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Abstract

After the Centros case in 1999, the Europe Court of Justice has again delivered a significant case dealing with the legal situation of EU companies establishing themselves in other Member States. In the Überseering case of November 5, 2002, the Court considered incompatible with the Treaty freedoms, the German rule, based on the real seat doctrine, whereby foreign companies with a seat on the German territory were refused to appear in German courts unless they proceeded to re-incorporation. This was considered an outright negation of the freedom of establishment. Member states should allow companies that have been incorporated in other Member states to freely enter their territory, according to the rules under which they have been formed in their state of origin. The case constitutes another landmark on the road towards the more free circulation of companies in Europe. Whether it introduces the incorporation theory as the European rule, is open to doubt, as the Court has exclusively relied on the Treaty rules on free establishment. It seems that the Court has rather developed a new approach that could allow to bridge the differences between incorporation and real seat techniques.

Keywords: European Company Statute, Seat Transfer, Incorporation theory, Real Seat theory, Überseering case, "General Good" Clause, EC Company Law

JEL Classifications: F02, F20, K22, L5

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THE TRANSFER OF THE COMPANY'S SEAT IN EUROPEAN COMPANY LAW

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1. For decades, the transfer of the seat of a company has been the subject of controversy in European company law[1]. Although the subject was expressly mentioned in the European Treaty, experts have not been able to agree on a workable solution[2]. Also, in most states, national company law has not been able to come forward with acceptable solutions. As a consequence, companies were prevented from enjoying the same freedom of movement as natural persons, and this notwithstanding their express assimilation in the Treaty[3].

It may seem astonishing that a technical issue such as the transfer of the seat has stirred so much animosity, even acrimony. The subject has to be situated against the background of the fundamental chasm that divides European company law systems between what is known on the one hand as the "Incorporation theory", and on the other as the "Real seat theory". Where the first theory connects a company to the jurisdiction in which it has been incorporated, so that the company may develop whatever activities it exercises in other states without losing its original status, the second technique starts from social and economic reality and applies its legal order to all entities that are effectively directed from within its territory. Where the first recognises all foreign legal entities according to the rules applicable in the state of origin, the second theory refuses to recognise companies that claim to belong to another jurisdiction which is not the one in which their real seat is established.

The controversy is especially strong where the question of the crossing of the state borders is concerned: this is the subject of the cross border transfer of the seat, but also applies to the issue of the cross border merger, two subjects on which harmonisation has not been able to make any progress for several decades.

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[1] Extensive overviews of the subject per Member State can be found in M. MENJUCQ, *La mobilité des scoiétés dans l'espace européen*, Paris, 1997, 441 p; M. MENJUCQ, "Transfert international de siège social : Etat du droit positif", *JCP*, Ed. Entr. 1999, 1617; J.W. BELLINGWOUT, *Zetelverplaatsing van rechtspersonen*, 1996, 510 p.; J. WOUTERS, *Het Europese vestigingsrecht voor ondernemingen herbekeken*, Thesis, 1997, 4 vol; for a good œuvre of the status in the Nordic states : M. NEVILLE, N.WINTHER-SØRENSEN, K.E. SØRENSEN, "Free Movement of Companies under Company law, Tax Law and EU law", in M. NEVILLE and K.E. SØRENSEN, (eds) *The Internationalisation of Companies and Company laws*, Copenhagen, 2001, 181

[2] Draft Treaty of 27 February 1968, Convention on the Mutual Recognition of Companies and Firms, see MENJUCQ, M., nt.1, nr. 118.

[3] On the basis of article 48 (ex 58).

2. In Europe, the legal issue would not be so controversial if, beyond the technical discussion, there were no important political interests at stake. In this regard, several elements deserve to be mentioned. Some of the arguments relate to the general controversy between the two mentioned theories, others more directly address the case of the cross border merger, or of the cross border transfer of the seat

The incorporation theory allows the founders of a company to freely choose for the legal system they think most appropriate: once the choice is made, it can be maintained throughout the company's life. The legal status of the company can be determined regardless of the state in which its activity is effectively deployed. Other states would therefore have to accept this "foreign" element in their social fabric.

The incorporation technique, it is alleged, facilitates the creation of mere letter box companies, and hence contributes to locate important – and sometimes rather controversial - transactions in more or less fictitious companies, located in exotic places. Unhealthy practises might result, the more so as the incorporation technique is often applied by jurisdictions that are considered tax havens. Real seat systems therefore are more oriented towards exercising close control over the entities that operate within their jurisdiction. Said jurisdictions will refuse these companies, whether by disqualifying them, or by submitting them to their own legal order, when in fact the company is being managed from their own territory. Incorporation systems sometimes voluntarily correct their system to take into account the potential danger to their reputation: special legislation will be enacted for "quasi" or "formally foreign companies"[4].

3. The issue of "legal arbitrage" has always been at the centre of this debate. By choosing for a legal regime that best suits the founders, some legal systems will be preferred as tending towards what is perceived as a lower level of regulation, and hence of protection of the different interest involved (shareholders, creditors, employees). The spectre of the "race for laxity" is raised. While this type of competition cannot be avoided upon formation, it can be controlled much better during the later life of the company. Hence the generally hostile attitude against allowing companies to transfer themselves into another legal system.

Whether competition between company law systems, or between regulatory systems in general has only negative consequences remains to be proved, and is considered by many as very controversial[5]. But it is perceived by legislators and

[4] See the Dutch law on Formeel buitenlandse vennootschappen, which is the subject of a referral for a preliminary ruling by the ECJ, see infra note15; on the subject see C.W.A. TIMMERMANS, "Das niederländische Gesellschaftsrecht im Umbruch" in U. H. SCHNEIDER e.a. (ed.) *Deutsches und europaïsches Gesellschafts-, Konzern und Kapitalmarktrecht: Festschrift fur Marcus Lutter zum 70. Geburtstag*, Cologne, 2000, p. 173.

[5] See for the sources on the controversy: W.L. CARY, "Federalism and corporate law: reflections upon Delaware", *Yale Law Journal*, 1974, 663 (race to the bottom) and the reaction in R. WINTER, "State law, shareholder protection and the theory of the corporation", *Journal of Legal Studies*, 1977, 251 (race to the top). R. ROMANA deals

regulators as a definite threat to their legislative work. In some quarters, the controversy has been focusing on the specific aspects of national company law: would a cross border transfer of the seat not harm the fundamental – and hard fought – features of national company law, e.g. German or Dutch co-determination, or the German law on groups of companies?

Faced with competition, legislators will experience difficulties in enforcing their laws. Voices will be heard to engage in harmonisation that would amount to installing a floor under the competitive pressures. In Europe, harmonisation has sometimes been used to achieve this type of anti-competitive conduct[6].

The hostility against the emigration of companies is furthermore rooted in tax questions: if jurisdictions allow companies to have their seat transferred, valuable tax substance may be looking for a more clement tax climate. Therefore most legal systems impose considerable taxes upon leaving their jurisdiction.

4. It is striking that this controversy has popped up with some passion several times in the history of European company law. The now historical, unsuccessful attempt, in a 1968 draft Treaty[7], to achieve some form of mutual recognition of companies originating from one of the then six member states was ominous for later developments. The issue poisoned the discussion on the cross border merger, and later on the cross border transfer of the seat. It was also an important feature in the running up to the Statute for a European Company [8].

The issue has remained deadlocked for several decades. The draft Treaty of 1968, essentially dealing with recognition of companies from other member states, became purposeless as recognition had de facto been achieved. But all progress on the Tenth Directive on cross border mergers was blocked, allegedly out of fear that the German co-

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with the subject in an empirical way: “Law as a product: some pieces of the incorporation puzzle”, *Journal of law, Economics and Organization*, 1985, 225); J.R. MACEY en G.P. MILLER, “Toward an interest-group theory of Delaware corporate law”, *Texas Law Review*, 1987, 469; L. BEBCHUK “Federalism and the corporation: the desirable limits on state competition in corporate law”, *Harvard Law Review*, 1992, 1435; H. S. BIRKMOSE “The fear of the Delaware-effect - the American Demon?” in M. NEVILLE and K.E. SØRENSEN (eds), *The Internationalisation of Companies and Company laws*, Copenhagen, 2001, 243.

6 See for recent European publications on this subject EIDENMÜLLER, H., “Wettbewerb der Gesellschaftsrechte in Europa”, *ZIP*, 2002, 2233; HEINE and KERBER, “European Corporate Law, Regulatory Competition and Path Dependence” *European Journal of Law and Economics*, 2002, 47. Further WYMEERSCH, “Company Law in Europe and European Company law”, 1st European Jurists Forum, Nomos V., 2001, 87.

7 H. LE NABASQUE, “Le droit européen des sociétés et les opérations transfrontalières” in *Mélanges Champaud*, 1997, 417, indicates that the absence of this treaty has no negative effect on the recognition of foreign companies.

8 Previous drafts, e.g. the ones of 1970, 1975 en 1989 do not contain provisions dealing with the transfer of the seat.

determination regime would be undermined. The Commission prepared a proposal of a draft directive on the cross border transfer of the seat, but its discussion never reached an advanced stage.

5. Changes in the system have been triggered by the case law of the European Court of Justice. It becomes increasingly apparent that the traditional legal system constitutes a significant burden on intra-European mobility of companies, and a drag on the competitiveness of Europe's overall economy.

In several cases, the relationship of national company law rules with the Treaty principles of free establishment has been tested.

In the first case, known as Segers[9] (1985), the Court considered that a Dutch social security organisation could not validly refuse to grant social security benefits to the director of a company that, having been incorporated in the UK, had its activity exclusively deployed in the Netherlands, on the mere basis that the employer company had its registered office in the UK. It was considered contrary to article 58 (now article 48) to apply a different regime depending on whether the company seat was established in another member state[10].

In a second, important case, known as the Daily Mail case[11] (1988), the Court seemed to have frozen the issue of the cross border seat transfer: faced with the large differences in national law systems, the Court was of the opinion that this was not an issue to be solved under the Community law rules on freedom of establishment, but had to be dealt with by future legislation or conventions[12].

The third case – Centros[13] (1999) - more clearly dealt with a cross border transfer of a seat through branc establishment, by a UK company into Denmark. The Court considered incompatible with the freedom of establishment, the ruling of the Danish authorities imposing stricter requirements as applicable to Danish companies, on a UK company, although it had no main business office in the UK but essentially operated out of its Danish office.

