude that the decision did not have any consequences for Member States which apply the real seat doctrine.[112] They reason that if Centros Ltd. had wanted to establish a branch in a Member State applying the real seat doctrine, that state would argue that, as Centros Ltd. did not have its central administration in the United Kingdom, then the branch would be the actual central administration.[113] This would be equivalent of a transfer of the central administration, and Centros Ltd. would therefore be considered a national of the receiving state. Not

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110. *Id.* at I-1496.

111. *Id.*

112. *See* Peter Kindler, *Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die „*Centros*"-Entscheidung des EuGH und das Internationale Privatrecht*, 28 NEUE JURISTISCHE WOCHENSCHRIFT 1993, at 1996-99 (1999); Hans Jürgen Sonnenberger & Helge Großerichter, *Konfliktlinien Zwischen Internationalem Gesellschaftsrecht und Niederlassungsfreiheit*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT 721, 726-27 (1999); Michael Timme & Fabian Hülk, *Das Ende der Sitztheorie im Internationalen Gesellschaftsrecht-EuGH, EuZW 1999*, 216, *in* 11 JURISTISCHE SCHULUNG 1055, 1058 (1999); Wulf-Henning Roth, *Case C-212/97,* Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, Judgement of 9 March 1999 (Full Court)*, 37 COMMON MKT. L. REV. 147, 154-55 (2000); Roth, *supra* note 96, at 327; Ebke, *supra* note 96, at 660; Stefan Görk, *Das EuGH-Urteil in Sachen „*Centros*" vom 9. März 1999: Kein Freibrief für Briefkastengesellschaften!*, 15 GMBHRUNDSCHAU 793, 795 (1999); Knut Werner Lange, *Rechtsprechung EGV art. 52, 56 & 58*, DEUTSCHE NOTAR-ZEITSCHRIFT 593, 606 (1999); Jochen Hoffmann, *Neue Möglichkeiten zur Identitätswahrenden Sitzverlegung in Europa?*, 164 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT & WIRTSCHAFTSRECHT 43, 49 (2000).

113. *See* Kindler, *supra* note 112, at 1996-99; Sonnenberger & Großerichter, *supra* note 112, at 726-27; Timme & Hülk, *supra* note 112, at 1058; Roth, *supra* note 112, at 154-55; Roth, *supra* note 96, at 327; Ebke, *supra* note 96, at 660; Görk, *supra* note 112, at 795; Lange, *supra* note 112, at 795; Hoffmann, *supra* note 112, at 49.

being validly incorporated there, the legal personality of Centros Ltd. would not be accepted. These writers argue that the outcome of the *Centros* case could, in part, be attributed to the fact that neither Denmark nor the United Kingdom apply the real seat doctrine. Therefore the choice of law rules did not prevent Centros Ltd. from establishing a branch in Denmark when its central administration was not established in the United Kingdom.

Others reason that the outcome would have been the same if Centros Ltd. had wanted to establish a branch in a Member State which applies the real seat doctrine, but that the decision did not overrule the real seat doctrine.[114] These writers distinguish clearly between primary and secondary establishment.[115] They argue that *Centros* concerns a secondary establishment where a U.K. company wanted to set up a branch in another Member State.[116] In articles 43 EC and 48 EC, the EC Treaty grants a company the right to set up a secondary establishment.[117] Therefore, as long as a company is validly incorporated in the state of incorporation, the other Member States must acknowledge the company's right to make a secondary establishment, even when the branch is set up in a Member State that applies the real seat doctrine. Though it can be argued that Centros Ltd. had in fact transferred its central administration to Denmark, these writers hold that it cannot be concluded on the basis of *Centros* that a company has the right to transfer its central administration to another Member State.[118] Therefore, the Member States

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114. *See* VOLKER GEYRHALTER, NIEDERLASSUNGSFREIHEIT CONTRA SITZTHEORIE EUROPÄISCHE WIRTSCHAFTS- UND STEUERRECHT 201, 203 (1999); Hartwin Bungert, *Konsequenzen der* Centros*-Entscheidung des EuGH für die Sitzanknüpfung des deutschen internationalen Gesellschaftsrecht*, 36 DER BETRIEB 1841, 1844 (1999); Stefan Leible, *Anmerkung*, 7 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 298, 301 (1999); Günther H. Roth, *Grundungstheorie: Ist der Damm gebrochen?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS 861, 863 (1999); Daniel Zimmer, *Mysterium „*Centros*"*, 164 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTRECHT 36 (2000); Ernst Steindorff, Centros *und das Recht auf die günstigste Rechtsordnung*, 54 JURISTENZEITUNG 1140, 1142 (1999); Georg Borges, *Die Sitztheorie in der* Centros*-Ära: Vermeintliche Probleme und unvermeidliche Änderungen*, 46 RECHT DER INTERNATIONALEN WIRTSCHAFT 167, 176 (2000); Max Göttsche, *Das* Centros*-Urteil des EuGH und seine Auswirkungen*, 34 DEUTSCHE STEUERRECHT 1403, 1406 (1999).

115. *See, e.g.*, Neville et al., *supra* note 64, at 213-14; ARNULL, DASHWOOD, ROSS & WYATT, *supra* note 84, at 431; CRAIG & DE BÚRCA, *supra* note 84, at 755-56.

116. GEYRHALTER, *supra* note 114, at 203; Bungert, *supra* note 114, at 1844; Leible, *supra* note 114, at 301; Roth, *supra* note 114, at 863; Zimmer, *supra* note 114, at 36; Steindorff, *supra* note 114, at 1142; Borges, *supra* note 114, at 176; Göttsche, *supra* note 114, at 1406.

117. CONSOLIDATED EC TREATY, *supra* note 8, arts. 43, 48.

118. Some writers took this point of view. *See, e.g.*, Søren Friis Hansen, *Nekrolog over hovedsædeteorien*, *in* JULEBOG 143-74 (1999); OTTO SANDROCK, CENTROS: EIN ETAPPENSIEG FÜR DIE ÜBERLAGERUNGSTHEORIE DER BETRIEBS-BERATER 1337, 1340 (1999); JOCHIM SEDEMUND &

which apply the real seat doctrine do not have to surrender their conflict of laws rule. They can still apply it to a company transferring its central administration.

Two questions in particular remained unclear after *Centros*. One question was whether the duty to recognise a company's right to establish a branch when the company did not have a specified central administration applied to Member States which apply the real seat doctrine. The other question was whether the duty to recognise companies validly incorporated under the laws of a Member State applies when the company moves its central administration out of the state of incorporation.

Despite these two questions, there is no doubt that *Centros* severely restricted the scope of the real seat doctrine.[119] Following *Centros*, it became possible to incorporate a company under the laws of a Member State which applies the incorporation state doctrine and then subsequently operate the company through a branch in any other Member State.[120] It also became immaterial whether the company carries on any economic activity in the state of incorporation or whether the central administration is located in the state where the branch is established.[121] This is probably also true if the branch is established in a Member State that applies the real seat doctrine.[122]

On the other hand, it was still possible for a Member State to require companies incorporated under its laws to have their central administrations there. This means that, if a company is incorporated in a Member State which applies the real seat doctrine, the company cannot invoke the Treaty-based right to secondary establishment. Only a validly incorporated company is granted this right, and, if a company incorporated in a Member State that applies the real seat doctrine no longer has its central administration there, the company will loose its status as a legal person.

Centros is important in another respect. Neither Denmark nor the United Kingdom apply the real seat doctrine, and Denmark did not question whether the U.K. company was validly incorporated. Instead, Denmark claimed the refusal to register the branch should be seen as a

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LUDWIG HAUSMANN, NIEDERLASSUNGSFREIHEIT CONTRA SITZTHEORIE-ABSCHIED VON DAILY MAIL DER BETRIEBS-BERATER 809, 810 (1999); WERLAUFF, *supra* note 49, at 6.

119. *See* BIRKMOSE, *supra* note 16, at 92.

120. *See Centros*, 1999 E.C.R. at I-1496. It should be remembered that both the United Kingdom and Denmark apply the incorporation state theory/registration state theory.

