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Centros, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law

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INTRODUCTION

Around the year 2000, three European Court of Justice ("ECJ") cases shook the foundations of European corporate law: *Centros* (1999),[1] *Überseering* (2002)[2] and *Inspire Art* (2003).[3] Applying the freedom of establishment to corporations, these cases heralded a new era, as in combination they permit free choice in incorporation, thus permitting an individual seeking to incorporate to choose the law of any country in the European Economic Area.

In contrast to the United States, free choice of incorporation was previously not possible in Europe. Traditionally, conflicts of law rules regarding legal persons were divided between the *incorporation theory* and the *real seat theory*. Under the incorporation theory, which is analogous to the internal affairs doctrine in the United States, a corporation is governed by the law where it was incorporated.[4] Under the real seat theory, a corporation is governed by the law of the country where its head office (the centre of its actual commercial and financial operations) is located. Consequently, if a firm is incorporated in state A, but is actually based in state B, B – as a real seat state – might deny the

[1] Case C-212/97 [1999] E.C.R. I-1459.

[2] Überseering BV v. Nordic Construction Company Baumanagement GmbH, Case C-208/00 [2002] E.C.R. I-9919.

[3] Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Case C-167/01 [2003] E.C.R. I-10155.

[4] The real seat theory has traditionally been used in Austria, Belgium, France, Germany, Italy and Luxemburg. Various forms of the incorporation theory have been used in common law jurisdictions as well as the Netherlands, Switzerland, Liechtenstein and the Scandinavian countries. See, e.g. Kilian Baelz & Theresa Baldwin, The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law, German L. J., vol. 3, no. 12, ¶9 (2002); Paul J. Omar, Centros, Uberseering and Beyond: A European Recipe for Corporate Migration, Part 1, 15 Int'l. Company & Comm. L. Rev. 398, 398–400 (2004).

firm's legal capacity, since it was not incorporated following B's laws. Alternatively, it might treat it as a partnership or a corporation governed by B law. If state B follows the incorporation theory, it might still find other reasons to refuse the recognition of the company (e.g. circumvention of B's law), or it might decide to apply some of its own laws to the corporation. In the three cases, a Member State either refused to recognize a firm set up in another Member State or attempted to apply some of its laws to the firm. In each case, the ECJ found the host State to be in violation of the freedom of establishment. Consequently, the real seat theory can no longer be applied to companies from other Member States, and States cannot use special laws to protect their own corporate law policies from circumvention by foreign incorporation. Companies' founders can, in principle, "pick and choose" the best legal form from all Member States.

This result is one that policymakers, lawyers and legal scholars sought to avoid for many decades, given its potential to undermine national corporate law policies that used the real seat theory as a protectionist tool to stop pseudo-foreign corporations at the border. This chapter attempts to tell a short, intellectual history of the debate, and how that history is linked to the freedom of establishment for corporations. In the early years of the European Economic Community (ECC), it was thought that company law would be harmonized to such a strong degree that the free movement of corporations would no longer raise any concern. When the harmonization program stalled, Member States felt justified in maintaining protectionist measures impeding free choice of corporate law. Many saw *dicta* in the *Daily Mail* case of 1988[5] as providing a justification for the real seat theory, whereas few observers paid attention to the *Segers* case of 1986,[6] which seemed to be saying the opposite. The triad of *Centros*, *Überseering* and *Inspire Art* thus was a particularly disruptive surprise.

The ECJ, which took a more cautious approach only in the *Cartesio* case of 2008, was seen as opening the door to regulatory competition in European corporate law, and in particular to English Private Limited Companies flooding the continent. In the end, there was little "offensive" regulatory competition, since no Member State had the incentive to capture a large part of the market for incorporation. Member States did, however, engage in "defensive" regulatory competition by eliminating requirements in their laws

[5] The Queen v. Treasury and Commissioners of Inland Revenue, Ex Parte Daily Mail and General Trust PLC, Case C-81/87 [1988] E.C.R. I-5483.

[6] Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, Case C-79/85 [1986] E.C.R. I-2375.

that seemed to drive founders to the United Kingdom. Consequently, the ECJ unwittingly nudged Member States towards a certain vision of corporate law that was never intended by policymakers.

This chapter proceeds as follows: the second section discusses the link between the freedom of establishment for companies and the European Community's company law harmonization program, and how the limitations of harmonization resulted in a greater desire to limit the free choice of incorporation. The third section looks at the *Segers* and *Daily Mail* cases of the 1980s and how they were understood in the Member States. The fourth section explores the triad of *Centros*, *Überseering* and *Inspire Art* and its path-breaking consequences for EU Company Law. The fifth section shows how the Court became more cautious in *Cartesio*. The sixth section discusses the effects of the Court's decisions on the European corporate law discourse. The seventh section describes the vision of corporate law towards which the Court is unwittingly pushing the Member States. The final section summarizes and concludes.

THE EC COMPANY LAW HARMONIZATION PROGRAM AND FEARS OF A EUROPEAN DELAWARE

By the late 1960s, the EEC already embarked on its company law harmonization program. While agreement on a supranational legal form – the SE or *Societas Europaea* – could not be reached until 2001,[7] the Community passed a series of directives addressing issues such as the validity of corporations and corporate acts,[8] legal capital and creditor protection,[9] mergers,[10] split-ups[11] as well as accounting[12] during the first intense period of harmonization from the

[7] Council Regulation 2157/2001/EC on the Statute for a European Company, 2001 O.J. (L) 294/1 [hereinafter SE Regulation]; on the history of the SE project, see Vanessa Edwards, The European Company – Essential Tool or Eviscerated Dream?, 40 COMMON MKT. L. REV. 443–50 (2003).

[8] First Council Directive of 9 March 1968 (68/151/EEC), 1968 O.J. (L 65) 8. The Directive has since been recodified as Directive 2009/101/EC, 2009 O.J. (L 258) 11.

[9] Second Council Directive of 13 December 1976, 1977 O.J. (L 26) 1. The directive has been recodified as Directive 2012/30/EU, 2012 O.J. (L 315) 74.

[10] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, 1978 O.J. (L 295) 36. It has now been replaced with Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, 2011 O.J. (L 110) 1.

[11] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, 1982 O.J. (L 378) 47.

[12] Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC),1978 O.J. (L 222) 1; Seventh Council

1960s through the 1980s.[13] During this period, the German corporate law model was particularly influential,[14] although obviously many compromises between Continental and English ideas had to be made after the United Kingdom joined the EU in 1973.[15]

Harmonization of company law was considered necessary in the EC for two reasons, both of which are closely linked to the freedom of establishment. First, as is evident from the Treaty itself, to achieve the freedom of establishment in the internal market, it was considered necessary for shareholders as well as third parties interacting with corporations (such as creditors and contracting parties) to be able to rely on a certain level of minimum standards. The Treaty authorized the Council and the Commission to coordinate "to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms . . . to making such safeguards equivalent throughout the Community."[16]

Directive of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC), 1983 O.J. (L 193) 1. The two directives were consolidated into Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19.

[13] For an overview of the directives, see, e.g. Jan Wouters, European Company Law: Quo vadis?, 37 Common Mkt. L. Rev. 257, 258–60 (2000); Luca Enriques, EC Company Law Directives and Regulations: How Trivial Are They?, 27 U. Pa. J. Int'l Econ. L. 1, 69–75 (2006); Mads Andenas, EU Company Law and the Company Laws of Europe, 6 Int'l & Comp. Corp. L.J. 7, 21–28 (2008).