In the fourth and most recent case – Überseering[14] (2002) – the Court again applied the rules on freedom of establishment to state that German law refusing to

[9] D.H.M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, case 79/85 of 10 July 1986, ECR, 1985, 2375

[10] § 14, Segers, nt. 9, where the Court, in § 17, already expressed a reservation towards cases tainted with fraud, or cases where the "general good" exception might have been validly invoked.

[11] The Queen v. H.M. Treasury and Commissioners of Inland revenue, ex parte Daily Mail and General Trust plc, Judgment of 27 September 1988, Case 81/87, ECR, 1988, 5483.

[12] § 23 Daily Mail,nt.11.

[13] Centros Ltd and Erhvervs-og Selskabsstyrelsen, Judgement of 9 March 1999, Case C 212/97, ECR, I-1459. As the number of commentaries on this case has been so numerous, especially in Germany, no attempt will be made to list them.

[14] Überseering BV and Nordic Constriction Company Baumanagement (NCC), case 208/00, Judgement of 5 November 2002, not yet reported; see also the opinion of Adv. Gen COLOMER; the case has been reported in many German law reviews: see; *DB*,

recognise a Dutch company that had moved its centre of administration into Germany, had no legal capacity and therefore could not stand in court.

A further case is forthcoming: the Amsterdam tribunal made a referral for a preliminary ruling with respect to the compatibility of the Dutch law on Formally Foreign Companies with the freedom of establishment. It seems probable that the Court will raise objections to the extent that these companies have a mere formal activity outside the Community[15].

6. The last two cases have now traced the path towards a more open discussion on this topic. This will be attempted in this paper.

In order to clarify the premises of the debate, part I will give a short overview of the existing national legal rules on the seat transfer. It will document that in most jurisdictions there is little if any case law dealing with the subject. Legal analysis is often contradictory and offers confusing guidance.

Part II will be dedicated to a commentary of the Überseering case and the long term perspectives it creates.

Part III will address some of the issues that may be raised concerning the rules of the European Company Statute that deal with the transfer of the seat.

Part I
National Company Law Rules and Opinions on the Transfer of the Seat.

2002,2425; *GmbHR*, 2002, 1137; *ZIP*, 2002, 75; *AG*, 2003, 37; the first commentaries have been published: P. BEHRENS, "EuGH klärt Niederlassungsfreiheit von Gesellschaften", *EuZW*, 2002, 737; U. FORSTHOFF, "EuGH fördert Vielfalt im Gesellschafstsrecht", *DB*, 2002, 2471; H. KALLMEYER, "Tragweite des Überseerings-Urteil des EuGH vom 5.11.2002 zur grensüberschreitenden Sitzverlegung", *DB*, 2002, 2521; LEIBLE S. and HOFFMANN, J., "Überseering" und das (vermeintliche) Ende der Sitztheorie, RIW, 2002, 925; MICKLITZ, H.-W., Überseering – die geschenkte Chance, *EWS*, 12/2002, *Die erste Seite*; M. LUTTER,"Überseering" und die Folgen, BB, 203,7; E. SCHANZE and A. JÜTTNER, "Anerkennung und Kontrolle ausländischer Gesellschaften, Rechtslage und Perspektive nach der Überseering-Entscheidung des EuGH", *AG*, 2003, 30; M. SCHULZ and P. SESTER, "Höchrichterliche Harmonisierung der Kollisionsregeln im europäischen Gesellschaftsrecht: Durchbruch der Gründungstheorie nach Überseering", *EWS*, 2002, 545; SCHUTTE-VEENSTRA, N., "Commentary sub Überseering", *Ondernemingsrecht* 2002, at 531; WERNICKE, TH., Anmerkung, EuZW, 2002, 758; D. ZIMMER, Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH, BB, 2003, 1.

[15] See Case 167/01 and Kantongerecht Amsterdam, 5 February 2001; JOR 2001/200 nt. G. VAN SOLINGE; see SCHUTTE-VEENSTRA, N., "Commentary sub Überseering", *Ondernemingsrecht* 2002, 528.

1. Incorporation theory jurisdictions

7. In jurisdictions adhering to the incorporation theory, to transfer the "seat" of the company has no legal meaning. The company remains subject to the jurisdiction of the state in which it was incorporated, in which it has its registered office[16]. Within the original jurisdiction of its formation, the company can transfer its registered office by lodging a document, signed by its directors, with the Companies registrar.[17] Under Dutch law, a cross-border transfer of the seat would not be recognised: emigration has to be effectuated by a charter amendment, which will not be "approved" by the Dutch Ministry of Justice[18]. The same applies to an "immigration" decision[19]. The Dutch law on conflicts of laws in relation to corporations states that it will recognise transfers of seat taking place in a third country but only to the extent that both exit and entry states recognise the corporation's continuing legal existence[20]. Cross border mergers would equally be rendered impossible.

Danish law may take a similar attitude: on the one hand, art. 4, 2 of the Danish Companies Act provides that the articles of association shall contain: ". 2. the municipality in this country is where the company shall be situated (head office)"[21]. This is read as establishing the incorporation theory, as the head office being established in the Articles would determine the applicable law for private international law purposes. The transfer of the "siège réel" would therefore not lead to its dissolution[22].

8. A company is free to establish an operational seat or residence[23] in another jurisdiction without incurring dissolution of the company, or any other consequence. However, as appeared from the Daily Mail case, the "emigrating" company may be invited first to settle its accounts with the tax authorities.

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16 GOWER-DAVIES, *Principles of Modern Company Law*, 1997, 6th Ed., at p.14.

17 Companies Act s. 287.

18 In that sense: L. TIMMERMAN, "Sitzverlegung nach niederlandischem Recht", *ZGR* 1999, 153. Since then the approval requirement has been abolished. It is unclear what the consequence are of this change in regulation. See also L. TIMMERMAN, De internationalisering van het effectenverkeer ofwel de opleveing van de leer van de statutaire zetel, *TVVS*, 2002, 167-170.

19 L. TIMMERMAN, at 154.

20 Art. 4, Wet conflictenrecht corporaties (17 December 1997), cited by L. TIMMERMAN, at 153.

21 A similar provision can be found in the Swedish and Finnish Companies Acts.

22 According to Commission des Communautés Européennes, *Etude sur le transfert du siège d'une société d'un état membre à un autre*, 1993, p. 11.

23 H. RAJAK appropriately underlines that the Daily Mail case related to the company's residence, as defined in the Income and Corporation Tax Act 1970, s.; H. RAJAK, "Sitzverlegung nach britischem Recht", *ZGR* 1999, 113.

An emigrating company will always remain subject to the law under which it was incorporated. This is one of the main advantages of the incorporation technique: whatever happens, the company can act according to its original, familiar company law system. Even if exclusively operating in a foreign country, the rules of its domestic jurisdiction remain in force[24].

Conversely, an immigrating company establishing a seat in a jurisdiction adhering to the incorporation theory - e.g. a French company transferring its seat to the UK - will not be affected by UK company law. If this company will be held to have abandoned its "real seat" in France, it runs the risk of becoming "apatride", an idea which is difficult to bear. As mentioned infra, Italian law has argued to the continuing application of Italian law.

Also certain "general interest" reservations will apply, e.g. insolvency regulation[25]. A general reservation was discussed in Dutch law on the basis of "fraus legis"[26].

9. Essential in the discussion about charter competition is the possibility for a company to change jurisdiction. In principle, according to the incorporation theory, a company cannot modify the jurisdiction under which it was incorporated. However, at least under the American incorporation theory, a company can subject itself to the jurisdiction of another state, by merging into a company founded in the jurisdiction to which it wants to emigrate. Cross border mergers are therefore an essential tool in creating competition between jurisdictions[27].

2. The Real Seat or "Siège Réel" jurisdictions

10. Real seat or "Siège réel" jurisdictions are essentially based on the idea that the company should have a real link with the state of whose legal system it claims application. If no such link exists, the company will not be allowed to qualify under its jurisdiction, e.g. letter box companies are requalified under the jurisdiction of their "siège réel". Reality gains over legal form. Hence the transfer of the seat should logically be allowed, as soon as the "siège réel" is transferred to another jurisdiction. Apart form tax questions, many jurisdictions do not allow the seat to be transferred, but impose dissolution of the company.

24 Reportedly, this was one of the reasons for the Dutch legislation to be changed, in light of the pressures exercised by the large Dutch multinationals.

25 Insolvency Act 1986 s. 221 according to which a UK tribunal may impose liquidation on insolvent companies, even if these have no registered office in the UK.

26 See Trib. Amsterdam, 6 April 1982, WPNR, n° 5765, (1985) 817. comments by W. VLAS.

27 MENJUCQ, nt.1, nr. 380 rightly stresses the importance of this feature of US company law; there is apparently no comparable instrument in most of the European legal systems.

The "siège réel" criterion was introduced in France after discussions about French companies emigrating to the legally more clement climate in Belgium in the 19 century [28].

Three systems can be distinguished:

- some states do not allow any seat transfer: Germany and Austria
- some states explicitly allow seat transfer: France and Italy;
- finally, jurisdictions in which no explicit provision exist: Belgium, Luxembourg.

a) "emigration"[29]

11. In Germany[30], and according to some legal writers in France[31] as well, the emigration results in the company being dissolved.

The German approach [32] is by far the strictest. It is based on the power of the Sovereign to grant the legal personality[33]. In case of emigration, German law would cease to be applicable, and hence the company would be dissolved. However, if the seat is transferred to the UK, an incorporation theory jurisdiction, German conflict rules would - at least according to some legal writers[34] - refer to UK law, which would refer back to German law (renvoi) as the state where the company has been incorporated. Hence in this case no dissolution would apply.

In other jurisdictions, the emigration is allowed under certain conditions. These vary according to the jurisdictions:

- in Spain, there should be a treaty in force between the exit and the entry state. A qualified majority decision is necessary and ample disclosure has to be provided for[35].

- Portugal allows emigration: the decision is subject to a supermajority decision of the general meeting[36].

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28 See BUXBAUM-HOPT, *Legal Harmonization and the Business Enterprise*, 1988, at 174 e.s.; D. CHARNY, "Competition among jurisdictions in formulating Corporate Law Rules: an American Perspective on the Race to the Bottom in the European Communities", 1991 *Harvard Journal of International Law* 423-56 makes the point of competition among company laws in the 19th century.