121. *See, e.g.*, SØREN FRIIS HANSEN & JENS VALDEMAR KRENCHEL, I LÆREBOG I SELSKABSRET 107 (1999); Kieninger, *supra* note 5, at 729.

122. *See* BIRKMOSE, *supra* note 16, at 102.

measure to prevent companies from avoiding the requirements of Danish company law, particularly the minimum capital requirements.[123] In this respect, the ECJ held that when a company is set up in a Member State whose company law seems to be the least restrictive and a branch is then set up in another, more restrictive Member State, this is not, in itself, an abuse of the right of establishment.[124] On the contrary, it should be seen as a consequence of the exercise of the right of establishment guaranteed by the EC Treaty.[125] Apparently, the consequence of this was that Member States which apply the incorporation state doctrine could not guard themselves against pseudo-foreign companies, whereas it was questionable whether this applied to Member States which apply the real seat doctrine. Therefore, after the *Centros* decision, there seemed to be no doubt that forum shopping could occur between the Member States which apply the incorporation state doctrine. This problem will be examined more closely in Part IV.D.

*C. Concluding Remarks on the Pre-*Überseering *Situation*

It was mentioned at the beginning of Part III that a precondition for the establishment of a market for company incorporations is that it must be possible for a company to choose its state of incorporation independently of where it locates its central administration and economic activities. This precondition seems to be difficult to meet as long as the real seat doctrine is used because the real seat doctrine links the central administration to the state of incorporation.

However, conflict of laws rules can no longer be considered in isolation from the right of establishment granted by the EC Treaty. According to some, the *Daily Mail* decision gave the impression that because "companies are creatures of the law and, in the present state of Community law, creatures of national law," Member States were free to apply their preferred conflict of laws rules to companies.[126]

Centros emphasized that companies are creatures of national law and that the Member States apply different conflict of laws rules.[127] However, the ECJ made clear that the Member States have to

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123. Denmark was not the only Member State trying to exclude pseudo-foreign companies. The Netherlands tried also. The Dutch rules were the subject of a recent case before the ECJ. *Inspire Art*, 2003 E.C.R. I-10155; *see also infra* Part V.

124. *Centros*, 1999 E.C.R. at I-1493 (holding that this interpretation did not prevent Member States from adopting any appropriate measure for preventing or penalizing abuse or fraudulent conduct).

125. *Id.*

126. *Daily Mail*, 1988 E.C.R. at 5511.

127. *Centros*, 1999 E.C.R. at I-1491.

acknowledge the different conflict of laws rules and that the right of establishment in relation to the right to secondary establishment take precedence over the national conflict of laws rules.[128]

Therefore, *Centros* made it possible to set up a company in the Member State with the most attractive company law regime and carry on business activities there, including the management of the company, through a branch in another Member State.[129] As long as the state of incorporation considers the company to be validly incorporated, the other Member States have a duty to recognise its legal personality.[130] Thereby, the Member States could start to compete to attract new incorporations.

The implications of the *Centros* case are limited, because they only concern secondary establishment.[131] In order to establish an efficient market for company incorporations, two additional conditions must be met. First, it must be possible for companies to choose freely between the different company law regimes of the Member States, regardless of whether the company conducts any economic activity in the state of incorporation or the state where its central administration is located. Second, it must also be possible for the Member States to compete to attract reincorporations, which requires that European companies enjoy full freedom of establishment, including the right to make a primary establishment by transferring their registered offices or by taking part in cross-border mergers. Nonetheless, even though *Centros* did not establish a European market for company incorporations, it can be seen as heralding change and as an important step on the way to creating a situation where there is competition between the Member States.

IV. *ÜBERSEERING*—A TURNING POINT?

The *Centros* case made it possible for companies to make a de facto separation of the central administration from the registered office through a secondary establishment.[132] However, even after *Centros*, the use of the real seat doctrine continued to impose an actual restriction on competition between legal orders in the European Union. Nevertheless, *Centros* can be seen as a step towards the creation of a market for company incorporations, and *Überseering* can be seen as an even bigger step because it clarified some of the uncertainties which remained after *Centros*.

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128. *Id.* at I-1496.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

A. Überseering BV v. Nordic Construction Co. Baumanagement GmbH[133]

The case concerns a Dutch corporation, Überseering BV, which in 1990 acquired a piece of land in Düsseldorf, Germany, that included a garage and a motel.[134] In 1992, Überseering BV engaged Nordic Construction Company Baumanagement GmbH (NCC) to refurbish the buildings on the Düsseldorf property.[135] The refurbishment was carried out, but Überseering BV claimed the painting was defective.[136]

In 1994, two German citizens residing in Düsseldorf acquired all shares of Überseering BV.[137] In 1996, Überseering BV brought an action before the *Landgericht* (Regional Court) in Düsseldorf on the basis of the contract with NCC and the alleged defects.[138] The *Landgericht* dismissed the action.[139] The *Oberlandesgericht* (Higher Regional Court) in Düsseldorf upheld the decision to dismiss the action because it found that Überseering BV had transferred its central administration to Düsseldorf once the two German nationals had acquired the shares.[140] This reasoning was based on the German application of the real seat doctrine.[141] Überseering BV appealed to the *Bundesgerichthof* (German Supreme Court), which decided to stay proceedings and referred the following questions to the ECJ for a preliminary ruling:[142]

> 1) Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?
>
> 2) If the Court's answer to that question is affirmative:
>
> Does the freedom of establishment of companies (Article 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to

133. *Überseering*, 2002 E.C.R. I-9919.
134. *Id.* para. 6.
135. *Id.*
136. *Id.*
137. *Id.* para. 7.
138. *Id.* para. 8.
139. *Id.* para. 9.
140. *Id.*
141. *Id.* paras. 9-10.
142. *Id.*

> legal proceedings is to be determined according to the law of the State where the company is incorporated?[143]

B. Findings of the ECJ

Initially, the ECJ examined whether the Treaty provisions on freedom of establishment applied to cases such as the one before the Court.[144] It found that in general

> where a company which is validly incorporated in one Member State ("A") in which it has its registered office is deemed, under the law of a second Member State ("B"), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment.[145]

This was contrary to submissions of NCC and the German, Spanish, and Italian governments.[146] Among other things, they had argued that if a company validly incorporated in one Member State transfers its central administration to a Member State that applies the real seat doctrine, then the latter Member State can apply its national provisions to determine the legal status of the company in that Member State.[147] They based this point of view on several arguments, one being that it had been endorsed by the *Daily Mail* decision, particularly paragraphs 23 and 24.[148]

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143. *Id.*
144. *Id.* para. 51.
145. *Id.* para. 52.
146. *Id.* They submitted that

> the Treaty provisions on freedom of establishment do not preclude the legal capacity, and the capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined under the rules of law of another Member State, to which that company is found to have moved its centre of administration: nor, depending on the circumstances, do they preclude the company from being prevented from enforcing before the courts of the second Member State rights under a contract entered into with a company established in the second State.

Id. para. 23.

147. *See id.* paras. 23-25.
148. *Daily Mail*, 1988 E.C.R. at 5513. Paragraphs 23 and 24 of *Daily Mail* read:

> [T]he Treaty regards the differences in national legislation concerning the required connecting factor and the question whether—and if so how—the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.
>
> Under those circumstances, Article 52 [of the EEC Treaty (now, after amendment, Article 43 EC)] and Article 58 of the Treaty [(now Article 48 EC)] cannot

In response, the ECJ stressed that *Daily Mail* concerned relations between a company and the Member State under whose laws it had been incorporated.[149] By contrast, the present case concerned the recognition by one Member State of a company incorporated under the law of another Member State, when the company had been denied recognition of its legal capacity in the host Member State because the company had transferred its central administration to the host Members State's territory, regardless of whether the company had actually intended to do so.[150]

Based on this reasoning, the ECJ rejected the argument that it could be concluded from *Daily Mail* that the facts of the *Überseering* case fell outside the scope of the Treaty provisions on freedom of establishment.[151] Therefore, the question of recognition of a company's legal capacity and its capacity to be a party to legal proceedings, when the company is formed in accordance with the law of one Member State and has exercised its freedom of establishment in another Member State, had to be considered in relation to the scope of the Treaty provisions on freedom of establishment.[152] The ECJ found this to apply even when the company was found by the host State to have moved its central administration to that State.[153]

The result of the question of whether the Treaty provisions on freedom of establishment applied to the present case was that Überseering BV was entitled to rely on the principle of freedom of establishment in order to contest the refusal of the German court to recognise it as a legal person with the capacity to be a party to legal proceedings.[154] Having established that Überseering BV had a right to rely on the principle of freedom of establishment, the ECJ found the refusal by the German courts to recognise Überseering BV's legal capacity and capacity to be party to legal proceedings constituted a restriction on the right of establishment.[155]

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be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

Id. at 5512.