[14] E.g. Angel Rojo, The Typology of Companies, in European Company Laws (Robert R. Drury & Peter G. Xuereb eds. 1991) 41, 47 (identifying a "Germanization of the EEC member states' laws" as the result of the directives); Krešimir Piršl, Trends, Developments, and Mutual Influences between United States Corporate Law(s) and European Community Company Law (s), 14 Colum. J. Eur. L. 277, 332–33 (2008) (noting that German law was considered the most modern at that time and also satisfied the Commission's preference for complexity); Hans-Jürgen Hellwig, Das deutsche Gesellschaftsrecht und Europa – Ein Appell zu mehr Offenheit und Engagement, 2012 Zeitschrift für Unternehmens- und Gesellschaftsrecht [ZGR] 216, 217–18; see also Eric Stein, Harmonization of European Company Laws 101 (1971) (noting that German law was considered as the principal model); Stefan Grundmann, European Company Law 205 (2nd ed. 2012) (noting the strong influence of German law on the Second Directive).

[15] E.g. Hellwig, supra note 14, at 218–19 (noting an increasing influence of English law, in part because of more targeted personnel policies in Brussels by the UK government).

[16] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 54(3)(g) [hereinafter EEC Treaty], and subsequently Consolidated Version of the Treaty Establishing the European Community art. 44(2)(g), 2006 O.J. C 321 E/37 [hereinafter EC Treaty]; Consolidated Version of the Treaty on the Functioning of the European Union art. 50(2)(g), 2008 O.J. C 115/47 [hereinafter TFEU]. E.g. Walter Hallstein, Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft, 28 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ] 211, 212 (1964); Andenas, supra

The First Directive, which applied both to Public Limited Liability Companies[17] and Private Limited Liability Companies,[18] required that firms disclose, among other things, their statutes, the names of individuals authorized to represent it, as well as accounting information.[19] To protect third parties relying on contracts, it ensured that these could not be repudiated on the basis that they were *ultra vires*,[20] and it limited the circumstances of the company's nullity and stated that it could apply only prospectively.[21] For creditors, during this period, it was assumed to be crucial to be able to rely on the firm's legal capital, a Continental concept that was the centrepiece of the Second Directive. Public – but not private – limited liability companies were required to have a minimum capital (art. 6),[22] were subjected to protective and procedural requirements for capital increases (art. 25) and reductions (art. 30), and were subjected to capital maintenance rules and the prohibition against returning the capital to shareholders (art. 15). Moreover, under the Directive, firms must grant preemptive rights to the existing shareholders in the event of a share issue (art. 29).

The initial measures were largely uncontroversial at that time and, in part, led to a more modern company law in some countries,[23] even though the relatively general statements in the preambles and of EU policymakers did not always make it clear how exactly the various harmonization measures were supposed to contribute to the development of the Common

note 13, at 9; Yves Guyon, La coordination communautaire du droit français des sociétés, 26 Revue Trimestrielle de Droit Européen [RTDE] 241, 241 (1990); see also Guyon, id., at 247 (finding that contracting parties were the main beneficiaries of harmonization).

[17] This includes the Aktiengesellschaft (AG), société anonyme (SA), and società per azioni (spa).

[18] This includes the Gesellschaft mit beschränkter Haftung (GmbH), société à responsabilité limitée (SARL), and società à responsabilità limitata (sarl).

[19] Directive 2009/101/EC, art. 2.

[20] All original Member States besides Germany adhered to the ultra vires doctrine before the enactment of the First Directive. See Stein, supra note 14 at 283–87.

[21] Directive 2009/101/EC, art. 9 (regarding ultra vires), art. 10–12 (regarding nullity). In the recodified version of 2009 art. 10 governs ultra vires, and art. 11–13 govern nullity. On the latter, see, e.g., Robert Drury, Nullity of Companies in European Company Laws, supra note 14, at 247, 250–53. See already R. Houin, Le régime juridique des sociétés dans la Communauté Économique Européenne, 1 RTDE 11, 14 (1965) (noting the importance of the harmonization of company disclosure and reasons for nullity of the corporation).

[22] The delineation between public and private companies limited by shares in the United Kingdom and Ireland was the source of considerable controversy and became more pronounced because of the directive. See Clive Schmitthoff, The Second EEC Directive on Company Law, 15 Common Mkt. L. Rev. 43, 43–46 (1978).

[23] Richard M. Buxbaum, Is There a Place for a European Delaware in the Corporate Conflict of Laws, 74 RabelsZ 1, 12 n.31 (2010).

Market.[24] However, the originally planned harmonization program went far beyond the relatively limited measures that were actually implemented. These included, for example, a draft Fifth Directive that would have harmonized board structure (including employee participation on the board) and detailed shareholder powers.[25] Proponents argued that nearly complete harmonization of company laws was necessary to achieve equal conditions of competition between companies from different states.[26]

Second, a look at contemporary views on harmonization reveals that the applicable conflicts of law rules for corporations and harmonization were linked. Except for the Netherlands, all of the original six Member States applied the real seat rule.[27] Yet, some contemporary sources make clear that the prevailing understanding in the 1960s was that, since the freedom of establishment applied to companies, Member States would not be able to maintain restrictions on foreign firms as long as they maintained a registered office, central administration or principal place of business anywhere in the community territory.[28] In other words, the real seat theory may have been doomed, even if that understanding was not entirely universal.[29]

[24] Richard M. Buxbaum & Klaus J. Hopt, Legal Harmonization and the Business Enterprise 196–204 (1988) (summarizing the rationales given for harmonization and critiquing their unstated assumptions).

[25] See, e.g. Walter Kolvenbach, EEC Company Law Harmonization and Worker Participation, 11 U. Pa. J. Bus. L. 709, 720–33 (1990).

[26] See e.g. Marcus Lutter, Die Entwicklung des Gesellschaftsrechts in Europa, 10 Europarecht [EuR] 44, 48 (1975).

[27] Houin, supra note 21, at 22; Stein, supra note 14 at 29–31, 53, 397.

[28] TFEU art. 54. The provision at that time was art. 58 of the Treaty of Rome. See Stein, supra note 14, at 28–29 (noting that it is not necessary that a company maintains both a registered office and a real seat in the community); see also Houin, supra note 21, at 24 (noting that Member States could not invoke public policy ("ordre publique") to refuse the recognition of companies incorporate in other Member States, given that there is a European public policy of higher order); Ulrich Drobnig, Kritische Bemerkungen zum Vorentwurf eines EWG-Übereinkommens über die Anerkennung von Gesellschaften, 129 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR] 92, 101–02 (1966); Bernard Großfeld, Die Anerkennung der Rechtsfähigkeit juristischer Personen, 31 RabelsZ 1, 18 (1967) (noting that the EEC has decided in favor of the incorporation theory for all practical purposes); Peter Doralt, Anerkennung ausländischer Gesellschaften, 91 Juristische Blätter [JBl] 181, 196 (1969) (noting that Austria would have to abandon the real seat theory if it were to join the EEC with respect to other Member States); Alfred F. Conard, Company Laws of the European Communities from an American Viewpoint, in The Harmonisation of European Company Law 44, 56, 58 (Clive M. Schmitthoff ed. 1973) (explaining that the treaty endorses the incorporation theory).

[29] E.g. P. Leleux, Corporation Law in the United States and in the E.E.C., 5 Common Mkt. L. Rev. 133, 149 (1967) ("There is nothing in the Treaty of Rome that would require continental legal traditions on this point to be altered").