29 In German literature referred to as "*Wegzug*".

30 B. KNOBBE-KEUK, "Umzug von Gesellschaften in Europa", *ZHR* 1990, 325.

31 NIBOYET, Traité II, n° 71; BATTIFOL, "Le changement de nationalité des sociétés", *Trav. Com. fr. Dr. Int. Privé*, 1966-69, 65; HAMEL and LAGARDE, *Traité de droit commercial*, I, 429.

32 See STAUDINGER/GROßFELD, *Kommentar zum BGB*, 13de ed., 1993, Internationales Gesellschaftsrecht, nr. 557 e.s.; P. BEHRENS, "Identitätswahrende Sitzverlegung einer Kapitalgesellschaft von Luxembourg in die Bundesrepublik Deutschland", *RIW*, 1986, 592.

33 See RG 5 June 1882 and RG 22 January 1916, cited in STAUDINGER / GROßFELD, n° 558 e.s.

34 See EBENROTH, *Münchener Kommentar*, nos. 217 e.s., p. 488. Also: EBENROTH/AUER and REITHMAN, cited by BELLINGWOUT, *o.c.*, p. 170; in STAUDINGER / GROßFELD the opposite opinion is defended.

35 See art. 149 Spanish Companies Act.

- in France, the majority opinion defends that the seat may be transferred without dissolution of the company[37]. Art. L. 225-97 and art. L. 226-1 of the Commercial Code[38] allow companies to transfer their seat abroad, by a decision by the general meeting, with a 50% quorum and a 2/3 rd majority. The rule allows this supermajority decision only in case France has concluded an international convention with the entry state about the maintenance of the legal personality. However, as obviously France has not entered into any such convention[39], the rule is inapplicable. The widespread opinion in legal writing is that the decision should therefore be taken by an unanimous vote, as has been provided for with respect to the limited partnerships (art. L. 222-9 of the Commercial Code). The articles of association should be adapted to the then applicable law[40]. For tax reasons, the emigration of a French company is considered a dissolution and gives rise to considerable liquidation taxes [41].

12. The Italian Civil Code allows the emigration of Italian companies abroad without disruption of their legal personality[42]: Italian companies are governed by the law applicable to their corporate seat, even if their activity is pursued abroad (art. 2509 Civil Code). An extraordinary general meeting (art. 2365 Civil Code) is called to decide on transferring the seat abroad. According to art 2369, para. 4 of the Civil Code, the decision has to be taken by a supermajority[43] and is subject to a specific form of disclosure. Article 2437 adds that dissatisfied shareholders have the right to withdraw from the company ("*diritto di recesso*") at the average price of the last semester if listed, or, if unlisted, at the net asset value as appearing from the last annual accounts. The emigration of an Italian company to an incorporation system state would, according to Italian legal opinion, not lead to a loss of the Italian jurisdiction as this company will normally not become subject to the host state jurisdiction, not having been incorporated there. There is therefore no issue of "bi-nationality". Therefore it was decided that an Italian company, although having transferred its seat to Canada, remains exposed to the Italian insolvency

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36 See art. 3 of the Portuguese Companies Act.

37 ESCARRA, Manuel, 851; BATTIFOL and LAGARDE*, Droit international privé*, 1981, 194; Y. LOUSSOUARN and BOUREL, *Droit international privé*, 3rd Ed., 1988, 709.

38 Previously article L. 225-97 and L. 226-1 L. Commercial Code.

39 COZIAN and VIANDIER, *Droit des sociétés*, 10th Ed., 1997, 109, n° 295 bis.

40 MAYER, P, O.C., *Droit international privé*, 6th ed, 1998, 1066; LOUSSOUARN and BOUREL, *o.c.*, n° 709, 974; these writers state that if the transfer has been imperfect for not having met one of the conditions specified, the company should be dissolved, except for regularisation.

41 COZIAN and VIANDIER, n° 295 bis, 109; LE NABASQUE, fn. 7, 430; J. WOUTERS, *Het Europese vestigingsrecht voor ondernemingen herbekeken*, Thesis, 1996-1997, n° 666, 671.

42 T. BALLARINO, in COLOMBO and PORTALE, *Trattato delle società par azioni*, vol. 9, 107.

43 More than 50% of all shareholders, and not of all shareholders taking part in the vote. A similar system applies in Spain, see art. 5 and 6 of the Consolidated Corporations Act. Pursuant to whcih the applicable legal regime is determined according to the company's seat.

court's jurisdiction, as it had continued to exist as an "Italian legal person", not having obtained the foreign legal personality[44].

- Belgium has a more liberal regime. This was illustrated in the Vanneste case, which will be discussed later. Luxembourg law[45] contains the same provisions as Belgian law.

b) "immigration"[46]

13. Immigration cases raise equally difficult questions, certain states refusing to recognise the foreign entity, others allowing it to establish its seat in its jurisdiction, conditional upon certain disclosures and the adaption of its charter to the entry state legislation.

Here also Germany takes a strict attitude: a foreign company establishing its seat in Germany will not be regarded as a German company, not having been organised according to the rules of German law, but as an "unincorporated association" or as a "private firm"[47]. This results in poor protection of creditors. Even if the company was regarded as a valid legal body in its state of origin, and even if the seat transfer does not lead to dissolution, German law refuses access to the German legal form: the company has to be formed all over again; a mere change of the articles of association would not suffice. Recently - and even before the Überseering case was rendered - other voices are being heard in German legal writing, pleading for a more flexible attitude, based i.a. on Community law arguments[48]

Other states take a more flexible attitude and allow immigration, sometimes[49] under the condition that the exit state allows the seat to be transferred:

- France: the French Commercial Code does not provide for this hypothesis. In legal writing it is largely accepted that immigration is possible, and that the company should file at the commercial registry all documents that have to be filed by French companies[50]. An express adaptation of the charter is not deemed necessary, but the mandatory rules of French law will apply[51]. From the taxation angle, immigration is considered a formation of a new company, and hence is subject to the taxes due for

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44 Trib. Torino, 16 December 1991, Giust Civ, 1992, 811, analysed by T. BALLARINO, in COLOMBO and PORTALE, *Trattato delle società par azioni*, vol. 9.

45 Artt. 158 and 159, Luxembourg Companies Act 1915. No case law is known.

46 In German literature referred to as "*Zuzug*".

47 KÜBLER, *Gesellschaftsrecht*, 4 Ed, 420; but the company could become a defendant in a civil procedure (§50 II ZPO). BELLINGWOUT, at 172, mentions that the limited liability of shareholders would lapse.

48 These are especially the opinions of BEHRENS and GROßFELD.

49 This rule has been mentioned in Belgium and in Portugal.

50 P. MAYER, *Droit international privé*, 1991, n° 1057, 629 ; comp. MENJUCQ, nt.1, nr. 110 for a stricter opinion.

51 See for a list of possible mandatory rules: LOUSSOUARN, p. 129 e.s. *Les Conflits de lois en matière de sociétés*, 1949.

contributions to the capital[52]. However the rule is not applicable to a transfer within the EU[53].

- Italy: applies the "siège réel" to immigrant companies which formally decide to establish their seat in Italy. They become Italian and have to adapt to Italian law, e.g. as to the types of companies available.
- Spain: a full documentation should be deposited with the commercial registry, but the charter must not necessarily be adapted.
- Portugal: the charter provisions should be modified to conform with Portuguese law and published accordingly.
- Belgium: allows immigration; charter provisions should be adapted or at least the mandatory company law rules will apply.

In opposition to the case of incorporation-state companies, the transfer of the seat between incorporation state and siège réel states may lead to companies becoming subject to each of both jurisdictions depending on the state where the question is raised (so called "bipatride" companies[54]).

3. **Belgium Case Law**:

14. Belgian law is interesting as it contains cases dealing both with emigration and immigration.

The important case on immigration is known as the Lamot case[55].

The facts are relatively simple: Lamot limited has been established as a genuine British company limited, in 1927, when UK taxes were less unattractive than Belgian taxes. The family decided in a regular general meeting in 1932 to transfer the seat to Belgium. According to Belgian law, as it then stood, a company limited could not be established for more than 30 years[56]. Hence the question was whether or not the company still existed in 1962, date on which its duration had been prolonged for another thirty years. Around that time a quarrel broke out among the shareholders, in fact the brothers Lamot. One argued that the company had been dissolved, having expired in 1957. The other argued that the company had been continued under Belgian law, and that Belgian law became applicable as from the transfer of the seat, hence having been lawfully

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52 P. MAYER, *o.c.*, n° 1066.

53 See for further details J. WOUTERS, J., *Het Europese vestigingsrecht voor ondernemingen herbekeken*, Thesis, *o.c.,* 671, n° 665.

54 See e.g. in Italian law: T. BALLARINO, T, in COLOMBO and PORTALE, *Trattato delle società par azioni*, vol. 9, 104.

55 Cass., 12 November 1965, *Pas.* 1966, I, 336; *R.P.S.* 1966, 136; *R.W.* 1965-66, 911 concl. Adv. gen. DUMON; *R.C.J.B.* 1967, 397, ann. VAN RYN; F. DUMON, "Rechtsgevolgen van de overbrenging naar België van een buitenlandse vennootschap", *R.W.* 1965-66, 873 e.s.; RC Dip, 1967, 606 nt. LOUSSOUARN; see also: A. DE SMET and S. FREDERICQ, "Le transfert du siège social", *Rev. Dr. Int. Dr. Comp.*, 1958, 147.

56 The rule was abolished in 1984.

extended after 1957. The matter was raised to the Cour de Cassation, which decided as follows:

The company having its "siège réel" in Belgium should be held a Belgian company as from the transfer of its seat into Belgium. The law[57], does not distinguish between companies formed in Belgium and those whose seat is transferred into Belgium: all should equally be designated Belgian.

Belgian law does not contain a rule declaring the company to have lost its status as a legal person upon the transfer of its seat to Belgium.

Nothing prevents this company to be recognised as a Belgium company and to enjoy all privileges ensuing from its legal personality. The court added a proviso that the company should meet the conditions to be recognised as a Belgian company, e.g. as to the type of company involved[58]. Therefore it might have to adapt its articles of association to conform with Belgian law, without modifying its essential features.

Provided that under UK law the transfer could have been decided lawfully, the transfer of the seat takes place, as far as Belgian law is concerned, without interruption of the corporate personality. The limitation on a company's duration is a provision of Belgian law which applies only once the company becomes subject to Belgian law, the more so as this rule has technically been framed in a wording indicating that it is a condition for its existence, not for its lawful formation. Therefore the restriction on its duration influences not the existence of the legal person in itself but only its existence within the Belgian legal order. Therefore the company continued to exist, also after 1957.