149. *Überseering*, 2002 E.C.R. I-9919 para. 30.
150. *Id.* para. 62.
151. *Id.* para. 64.
152. *Id.* para. 77.
153. *Id.* para. 73.
154. *Id.* para. 76.
155. *Id.* para. 82.

The ECJ relied on the fact that Überseering BV was validly incorporated in the Netherlands, where Überseering BV had its registered office.[156] Because of this, it was entitled under articles 43 EC and 48 EC to exercise freedom of establishment in Germany as a company validly incorporated under Dutch law.[157] The fact that German nationals had subsequently acquired all of the shares had little significance since it had not caused Überseering BV to cease to be a legal person under Dutch law.[158] Referring to the *Daily Mail* case, the ECJ made it clear that the existence of a company is inseparable from its status as having been incorporated under the law of a Member State.[159] The ECJ reasoned that a company exists only by virtue of the national legislation which determines its incorporation and function.[160] The German requirement for reincorporation of the company in Germany was, therefore, "tantamount to an outright negation of freedom of establishment."[161]

Finally, the ECJ considered whether such a restriction on freedom of establishment could be justified.[162] The ECJ stated that it was conceivable that overriding public interests, such as the protection of the interests of creditors, minority shareholders, employees, or even the taxation authorities, may, in certain circumstances and conditions, justify restrictions on freedom of establishment.[163] In the present case, the ECJ did not find such aims "could justify denying the legal capacity, and consequently the capacity to be a party to legal proceedings, of a company properly incorporated in another Member State in which it has its registered office."[164] "Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC."[165]

Accordingly, the answer to the first question was that

> where a company formed in accordance with the law of a Member State (.A') in which it has its registered office is deemed, under the law of another Member State (.B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude

156. *Id.* para. 80.
157. *Id.*
158. *Id.*
159. *Id.* paras. 81-82.
160. *Id.* para. 81.
161. *Id.* paras. 79-82.
162. *Id.* paras. 82-93.
163. *Id.* para. 92.
164. *Id.* para. 93.
165. *Id.* paras. 92-93.

> Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.[166]

The answer of the second question was:

> where a company formed in accordance with the law of a Member State (.A") in which it has its registered office exercises its freedom of establishment in another Member State (.B"), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to bring legal proceedings which the company enjoys under the law of its State of incorporation (.A").[167]

C. The Duty to Recognise Corporations Incorporated in Other Member States After Überseering

It was mentioned earlier that two questions in particular remained unclear after the *Centros* decision. One was whether the duty to recognise a company's right to establish a branch when the company has no specified central administration applies to Member States which apply the real seat doctrine. The other was whether the duty to recognise companies which are validly incorporated under the laws of a Member State applies when the company moves its central administration out of the state of incorporation. The ECJ answered both questions in *Überseering*.

First, it is important to note that the ECJ apparently maintained its opinion in the *Daily Mail* decision, according to which the laws of the Member States vary widely both with regard to the connecting factor to the national territory required for the incorporation of a company and to the question of whether a company incorporated under the laws of a Member State may subsequently modify that connecting factor.[168] Thus, the question of whether a company formed in accordance with the laws of one Member State can transfer its central administration to another Member State without losing its legal personality under the law of the state of incorporation is determined by the national law of the state of incorporation.[169] Therefore, each Member State can determine the procedure under which a company can be incorporated under its laws

166. *Id.* para. 94.
167. *Id.* para. 95.
168. *Id.*
169. *Cf.* Thomas Wernicke, *Anmerkung*, 24 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 754, 759 (2002).

and the conditions which the corporation must fulfil in order to maintain valid incorporation and legal personality.

Second, the ECJ explained when the EC Treaty provisions on freedom of establishment apply to a company.[170] If a company is formed in accordance with the law of a Member State and it has its registered office, central administration, or principal place of business within the Community, it shall be treated in the same way as natural persons who are nationals of the Member States. It thus has freedom of establishment as laid down in article 43 EC .[171] The ECJ explicitly stated that the purpose of the connecting factors laid down in article 48 EC is to establish a connection with the legal system of a Member State.[172] The three connecting factors are coordinated, and if just one of them is present, it will give a company the right guaranteed by the EC Treaty to establish an agency, branch, or subsidiary.[173]

However, what is new is that the ECJ has stated that the right of a company to transfer its central administration to another Member State without losing its legal personality is to be determined by the national law of the state of incorporation.[174] If a company is granted such a right, and the company is covered by the EC Treaty provision on the freedom of establishment, then the company is entitled to carry on its business in another Member State.[175]

It is a necessary precondition for the exercise of the freedom of establishment that a company should be recognised by the Member State in which it wishes to establish itself. Thus, a company which is validly incorporated in one Member State and fulfils the requirements of article 48 EC is entitled, under articles 43 EC and 48 EC, to exercise freedom of establishment in any other Member State as a company incorporated under the law of its state of incorporation.[176] A company's very existence is inseparable from its status as a company under the law of its state of incorporation[177] because a company exists only by virtue of the national law which determines its incorporation and functioning. As a

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170. *Überseering*, 2002 E.C.R. I-9919 para. 34.

171. *Id.* para. 56.

172. *Id.* para. 57. Exactly the same wording is found in *Centros*. 1999 E.C.R. at 1491.

173. *Cf.* Eddy Wymeersch, Centros*: A Landmark Decision in European Company Law*, *in* CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW 629, 633 (Theodor Baums et al. eds., 2000).

174. *Überseering*, 2002 E.C.R. I-9919 para. 36.

175. *Id.* para. 57.

176. *Id.* para. 80.

177. It was of little significance in the *Überseering* case that, after the company was formed, all of its shares were acquired by German nationals residing in Germany since that had not caused Überseering BV to cease to be a legal person under Dutch law. *See id.* para. 80.

consequence, a Member State cannot, by reference to its own choice of law rules, refuse to recognise a company formed in accordance with the law of another Member State.[178] This can be seen as a duty of recognition. Also, national conflict of laws rules must give way to the EC Treaty rules on freedom of establishment.

Another point of view has been offered by Wulf-Henning Roth.[179] Roth states that the Court seemed to assume that, according to German law, there was no alternative to refusing to recognise the legal capacity of the company.[180] Roth is of the opinion that it would be possible for a country that applies the real seat doctrine to maintain the change of nationality that occurs when a company transfers its central administration to a Member State such as Germany, if German law had rules that made it possible to carry out such a change of nationality.[181] In this way, the status of the company as a legal person is preserved, and thereby its legal capacity is also maintained. When the duty of recognition is viewed in this way, it is the status of the company as a legal person that is recognised rather than its nationality.[182]

Roth admits that this possibility is not mentioned by the Court and that it follows from the wording of paragraph 95 that "Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (.A')."[183] This could indicate that the Court would not accept a requirement for a company to change its nationality upon the transfer of its central administration.[184] Roth also seems to fail to see that in *Centros* the Court emphasized that it should be possible for a company to choose to set up a corporation in the Member State where the company law regime is the

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178. *Id.* para. 82.

179. *See* Wulf-Henning Roth, *From* Centros *to* Überseering*: Free Movement of Companies, Private International Law, and Community Law*, 52 INT'L & COMP. L.Q. 177, 205-08 (2003).