The spectre of corporate law arbitrage haunted European Company Law from its inception and was evident to early commentators. For example, Houin, writing in 1965, was concerned that companies might be able to opt out of protections for third parties by choosing lax laws.[30] During the EEC Treaty negotiations, the French delegation in particular feared that the Netherlands might become the Delaware of Europe, given that its corporate law was the most permissive at that time.[31]

As Timmermans (who served on the ECJ from 2000 to 2010) put it, some saw harmonization as a *quid pro quo* in the negotiation of the EEC Treaty for granting the freedom of establishment also to companies.[32] Even if the Treaty did not formalize this by making harmonization a prerequisite for the full exercise of the freedom, it was often thought that it could – at least for the time being – be interpreted in a way that would permit restrictions until harmonization was achieved. For example, Everling (on the court from 1980 to 1988) suggested in his 1964 book on the freedom of establishment that the Member States could – in spite of the Treaty – refuse the recognition of companies whose registered office and real seat were in different states on grounds of public policy "until the provisions for protection of creditors have been coordinated."[33]

The original assumption was that company law would largely be quite extensively harmonized by the end of the transition period for the common market in 1969.[34] It was thought that harmonization would cover "all provisions concerning structure and organs of companies, formation and maintenance of its capital, the composition of the profit and loss account, the issue of securities, mergers, conversions, liquidations, guarantees required in cases of

[30] Houin, supra note 21, at 16.

[31] Christiaan W. A. Timmermans, Die europäische Rechtsangleichung im Gesellschaftsrecht, 48 RabelsZ 1, 13 (1984); Christian Timmermans, Methods and Tools for Integration. Report, in European Business Law: Legal and Economic Analyses on Integration and Harmonization 129, 132 (Richard M. Buxbaum, Alain Hirsch & Klaus J. Hopt eds. 1991).

[32] Timmermans, Rechtsangleichung, supra note 31, at 12–14; Timmermans, Methods, supra note 31, at 132; see also Alfred F. Conard, The European Alternative to Uniformity in Corporation Laws, 89 Mich. L. Rev. 2150, 2190 (1991) (noting that France and Germany required "equivalent safeguards" to open their markets to corporations from other member states); Piršl, supra note 14, at 326 (describing harmonization as "price" or "necessary compensation" required by some member states to accept freedom of establishment).

[33] Ulrich Everling, The Right of Establishment in the Common Market ¶ 312 (1964).

[34] Houin, supra note 21, at 13–14 (noting that the directives were supposed to come into being by December 31, 1964); Stein, supra note 14, at 36–37; see also Stein, supra note 14, at 37–41 (discussing a two-year standoff between the Commission and Germany regarding the elimination of a ministerial authorization requirement to do business required of foreign companies).

company concentrations, etc."[35] Some authors even questioned whether an independent and comprehensive national reform of corporate law (which happened in both France and Germany in the 1960s) was still permissible in light of the EEC's plans,[36] and some suggested that a full unification of company law would be desirable.[37] Großfeld wrote in 1967 that it cannot be assumed that the existing restrictions on foreign corporations would cease to apply if the laws of the Member States have not been sufficiently approximated.[38]

By the end of the transition period, however, only one directive was promulgated, and the subsequent directives required more compromise after the entry of the United Kingdom and Ireland into the community. The Member States were thus confronted with only marginal harmonization, while the freedom of establishment began to apply. A "Convention on the Mutual Recognition of Companies and Bodies Corporate" was signed in 1968, but it never came into force because the Netherlands never ratified it.[39] This convention would have permitted Member States to apply their own mandatory laws to corporations whose registered office was elsewhere,[40] and would thus have obviated the need for the real seat theory.[41] Most Member States thus continued to adhere to the real seat theory even though the harmonization was not a legal *quid pro quo* for the freedom of establishment of companies in the treaties. The fact that harmonization was still an ongoing project seemed to support the argument that a "flexible" view of the relationship between the Treaty and the recognition of foreign companies was acceptable.

The US model of competing jurisdictions and Delaware's dominant role among large public corporations was known in Europe in the 1960s, as well as

[35] Wouters, supra note 13, at 268 (quoting from the Berkhouwer report of 1966).

[36] Stein, supra note 14, at 162–63 (summarizing the debate).

[37] Houin, supra note 21 at 12.

[38] Großfeld, supra note 28, at 20–21.

[39] Convention on the Mutual Recognition of Companies and Bodies Corporate, February 29, 1968, E.C. Bull. Supp. 2-1969, at 7. Regarding ratification, see Timmermans, Methods, supra note 31, at 149, 151; Werner F. Ebke, Centros – Some Realities and Some Mysteries, 48 Am. J. Comp. L. 623, 636 n.83 (2000); Helen Xanthaki, Centros: Is this really the end for the theory of the siege real?, 22 Comp. Law. 2, 3 (2001).

[40] Convention on the Mutual Recognition of Companies and Bodies Corporate, E.C. Bull. Supp. no. 2-1969 art. 4; See Leleux, supra note 29, at 148; Conard, European Alternative, supra note 32, at 2161. Apparently this is the reason for the Dutch disapproval of the convention. Brigitte Knobbe-Keuk, Umzug von Gesellschaften in Europa, 154 ZHR 325, 330 (1990).

[41] See also Timmermans, Rechtsangleichung, supra note 31, at 39 (doubting the legality of such a convention in light of the EC competence to harmonize company law to further the freedom of establishment).

the argument that its preeminent position had lead to a "liberalization" of corporate law.[42] Writing in 1973, Clive Schmitthoff opined: "The Community cannot tolerate the establishment of a Delaware in its territory."[43] In the meantime, across the Atlantic, William Cary's famous 1974 article[44] launched the debate about the "race to the bottom" in the United States.[45] While in the United States a counterview that posited a "race to the top" emerged in the following years,[46] Continental European corporate law scholars and policy-makers remained sceptical about the purifying powers of the market, which, according to that view, ultimately results in better laws because of member state competition and the pressure of market forces.[47] Thus, corporate conflict of law rules remained protectionist.[48] Allowing a free choice of corporate law (as in the United States) would have enabled individuals to circumvent the respective national schemes purporting to protect shareholders and third parties interacting with the firm. The fact that the early harmonization program of the EC remained a patchwork helped to justify the continued use of the real seat theory, which was not put to the test of the ECJ's stringent scrutiny for several decades. The effect was not just that local stakeholders

[42] See e.g. Y. Scholten, Company Law in Europe, 4 Common Mkt. L. Rev. 377, 390 (1967); Großfeld, supra note 28, at 39–42; Leleux, supra note 29, at 138, 150–52.

[43] Clive M. Schmitthoff, The Future of the European Company Law Scene, in The Harmonisation of European Company Law, supra note 28, at 3, 9.

[44] See e.g. William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663 (1974).

[45] A modified "race to the bottom" perspective is today most identified with Lucian A. Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435 (1992).

[46] Ralph K. Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Leg. Stud. 251 (1977); Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J. L. Econ. & Org. 225 (1985); Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 212–15 (1991); Roberta Romano, The Genius of American Corporate Law (1992).

[47] E.g. Werner F. Ebke, Die "ausländische Kapitalgesellschaft & Co. KG" und das europäische Gemeinschaftsrecht, 16 ZGR 245, 259–63 (1987) (comparing the situation in Europe with regulatory competition in the US, in particularly criticizing the argument that investors are adequately protected by market forces); Harm-Jan de Kluiver, European and American Company Law. A Comparison after 25 Years of EC Harmonization, 1 Maastricht J. Eur. & Comp. L. 139, 152 (1994) (noting that the literature on harmonization sometimes points out a "Delaware effect.") Arguably, in an environment with less developed capital markets such as most in Continental Europe, the likelihood of a race to the top may be smaller anyway, even competition would likely be less intense in Europe due to smaller incentives to compete. E.g. Martin Gelter, The Structure of Regulatory Competition in European Corporate Law, 5 J. Corp. L. Stud. 247, 274 (2005).

[48] Peter Behrens, Niederlassungsfreiheit und internationales Gesellschaftsrecht, 52 RabelsZ 498, 512 (1988) (discussing the real seat theory as a protective theory).

were shielded from arguably problematic foreign law but also that national laws were protected from competition by other legal systems.