15. There are several points of discussion left after this decision:
One question is whether the company should adapt to Belgian company law, and under what form.

It seems logical that rules of Belgian company law that are mandatory should also apply to this company: technically this should not require a change of the charter, but in practice one sees how difficult it would be to let a company, with UK articles of association, function without adaptation to Belgian law.

The Lamot rule is based on the hypothesis that both home and host state allow the seat to be transferred.

16. Does the same doctrine apply to the exit or emigration of a company?

This point has been actively debated. The Lamot decision stands on the presumption that the transfer of the seat is allowed under the home state, which evidently was not an issue under UK law. But from that does not necessarily follow that the company may also emigrate.

A decision rendered in an administrative law case indirectly admitted the parallel application of the Lamot doctrine to an emigration case. In that case, there is also the

[57] Art 56 Companies Code (ex art. 197) reads as follows: “Each company which has its principal place of business in Belgium shall be subject to Belgian law even if its deed of formation was executed abroad”.

[58] It is standard Belgian opinion that parties may not form companies other than the one provided for in the law (“cadres légaux obligatoires” doctrine).

prerequisite that the entry state allows the transfer into its territory. Also there is discussion as to whether the decision is to be taken unanimously, or by a supermajority: for the latter opinion, it is often invoked that Belgian law allows a change in the legal form to be voted by a qualified majority. The Belgian Conseil d'Etat[59] has held, in an obiter dictum, that no provision of Belgian law prevents a company from transferring its seat to the Netherlands, and that it does not stop to exist as a legal person. Dissolution is not necessary. Therefore rules analogous to the Lamot case are followed for the emigration case. The Conseil however, took into consideration that the seat transfer having been decided merely de facto, by an act of the managing director, no valid seat transfer had occurred.

Belgian law apparently takes a very liberal attitude to the seat transfer. In fact tax law largely prevents companies to emigrate and choose for a better world: upon emigration the company is dealt with as being dissolved, resulting in tax liabilities for all surplus and for all previously untaxed reserves.

Chapter II
The Überseering-case

17. The Überseering-case constitutes, after the Centros case and more strongly worded, the second, important case law orientation in the matter of the cross border establishment of a EU company. It clearly decides that a member state may not deny access to its legal order on the basis that it considers a company from another member state to have transferred its seat to its territory, unless the additional requirement would be based on the "general good" exception.

a) factual setting

18. The facts of the case are relatively simple. Überseering is a Dutch company that had acquired a tract of land in Germany, on which it had ordered an existing construction to be renovated or rebuilt by a German contractor. For reasons that are immaterial here, the German contractor sued Überseering in payment before a German court. The first instance court and the court of appeals had found that the company had transferred its actual centre of decision to Germany, as moreover its shares had been acquired by German nationals. Therefore, although no formal seat transfer had taken place, the Dutch company was held by the German courts to having its seat in Germany,

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[59] Conseil d'Etat 29 June 1987, n° 28.267, *T.R.V.* 1989, 110, ann. LENAERTS; previously: DE SMET and FREDERICQ "Le transfert du siège social", *Rev. belge droit int. droit comp*. 1958, 147; SIMONART, *La personnalité morale en droit privé comparé*, 1995, 443 e.s.

and therefore was declared subject to German law. However, as the company had not been formed according to German law, it was held to have no legal capacity nor right to stand before a German court.

The German Supreme Court referred the case to the ECJ, especially as to the compatibility of the lower court's refusal to grant this company access to court, with the rules on freedom of establishment.

b) legal basis: freedom of establishment

19. It is important to point out that the decision of the ECJ is based on arguments relating to the Treaty freedoms, especially the freedom of establishment[60]. The case does not deal with company law as such, nor with conflict of law issues, but obliquely has a definite importance for company law issues. The Treaty freedoms impose member states to abolish any rules that would restrict said freedoms, unless the restriction would be based on the four well known criteria of the "general good clause"[61]. Rules restricting access in case of a seat transfer cannot be maintained to the extent that they would restrict freedom of establishment.

As being exclusively based on the Treaty's freedom, the case only concerns cross borders relations among EU member states. The way member states deal with their nationals, especially whether or not legal personality is granted, or refused, is therefore a matter for national discretion[62]. The legal entities that will enjoy said freedoms have been defined in the Treaty: article 48 grants the privilege to "companies and firms" with a registered office, central administration or principal place of business within the territory of the Community. Whether a company or firm is to be regarded as the beneficiary of Community privileges would be a matter of national decision: it is the national legislation that decides whether a given company type is considered as a separate legal entity and hence as a Community citizen, or not. Article 48 expressly declares that it applies "to companies and firms formed in accordance with the law of a Member State". In that respect substantial differences exist among the member states, especially as far as partnerships and similar companies are concerned: notwithstanding the legal liability of their members, these are regarded in some member states as full legal persons, while in others legal personality is refused, and in a third group, an intermediate situation has been adopted. As Community law contains no rules on the subject, it will follow the national legislation, and grant the Community privileges to those companies that have been

[60] § 56 of the Überseering case.

[61] These are non-discrimination, justified by the "general good", adapted to achieve the stated objective, and meeting the proportionality test; see also in the Centros case, § 34.

[62] This approach refers to the 19th century idea that granting the legal personality was a Crown privilege. In most jurisdictions it is considered a legal technique aimed at facilitating social and business organisation. This reasoning is pursued in somewhat different terms in Daily Mail's analysis that a company is a mere legal product of the home state's jurisdiction, and hence can be denied legal personality at will. See further nr. 22.

granted legal personality under the applicable national law[63]. That this question has to be dealt with under the law of the state where the company has been formed, could be linked to the second of the court's holding in the Überseering case. There is was held that "the articles 43 and 48 require the host state to recognise the legal capacity and consequently the capacity to be party to legal proceedings which the company enjoys under the law of its state of incorporation"[64]

20. As far as cross border primary establishment cases are concerned, two issues may arise. Does the host state have to recognise a company originating in another (EU member) state? This is the immigration case. Different from the emigration case, in which only one jurisdiction may be involved, immigration concerns two legal systems. Only this aspect seems to have been addressed by the Treaty provisions. Therefore, according to this line of reasoning, a member state could refuse to further grant legal personality to – could in fact withdraw legal personality from - a company that is emigrating to another jurisdiction within the EU. As was dramatically described in German literature, the "company will be killed at the border". This factual setting has been addressed in the Daily Mail case. However, there remain doubts as to the limits on free establishment that the home state has to respect. By forbidding emigration, immigration will often become purposeless.

The Überseering decision has addressed the immigration case. It will be discussed further. But it also touched on the emigration issue, introducing some clarification of the Daily Mail hypothesis. This is the more welcome as doubts have been expressed as to the relationship between Daily Mail and Centros, where no reference was made to Daily Mail. In Überseering several of the Daily Mail arguments have been reviewed and the necessary distinctions introduced. Far from revoking Daily Mail, the Court clearly traced the dividing lines. According to the reading of the latter case by some legal writers, there still is no definite ECJ decision on the emigration hypothesis.

c) cross border emigration: "Daily Mail"

21. In the Daily Mail case[65], a United Kingdom company proposed to transfer its central management and control outside the United Kingdom to the Netherlands, in order to avoid substantial UK capital gains taxes on assets which it intended to sell after having transferred its residence. According to UK law, the consent of the Treasury was necessary to allow a company to transfer its central management and control[66] outside the UK while maintaining its legal personality and its status as a UK company. The company mainly argued on the basis of articles 43 and 48 of the Treaty. The Court held that as far as primary establishment is concerned, said articles do not confer on a company

[63] The question remains however for mere contractual companies, that would have no "principal place of business". See for the discussion, LEIBLE, S. and HOFFMANN, J., nt. 14, at 933

[64] § 95 of the Überseering case

[65] see supra note 11.

[66] The criterion to be used for tax purposes was that of the "residence", see adv. Gen. COLOMER, note 13, § 21.

incorporated under the law of a member state, the right to transfer its central management and control and its central administration to another member state while retaining the status of a company incorporated under UK law[67]. Differences in national laws regarding the connecting factors cannot be solved on the basis of the Treaty Rules on freedom of establishment [68].

In the Überseering case the court clearly distinguishes the emigration from the immigration issue. Indeed, in Daily Mail, the issue at stake was whether the jurisdiction of formation allows a company to transfer its actual centre of administration to another member state whilst retaining its legal personality in its state of incorporation. Here the Überseering Court recalled its holding in Daily Mail, stating that these questions were determined by the national law in accordance with which the company has been incorporated [69]. Hence that law may declare the continuing legal personality subject to restrictions on the transfer of its actual centre of administration to a foreign country[70].

The Überseering Court clearly indicated its support for the Daily Mail holding. It is important to note – as Überseering recalls - that the court's holding in Daily Mail is framed in terms of a state's powers within its own jurisdiction, and not in terms of rules relating to a cross border relationship where the Treaty's freedom of establishment limits the powers of a member state vis-à-vis companies originating from another member state[71]. As a consequence, until further decisions by the Court or in the absence of a Treaty[72] dealing with the cross border seat transfer, one may analyse this case as allowing member states to continue to impose important restrictions on emigrating companies. Whether that may lead to fully denying companies the right to emigrate, or merely allows member states to impose certain conditions, especially in the tax field, will have to be clarified in further court decisions.

22. The Court's reasoning leaves substantial uneasiness: the argument that freedom of establishment relates only to immigration, but leaves the states free to deal with emigration, - on the basis of the reasoning that emigration is not a cross border issue - is rather theoretical, and leaves reality aside. National regulators would be able to continue to freely impose very substantial restrictions on the free movement of legal entities, thereby substantially jeopardizing or even annihilating free movement of legal persons[73]. The situation would be very unbalanced, certain states being entitled to stop their corporate citizens at their borders, others allowing free movement. The comparison with free movement of individuals – the reference point in article 48 – would be lost out

[67] § 24 Daily Mail, note 11.
[68] § 23, Daily Mail, note 11.
[69] § 70,Überseering case.
[70] § 70, Überseering case.
[71] See § 73, Überseering case.
[72] See art.293 of the Treaty. But would a directive do as well? See § 23 in ZIMMER, nt. 14, at 3; Daily Mail case, nt. 11.
[73] ZIMMER, nt. 14, convincingly calls for the same treatment for emigration cases.

of sight. A comparison with the free movement of capital[74] would oblige to deal with both emigration and immigration on the same footing. Therefore, emigration should, from the angle of free movement, be dealt with along the same lines as immigration[75].