180. *See id.* at 206.

181. Presumably Wulf-Henning Roth believes that a requirement to reincorporate can be maintained because, in paragraph 92, the Court does not preclude Member States from requiring foreign companies to fulfil certain conditions, with the purpose of protecting, among others, creditors, minority shareholders, and employees. It seems certain, however, that such requirements must comply with the four conditions laid down by the Court in paragraph 34 of *Centros*, and it seems absolutely certain that a Member State that applies every rule of the national company law to foreign companies can pass this test. *See* Karsten Engsig Sørensen, *EU-Domstolens seneste praksis om selskabsret: Überseering og hovedsædeteorien*, 4 NORDISK TIDSSKRIFT FOR SELSKABSRET 405, 410 (2002); *see also infra* Part V.

182. BIRKMOSE, *supra* note 16, at 119.

183. *Überseering*, 2002 E.C.R. I-9919 para. 95.

184. *See* Roth, *supra* note 179, at 207.

least restrictive and to set up branches in other Member States, even when the company has no economic activity in the state of incorporation.[185] Even though the Court does not repeat this in *Überseering*, there is no reason why there should be any difference regarding primary and secondary establishment. It would not be possible to forum shop if some Member States can require a change of nationality, so it seems to be questionable whether the Court would accept such a requirement. Therefore, it is unlikely that the ECJ would allow a Member State to invoke its conflict of laws rules to require a company to change its nationality from that of its state of incorporation.[186]

Therefore, it can be argued that the right of a company to transfer its central administration to a Member State other than its state of incorporation depends on the law under which it is established. If such a right is granted and it fulfils the requirements of article 48 EC, then a transfer of the central administration will be considered to be an exercise of freedom of establishment, and the company's right to do so must be recognised by the Member State in which it wishes to establish itself, that is, where it locates its central administration. Further, the right to transfer the central administration from one Member State to another is not guaranteed by the EC Treaty. It exists solely on the basis of the law under which the company is incorporated.[187]

The questions remaining after *Centros* can now be answered. The duty to recognise a company's right to secondary establishment also applies to Member States which apply the real seat doctrine.[188] As long as a company is legally formed in accordance with the corporate law of a Member State, it can set up a secondary establishment in any other Member State, regardless of whether the company conducts any economic activity there or where its central administration is located. According to the real seat doctrine, such a secondary establishment would, in some cases, be considered to be the central administration, so the company would be considered a national of the Member State in which the secondary establishment is located. After the *Centros* case, national conflict of laws rules must give way to the Treaty rules on freedom of establishment because the EC Treaty grants all companies

185. *Centros*, 1999 E.C.R. I-1459, 1493.

186. WERLAUFF, *supra* note 49, at 6.

187. *See Daily Mail*, 1988 E.C.R. 5483, 5512. It is not directly repeated in the *Überseering* case, but in paragraph 81 the ECJ repeats that companies only exist by virtue of national laws which determine their incorporation and function. This is done with a reference to the *Daily Mail* case. *See Überseering*, 2002 E.C.R. I-9919.

188. Remember, Germany applies the real seat doctrine.

formed in accordance with the laws of a Member State freedom of establishment to set up a branch, agency, or subsidiary.[189] So, if a Member State considers a company to be legally formed under its laws even if it has no central administration or any economic activity in that State, but only its registered office, it has the right to exercise the freedoms granted in the EC Treaty. There is also a duty to recognise companies validly incorporated under the laws of a Member State when such a company transfers its central administration out of the state of incorporation if it is entitled to do so under the law of the state of incorporation.

D. Questions Remaining After Überseering

It is still not clear whether the duty of recognition in relation to primary establishment also applies when a company has no connection with the Community other than having its registered office in a state of incorporation within the Community. This would be the case where a company has not yet started trading. If forum shopping is possible, it would be permissible to acquire a newly formed company and conduct activities in the desired Member State without first establishing any link to the state of incorporation. This situation is similar to the one in *Centros*, where a company had no economic activity in the Community prior to the establishment of a branch or transfer of its central administration. This uncertainty arises primarily because of the comments of the ECJ on the requirement in Title I of the General Programme[190] that there should be a real and continuous link with the economy of a Member State for the purpose of the exercise of the freedom to set up a secondary establishment.[191] It seems to be sufficient, though, that economic activity is planned in light of the decision of the Court in *Factortame II*.[192]

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189. *Cf.* PETER BEHRENS, DAS INTERNATIONALE GESELLSCHAFTSRECHT NACH DEM CENTROS-URTEIL DES EUGH, IPRAX 323, 329 (1999); Eddy Wymeersch, *supra* note 173, at 633; Barbara Höfling, *Die* Centros*-Entscheidung des EuGH-auf dem Weg zu einer Überlagerungstheorie für Europa*, 23 DER BETRIEB 1206 (1999); Zimmer, *supra* note 114, at 35; Søren Friis Hansen, C-212 og L 212, 1 NORDISK TIDSSKRIFT FÜR SELSKABRET 51 (2000).

190. The General Programme for the abolition of restrictions on the freedom of establishment was adopted in Brussels on December 18, 1961. (OJ, English Special Edition, Second Series (IX), p. 7). Today the General Programme is mainly of historical interest, as the ECJ has ruled that article 43 has direct effect. *See, e.g.*, CRAIG & DE BÚRCA, *supra* note 84, at 734-38.

191. *Überseering*, 2002 E.C.R. I-9919 para. 75.

192. *Id.* para. 21. The registration of a vessel did not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel was not used to pursue an economic activity or where the application for registration was made by or on behalf of a person

In its written submission in the *Überseering* case, the Spanish government argued that, although the General Programme imposes a requirement for a real and continuous link only in relation to secondary establishment, such a requirement should also apply to principal establishments.[193] The Court denied that the General Programme was applicable[194] and referred to its wording, which requires a real and continuous link solely when a company has nothing but its registered office within the Community.[195] That, stated the Court, was unquestionably not the position in the case of Überseering BV, whose registered office and actual centre of administration were within the Community.[196] The Court went on to indicate:

> As regards the situation just described, the Court found, at paragraph 19 of Centros, that under Article 58 [present article 48] of the Treaty companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the community are to be treated in the same way as natural persons who are nationals of Member States.[197]

If one looks at paragraph 19 of the *Centros* judgment, the paragraph quoted in *Überseering* above is mentioned in connection with the interpretation of article 43 EC (formerly article 52), according to which the freedom of establishment gives nationals of a Member State the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for the nationals of the state of incorporation.[198]

The Court does not directly comment on the argument of the Spanish government that the requirement for a real and continuous link should also apply in the case of the principal establishment. But the Court's statement in the third sentence of paragraph 75, that "as regards the situation just described," must be seen as a reference to the first sentence of paragraph 75, which is a general reference to the situation in which a company only has its registered office within the Community.[199]

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who was not established, and had no intention of becoming established, in the state concerned. *See also* SØRENSEN & NIELSEN, *supra* note 11, at 414.

193. *Überseering*, 2002 E.C.R. I-9919 paras. 34-35.

194. *Id.* para. 74.

195. The requirement for a real and continuous link with the economy of a Member State had not previously been put before the Court, which was why there was uncertainty about whether or not the requirement could be maintained. *See also* SØRENSEN & NIELSEN, *supra* note 11, at 410.

196. *Überseering*, 2002 E.C.R. I-9919 para. 75.

197. *Id.*

198. *Id.*

199. *Id.*

The fact that the Court chose to comment on this situation with a reference to paragraph 19 of *Centros* and article 48 EC (former article 58) must mean that the national law is decisive. If, under national law, it is possible for a company without economic activity in the state of incorporation to set up a secondary establishment, other Member States cannot impose supplementary requirements on the company.[200] This also means that there cannot be a requirement for a real and continuous link to the Community if such a company can transfer its central administration under the law of its state of incorporation.