While the incorporation theory was arguably on the rise until the 1960s,[49] the spectre of regulatory competition may subsequently have had the opposite effect and seems to have helped the hitherto controversial and uncodified real seat theory to solidify in the German literature and case law from the 1970s. In the absence of meaningful harmonization, the real seat theory was considered necessary to protect shareholders, employees and creditors, and therefore a justifiable limitation of the freedom of establishment.[50] Halbhuber provocatively indicted German legal scholars for rewriting legal history, specifically focusing on shifts in the published views of the influential scholar Bernhard Großfeld. While in 1967 Großfeld stated that the Treaty implicitly endorsed the incorporation theory, in 1981 the same author wrote that the Treaty did not deal with the recognition of companies, presumably (according to Halbhuber) because the ECJ had, in the meantime, found that the freedom of establishment had direct legal effect.[51]

CLINGING TO *DAILY MAIL*

The 1980s saw two important cases potentially relating to the issue at hand, with seemingly conflicting outcomes. The first was the *Segers* case of 1986.[52] Mr. Segers incorporated in England and was now the director of an English company that did business only in the Netherlands. According to the Dutch authorities, he was not eligible for health benefits provided by the national Dutch health care systems. The ECJ found that the freedom of establishment prohibited Member States from excluding a director "from a national sickness insurance benefit scheme solely on the ground that the company in

[49] Großfeld, supra note 28, at 14–22; but see Ernst Rabel, 2 The Conflict of Laws 52 (1960) (suggesting that the real seat theory dominated in Germany at that time).

[50] Ebke, Realities, supra note 39, at 649 (citing Bernhard Großfeld for the proposition that the real seat theory is condition on the absence of meaningful harmonization); Carsten Thomas Ebenroth & Uwe Eyles, Die Beteiligung ausländischer Gesellschaften an einer inländischen Kommanditgesellschaft, 41 Der Betrieb [DB], Beilage 1, 12, 19, 20 (1988).

[51] Harald Halbhuber, Limited statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand 118–23 (2001); Harald Halbhuber, National Doctrinal Structures and European Company Law, 38 Common Mkt. L. Rev. 1385, 1402 (2001). This was established in Reyners v. Belgium, Case C-2/74, (1974) E.C.R. 631, where the Court dealt with a Dutch national born and raised in Belgium seeking admission to the Belgian bar. Contrary to the argument of the Belgian government, according to which the freedom of establishment required implemented through national or EC legislation, the Court found that Mr. Reyners could request admission based directly on the freedom of establishment.

[52] Segers, C-79/85.

question was formed in accordance with the law of another Member State, where it also has its registered office, even though it does not conduct any business there."

Just two years later, the court decided *Daily Mail*.[53] An English company had intended to establish its central management in the Netherlands while staying incorporated in the United Kingdom, apparently to save taxes. British tax authorities imposed an "exit tax" on the corporation and refused their consent to the transfer until the exit tax had been paid. The ECJ did not object to the exit tax. More importantly, it explicitly discussed that some Member States require that "not only the registered office but also the real head office ... should be situated in its territory," while others, such as the United Kingdom, make the right to transfer its head office subject to conditions, particularly regarding taxation.[54] In the court's view, the Treaty regarded these differences as problems that would have to be resolved by future legislation or a convention.[55] Consequently, the Court held that companies had no right, under the present state of EC law, "to transfer their central administration from their state of incorporation to another Member State while retaining their status as companies incorporated under the legislation of the first Member State."[56]

At least superficially, the two cases seemed to contradict each other, and it is most telling of how they were received in the literature. Two Dutch commentators – namely the lawyer who had represented Mr. Segers and the future ECJ judge Timmermans – opined that the case implied the end of the real seat theory within the community.[57] The view was, apparently, not shared within the legal service of the Commission, which read the case as limited to government benefits.[58] Others argued that the decision was limited to cases where a firm created a secondary establishment in another Member State[59] – which was somewhat at odds with the facts of the case since Mr. Segers had simply incorporated his Dutch business in the United Kingdom.[60] Even many

[53] Daily Mail, C-81/87. [54] Id. at ¶ 20. [55] Id. at ¶ 23. [56] Id. at ¶ 24.

[57] Inne G.F. Cath, Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market, 6 Y.B. Eur. L. 246, 261 (1986); Timmermans, Methods, supra note 31, at 134–141; similarly, see Takis Tridimas, The Case-Law of the European Court of Justice on Corporate Entities, 13 Y.B. Eur. L. 335, 344 (1993) (suggesting that there is only a secondary, but no primary right of establishment, meaning that the state of origin can impose restrictions, while the host state cannot).

[58] Geoffrey Fitchew, Discussion, in European Business Law, supra note 31, at 154.

[59] Ebenroth & Eyles, Die Beteiligung, supra note 50, at 11; see also Halbhuber, National Doctrinal Structures, supra note 51 at 1388 (suggesting that German analysts may not have had the full text of the case available).

[60] E.g. Alexandros Roussos, Realising the Free Movement of Companies, 2001 Eur. Bus. L. Rev. 7, 12 ("The case is normally regarded as one of secondary establishment but perhaps incorrectly so").

scholars contesting the compatibility of the real seat theory with the Treaty paid surprisingly little attention to the decision.[61] *Daily Mail*, however, in the summary response to the first question asked to the court, clearly stated that "in the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State." On its face, this key sentence seemed to confirm the compatibility of the real seat theory with the Treaty. Many adhered to the idea that "the freedom of establishment was directly applicable only with respect to secondary establishment,"[62] which in retrospect seems implausible in light of the much more cursory discussion in *Segers*.

Without a deliberate attempt to construe *Daily Mail* narrowly in the light of its facts – namely the capability of a Member State to prevent a company from moving its head office to another State while retaining its legal form[63] – or to

[61] E.g. Behrens, Niederlassungsfreiheit, supra note 48, at 504, 520 (considering the theory incompatible with the Treaty, but not considering the implications of Segers while citing that decision); Knobbe-Keuk, supra note 40 (arguing against the real seat theory but not mentioning Segers); Marco Gestri, Mutuo Riconoscimento delle società comunitarie, norme di conflitto nazionali e frode alla legge: Il case Centros, 83 Rivista di diritto internazionale 71, 80 (2000) (noting that the majority of scholars considered the real seat theory to be permissible in light of Daily Mail); Andrea Perrone, Dalla libertà di stabilimento alla competizione fra gli ordinamenti? Riflessioni sul "caso Centros," 46 Rivista delle Società 1292, 1297 (2001) (describing Segers as a decision receiving little attention); but see Carsten Thomas Ebenroth & Uwe Eyles, Die innereuropäische Sitzverlegung des Gesellschaftssitzes als Ausfluß der Niederlassungsfreiheit? (Teil I), 42 DB 363, 371 (1989) (arguing that the Court misinterpreted the Treaty); Ebke, ausländische, supra note 47, at 250 (describing Segers as problematic).

[62] Grundmann, supra note 14, § 25 ¶22 (summarizing this point of view); see also Robert R. Drury, Migrating Companies, 24 Eur. L. Rev. 354, 360 (1999); Alessandro della Chà, Companies, Right of Establishment and the Centros Judgment of the European Court of Justice, 2000 Diritto del commercio internazionale 925, 933–36; Omar, supra note 4, at 403; Francisco Garcimartín Alférez, La Sentencia "Centros": el status quaestionis un año después, 195 Noticias de la Unión Europea 79, 84 (2000) (noting that the majority of authors considered the Treaty not to affect the recognition of companies). But see Tridimas, supra note 57, at 343 (noting the contradiction between the two cases and criticizing the Court for not applying the freedom of establishment more proactively); Massimo V. Benedettelli, Libertà comunitarie di circolazione e diretto internazionale private delle società, 2001 Rivista di diritto internazionale privato e processuale 569, 582 (summarizing criticism of Daily Mail, while probably overstating its prevalence as a prevailing opinion among scholars).