However this reasoning would not prevent member states from imposing certain restrictions on the basis and within the limits of the “general good”. One can easily understand that – as was the case in Daily Mail – states cannot allow taxable substance to be freely transferred abroad. Here the traditional four ingredients of the “general good” exception would apply. One may consider proportionate that companies that prefer to establish themselves in another state should be held to account for their taxes, both present and deferred. But for that reason they should not be prevented from emigrating: even tax debts can be recovered in other EU jurisdictions. The general good exception could usefully come into play: the hypothesis that the company should be held hostage and subject to an outright emigration ban seems disproportionate to the objective of the prohibition. Therefore there appear to be arguments to allow emigration as well as immigration, both on the basis of article 42 and 48. This reasoning would lead to refining the Daily Mail case.

A further note could be added on Daily Mail: it is not a case on the transfer of the seat.

According to the incorporation technique, companies cannot change their applicable legal regime. Activities may be undertaken abroad, even the actual centre of administration may be transferred, but the company will always remain subject to the legal regime of its jurisdiction under which it has been incorporated. This is the paradox of Daily Mail: the company did not – and could not – strive at changing its legal regime, but only wanted to become subject to the Dutch tax regime by establishing its centre or administration in the Netherlands. Daily Mail is therefore not a case on the transfer of the seat, and on cross border changes of the applicable legal regime of legal entities. It is neither cross border, nor raises the issues of recognition by another state.

This analysis also clarifies the difference with legal systems that follow the siège réel technique: here a transfer of the seat would lead to a transfer of the applicable legal regime, provided that both jurisdictions adhere to the siège réel technique.

d) free cross border immigration: ambit of the rule

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[74] Applicable according to § 77 of the Überseering case.

[75] SCHULZ and SESTER nt. 14, 550; KALLMEYER, nt. 14, 2522, is of the opinion that this matter has nothing to do with the seat theory, and that the company should be obliged to re-incorporate after having been stripped of its legal capacity. However, this is not compatible with free movement. SCHUTTE-VEENSTRA, nt. 14, 531, also stresses that national law could forbid emigration. In that case the seat doctrine could be further applied, and the home state should equally refuse to recognize the legal capacity of the company. However, in this case also, European freedom of movement rules would be violated.

23. The Überseering case essentially deals with cross border immigration within the European Union of companies in the sense of article 48. Here the Treaty's freedoms would be fully applicable.

Quite understandably, the Court referred to the Treaty itself to define the beneficiary of this freedom and the conditions that this beneficiary should meet. The reasoning refers to article 48, according to which

> "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 enjoy the freedom in the same way as a national of a member state[76]. As article 48 does not make any distinction among the said three connecting factors[77], the Court holds each of these three criteria as fully equivalent[78]. Hence, as far as the Treaty freedoms are concerned, each of the three connecting factors is equivalent to the nationality of a natural person[79]. The question therefore arises whether the Treaty freedom could be invoked by a company that meets one of the three criteria, but which would not be regarded as a national according to the company law applicable according to the criterion put forward. To make this question more clear: could a company consider itself to be French, having its registered office, but not its "siège social" in France, and should this issue be dealt with under French law, or under Community law?

24. The privilege of articles 42 and 48 only applies to companies "formed in accordance with the law of a member state". One can supplement this phrase by requiring that the company should have been *validly* formed[80]: Community law should not sanction acts that run contrary to the legal system of a member state.

To what extent can jurisdictions of other member states review the validity of the formation process? In principle, according to traditional conflicts of law techniques, jurisdictions are entitled to review the validity of legal acts accomplished in other member states. The effects of deficiencies has to be determined according to the law applicable to the formation. Whether defects in the formation will result in holding the

[76] The ambit of the Court's holdings is also limited in several other respects: the company has to be validly incorporated in a member state: hence third state companies are outside the scope of the court's decision; the rule only applies to companies, and not to any other legal entities, such as non profit organisations, state bodies, etc. Finally what with different intensities of legal personality, as has been advocated in some jurisdictions: see nt. 63.
[77] See also § 21 Daily Mail, nt. 11.
[78] § 86, at least as far as administrative office and registered office are concerned; but there are no reasons not to extend this assimilation to the three criteria.
[79] § 57, Überseering case.
[80] See in that sense § 52 of the Überseering case.

company null and void, or in other remedies or sanctions, will depend on the legal regime applicable in that jurisdiction. Therefore, one must take into account the rules of the first company law directive – more precisely the national rules implementing this directive – that severely limit the cases in which companies can be held invalid. If the company, according to its national law, would be considered a legal entity, albeit invalid as a company, its legal personality should be recognised in other jurisdictions. So e.g. according to Belgian law, an SA or SPRL type of company cannot be annulled except on very limited grounds, and even after having been annulled the company maintains its legal personality for the purposes of its liquidation. Hence, Belgian companies of these types always have legal capacity, after having apparently been validly formed.

e) freedom of establishment should not be restricted

25. The Überseering case referred to cross border recognition of a company's legal personality after it had been validly formed in another state. The case actually related to access to justice, but covers all forms of recognition of the legal capacity of foreign corporate bodies[81].The German Courts had refused the Dutch company the status of a legal person and hence its capacity to appear in court on the ground that the company had transferred its actual centre of administration to Germany. Surprisingly, it was not mentioned that the company had transferred its seat to Germany: German law regards the transfer of the actual centre of administration as sufficient to deny it all legal capacity[82], unless the company proceeds to re-incorporation. Observations presented by some of the intervening Governments had pointed out that the question of the company's continuous existence under Dutch law had not been called into question.[83]

Hence the following question was submitted to the Court: could a company incorporated in state A be barred from access to justice in state B because the law of the latter state refused to recognise its legal personality on the basis that its actual centre of administration has been moved to B?

The Court clearly affirmed that freedom of establishment could not be restricted by state B's legal system declaring the company inexistent. As German law required re-incorporation, the Court considered this to be tantamount to an outright negation of freedom of establishment[84].

It should be highlighted that the Court based its holding exclusively on grounds of freedom of establishment, not on company law grounds. It did not declare German

[81] According to article 48, non profit entities would not be entitled to the same freedom.
[82]§ 62, Überseering case.
[83] § 63, Überseering case: "under Dutch law it did not cease to be validly incorporated".
[84] § 81, Überseering case; SCHANZE and JÜTTNER, nt. 14, indicate that this "negation" of said freedom excludes that any justification (e.g. on the basis of abusive exercise of rights, or on the basis of the "general good") could be invoked.

company law invalid[85] but merely refused its application in light of the superior legal rule, i.e. the Treaty. Indirectly however, it held that German company law may not declare the company inexistent, because by doing so it would unjustifiably restrict the company's freedom of establishment.

It also denied the German legal order the right to assess whether the company's establishment in state B could be held as being a seat transfer to that state. Indeed, a company which has its "registered office, central administration or principal place of business within the Community" cannot be denied access to any other member state. Therefore, the question whether the case related to primary or secondary right of establishment is moot: any of the three connecting factors in the state of origin will suffice to allow the company to avail itself of the Treaty freedom[86]. Remarkably, the precise form of establishment in the host state is irrelevant: the company may avail itself of all types of establishment, whether by way of opening a branch, taking up shares, or moving its head office, or its centre of administration to the host state. In terms of Treaty freedoms, each of these have to be allowed by the host state. Here again company law is not at stake.

However, the Court added one restriction, applicable to companies that meet no other connecting factor to the European economy than their "registered office". Answering an observation by the Spanish government, according to which the General Programme requires a continuous link with the economy of a member state, the Court seems to have admitted that such a requirement may be applicable to companies that have no other presence in the Community except by way of their registered office[87]. Hence, mere letter box companies with no activity within the Community will not be protected by the Treaty's freedoms. It will suffice that the company has a central administration or principal place of business in the Community, even if these do no coincide with their registered office. But this requirement is not applicable to EU companies, for which it will suffice to meet one of the three connecting factors of article 48.

26. It has often been debated that the Court, first in Centros, and again in Überseering, has set aside the real seat theory, and made the incorporation theory mandatory. The matter is fallacious. In the absence of specific elements in the Treaty, the

[85] Which would in any case not apply to companies from outside the EU, where the German approach can continue to be applied.
[86] The notion of primary and secondary right of establishment has largely become meaningless due to the large interpretation of the Court in both Centros and Überseering: see also Adv.Gen. COLOMER, nt. 13, § 36.
[87] §§ 74 and 75, Überseering case, thereby derogating from the incorporation theory as such. Here one sees the divergence between the Court approach and the general incorporation doctrine, as the latter would also protect companies the presence or activity of which is exclusively taking place outside the Community. For a different reading, see LEIBLE and HOFFMANN, nt. 14 at 932. The quoted text will be of interest in judging the Dutch Formally Foreign Companies Act: to the extent that these companies would have their effective business in the Community, one of the criteria of article 48 having been met, they could not be excluded from the benefits of free establishment.

Court has no power to decide on company law matters, except for interpreting the company law directives. But it can rule on matters dealing with the Treaty freedoms, and set aside rules of national law that would be detrimental to said freedoms. In the present cases, the effect of these (company law) rules, or doctrines will have to be modified in order to give precedence to the higher ranking European rule. Therefore, technically, this case law does not touch upon company law, nor upon conflicts of laws, but it may indirectly affect them.

The Court's holding goes beyond the traditional incorporation doctrine in two respects[88]: firstly, the link with a given legal order is not restricted to the national legal order of incorporation, but refers to the legal order of the Community, this is of one of the member states; secondly, the three connecting factors of article 48 are put on the same footing. By doing so, the Court has opened a new avenue in the prevailing reasoning on cross border establishment of legal entities. In addition, the type of establishment in the host state is irrelevant.