The conclusion must be that the result would have been the same if there had been a situation like the one in *Centros*, where a company which has had no prior economic activity within the Community transfers its central administration to another Member State. Based on this, it can be concluded that the duty of recognition has been extended by *Überseering*, and it now applies in all cases where a company transfers its central administration in conformity with the law of the state of incorporation.[201] This conclusion has implications for the access of non-EU nationals and companies to the internal market of the European Union. It is now possible for a U.S. corporation to incorporate a subsidiary in the Member State with the most favourable company law regime, regardless of the location of the U.S. corporation's central administration. Such a corporation thereby gains access to the internal market and enjoys the privileges of being covered by the EC Treaty.

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200. Some questions still remain. One question is whether the duty of recognition only applies if the secondary establishment is used to pursue economic activity in a Member State, and if such activity is planned, whether the requirement for a real and continuous link to the Community is fulfilled when such an activity is merely planned. For example: a German lawyer incorporates an English shelf company which has not yet had any economic activity, and the lawyer subsequently wants to register a branch of the company in Germany. It cannot be excluded that, in such a case, Germany can apply the real seat doctrine and refuse to recognise the corporation because the corporation is not yet covered by article 43 EC, as there is no real and continuous link. However, it can be said that even if the real seat doctrine can be applied in a case like this, it does not have any practical relevance, apart from the fact that it is not possible to register a branch in Germany until the company has or is planning to have economic activity there in the near future. Karsten Engsig Sørensen seems to agree with this point. *See* Sørensen, *supra* note 181, at 408. It also seems to be supported by Eddy Wymeersch in *The Transfer of the Company's Seat in European Company Law, ECGI-Law Working Paper No. 08/2003 22*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384802 (last visited Feb. 4, 2005). Curiously, Wymeersch further indicates that "this requirement is not applicable to EU companies, for which it will suffice to meet one of the three connecting factors of article 48." *Id.* If this were the case it would mean that a shelf company incorporated according to, for example, English law, must be considered a European company. Therefore, if it fulfils the requirements of article 48 EC, it will be covered by the freedom of establishment. Based on this, it would seem to be difficult to keep foreign shelf companies out of the European Union.

201. *Cf.* Stefan Leible & Jochen Hoffmann, *„*Überseering*" und das (vermeintliche) Ende der Sitztheorie*, 48 RECHT DER INTERNATIONALEN WIRTSCHAFT 925, 932 (2002).

Another question that remained unanswered after *Überseering* concerns what measures a Member State can take to restrict the use of pseudo-foreign companies.[202] As already mentioned, a company is considered to be pseudo-foreign when it has most or all of its economic activity (including its central administration) in one Member State, but it is incorporated in another Member State with which it has no connection other than the fact that it is incorporated there. The question is important, because some Member States which apply the incorporation state theory regulate pseudo-foreign companies operating in their territories.[203] In this case, it is not the use of a particular conflict of laws rule that complicates corporate mobility, but the explicit regulation of a certain type of foreign company. The situation is clearly seen in the Netherlands. After a history of Dutch undertakings being incorporated in other Member States, particularly in the United Kingdom but operating in the Netherlands, the Dutch government passed a law regulating pseudo-foreign companies.[204] According to this, several provisions of the Dutch company law apply to companies which are categorized as pseudo-foreign, thereby making it less attractive to seek to avoid incorporation under Dutch company law.[205]

The ECJ touched on this question in *Centros*, holding that the national courts may, on a case-by-case basis, take account of abuse or fraudulent conduct on the part of persons seeking to rely on the freedom of establishment and deny them the benefit of the provisions of the EC Treaty on which they seek to rely.[206] Yet, although Denmark argued that the Danish refusal to register the branch could be justified on grounds of article 46 EC,[207] the ECJ dismissed this, holding:

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202. *See* Sørensen, *supra* note 181, at 410; *see also infra* Part V.

203. Denmark also imposes additional requirements on pseudo-foreign companies in Denmark.

204. *See Inspire Art*, 2003 E.C.R. I-10155:

> Art. 1 of *Wet op de Formeel Buitenlandse Vennootschappen* (Law on Formally Foreign Companies) defines a formal corporation as a capital company formed under laws of other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which it the company was formed applies.

Id. para. 22.

205. *Id.*

206. *Id.* para. 25. The Court further held that "the fact that a National of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment." *Id.* para. 27.

207. *See* CONSOLIDATED EC TREATY, *supra* note 8, art. 46. Article 46(1) EC provides: "The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the

> National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[208]

The ECJ also considered whether restrictions on freedom of establishment can be justified in certain cases in the Court's decision in *Überseering*. The Court held that "it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interest of creditors, minority shareholders, employees and even taxation authorities may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment."[209]

Based on this, it seems correct to conclude that a Member State can restrict freedom of establishment in order to prevent fraud. The authorities of a Member State can adopt any appropriate measures either in relation to the company itself, if need be in cooperation with the state of incorporation, or in relation to its members, when it has established that the company or its members are, in fact, attempting, by means of the formation of a corporation, to evade their obligations towards private or public creditors in the territory of the Member State concerned. However, it is not clear what constitutes either fraud or the appropriate measures against it.

Member States can also require pseudo-foreign companies to comply with certain requirements relating to the public interest, including parts of the company law of the Member State in question. Such provisions also must fulfil the four conditions referred to in *Centros* and cited above. As for the extent to which Member States could impose additional measures to prevent the fraudulent use of pseudo-foreign companies, it remains for the ECJ to specify what measures would be justified, given the EC Treaty's provisions on freedom of establishment.[210]

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applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." *Id.*

208. *Inspire Art*, 2003 E.C.R. I-10155 para. 133.

209. *Überseering*, 2002 E.C.R. I-9919 para. 92.

210. This question will be examined further *infra* Part V.

E. The Scope for Forum Shopping After Überseering *and the Consequences for the Establishment of a Market for Company Incorporations*

As stated earlier, the second condition that must be fulfilled before a market for company incorporations can be established is that it must be possible for the companies to forum shop. That is, it must be possible to choose freely between the different company law regimes offered by the Member States, regardless of whether the company conducts any economic activity in the incorporation state or where its central administration located. This condition is very close to being fulfilled after the ECJ's decision in *Überseering*.

When setting up a company, it is possible to choose the state of incorporation by determining which state seems to have the most favourable corporate law. This right follows from article 43 EC.[211] Whether it is possible to choose without regard for whether or not the central administration will be located in the state of incorporation depends on the law under which the company is incorporated. This is because the right to transfer the central administration from one Member State to another is not guaranteed by the EC Treaty, but exists by virtue of the law under which the company is incorporated.[212] Therefore, when determining whether a corporation has the right to make a primary establishment by transferring its central administration, it is necessary to start by proving the nationality of the company. This means that, as long as a company has the right under the national law of the state of incorporation to separate its central administration from its registered office by transferring the central administration, other Member States cannot question the legal capacity of such a company.

It is likely that a company will be granted the right to transfer its central administration out of the state of incorporation if the state applies the incorporation state theory. It is crucial that the company should still be considered validly incorporated in the state of incorporation even though its central administration is no longer in this state but its registered office is still located there. On the other hand, it must be assumed that it is not generally possible for a company incorporated in Member States which apply the real seat doctrine to transfer its central administration.[213] If it does so, it will no longer be considered by the state

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211. CONSOLIDATED EC TREATY, *supra* note 8, art. 43.

212. *Daily Mail*, 1988 E.C.R. 5484 paras. 19-20.

213. *See also* Wymeersch, *supra* note 200, at 27. An exception is made when the Member State applying the real seat doctrine allows for a transfer but, as mentioned above, this is not normally the case.

of incorporation to be validly incorporated in accordance with its law.[214] Also, it is not possible for a company incorporated in a Member State whose national laws do not allow for the separation of the central administration and the registered office without the loss of legal capacity to invoke freedom of establishment. Therefore the Member States which apply the real seat doctrine can maintain it in relation to their national companies, and these companies cannot locate their central administrations outside the state of incorporation. The consequence is that, for example, a U.K. limited liability company will have the right to transfer its central administration, but a German *Aktiengesellschaft* will not. The consequence of the German use of the real seat doctrine is that a German *Aktiengesellschaft* will still be dissolved if it transfers its central administration out of Germany.