[63] But see Knobbe-Keuk, supra note 40, at 332–33 (opposing the real seat theory and criticizing the ECJ for making unnecessary statements not necessary for the case); Andreas Reindl, Companies in the European Community: Are the Conflict-of-Law Rules Ready for 1992? 11 Mich. J. Int'l L. 1270, 1281–85 (1990) (suggesting a narrower reading of Daily Mail would be possible); Benedettelli, supra note 64, at 582–83 (suggesting that the key sentences in Daily Mail were basically obiter dicta written because of judicial self-restraint).

distinguish the two cases, *Daily Mail* thus came as a godsend for those cherishing the role of the real seat theory as a protective mechanism against regulatory arbitrage in corporate law. For the coming decade, the Continental, particularly German, scholarship[64] could thus cling to this case as a justification of the real seat theory. In spite of possible objections to this broad reading, such as the fact that *Daily Mail* dealt with two incorporation theory countries, with the situation of a firm "exiting" the Member State in question as opposed to entering it, and even though the United Kingdom's fiscal interests were at stake, *Segers*' could be safely set aside. While *Daily Mail* did not distinguish or overrule *Segers*, or even mention it, those analysts aware of *Segers* considered it irrelevant or implicitly overruled.[65] For example, Merkt, writing about the prospects for regulatory competition in Europe in 1995, saw the *Daily Mail* doctrine as firmly entrenched and considered it implausible that the court would soon abandon it.[66] As documented by Halbhuber, *Daily Mail* was widely cited in the German academia, while *Segers* remained apocryphal.[67] The passage of the case dealing explicitly with the circumvention of national corporate law was omitted in German law journals,[68] and that the court had met in a chamber of three judges and not in a plenary session as in *Daily Mail*, may also have played a role. Quite tellingly, in a 1998 case, a German Court of Appeals rejected the registration of a branch office of a pseudo-English company and refused to submit the question to the ECJ. Citing *Daily Mail*, the court argued that nothing had changed since 1988. Implicitly elevating the *quid pro quo* theory to an element of the EC Treaty, the Court said that the harmonization of Member State

[64] Halbhuber, supra note 51, at 50–52 (arguing that most of the non-German literature did not share this understanding of the case).

[65] See e.g. Peter v. Wilmowsky, Gesellschafts- und Kapitalmarktrecht in einem gemeinsamen Markt, 56 RabelsZ 521, 536 (1992) (discussing Timmermans'argument that the real seat theory was incompatible with the Treaty in light of Segers, but considering it outdated in light of Daily Mail); Ebenroth & Eyles, Die innereuropäische, supra note 61, at 372 (suggesting that Daily Mail made it clear that the Treaty does not override national rules of conflict of laws relating to incorporations).

[66] E.g. Hanno Merkt, Das europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber, 59 RabelsZ 545, 563 (1995) (considering it implausible that the Court would abandon Daily Mail soon in light of the recently established principle of subsidiarity). The view that the real seat theory was compatible with the Treaty was not limited to Germany, as other Member States continued to apply it. See, e.g. Francisco J. Garcimartín Alférez, El Tratado CE y la Sitztheorie: El TJCE considera – por fin – que son incompatibles, 51 Revista Española de Derecho Internacional Privado 295, 296 (1999).

[67] Halbhuber, National Doctrinal Structures, supra note 51 at 1390–95; for references, see supra note 59.

[68] Halbhuber, National Doctrinal Structures, supra note 51 at 1388.

company law was not yet complete, and that the arguments brought for the incorporation theory could not substitute community legislation or international agreements between the Member States.[69]

"THREE STRIKES AND YOU'RE OUT" FOR THE REAL SEAT THEORY

The *Centros* case[70] in 1999 thus came as a surprise to the Continent, particularly the German corporate law world. A Danish couple formed a Private Limited Company ("Limited") in the United Kingdom – with the full intention of using it only for business purposes in Denmark – and requested that the Danish authorities register a branch office. After the registration was denied and a preliminary reference submitted to the ECJ, the Court found that the Danish company register violated the freedom of establishment. Legal scholars on the Continent subsequently began to discuss the implications, particularly in the context of private international law doctrine.[71] Many saw the end of the real seat theory coming,[72] particularly because the court explicitly stated that setting up a firm in one Member State and branches in other states in itself does not constitute an abuse of the treaty provisions.[73]

Many commentators – most of them German – tried to find ways around the case. Some suggested that the case did not apply in real seat theory countries, given that Denmark applied the incorporation theory as a matter of principle and only corrected its results by requiring proof of a genuine link

[69] Bayerisches Oberstes Landesgericht, August 26, 1998, 1 Neue Zeitschrift für Gesellschaftsrecht [NZG] 936 (1998).

[70] Centros, C-212/97.

[71] See Wulf-Henning Roth, From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law, 52 Int'l & Comp. L.Q. 177, 178 (2003); Omar, supra note 4, at 406 (both explaining that Centros received little attention in the United Kingdom, but stirred much discussion in Germany).

[72] E.g. Ulrich Forsthoff, Niederlassungsrecht für Gesellschaften nach dem Centros-Urteil des EuGH: Eine Bilanz, 2000 EuR 167, 182; Ilan Rappaport, Freedom of Establishment – a new perspective, 2000 J. Bus. L. 628, 633 (2000); Roussos, supra note 60, at 13–14; Gestri, supra note 61, at 86 (noting that the case blew a breach in the real seat theory); Thomas Bachner & Martin Winner, Das österreichische international Gesellschaftsrecht nach Centros (Teil I), 2000 Der Gesellschafter [GesRZ] 73; Garcimartín Alférez, La Sentencia, supra note 63, at 83; Peter Behrens, International Company Law in View of the Centros Decision of the ECJ, 1 Eur. Bus. Org. L. Rev. 125, 145 (2000); but see Eddy Wymeersch, Centros: A landmark decision in European Company Law, in Corporations, Capital Markets, and Business in the Law: Liber Amicorum Richard Buxbaum 629, 642–44 (noting that the real seat theory can no longer be used to deny the recognition of a company, but may serve other purposes).

[73] Centros, C-212/97, at ¶27.

to the home country before registering a branch office.[74] Since the court said, "the Treaty regards the differences in national legislation concerning the required connecting factor … as problems which are not resolved by the rules concerning the right of establishment,"[75] it was argued that the case, like *Daily Mail*, left the conflict-of-law rules regarding the recognition of foreign companies intact.[76] In other words, *Centros* was understood not to apply to real seat theory countries because – other than Denmark – they did not recognize the existence of firms such as Centros Ltd at all.

Just four months later, the Austrian Supreme Court found that the real seat theory, which was enshrined in an explicit statute, could no longer apply to EU firms in light of *Centros*.[77] Many proponents of the real seat theory criticized the court, which had apparently misunderstood Denmark to be a real seat country.[78] Given that the ECJ did not engage with private international law theories at all,[79] the academic position that the freedom of

[74] Erik Werlauff, The Main Seat Criterion in New Disguise – An Acceptable Version of the Classic Main Seat Criterion, 2001 Eur. Bus. L. Rev. 2, 3 (explaining that Danish law applies the incorporation theory with a "genuine link" criterion).

[75] Centros, C-212/97, at ¶23.