A validly formed Belgian company with its principal base of business in the Netherlands, would according to Belgian law not be considered Belgian – for lack of meeting the "siège social" criterion – nor Dutch – having been formed under Belgian law - while according to the Überseering case, the German legal system could not refuse its access to German justice, even if it did not qualify as a Belgian nor as a Dutch company. If that would be the purport of the Court's ruling, European company law would have taken an important step forward: the incorporation theory as such would not prevail, because that would have led to denying the company its legal existence under any of the applicable legal regimes[89]. For purposes of freedom of establishment, a new concept would have been introduced, which one could provisionally refer to as the "Community formation theory"[90]. If a company has originally been formed under the jurisdiction of the legal system of one of the member states, all other member states have to admit it to their territory, even if the company would not further qualify as a "domestic company" under the jurisdiction of the state under which it has been formed. Mutual recognition cannot be denied on the basis that the company has moved "its central administration or principal place of business" to another member state, even if according to the national company law of the jurisdictions involved, this transfer would have resulted in disqualifying the company under the applicable law. National company law, including rules on conflict of law will have to cede when faced with the Treaty higher freedom rules.

As a consequence, the national legal order under which a company has been formed has no further power to govern recognition nor access, once the company has moved outside the borders of the original state of incorporation[91]. Nor has any other legal order the right to contest the valid existence of this company, nor on the basis of its own

[88] Apart form the case mentioned in the previous footnote.
[89] This case has been discussed in Italian law, see supra fn. 44.
[90] LEIBLE and HOFFMANN, nt**.** 14 at 930 also refer to a "europarechtliche Grundungstheorie" but their analysis is substantially different.
[91] This case is to be distinguished from the one referred to above, where the power of the state before emigration was discussed.

conflict of law criteria, nor of those of the state of origin. This formulation is far removed from the traditional incorporation doctrine, but formulates an original community law driven approach allowing to integrate – or to transcend - the three connecting factors of article 48.

27. The analysis of the Court was exclusively based on freedom of establishment. But the Court opens another avenue of thought by drawing attention to the application of the rules relating to the free movement of capital[92]. Under that heading further restrictions to the states' freedom to decide on e.g. the legal status of securities in a cross border context may be applicable. In the field of capital movement, most if not all restrictions have been abolished. Therefore, it does not seem very likely that member states would restrict companies' free access to their capital markets. But discriminatory requirements that are not justified on the basis of general good criteria may continue to be found[93].

28. The foregoing analysis therefore is limited to issues of recognition and access by companies originating from other Community jurisdictions, including restrictions host states may impose on companies originating from other EU states, whether by law, or on the basis of administrative requirements. As such, the Court's holding does not extend to company law issues, such as the relations between the shareholders, the validity of decision making, the protection of shareholders and creditors, the rights attached to the securities issued by the company. In these matters, traditional company law, including conflict of law rules will continue to be applicable.

However, company law rules will only be held to be applicable if, when confronted with the Treaty's freedoms, the latter have not been thwarted. When Treaty rules apply in conflict with company law rules, the former, belonging to a higher legal order, will prevail. Here a new field of development may open up.

E – Further analysis and application of the "general good" reservation

29. The case law does not deal with the transfer of the seat as such, nor with the incorporation or real seat theories. It does not contain elements that could constitute the core for a legal regime applicable to the way companies could transfer their corporate seat. It only contains a –significant – restriction on the member states' powers to deny legal capacity (Überseering case) or to impose burdens to Community entrants unless it would be justified on the basis of the general good (Centros case).

As already mentioned, the Court's case law does not interfere with the national rules of company law governing the conditions on which legal personality is granted,

[92] § 77, Überseering case.

[93] One could imagine that the conditions set by the states pursuant to art 3 of the 1989 prospectus directive (now art. 5 of the Directive 2001/34/EC of 28 May 2001, *OJ. L 184,* 7 June 2001, 1-66.) for defining Eurosecurities may contain restrictions likely to limiting access to other States' capital markets.

maintained or lost as a consequence of a transfer of the seat. It only allows companies- provided these have been validly formed in one EU state - to establish themselves in another state, irrespective of the fact whether the company establishes itself by way of a branch or a subsidiary, or by way of acquiring shares in another company, but also by establishing its central administration or its principal place of business in another EU state. If the form of establishment triggers certain consequences under host state company law, one will have to check whether these company law rules are not likely to jeopardize the Treaty freedoms. It is clear that this issue is far removed from the traditional issue of the transfer of the seat.

If the host state imposes additional, non proportional burdens on a new entrant, these will be considered unjustified restrictions to free establishment. So e.g. will the host state be prevented from imposing a minimum capital requirement to a private company limited originating from the UK, where no such requirement exists[94]. This was allowed by Centros[95], but only within the limits of the general good.

30. The Überseering case has only dealt with restrictions on access to the host state: once access has been granted, one must explore to what extent host state company law would be affected by the Treaty freedoms. Here company law intervenes as a consequence of free access.

One type of interference has clearly been outlawed by the Court: if the host state would mandate the company to reincorporate[96], therefore denying its legal existence without re-incorporation, that would be "tantamount to outright negation of freedom of establishment" [97]. The same might apply if the host state would restrict the legal capacity of the new entrants, e.g. by refusing access to court unless after having posted sufficient guarantees[98].

In Centros the Court admitted that the host state may impose additional requirements if these were justified for pursuing its public interest: so e.g. in lieu of a higher minimum capital, the host state could have imposed other requirements to protect creditors, such as guarantees[99]. Host state law should limit these requirements to meet the four pronged criteria of the general good exception[100].

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[94] See § 34 of the Centros case, nt. 13.
[95] See § 34 of the Centros case, nt. 13.
[96] § 78 –81 of the Überseering case.
[97] § 81, Überseering case. Some legal writers consider that accepting the legal existence constitutes the base line under which national legislators may not go.
[98] The Court of Justice has already considered (Case C-20/92 Anthony Hubbard v Peter Hamburger [1993] ECR 3777) that the imposition of a "cautio iudicatum solvi" only to European Union (EU) citizens or firms and not foreign nationals constitutes a barrier to the free movement of services, in breach of Article 59 of the EC Treaty.
[99] Centros case,§ 37, nt. 12.
[100] See SCHULZ and SESTER, fn. 14, 551, for further applications. ZIMMER, nt. 14 at 6, also admits these softer measures.

31. Companies originating in incorporation states will be able to move to other incorporation states without additional requirements: this follows from Centros, where an exception to the rule was framed limited to "general good". The company will maintain its legal status according to the rules of the home state: any other solution would seriously jeopardize the company's access to the other jurisdiction.

German case law has attempted to solve the problem by stipulating that the legal capacity of the foreign company will be recognised, but that the company will be treated as an "offene Handelsgesellschaft" or as a company under the Civil Code. In both cases the internal and external structure of the company would be seriously disturbed. So e.g. would the shareholders incur unlimited liability for the company's debts. The Court has clearly put an end to this debilitating reasoning by stating that the host member state must recognise the "company's legal capacity and its capacity to be a party to legal proceedings which the company enjoys under the law of its state of incorporation" [101].

32. A second hypothesis concerns companies originating in incorporation states and transferring their centre of administration to a "siège réel" jurisdiction. On the basis of Überseering, the host state will have to recognise that company's legal capacity. It will be the same legal entity continuing to "live" in the host state's jurisdiction. According to the host state's company law rules, the company will be considered "domestic", its centre of administration being in the host state, and this notwithstanding the position of the home state, for which it will remain subject to its jurisdiction. The question arises then to what extent the home state can impose its company law or other regulations: on the basis of Centros, the rules on the host state's "general good" will trace the limits within which it will be entitled to govern that company. The outcome is not very different from the one in the previous case. In both, the home state's rules will continue to govern the company in its internal and external organisation.

By way of example, one could take a rule, undeniably aimed at creditor protection, declaring company directors personally liable for company debt in case of "wrongful trading". These rules exist in several jurisdictions. Provided the host state rule on wrongful trading is considered to qualify as a rule falling within the ambit of the "general good", one may accept this rule to be applied to foreign companies that have their principal centre of administration in the host state's jurisdiction, Unless the rule would have been framed differently, it would not be applicable to mere branches; but it would apply to subsidiaries, being local companies. A similar reasoning may apply to other aspects of company life, including co-determination, or certain techniques of

[101] According to the BGH, in a decision of 1 July 2002, *ZIP*, 2002, 1763, the company could still exist under the form of a oHG or a Gesellschaft Bürgerliches Recht. According to the ECJ- responding to the BGH's second question -it is the same company that should be recognized in the host state, and continue to function "under the law of its state of incorporation" : see § 95 ; also in that sense: SCHANZE and JÜTTNER, nt. 14; SCHULZ and SESTER, nt. 14, 545; KALLMEYER, fn. 14, 2521; FORSTHOFF, fn.14, 2477. ZIMMER, nt. 14, at 5, would also refuse to reduce the foreign company to a oHG. However, WERNICKE, TH., nt. 14 at 760, limits the foreign company's recognition (§ 59 and § 95 Überseering case) to a mere acceptance of legal capacity ("achten" and not "Anerkennung").

creditor protection: the host state may be successful in arguing that these requirements are essential features of the company's functioning within its jurisdiction[102]. But often these requirements will not meet the four pronged test used under the "general good", especially with respect to proportionality between rules and objectives[103].

The same reasoning would apply to the requirement of adapting the articles of association to the host state's rules. Unless one deals with rules that could be brought under the definition of the "general good" in the host state, most provisions dealing with the articles of association would have the nature of default rules. Therefore these would not qualify as rules that can be imposed by the host state. As a consequence the internal organisation of that company will largely remain subject to the home state rules.

33. The third hypothesis concerns a company originating in a "siège réel" jurisdiction and transferring its centre of administration to an incorporation jurisdiction. According to traditional conflict rules, this company would lose its legal capacity under the former and might not regain it under the law of the latter jurisdiction. Effective establishment would be rendered impossible and the Treaty's freedom of establishment could not effectively be attained.

Therefore a more constructive solution could be found by stressing the continuing existence of the company on the basis of the Überseering doctrine, thereby maintaining the company's status under the home state jurisdiction[104]. This approach could be readily accepted in the host state, which by hypothesis follows the incorporation doctrine.

More difficult will be the position of the home state: it will have to accept that companies that have been founded under its law remain subject to that law, even after the centre of administration has left the country. In the absence of clear rules dealing with the emigration of companies, this solution cannot clearly be derived from the present ECJ's case law. One can only refer to the Italian case law where this approach seems to have been followed[105].