Prior to *Überseering*, it was generally assumed that, in most situations, it was impossible to forum shop in the European Union because of the implications of separating the central administration from the registered office. This was partly due to the use of the real seat doctrine in a number of Member States and partly due to the fact that companies do not enjoy full freedom of establishment. It must still be assumed that companies do not enjoy freedom of establishment to the same extent as natural persons, but the consequence of *Überseering* is that Member States now have a duty to recognise the right to forum shop when this does not conflict with the law of the state of incorporation.[215]

The most serious obstacle to competition between legal orders in the European Union is still to be found in the national conflict of laws rules, as the majority of the Member States apply the real seat doctrine.[216] With its decisions in *Centros* and *Überseering*, there is no doubt that the Court has brought the European Union a great deal closer to a situation where competition for company incorporations is a reality, but the real seat doctrine still prevents the establishment of a true market for company incorporations. It is questionable, though, whether the restrictions that are still allowed after *Überseering* really prevent the establishment of a market for company incorporations. Rather, it is

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214. *Id.*

215. Their scope for forum shopping will also depend on how the Member State reacts. It is possible that some will attempt to regulate pseudo-foreign companies, but there are still no clear guidelines from the Court on how far it will accept such regulations.

216. *Cf. supra* Part III.A.2. There are indications that this might change. The German *Bundesgerichtshof* (the German Supreme Court) has stated that, according to German private international law, the status of the plaintiff must be determined according to the law under which the plaintiff was incorporated. The Decision of March 13, 2003, is reported in 18 DER BETRIEB 986-87 (2003).

probable that the restrictions will have a marginal effect and only prevent some Member States from participating in the competition for company incorporations. Thus, the consequences of the continued use of the real seat doctrine are that countries like Germany cannot take part in the competition for company incorporations. Despite this, they will probably be significantly affected by the competition between other Member States.

F. The Implications of Centros *and* Überseering *for the Real Seat Doctrine*

On the basis of neither *Centros* nor *Überseering* can it be concluded that the real seat doctrine can be declared dead, as a number of writers seem to have done.[217] Instead, the conclusion must be that the real seat doctrine has, to a large extent, lost its importance as a conflict of laws rule in the European Union, but that Member States can still apply it within the constraints of EU law. This means that Member States have a duty to recognise companies that have been validly formed in accordance with the law of a Member State and which continue to exist in the state of incorporation. This is of special importance to the Member States which apply the real seat doctrine because they can no longer impose additional requirements on a company validly incorporated in another Member State by reference to the location of its central administration. The duty of recognition applies to a company wanting to set up a secondary establishment in another Member State as well as a company wanting to transfer its central administration.

It is still possible for Member States to apply the real seat doctrine to their own national companies. Thus, a national company law can require a company incorporated under it to have its central administration as well as its registered office in the state of incorporation.[218] If a company incorporated in a Member State that applies the real seat doctrine sets up a secondary establishment[219] or transfers its central administration to another Member State, it is possible to apply the real seat doctrine so that the company loses it legal personality, as it will no longer be considered to be validly incorporated in accordance with the law of the state of incorporation. This is because the law of a Member

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217. *See, e.g.*, Hansen, *supra* note 118, at 143; SANDROCK, *supra* note 118, at 1340; SEDEMUND & HAUSMANN, *supra* note 118, at 810.

218. *Cf.* Sørensen, *supra* note 181, at 409; Leible & Hoffmann, *supra* note 201, at 928.

219. Presumably, it is a situation like the one in *Centros*. *See Centros*, 1999 E.C.R. at I-1459.

State that applies the real seat doctrine will require the central administration as well as the registered office to be located there.

The paradox at present is that in Europe different conditions apply to a company depending on whether the company was originally incorporated in a Member State that applies the real seat doctrine or the incorporation state doctrine.[220] Companies formed in accordance with the law of a Member State that applies the incorporation state doctrine have access to a wider range of cross-border activities. This option is not available to companies formed in accordance with the law of a Member State that applies the real seat doctrine. Such companies can set up secondary establishments as long as the state of incorporation still considers the central administration to be located there, and they presumably have no right to transfer the central administration. This right depends on national law.

The real seat doctrine is still applicable in a number of other cases. First, it can still apply to internal matters which do not relate to company law, such as insolvency or tax law.[221] Second, it can apply where the policy reasons that lie behind the real seat doctrine can justify its application from the perspective of protecting public interests.[222] Third, it is still possible to apply the real seat doctrine as a conflict of laws rule without restriction to companies not covered by the Treaty.[223] This will include, for instance, non-profit organizations and foreign companies that have any of the connecting factors referred to in article 48 EC.[224] This means that the real seat doctrine can be applied to foreign corporations from non-EU Member States like the United States.

G. The Market for Reincorporations

There is no doubt that *Überseering* has had a tremendous impact on the ways in which European companies can make use of the internal market. This is mainly by virtue of the consequences of the decision on the real seat doctrine. However, there are limits to the new possibilities

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220. *Cf.* Leible & Hoffmann, *supra* note 201, at 933; Wymeersch, *supra* note 200, at 30.

221. *See* Wymeersch, *supra* note 173, at 633; Søren Friis Hansen, C-212 og L 212, 1 NORDISK TIDSSKRIFT FOR SELSKABSRET 45, 61 (2000); Alexandros Roussos, *Realising the Free Movement of Companies*, JAN.—FEB. EUR. BUS. L. REV. 7, 13-14 (2001).

222. Eddy Wymeersch mentions that it is necessary to differentiate between provisions on the establishment of a company and provisions on the business of a company. *See* Wymeersch, *supra* note 173, at 639. Only for the latter will a Member State be able to maintain restrictions on freedom of establishment by reference to the public interest. This observation is made with reference to the *Centros* case at paragraph 26. *See id.*

223. *Id.* at 647.

224. *See* CONSOLIDATED EC TREATY, *supra* note 8, art. 48.

because the conflict of laws rules do not, in general, affect the possibility of reincorporating a company. Thus, *Überseering* has not had a substantial effect on the right of a company to migrate across the borders of the European Union.

It is generally accepted that it is not possible at present for a company in Europe to be reincorporated and to retain its identity unless this follows from national law.[225] Reincorporation can be made either by a cross-border merger or a transfer of the registered office (a change of nationality). These two alternatives, together with a transfer of the central administration, make up the ways in which a company can make a primary establishment. Even though *Überseering* deals with one of the three, it cannot be assumed that the principles laid down in *Überseering* on the right to transfer the central administration apply to the other two areas. *Überseering* does not in any way say that the EC Treaty grants companies the right to primary establishment. It does refer to the right to transfer the central administration which, in some cases, follows from national law.[226] Therefore, it must be assumed that a company cannot rely on the EC Treaty if it wishes to move its incorporation or merge to another Member State.[227] The Court even stated in *Daily Mail* that neither the right to transfer the central administration nor the right to transfer the registered office is covered by freedom of establishment.[228] In *Daily Mail*, the Court also stated that the Member States each lay down the conditions under which companies can be incorporated, "as companies are creatures of national law."[229] Therefore, it seems clear that a Member State cannot be forced to accept that a foreign company has become domestic without first being consulted. This would be the consequence if the duty of recognition were also assumed to apply to a transfer of the registered office.

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225. In most cases, if a company transfers its registered office to another Member State, it will be dissolved in the state of origin and reincorporated in the receiving state. One result of this is that the company will be taxed as if it had been wound up. A few Member States do allow a company to dissolve and reincorporate in the receiving state, if the original state of incorporation and the receiving state both accept it. *See* Sørensen & Neville, *supra* note 3, at 191. Even fewer Member States allow cross-border mergers, and it must be considered impossible in present circumstances.

226. *See supra* Part III.A.

227. *See, e.g.*, SØRENSEN & NIELSEN, *supra* note 11, at 458.