[76] Peter Kindler, Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die"Centros"–Entscheidung des EuGH und das internationale Privatrecht, 1999 Neue Juristische Wochenschrift [NJW] 1993, 1996–99; Knut Werner Lange, Note, 1999 Deutsche Notariatszeitung [DNotZ] 599, 605; Hans Jürgen Sonnenberger & Helge Großerichter, Konfliktlinien zwischen internationalem Gesellschaftsrecht und Niederlassungsfreiheit, 45 Recht der internationalen Wirtschaft [RIW] 721, 726–27 (1999); Wulf-Henning Roth, Case note, 37 Common Mkt. L. Rev. 147, 153–54 (2000); Ebke, Realities, supra note 39, at 633, 660; Xanthaki, supra note 39, at 7; see also Marc Lauterfeld, "Centros" and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo-foreign Companies in German International Company and Insolvency Law?, 2001 Eur. Bus. L. Rev. 79, 80 (summarizing this line of reasoning); similarly, Diana Sancho Villa, La dudosa compatibilidad con el derecho comunitario de la construcción del tribunal de justicia de la Comunidad Europea en el sentencia Centros Ltd., 1999 La Ley 1851, 1857 (arguing that the Centros decision is generally incompatible with EU law, but that it could be read narrowly by leaving the real seat theory permissible following *Daily Mail*).

[77] Oberster Gerichtshof, July 15, 1999, 6 Ob 123/99b.

[78] E.g. Ebke, Realities, supra note 39, at 657 (suggesting that the Austrian court misunderstood the ECJ); Jörg Zehetner, Niederlassungsfreiheit und Sitztheorie, 1999 ecolex 771; Stefan Korn, Sitztheorie contra Niederlassungsfreiheit: Die Private Limited Company mit Hauptverwaltung in Österreich, 2000 Wirtschaftsrechtliche Blätter [wbl] 56; Kristin Nemeth, Case Law, 37 Common Mkt. L. Rev. 1277, 1281–84 (2000); Norbert Kuehrer, Cross-border company establishment between the United Kingdom and Austria, 12 Eur. Bus. L. Rev. 110, 117 (2001); but see Werlauff, supra note 74, at 3 (explaining the Danish law, but suggesting that the Austrian court had correctly applied EU law).

[79] E.g. Ulrich Forsthoff, Niederlassungsfreiheit für Gesellschaften nach dem Centros-Urteil des EuGH: Eine Bilanz, 2000 EuR 167 (noting that the ECJ is only interested in the effects of national law and does not address the theories as such).

establishment would somehow only apply to incorporation theory countries was untenable even then, but it illustrates how real seat theory proponents clung to their turf.

Given the discussion whether *Centros* applied only in incorporation theory countries or only to secondary establishments,[80] the death knell for the real seat theory only came with the *Überseering* case of 2002,[81] which concerned Germany, the real seat country par excellence.[82] Two Germans bought all the shares of a Dutch BV (*Besloten vennootschap*, i.e. a private limited liability company) and led it to conduct all of its business in Germany. Following the radical German interpretation of the real seat theory, German courts would have denied the existence of Überseering BV as a legal entity. Yet, in a preliminary reference ruling, the ECJ held that German courts could not do so when a Member State company simply exercised its freedom of establishment. The Court, in particular, addressed how the new judgment was to be reconciled with *Daily Mail*, which served as support for the real seat theory, but – to the surprise of many observers – was not even mentioned in *Centros*. To the *Überseering* court, *Daily Mail* concerned the relationship between companies and their state of incorporation, while *Centros* and *Überseering* dealt with restrictions on the company's right of establishment imposed by other states.[83] While the case was pending, the German *Bundesgerichtshof* (Federal Supreme Court) decided that a non-EU pseudo-foreign corporation could be accorded legal capacity as a partnership.[84] Inconveniently, this rendered its members personally liable.[85] This may have been a last-minute attempt to save the real seat theory, but it came too late, and the damage was done. For most intents and purposes, for the establishment of companies

[80] E.g. Jean-Matthieu Jonet, La théorie du siège réel a l'épreuve de la liberté d'établissement, 11 Journal des tribunaux droit Europeen 33, 34 (2002) (discussing doubts about the scope of *Centros*).

[81] Überseering BV, C-208/00.

[82] E.g. Thomas Bachner, Freedom of Establishment for Companies: A Great Leap Forward, 62 Cambridge L.J. 47, 49 (2003) ("this is the end of the theory of the real seat").

[83] Überseering BV, C-208/00, at ¶62. See, e.g. Eva Micheler, 2003 Int'l & Comp. L.Q. 521, 524; Paul J. Omar, Centros, Uberseering and Beyond, A European Recipe for Corporate Migration, Part 2, 16 Int'l Comp. & Com. L. Rev. 18, 21 (2005).

[84] Bundesgerichtshof [BGH] [Federal Court of Justice] July 1, 2002, II ZR 380/00, NJW 2002, 3539. See, e.g. Roth, supra note 71, at 207; but see Hellwig, supra note 14, at 227–28 (interpreting the decision as part of a struggle between the Court's 2nd senate, which is normally responsible for corporate law, and the 7th senate, which is responsible for construction contracts and had submitted the preliminary reference to the ECJ in *Überseering*).

[85] See Baelz & Baldwin, supra note 4, ¶23 (noting that this approach is likewise incompatible with the freedom of establishment).

within the EU, the real seat theory was dead.[86] After *Überseering*, the zombie idea that the freedom of establishment did not apply in real seat countries quickly disappeared from the pages of legal journals.[87]

The third strike, *Inspire Art*, came a year later, paradoxically in the Netherlands, a country that has long (at least since the 1960s) applied the incorporation theory.[88] The Dutch law on "formally foreign companies" at that time imposed a number of restrictions against those companies from whose intrusion the real seat theory was intended to provide protection.[89] Most importantly, directors of such a company were jointly and severally liable if the company did not have the minimum capital required by Dutch law.[90] Interestingly, some US states, notably New York and California, have statutes of this type called pseudo-foreign incorporation laws and apply them to other states in the union.[91] These laws' compatibility with the US Constitution is debatable,[92] but it has never been tested in the federal courts. The ECJ, however, found that the Dutch law violated the freedom of establishment. As in *Centros*, the Court applied the *Gebhard* criteria, according to which restrictions on the freedom of establishment "must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it."[93] The Court also repeated that the Member States could implement measures against fraud.[94] Blanket measures applying to all "formally foreign corporations," such as imposing

[86] See also Paul Lagarde, Note, 92 Revue Critique de Droit international Privé [RCDIP] 524, 531–32 (2003) (noting that this reintroduction in a decision of the German Supreme Court also violates the freedom of establishment).

[87] For an overview of opinions, see Grundmann, supra note 14, § 25 ¶ 26.

[88] Großfeld, supra note 28, at 15 (citing a 1959 law following the incorporation theory).

[89] Interestingly, the Dutch law came into force only in 1998 and reflected an increasingly protective attitude toward company law in the Netherlands, which had applied the incorporation theory for several decades and became now concerned with an increasing number of companies incorporated abroad deliberately to avoid Dutch law. See Timmermans, supra note 31, at 151; Harm-Jan de Kluiver, Inspiring a New European Company Law?, 1 Eur. Company & Fin. L. Rev. 121, 123–25 (2004).

[90] For further details, see Inspire Art Ltd., C-167/01, at ¶¶ 22–33.

[91] Cal. Corp. Code § 2115; N.Y. Bus. Corp. L. §§ 1317–20.

[92] See, e.g. Franklin A. Gevurtz, Corporation Law 36–37 (2nd ed. 2010); Buxbaum, supra note 23, at 19–21.

[93] Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94 [1995] E.C.R. I-4165, ¶ 37; Centros Ltd., Case C-212/97 [1999] E.C.R. I-1459. ¶34; Inspire Art Ltd., C-167/01, at ¶133.

[94] Inspire Art Ltd., C-167/01, at ¶136.

domestic capitalization requirements, however, are off limits as they are regarded as a restriction of the freedom of establishment.

Over the decades, scholars (including those favouring the incorporation theory) often thought that the Member States could, similar to the Dutch law, apply at least some of their domestic corporate laws to mitigate the effects of the incorporation theory.[95] Some continued to hold this view after *Centros*.[96] Ironically, the Netherlands, whose government in fact argued against the restrictions on the recognition of legal personality in its submissions to the *Überseering* court,[97] ended up being called out by the Court for employing a less restrictive measure. The peculiar consequence is now that the freedom to apply their corporate law policies to such companies is more curtailed for EU Member States than the component states of the United States. The Member States seemed to have slid into this situation, which likely was not intended when the Treaty was drafted.