34. Finally the case of a transfer of the centre of administration between two "siège réel" jurisdictions. According to conflict of law rules applicable in these jurisdictions, the transfer will result in a change of "nationality", leading to fully submitting the company to host state company law. The articles of association would have to be adapted to host state rules and practices. But it is now beyond doubt that the host state cannot deny this company its legal existence, and oblige it to re-incorporate. The company will exist in the host state, even if in the home state it would no longer be

[102] Some of these aspects were analysed by SCHANZE and JÜTTNER, nt. 14.
[103] Several German writers have pointed out that alternative techniques may be developed to the German system of co-determination. The co-determination rules of the European SE directive may be used as a source of inspiration.
[104] This aspect is strongly stressed by FORSTHOFF, fn. 14, 2477; also ZIMMER, nt. 14, at 3-4, but restricts to capacity.
[105] See supra nt. 44; in that sense FORSTHOFF, fn. 14, 2475.

recognized as a company resident in that state. This consequence of the application of the free movement rules clearly goes beyond the incorporation theory[106].

The requirement to adapt a company's internal organisation is a serious intervention in company life. Unless the host state has peremptory reasons for demanding such an adaptation, this requirement would normally be beyond the limits of its "general good" criterion. The host state would have to address specifically companies with their centre of administration in its jurisdiction, and hence, according to its conflict of law rules, subject to its jurisdiction. Provided these conditions have been met, there is no reason why host state rules could not impose additional requirements on immigrating companies. These requirements have to remain within the limits of the "general good", as defined in the Court's four pronged approach.

One could however also reason differently. One could argue that by choosing to transfer its centre of administration, rather than forming a mere branch, or any other type of establishment that would not have triggered the same obligations, the company has made a choice for which it has to accept the consequences, in this case to become entirely subject to the laws and rules of the host state. A change of "nationality" is not incompatible with the freedom of establishment: the company has kept its legal existence and capacity, and freely chooses to submit itself to the host state laws.

By way of example one may cite the case of a company with a unitary board, transferring its centre of administration to a state where the two tier structure is mandatory, and co-determination is organised within the supervisory board. The co-determination rules may be rendered applicable to this company, but not necessarily the rule mandating a two-tier board, as the objective for a well-balanced supervision on the management may also be attained within a unitary board[107]. This case also illustrates that companies, before deciding to transfer their centre of administration into other jurisdictions, will have to clearly assess the dangers or advantages of moving to another jurisdiction. In these matters only further harmonisation and /or, eliminating of "the general good" exception will solve the difficulties that still subsist.

35. The Court admitted that certain requirements may justify restrictions on the freedom of establishment, but the ones mentioned by the German government[108] were unable to justify in the present case the denial of legal capacity. Therefore, much of the

[106] See KALLMEYER, fn. 14, 2521, who admits continuity of the legal personality in the host state only in case the company is originating from a state in which the incorporation theory applies. Hence, he consider that this is not the great breakthrough of the incorporation technique, and its choice of law consequences.A similar reasoning is found in LEIBLE and HOFFMANN, nt. 14, at 932-933, stating that the freedom of establishment rules do no allow the transfer of the seat from one seat state to another seat state. This seems a confusion between treaty rules, and conflict of law rules.

[107] Several European states organise some form or another of workers' co-decision within the unitary board: see for an overview WYMEERSCH, "A Status Report on Corporate Governance Rules and Practices in Some Continental European States", in HOPT a.o. (ed.), *Comparative Corporate Governance*, Oxford, 1998, 1045.

[108] See §§ 83-94, Überseering case.

future debate will probably turn on the question to what extent national requirements will constitute a sufficiently grave restriction on free establishment. Both Centros and Überseering indicate that the Court will adopt a rather strict standard, and that the proportionality test will be applied with severity.

One element may be particularly important, also for the analysis of the SE regulation.

Several regulations, especially in the field of prudential supervision[109] require companies to have their registered office or company seat at their principal place of business. The rule aims at avoiding that supervision would be exercised by neither the authorities in the one, nor by those in the other state, as happened in the ominous case of BCCI. Would a requirement of that nature be compatible with the Court's reading of freedom of establishment?

The argument had been advanced by the German government, but has not been acted upon, at least not explicitly by the Court[110]. The requirement would certainly come under the general good reservation, and would be considered necessary and proportional to the requirements of prudential supervision, as the objectives of that supervision clearly are based on general good considerations.

Whether the same reasoning could be applied to a similar requirement in the SE statute will be dealt with later.

F. Conclusion in company law

37. The Überseering case essentially relates to freedom of establishment. It affects company law and conflicts of law only by reflex. Hence the question arises what elements of company law are affected.

Essentially the case relates as to how companies can have access to other member states. The Court's reasoning is essentially very simple and based on general principles of Community law. Companies formed within the Community have freedom of establishment. Hence they can freely access other member states. These states may not restrict free access, neither by company law rules, nor by any other rules, including conflicts of law rules. Restrictions to free access are allowed, but are limited to the

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[109] Some examples: according to art. 3 of the Ucits directive of 12 december1985 (OJ L 375 31/12/1985 p. 0003); Art. 6 of the Regulation of the EEIG, (OJ L 199, 31/07/1985 p. 0001 – 0009); see also the financial conglomerates directive (Directive of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and the Council, not yet published) and the BCCI directive (European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, *(OJ. L 168,* 18 July 1995, 7-13).

[110] § 87, Überseering case.

"general good" as invoked by the host state. In their absence, these companies must be offered access according to the terms in which they exist in their home state. Looking at this analysis, it is evident that the Court has not taken a stand for or against the incorporation theory. This theory does not intervene in its reasoning. In practice however, the Court's reasoning leads to a significant shift towards paying more attention to the state in which the company has been incorporated. This is quite normal: the issues that are analysed here essentially deal with cross border relations.

Read in conjunction with the Centros case, many legal writers state that the European Court of Justice seems to have taken an additional step in the direction of the incorporation theory[111]. This is apparently true. The Court's opinions privilege the state from which the company is "crossing the border", but this is not the "incorporation theory" as such. Moreover, differences with the incorporation theory have been identified.[112]

Several unsolved issues remain, especially with respect to the relationship between the Treaty freedoms and national company law rules, including those on conflicts of laws.

As the Court only decides on matters of freedom of establishment and not on company law matters, tensions continue to exist with national company law. Will this approach be applied to emigration of companies as well? What will be the impact of "general good" rules? The present regulations create a non-level playing field: companies located in incorporation states enjoy a greater flexibility to move around in Europe than those in "siège reel" states. The same applies to legal systems: the former are more export-orientated than the latter.

Taking into account these open questions, there may be convincing arguments for proposing a directive dealing with the seat transfer, not only in terms of the mechanics of the transfer but also offering guidance to the abovementioned questions of substantive company law. Here the issues that remain for national company legislators on the basis of the "general good" exception could be identified. Also the directive should clarify that companies that meet the mentioned "general good" requirement remain subject to their home state regime. Finally a stand has to be taken with respect to the need to adapt to the

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[111] Which does not mean that the court has downright adopted or mandated the incorporation theory: SCHULZ and ESSER, fn. 14, 547; KALLMEYER, fn 14, 547, who indicates that the Court has not dealt with the matter of the transfer of the seat as such, but who cannot deny that the Court ruling has a more than considerable effect on cross border seat transfers. FORSTHOFF, nt. 14, at 2475, takes a stronger stand on the mandatory application of the incorporation theory, but seems to overstate the case, as the Court only dealt with freedom of establishment and abolition of restrictions within that freedom. FORSTHOFF excepts the case in which the company has been formed abroad with real seat in Germany: there the incorporation theory would not apply. But except for cases of circumvention of the law, one does not see why these companies should not also enjoy free movement.

[112] See supra nr. 26.

host state provisions on the articles of association. Companies that have decided to change the legal regime to which they are subject should know to what formalities they will be held.

Whether national governments will be able to find constructive solutions to these issues in the short term is doubtful: in the last 45 years only the Court has been able to make any progress in this field. But now that the most difficult hurdles have been taken, one can expect national governments to prefer to control the "damage," rather than be confronted with a full home state regime.

Chapter III
The transfer of the seat in the European Company statute.

38. As far as cross border transactions are concerned, the SE statute differs from national company law in two essential respects: it allows SE's to freely transfer their seat, and allows cross border mergers. While the cross border merger is a specific feature of the rules on the formation of the SE, the seat transfer rules have an independent position in the whole statute (article 8). This is the more important as the discussion on the transfer of the seat has been raging in Europe for decades. The SE statute has for the first time created a major opening in this field: it determines that the company may transfer its seat to another jurisdiction, and that this change will not affect the continuity of its legal personality[113].

Before the Court rendered its opinion in the Überseering case, these were considerable innovations[113 bis]. One will have to determine to what extent Überseering will have a dampening effect on the innovative function of the Statute's rule (article 8, § 1)[114].

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[113] R. BUCHHEIM, *Europäische Aktiengesellschaft und grenzüberschreitende Konzernverschmelzung*, 2001, 169, draws attention to the relationship with the provision for a mandatory choice between a unitary and a two tier board.

[113 bis] GEENS, K., "De zetelverplaatsing van de Europese vennootschap als vrij vestigingsvehikel", *Liber Amicorum Lucien Simont*, Brussel 2002, 1025; KOPPENSTEINER, H.G., "Die Sitzverlegung nach Centros", 141; MENJUCQ, M., "La société européenne, (Règlement CE n° 2157/2001 et directive 2001/86/CEE du Conseil du 8 Octobre 2001", *Rev.Sociétés, 2002*, 225; MENJUCQ, M., "Réflexion critique sur la proposition de 14e directive relative au transfert intra-communautaire de siège social, *Bull. Joly*, 2000, 137; PARIENTE, M., "Les obstacles à la libre mobilité des entreprises européennes à l'intérieur de l'Union", *Bull. Joly*, 2002, 21. More in general: BUNGERT, H. and BEIER, C., "Die Europäïsche Aktiengesellschaft", *EWS*, 2002, 1; EBKE, W.F., "The Real Seat Doctrine in the Conflicts of Corporate Laws", 36 *The International Lawyer*, 1015 (fall 2002); LUTTER, M., "Europäische Aktiengesellschaft – Rechtsfigur mit Zukunft?" *BB*; 2002, 1; PAULUS DE CHÂTELET, P., "La société européenne", *Tijdschrift Belgisch Handelsrecht* 2002, 167; TEICHMANN, CHR. "Die Einführung der Europäische Aktiengesellschaft" *ZGR,* 2002, 383.

[114] Will the rule affect the member states right to levy taxes on transferring the seat, as these national tax rules are often based on the dissolution of the company. F. BLANQUET, "La société européenne n'est plus un mythe", *Rev.Dr.Int.Dr. Comp.*, 2001, 139,at 155

39. The transfer of the seat has been defined differently in the French and in the English version of the Regulation. This is logical as each jurisdiction is starting from a different terminology.