228. *Daily Mail*, 1988 E.C.R. 5483, 5512. Cross-border mergers are not mentioned in *Daily Mail*. This is possibly because the judgment of the Court deals with the connecting factors associated with international private law. These are without relevance to the right to carry out cross-border mergers, and therefore, it seems quite natural for the Court not to include this aspect of the primary establishment.

229. *Id.* at 5511. This was subsequently repeated in *Überseering*, 2002 E.C.R. I-9919.

Additionally, this would also be contrary to the conditions described in the other decisions of the Court. In *Centros* as well as in *Überseering*, the Court seemed to presuppose that the company was still validly incorporated in the state of incorporation after the cross-border activity was completed.[230] If it retains its status as a company, then articles 43 EC and 48 EC on the freedom of establishment apply to the company, and the other Member States cannot refuse to recognise its legal capacity.

To obtain legal personality, a company must be validly incorporated under the law of a Member State, and as a part of this incorporation, it must be registered in the state of incorporation. Because of this, any cancellation of the registration means that the company is no longer validly incorporated. Therefore, there is an important difference between a transfer of the central administration and a transfer of the registered office. In the first instance, it is possible to make the transfer without the involvement of the Member State to which the central administration is transferred because the company is still validly incorporated in the state of incorporation. This is not the case when the registered office is transferred because, in order for a company to retain its legal personality, the Member State to which the registered office is transferred must enter it on the national companies register at the same time as the registration is cancelled in the original state of incorporation. Therefore, this kind of primary establishment requires the involvement of both Member States.

Thus, it cannot be assumed that *Überseering* has any effect on the right to make a primary establishment by transferring the registered office. The same must be assumed in relation to the right to participate in a cross-border merger, which is even more remote from the *Überseering* decision than a transfer of the registered office. This means, while *Überseering* has had a significant influence on the market for initial company incorporations, as far as reincorporations are concerned, there is still a long way to go.

However, there might be some movement in this area, too. Proposals for a Tenth Company Law Directive on cross-border mergers and a Fourteenth Company Law Directive on cross-border transfer of statutory domicile are being considered.[231] If the Tenth Company Law Directive is adopted, cross-border mergers between companies from

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230. *Daily Mail*, 1988 E.C.R. at 5511.

231. The Commission has just presented a new proposal for a Tenth Company Law Directive. Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital, COM (2003) 703 final. The Commission is further expected to present a new proposal for a Fourteenth Company Law Directive before 2005. *See* Communication from the Commission to the Council and the European Parliament, COM (2003) 284 final.

different Member States will be possible, and adoption of the Fourteenth Company Law Directive will allow a company to change its nationality within the European Union without losing its legal personality.[232] A company may thus change its state of incorporation without having to dissolve in the original state and then reincorporate in the new state.[233]

The existing proposals for the Tenth and the Fourteenth Company Law Directives will certainly make a difference for companies wanting to participate in cross-border activities, but they also have shortcomings.[234] However, the proposal for the Fourteenth Company Law Directive was presented before the judgments of the ECJ in *Centros* and *Überseering*, and it took into consideration the widespread use of the real seat doctrine. It must therefore be expected that the restricted importance of the real seat doctrine will, to a certain degree, be reflected in a new proposal for this company law directive. It is thus difficult to predict the consequences *Überseering* will have on the market for company incorporations.

V. THE LATEST DEVELOPMENT—CASE C-167/01, *INSPIRE ART*

Some of the questions which remained after *Centros* and *Überseering* have been answered in the latest decision from the ECJ. *Inspire Art* concerned the Dutch regulation of a pseudo-foreign company.[235] Two questions were referred to the ECJ:

1. Are Articles 43 EC and 48 EC to be interpreted as precluding the Netherlands, pursuant to the *Wet op de formeel buitenlandse*

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232. It will be possible to participate in a cross-border merger if the SE Company form is used. The idea of a supranational European corporate form was first proposed more than fifty years ago, but the SE Regulation was not adopted until October 2001. *See* ERIK WERLAUFF, SE-THE LAW OF THE EUROPEAN COMPANY (2002). It has been argued that the SE Company could be used as a vehicle for forum shopping, and therefore, this legal form could become an important factor in the establishment of a market for company incorporations. *See* Luca Enriques, *Silence Is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage, ECGI-Law Working Paper No 07/2003*, Mar. 2003, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384801 (last visited Feb. 4, 2005).

233. The adoption of the Merger Taxation Directive already allows cross-border mergers with fiscal succession. *See* Council Directive 90/434/EEC, 1990 O.J. (L225/1). In terms of tax law, it is therefore possible to apply the same procedure as in the United States and reincorporate a company through a merger. Conversely, the proposed Fourteenth Company Law Directive does not address fiscal issues, and it is therefore uncertain whether a change of nationality will be fiscally possible if and when the Directive is adopted. *See* Sørensen & Neville, *supra* note 3, at 206.

234. *See* BIRKMOSE, *supra* note 16, at 145-55; R. Drury, *Migrating Companies*, 24 EUR. L. REV. 354, 368-71 (1999); Sørensen & Neville, *supra* note 3, at 196; Hoffmann, *supra* note 112, at 57.

235. *Inspire Art*, 2003 E.C.R. I-10155.

> *vennootschappen* of 17 December 1997, from attaching additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?
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> 2. If, on a proper construction of those articles, it is held that the provisions of the *Wet op de formeel buitenlandse vennootschappen* are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?[236]

A. Findings of the ECJ

Once again, the Court held that it is immaterial to the rules on freedom of establishment that a company is formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or indeed entire, business is to be.[237] Therefore, except in the case of fraud, the reasons why a company chooses to be formed in a particular Member State are irrelevant.[238] Also, the ECJ rejected the argument that freedom of establishment was not in any way infringed by the Dutch rules, inasmuch as foreign companies are fully recognised in the Netherlands and are not refused registration in the Dutch business register, and that the law in question simply had the effect of laying down a number of additional obligations classified as "administrative."[239] The Court found that the setting up of a branch in the Netherlands by companies like Inspire Art Ltd. is subject to certain rules under Dutch law with respect to the formation of a limited liability company. Therefore the Dutch legislation, which requires the branch of such a company formed in accordance with the legislation of a Member State to comply with certain provisions of the Dutch company law, has the effect

236. *Id.* para. 39.
237. *Id.* para. 95.
238. *Id.*
239. *Id.* para. 99.

of impeding the exercise by those companies of the freedom of establishment conferred by the EC Treaty.[240]

Based on this reasoning, the ECJ concluded that articles 43 EC and 48 EC preclude national legislation such as that of the Dutch from imposing certain conditions for minimum capital and directors' liability on the exercise of the right of secondary establishment in the Netherlands by a company formed in accordance with the law of another Member State.[241] The reasons why a company is formed in another state and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where abuse is established on a case-by-case basis.[242]

Next, the ECJ considered whether the Dutch restriction on freedom of establishment could be justified in any way.[243] First, the Court found that none of the arguments put forward by the Dutch government—namely, the aims of protecting creditors, combating improper recourse to freedom of establishment, and protecting both effective tax inspections and fairness in business dealings—fell within the ambit of article 46 EC.[244] Then, the ECJ considered whether the restrictions could be justified on grounds of overriding public interest.[245] The Court repeated that, according to its established practice, national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make them less attractive must fulfil four conditions to be justified: (1) they must be applied in a nondiscriminatory manner, (2) they must be justified by imperative requirements in the public interest, (3) they must be suitable for securing the attainment of the objective which they pursue, and (4) they must not go beyond what is necessary in order to attain it.[246] After having considered whether the Dutch rules could be justified on the grounds of protecting creditors, combating improper recourse to freedom of establishment, safeguarding fairness in business dealings, or the efficiency of tax inspections, the Court concluded that the Dutch rules could not be justified on overriding public interest grounds.[247]

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240. *Id.* para. 101.
241. *Id.* para. 105.
242. *Id.*
243. *Id.* paras. 106-30.
244. *Id.* para. 131.
245. *See* Part IV.D.
246. *Inspire Art*, 2003 E.C.R. I-10155 para. 133.
247. *Id.* para. 142.