As empirical research a few years later showed, after *Inspire Art*, the number of incorporations of private limited liability companies in the United Kingdom with the apparent objective of doing business in Continental European countries skyrocketed.[98] In Germany, where the demand for English limited companies was particularly strong, it was met by a number of private agencies that took care of formalities for the creation of English limited companies for customers in Germany, offering their services over the Internet, thus providing a stark contrast to the typical necessity of seeking the expensive certification by a civil law notary to set up a domestic company. This opportunity did not immediately present itself in all countries equally. Becht, Enriques and Korom performed an experimental study in which they asked correspondents

[95] E.g. Houin, supra note 21, at 23; Großfeld, supra note 28, at 20–21; Conard, Company Laws, supra note 28 at 58; Behrens, Niederlassungsfreiheit, supra note 48, at 515–16; Knobbe-Keuk, supra note 40, at 345–50; Alain Hirsch, Discussion, in European Business Law, supra note 31 at 155.

[96] Gestri, supra note 61, at 102; Roth, supra note 71, at 200, 201; Werner F. Ebke, The "Real Seat" Doctrine in the Conflict of Corporate Laws, 36 Int'l Law. 1015, 1031 (2003); Tito Ballarino, Les règles de conflit sur les sociétés commerciales à l'épreuve du droit communautaire d'établissement, 92 RCDIP 373, 401 (2003); Michel Menjucq, Liberté d'établissement et rattachement des sociétés: du nouveau dans la continuité de l'arrêt Centros, 2003 La Semaine Juridique [JCP] Ed. Gén. II 10032; Lagarde, supra note 86, at 532–33; Jonet, supra note 80, at 36; but see Werlauff, supra note 74, at 4 (discussing a Danish law introduced after Centros).

[97] Überseering, C-208/00, at ¶ 36.

[98] John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, 58 Curr. Leg. Probs. 369, 386 (2005); André O. Westhoff, Verbreitung der Limited mit Sitz in Deutschland, 2006 GmbH-Rundschau [GmbHR] 525; Marco Becht, Colin Mayer & Hannes F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, 14 J. Corp. Fin. 241, 248 (2008).

in a number of countries to attempt to set up an English limited company (with the help of an agent if available) and register a branch office in the host state.[99] In some countries, there were nearly insurmountable hurdles. In Greece, the authorities would have required founders to comply with the Greek minimum capital requirement, apparently in ignorance of *Inspire Art*.[100] In Italy, notaries were so concerned about professional responsibility and the consequences of what might be construed as malpractice that they refused their necessary cooperation.[101] Nevertheless, English limited companies became more common across the Continent, even if no country matched their popularity in Germany.[102]

Regulatory competition consequently became a big topic in the growing pan-European body of legal scholarship. A number of articles analyzed the prospects, particularly whether regulatory competition might lead to a destructive race to the bottom by eliminating important protections in corporate law or to a race to the top by eliminating unnecessary paternalism.[103] Most authors concluded that the pressures in either direction were not likely to be particularly strong in the European context.[104]

[99] Marco Becht, Luca Enriques & Veronika Korom, Centros and the Cost of Branching, 9 J. Corp. L. Stud. 171 (2009).

[100] Id., at 179; but see Ioanna Thoma, ECJ, 5 November 2002, Case C-208/00 Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH, 11 Eur. Rev. Priv. L. 545, 551 (2003) (noting that a pseudo-foreign firm would be treated as a partnership in Greece).

[101] Becht et al., Cost of Branching, supra note 99, at 190.

[102] Id. at 248 (providing numbers of Limiteds where most director reside outside the United Kingdom).

[103] Klaus Heine & Wolfgang Kerber, European Corporate Laws, Regulatory Competition and Path Dependence, 13 Eur. J.L. & Econ. 47 (2002); Eva-Maria Kieninger, The Legal Framework of Regulatory Competition Based on Corporate Mobility: EU and US Compared, 6 German L.J. 741, 765–70 (2004); Luca Enriques, EC Company Law and the Fears of a European Delaware, 15 Eur. Bus. L. Rev. 1259 (2004); Jens C. Dammann, Freedom of Choice in European Corporate Law, 29 Yale J. Int'l L. 477 (2004); Tobias H. Tröger, Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance, 6 Eur. Bus. Org. L. Rev. 3 (2005); Armour, Who Should Make, supra note 98; Gelter, supra note 47; Christian Kirchner, Richard W. Painter & Wulf A. Kaal, Regulatory Competition in EU Corporate Law after Inspire Art: Unbundling Delaware's Product for Europe, 2 Eur. Comp. & Fin. L. Rev. 159 (2005); Simon Deakin, Legal Diversity and Regulatory Competition: Which Model for Europe? 4 Eur. L.J. 440 (2006); Marco Ventoruzzo, "Cost-Based" and "Rules-Based" Regulatory Competition: Markets for Corporate Charters in the U.S. and the E.U., 3 NYU J. L.& Bus.91 (2006); Hanne Søndergaard Birkmose, A 'Race to the Bottom' in the EU?, 13 Maastricht J. Eur. & Comp. L. 35 (2006); Seth Chertok, Jurisdictional Competition in the European Community, 27 U. Pa. J. Int'l Econ. L. 465, 506–13 (2006).

[104] E.g. Enriques, supra note 103, at 1266–73; Gelter, supra note 47, at 259–64; Tröger, supra note 145, at 23–24; but see Armour, Who Should Make, supra note 98, at 395 (noting that the legal services industry might provided the necessary incentives).

However, after some reflection, a nuanced discussion on "defensive regulatory competition"[105] developed: Member States were not actively competing for incorporations, but trying to discourage their own national entrepreneurs from incorporating abroad, particularly in the United Kingdom. The poster child issue for this is legal capital, or more precisely minimum capital. While the Second Directive requires a minimum capital of €25,000 for public corporations, the minimum capital for private limited liability companies varied widely amongst the Member States, since the Directive does not apply to them.[106] The United Kingdom did not require one at all. For, say, a German prospective entrepreneur, this eliminated the necessity to raise €25,000 for a GmbH.[107] As early as 2003, France and Spain amended their laws to permit "speedy" incorporations that required fewer formalities and, in the French case, only a nominal minimum capital.[108] These reforms may have helped to avoid a migration of incorporations into the English limited company, even though it is not clear whether these legislative innovations were actually motivated by the ECJ case law.[109] A 2004 Dutch reform, however, clearly mentioned the ECJ case law as a motivation.[110]

The most obvious case in point was the German *MoMiG* of 2008,[111] which created the *Unternehmergesellschaft (haftungsbeschränkt)*, a special form of GmbH that does not require a minimum capital, but which must retain all of its profits until the regular minimum capital is reached.[112] The same law also addressed some questions of whether creditor protection mechanisms should be formulated as corporate law or insolvency law doctrines, a debate that had been triggered by *Inspire Art*. The duty to file for insolvency[113] – and

[105] Armour, Who Should Make, supra note 98, at 394; Luca Enriques & Martin Gelter, Regulatory Competition in European Company Law and Creditor Protection, 7 Eur. Bus. Org. L. Rev. 417, 424 (2006); Luca Enriques & Martin Gelter, How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law, 81 Tul. L. Rev. 577, 589 (2007); William W. Bratton, Joseph A. McCahery & Erik P.M. Vermeulen, How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis, 57 Am. J. Comp. L. 347, 380–84 (2009); Wolf-Georg Ringe, Corporate Mobility in the European Union – a Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition, 2013 Eur. Comp. & Fin. L. Rev. 230, 243 (2013).