According to the English version of article 8, the regulation applies to the transfer of the "registered office". This is the more striking as according to the traditional incorporation theory, it was taught that the registered office could not be transferred into another member state.

On the other hand, the issue becomes more complicated as henceforth both registered office and head office will have to be located in the same member state (art 7)[115]. The reason for this requirement probably has been to avoid letter box companies[116], for which the state of incorporation could fear to be confronted with sometimes mala fide practices undertaken out of a different state, but affecting the reputation of the state of incorporation. Also, in some sectoral directives and in the regulation of the European Economic Interest Grouping[117], this requirement has been expressly formulated, in the former cases for credible prudential reasons. The regulation even provides that a member state may choose to require both elements - registered office and head office - to be located at the same address[118].

According to the Regulation, transferring the head office into another member state will necessitate a transfer of the registered office, or of the seat, according to the national law. And vice versa, it will not be possible to transfer the registered office and keep the head office where it was, leaving the jurisdiction but without change in actual operations. The sanction is very drastic, and underlines the importance to be attached to

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writes that this is compatible with the Regulation. MENJUCQ, M., "La société européenne, (Règlement CE n° 2157/2001 et directive 2001/86/CEE du Conseil du 8 Octobre 201), *Rev.Sociétés*, 2002, 225, at 243 is more explicit as he obviously considers that the regulation will put an end to member states competence to consider the company as being dissolved. However, this would constitute an implicit change of the Member States fiscal rules and hence run contrary to the Treaty.

115 The rule is considered of great importance and classified by F. BLANQUET among the backbone rules of the Regulations ("un élément de la colonne vertébrale") at 155. The importance of this rule lies at the basis of art. 69 of the Regulation according to which member states will assess the present system within five years of the regulation's date, to determine whether to allow registered office and head office to be located in different member states.

116 In that sense, BLANQUET, nt. 114 at 155; TEICHMANN "Die Einführung der Europäischen Aktiengesellschaft – Grundlagen der Ergänzung des europäischen Statuts durch den deutschen Gesetzgeber" in *ZGR*, 2002, 458, considers that the rule was aimed at avoiding the conflict between incorporation and seat theories.

117 See the directives cited note 80 supra. Also, art. 6 of Regulation 2137/85 of 25 July 1985 (OJ L 199, 31/07/1985 p. 0001 – 0009).

118 This requirement has been formulated in art 7, 2nd sentence of the Statute, as an option open to member states.

this rule: article 64(2) declares that the state, after having offered the possibility to regularise the illegal status, will order the SE to be liquidated[119].

The question should be raised whether this requirement is compatible with the Überseering holding: it imposes effectively considerable burdens on companies that would like to avail themselves of the freedom of establishment by establishing their head office in another state without moving their registered office, inter alia because this might result in a change of the applicable law, at least in the case where the company is moving into a "siège réel" state[120]. But if the opposite happens, i.e. from an incorporation state to another incorporation state, this would probably also result in a change of applicable law, as the place of the "registered office" will be affected, which – although the Regulation is unclear on that point[121] – would probably affect the applicable law. Here one sees that the Regulation tends to follow the "siège réel" theory[122].

As far as the compatibility of these rules with freedom of establishment, as now interpreted by the ECJ is concerned, the exception to the treaty freedom will have to be assessed on the basis of the general good exception. Therefore, and as already mentioned above, the exception can be considered compatible to the extent that is relates to prudential measures, where for reasons of effectiveness of supervision, it can be deemed necessary that the company be located at its head office, and be subject to the jurisdiction of the state where its head office is located. But in other fields, such as the EEIG or the SE, the overall justification is not convincing. Therefore, that provision of the Regulation seems incompatible with the Treaty's freedom provisions[123].

40. One will not be astonished that the French version of the Regulation is stated in terms of "siège statutaire", this being required to be located in the same jurisdiction as the "administration centrale"[124].

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[119] For further details see TEICHMANN, nt. 116.

[120] See supra as to the consequences of this hypothesis

121 The regulation does not expressly refer to the issue of a change in the applicable law due to a transfer of the seat. It merely states that the company will have to adapt its articles of association (art 8, § 10) . However, art.9, (1) (c) (ii) provides that the SE will be governed, i.a. and according to the sequence detailed in art 9, to the company law provisions of the Member States laws "wich would apply to a public limited liability company formed in accordance with the law of the Member State in which the SE has its registered office". One could argue whether this formulation necessarily obliges a company moved to a legal system where the incorporation theory is applicable to adapt to that states company law rules. See Zimmer, nt. 14, at 6-7, allowing Member states to require tranformation into the laocal company form.

[122] Also P. NICAISE, "La société européenne, une société de type européen", *Journal des tribunaux*, 2002, 481

[123] SCHUTTE - VEENSTRA, nt. 14, 531. In the same sense, already in 1993, C.R. HUISKES, *De Europese Vennootschap*, Zwolle, 91.

[124] see also on the German terminology: TEICHMANN, note 116, 455, where the "Sitz" is identified as the "siège statutaire" or the seat as designated in the articles of association. To assimilate this with the "Registersitz" is likely to change its meaning.

A change in the siège will therefore necessarily result in a change in the applicable legal regime. According to article 9, the applicable legal regime to an SE is, in the absence of specific rules in the regulation, and in its statutes, the rules of national law in the sequence as provided for in article 9(1). These national laws still present a great deal of diversity. As a consequence, by transferring its seat the company will not have to reincorporate – that has been provided for explicitly in article 8, §1 – but will have to conform to the local rules in force in its new home state. These adaptations may be relatively thorough: one can image that the company may prefer to draft its "statutes" according to the usual rules in force in its new home state. This may call for a complete overhaul of its statutes. Here again, Überseering may have introduced a more favourable regime[125]

41. A transfer effectuated according to the rules of the regulation will neither result in the winding up of the company, nor in the creation of a new company. However, it is to be questioned whether the tax authorities will deduct from this continuity principle that no taxes will be due. It is well known that those jurisdictions that already allow the company to leave, impose a stringent tax requirement calling "for settling all accounts at the border". The Regulation contains no hint as to the answer so that it seems likely that it has not affected the national taxation powers. Taxing may however have to be gauged against the rules on free establishment: if the factual tax situation would remain unchanged, the same tax base remaining in the former home state, it might seem an undue restriction to impose an special tax on transferring the seat. However, this factual situation seems unlikely, now that the Regulation requires that along with the registered office, the "head office" will have to be transferred. It seems therefore unlikely that transferring the head office would not result in important tax consequences. § 7 (2) hints at the tax issue by saying that the competent authorities may object on grounds of public interest. Although these "competent authorities" mainly refer to prudential supervisors, there is no reason why the tax authorities would not be included.

42. The transfer of the seat. This procedure aims at protecting the rights of all the parties that can be affected by the transaction:

- the shareholders
  - The regulation calls for extensive pre-transaction disclosure of the proposal for a transfer and the management report on it (§3)
  - The decision has to be taken at least by a 2/3rds majority
  - Opposing shareholders may be offered appropriate protections according to the law where the SE was reistered, e.g. by way of a withdrawal right (§ 5)
- the creditors
  - the exit certificate cannot be delivered if the SE does not prove that creditors have been adequately protected (art 7 §7)

[125] See supra nr. 32.

- o no transfer is allowed to companies engaged in liquidation, winding up, insolvency proceedings etc.(§15)
- the employees
  - o the effect of the transfer has to be detailed in the transfer plan (art 7(2)(c)

43. In addition some form of administrative supervision has been instituted: co-operation between the "competent authorities" (i.e. the notary, the tribunal, any other authority) of the two states involved will aim at securing that the entire transaction is not likely to harm the interest of creditors and "holders of other rights" (probably excluding the shareholders, protected under § 5)

The formal procedure is based on the delivery of a certificate by the home state, stating that the exit formalities have been met (§8). The certificate is then produced in the host state, who will inform the home state of the registration in the host state. The company may then be registered in its new home: it will be registered, and the seat transfer will take effect on that date[126]. The registration in the old home state will be deleted upon a notice sent by the authority of the new state to the authority of the former home state (§ 11) and subsequently be published (§ 12). This registration, which should necessarily led to a transfer of the head office into the same Member State, will lead to a change in applicable legislation and to a change in the articles of association.

The mechanics of this procedure are laid down in the regulation and are mandatory for the states.

44. From this first analysis of the rules on the seat transfer one may conclude that this technique may prove to be one of the attractive features of the SE statute, viz. that companies may be able to travel to other states, and back out from the application of their original state company law, provided they have first opted for the SE regime. Whether that would be a sufficient ground for adapting the SE regime is open for debate.

Conclusion

45. The following elements deserve attention and further discussion by way of conclusion:

1. Company law in Europe shows a deep division with respect to the factor used for connecting a company to a certain legal order. This attitude changes into hostility when the issue of a change of the legal regime is concerned: both the transfer of the seat and the cross border merger have been restricted by a series of devices, belonging to company law, to conflicts of law, to tax laws.
2. The present state of affairs can hardly be considered compatible with a regime of free circulation of legal entities, as prescribed by the European Treaty.
3. The case law of the ECJ, after having been rather timid, recently backed a more bold approach. Member States may not longer ignore the legal existence

[126] § 10,n referring to article 12.

and capacity of companies originating from other EU states, nor impose additional requirements, except within the limits of the protection of their "general good".

4. As a consequence of the more open attitude, national company law, and especially its rules on conflicts of laws are faced with new challenges, mainly dealing with the relationship of existing company law rules with the treaty's freedoms. The guideline should be the superiority of the Treaty rules v.à.v. national company law rules[127].
5. Implicit in the court's reasoning is a more favourable attitude towards the recognition of a company as it exists in its country of origin. Hence, the court bends towards – but without fully adopting – a rule that shows certain features of the incorporation theory.
6. This approach is not the end of the real seat doctrine, as the latter will remain applicable in the domestic context. It will also remain applicable in the relations to third states[128]. Its importance will be considerably reduced.

[127] See BEHRENS, nt. 14, 737, correctly states that collision rules are subordinate to freedom of establishment rules.

[128] However, its role might turn out to be significantly reduced due to the most favoured nations clauses that are included in many international cooperation treaties: see SCHANZE and JÜTTNER, nt 14.

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