B. Impact of Inspire Art *on the Establishment of a Market for Company Incorporations*

The consequences of *Inspire Art* on the establishment of a market for company incorporations seem to be limited. It did not expand the area of corporate mobility nor the ability of companies to forum shop. But, it has emphasized that, because forum shopping is a consequence of freedom of establishment, Member States do not have carte blanche to regulate pseudo-foreign companies.

In situations other than fraud or where the existence of an abuse is established on a case-by-case basis, national rules which constitute an impediment to freedom of establishment must be evaluated according to whether they can be justified on one of the grounds set out in article 46 EC or, failing that, by overriding public interest grounds. Justification relating to the public interest can be based on a number of different reasons. In *Überseering*, the ECJ specifically mentioned the protection of the interests of creditors, minority shareholders, employees, and even taxation authorities.[248] In *Inspire Art*, the ECJ again mentioned the protection of creditors and added combating improper recourse to freedom of establishment, safeguarding fairness in business dealings, and the efficiency of tax inspections.[249] For restrictions to be justified on such grounds, they must fulfil three further conditions: they must be applied in a nondiscriminatory manner, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.[250]

However, the Court has not given specific guidelines on the circumstances under which restrictions on freedom of establishment can be upheld on public interest grounds and not be considered unjustifiable restrictions on freedom of establishment. Therefore, even though the Dutch rules applicable to pseudo-foreign companies were found to be contrary to the EC Treaty's provisions on freedom of establishment, it cannot be concluded that it will be impossible to require pseudo-foreign companies to satisfy certain provisions in national company law.[251] However, it is hard to imagine what kind of additional requirements the Court will accept as justifiable, and *Inspire Art* can therefore be seen as confirming the corporate mobility established in *Centros* and *Überseering*. Whenever a company has the right to separate its central

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248. *Überseering*, 2002 E.C.R. I-9919 para. 92.

249. *Inspire Art*, 2003 E.C.R. I-10155 para. 132.

250. *See Centros*, 1999 E.C.R. I-1459, 1495; *Inspire Art*, 2003 E.C.R. I-10155 para. 133.

251. The additional requirements must, of course, satisfy the four conditions referred to in *Inspire Art*, paragraph 133. *See Inspire Art*, 2003 E.C.R. I-10155 para. 133.

administration from its registered office under the law of the incorporation state, it is covered by the EC Treaty provisions on freedom of establishment, and the other Member States cannot apply their national conflict of laws rules to deny recognition of the company.[252] *Inspire Art* stated that it is not only national conflict of laws rules that can constitute a restriction on the freedom of establishment; so can other national company law rules applied to pseudo-foreign companies that are covered by articles 43 EC and 48 EC, if those national rules restrict freedom of establishment and cannot be justified either on the grounds of article 46 EC or public interest grounds.[253]

VI. IS *ÜBERSEERING* THE BEGINNING OF THE END?

The answer to this question depends on whom you ask. There is no doubt that the ECJ has radically changed the corporate landscape in the last five years. But at the same time, it has been suggested in this Article that the European Union is far from having established a market for company incorporations that can be compared to the U.S. market. In order for competition between legal systems to arise, there must be a market that allows for Member States as well as the companies to participate in the competition. Such a market is at present only partially established by *Centros* and *Überseering*, but it is not yet complete, primarily because of the continued use of the real seat doctrine and the lack of access to reincorporation.

Competition between legal orders in the European Union will take more than just the creation of a market. It will require first that companies forum shop in order to find the most attractive company law and then migrate to the Member State offering that law. Secondly, the Member States must make an effort to attract as many incorporations as possible by changing their company laws to become more attractive.

While it seems likely that companies will forum shop given the opportunity, it is more questionable whether the Member States will have sufficient incentives to compete for company incorporations. In the United States, it is generally assumed that the states have an economic incentive to compete for incorporations.[254] Even though this assumption

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252. A company may separate its central administration from its registered office either by establishing a branch from which the corporation is managed or by transferring the central administration.

253. *Inspire Art*, 2003 E.C.R. I-10155 paras. 131-32.

254. *See, e.g.*, William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 715-16 (1998); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L., 885, 887-88 (1990); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 32 (1993).

has been debated, each state does have an income based on the number of corporations incorporated there.[255] Even though the Member States can have an income derived from company incorporations, the Directive on indirect taxes on the raising of capital regulates such an income.[256]

Under this Directive, the Member States can levy a tax on no more than one percent of the value of the shares on the formation of a capital company or on an increase in its capital.[257] Also, the formation of a company is only taxable in the Member State in whose territory the effective centre of management of a capital company is situated (the central administration) at the time of its formation.[258] Therefore, if a company is set up in one Member State and its central administration is located in another, it is the latter state that can raise tax on the formation. Therefore, taxation seems unlikely to be an incentive to compete for company incorporations.

Apart from capital duty, the Directive forbids Member States from charging any taxes whatsoever on the registration or any other formality to which a company may be subject by reason of its legal form required before the commencement of business.[259] In general, the Directive bans taxes that cover the registration of a company, but the ECJ has approved that a reasonable fee can be charged for the registration.[260] Besides fees that cover the actual costs of the registration, it is possible that certain fees and duties will fall outside the scope of the Directive and could thereby generate an income for the Member States.[261] However, it seems questionable that such income could reach a level where it would constitute an economic incentive.[262]

The Member States will undoubtedly experience other economic benefits from having a large number of company incorporations apart from the Directive income. The existence of a large number of

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255. There is a debate about whether the franchise tax really makes a difference in most states. *See* Loewenstein, *supra* note 6, at 501; Carney, *supra* note 254, at 719; Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 688-89 (2002).

256. Council Directive 69/335/EEC 1969 O.J. (L 249/25).

257. *Id.* arts. 4(1), 4(7).

258. *Id.* art. 2(1).

259. *Id.* art. 10.

260. The ECJ has provided some guidelines as to what is a reasonable fee. Case C-188/95, Fantask A/S v. Industriministeriet (Erhvervsministeriet), 1997 E.C.R. I-6783, 6818.

261. *See* Case C-4/97, Manifattura Italiana Nonwoven SpA v. Direzione Regionale delle Entrate per la Tascana, 1998 E.C.R. I-6469, 6479 (holding that the Directive did not bar a tax levied on business net property each year at the end of the accounting year).

262. *See also* Sørensen, *supra* note 5, at 225; BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 436-37; STEFAN GRUDMANN, THE EUROPEAN UNION AND GOVERNANCE 789-95 (Matthias Baudisch Snyder ed., 2001).

companies will have downstream effects for groups like lawyers and accountants in the state of incorporation. Therefore, the Member States will have some indirect income that can be an incentive for competition. It is also possible that different interest groups in the Member States will benefit if a state is able to attract a large number of companies. Such interest groups might succeed in lobbying the Member States to compete for company incorporations.[263] It is therefore difficult to predict whether the Member States will start a process of changing their company laws in order to attract incorporations.[264]

In conclusion, there is no doubt that the ECJ has started a process that might eventually lead to the creation of a market for company incorporations. However, even though the Court has taken the European Union a great deal closer to a situation where there is competition for company incorporations, it has only partially paved the way. The creation of such a market will not necessarily be the beginning of the end; that depends entirely on how companies and the Member States react to such a situation. Only if companies start to shop around for financially advantageous company laws and Member States respond by adopting company laws that do not maintain the existing levels of protection of stakeholders' interests, will *Überseering* be regarded as the beginning of the end.

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263. *See* BIRKMOSE, *supra* note 16, at 212; Jonathan R. Macey & Geoffrey P. Miller, *Towards an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 498-99 (1987); William J. Carney, *The Political Economy of Competition for Corporate Charters*, J. LEGAL STUD. 305, 311 (1997).

264. For instance, an objective of the current British company law reform is to make the law competitive so as to enable the United Kingdom to attract new companies and retain existing ones. *See* THE COMPANY LAW REVIEW STEERING GROUP, *Modern Company Law: For a Competitive Economy*, Final Report, Part 1, Chapter 1.13, at 6 (2001).