[106] Supra note 22 and accompanying text.

[107] GmbHG § 5(1) (Germany).

[108] Kieninger, supra note 103, at 768 (discussing the possibility introduced in 2003 of forming an SARL in France within 24 hours and with a capital of only € 1, as well as the Spanish Sociedad Limitada Nueva Empresa, which was also introduced in 2003).

[109] Id. (noting "there is not the slightest hint that the Spanish legislator passed the new legislation in order to take part in charter competition", and making a similar point for France).

[110] Ringe, supra note 105, at 240.

[111] Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen, 23. Oktober 2008, BGBl. I S. 2026.

[112] GmbHG § 5a (Germany).

[113] InsO § 15a (Germany).

consequently the liability following from the failure to do so – and the subordination of shareholder loans[114] were moved into insolvency law, thus enabling their application to pseudo-foreign firms whose "Center of Main Interest" under the European Insolvency Regulation[115] is situated in Germany. "Relabeling" or "insolvencification" of creditor protection doctrines resulted from the ECJ cases as an attempt to apply domestic doctrines to pseudo-foreign firms.[116]

While it was concluded early on that "offensive" regulatory competition attempting to capture a share of the market for incorporations abroad was unlikely to happen, "defensive" regulatory competition clearly occurred. However, it is less clear whether the known examples have much to do with the reduction of the number of English limited companies rolling over the Continent.[117] A recent study by Wolf-Georg Ringe compares the development of the number of "German" and "Austrian" limited company incorporations in the United Kingdom. Interestingly, while Germany reformed its corporate law in reaction to that wave in 2008, Austria did not until 2013 (and even that reform was more cautious). In particular, Austria retained a minimum capital of €35,000, more than in any other jurisdiction.[118] One would therefore expect only the number of "German" limited companies to have gone down. However, as Ringe's data show, they went down in both countries concurrently, namely starting in early 2006. It therefore is very unlikely that the 2008 reform in Germany played much of a role. Ringe mentions a number of other changes in German law, namely case law in the German courts applying German veil-piercing doctrine to English firms, as well as the enforcement of German directors' disqualification rules.[119] These factors seem to better coincide with the timing shown in the data.

[114] InsO § 39 (Germany).

[115] Council Regulation 1346/2000/EC on Insolvency Proceedings, art. 3, 2000 O.J. L. 160/1 implements a version of the real seat theory for bankruptcy law, under which the courts of the country where a debtor's Center of Main Interests (COMI) is competent to open the main insolvency proceedings.

[116] In interpreting whether e.g. the duty to file for insolvency or the liability for failure to do so falls under the EIR, the CJEU would obviously have to apply a supranational functional approach. On "relabeling," see generally Enriques & Gelter, Old World, supra note 149, at 640–44.

[117] See, e.g. Hellwig, supra note 14, at 227 (noting that the MoMiG stopped the English Limited Company in Germany, but it is still in the process of becoming the dominant legal form in the rest of Europe).

[118] GmbHG § 6(1) (Austria). This very high amount was somewhat mitigated by the requirement that only €17,500 of cash contributions had to be paid in at the time of registration. GmbHG § 10(1) (Austria).

[119] Ringe, supra note 105, at 258; see also Hellwig, supra note 14, at 229 (suggesting that a new doctrinal explanation of veil piercing in Germany as a tort claim allowed the courts to apply it to pseudo-foreign firms).

Ringe further looks for changes on the supply side (i.e. UK law), which appears to provide the most persuasive explanation. On the other side of the English Channel, he notes an extension of the English directors' disqualification scheme in the Companies Act 2006 to directors disqualified under foreign law. Additionally, a requirement that at least one director would have to be a natural person (as opposed to another company) was introduced at the same time.[120] Most of all, the hidden cost of incorporation in the United Kingdom became apparent during this period, particularly with regard to the annual filing of financial statements.[121] The Companies House began to strike many pseudo-English firms from the register as they failed to submit their first mandatory set of accounts, which led to the elimination of a wave of firms set up following *Inspire Art* in 2006.[122]

Thus, the English private limited company did not fail as the market-dominant legal form for private companies because of successful defensive regulatory competition, but rather because England was not willing to establish itself as a provider of throwaway entities. The real world thus seems to bear out the prediction that the United Kingdom – a real country with a real economy – would not have the incentives to establish itself as a European Delaware.[123] The political clout of the legal profession did not lead to UK Company Law becoming "competitive" in this sense.[124]

A CAUTIOUS TURN IN *CARTESIO*

Arguably, the approach taken by the Court toward the free movement of corporations became more cautious during the following years.[125] In *Cartesio* (2008), a Hungarian entity wanted to transfer its real seat to Italy while retaining its Hungarian status.[126] The Hungarian authorities refused the registration of the transfer, finding that the firm would have to reconstitute itself under Italian law. The ECJ did not consider the problem of what kind of connecting factor to its territory the state of incorporation requires, which is

[120] Ringe, supra note 105, at 259–60. Companies Act s. 155(1). [121] Id., at 260. [122] Id., at 263.
[123] E.g. Tröger, supra note 103, at 47; Gelter, supra note 47, at 263.
[124] See Armour, Who Should Make, supra note 98, at 395.
[125] Cadbury Schweppes (Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue Case C-196/04, [2006] E.C.R. I-7995) has also been cited as an example. See Ringe, supra note 105, at 233.
[126] Cartesio Oktató és Szolgáltató bt., Case C-210/06, [2008] E.C.R. I-9641; but see Veronika Korom & Peter Metzinger, Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail decision in the Cartesio Case C-210/06, 2009 Eur. Comp. & Fin. L. Rev. 125, 132–39 (discussing possible misunderstandings resulting from different understandings of "seat").

not harmonized by EU law.[127] The court returned to its formula that "companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning."[128] Contrary to the view of the advocate general, from this it deduced that "a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status."[129] However, a Member State must allow its entities to move its real seat away, at least provided they convert to the legal form of another Member State,[130] and the new State is, as the *VALE* case of 2012 states, required to accept corporations that want to come under the fold of its law by way of a conversion into a company registered in the host state.[131] But as long as a specific State's law applies, that State can limit where a company can set up its real seat.

As a matter case law development, *Cartesio* can clearly be reconciled with the *Centros* trilogy, but as a matter of policy, it is an interesting shift. Prior to the case, many observers thought that the court would abandon the distinction between "immigration cases" such as *Centros*, *Überseering* and *Inspire Art* and "emigration cases" such as *Daily Mail*, which surprisingly remains good law after the court's move in *Cartesio*.[132] Many observers expected a different outcome given the court's trajectory.[133] Moreover, Advocate General Maduro recommended in his opinion that the court should find "Articles 43 EC and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to

[127] Cartesio, at ¶¶ 58, 108, 109. [128] Id. at ¶ 104. [129] Id. at ¶ 110. [130] Id. at ¶¶ 111, 112.

[131] VALE Építési kft, Case C-378/10, [2012].

[132] See e.g. Oliver Gutman, Cartesio Oktató és Szolgáltató bt: the ECJ gives its blessings to corporate exit taxes, 2009 Brit. Tax J. 385, 388 (explaining that *Centros*, *Überseering* and *Inspire Art* would not change the outcome of *Daily Mail* if a similar case came forward today); Vittoria Petronella, The Cross-Border Transfer of the Seat after Cartesio and the Non-Portable Nationality of the Company, 2010 Eur. Bus. L. Rev. 245, 250 ("it confirms the Daily Mail ruling"); Korom & Metzinger, supra note 126, at 147–48.

[133] In *Lasteyrie de Saillaint*, the Court had restricted the exit taxation Member States could impose on individuals. Case C-9/02, Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie, 2004 E.C.R. I-2409. Moreover, in *SEVIC*, the Court had found that Member States had to allow outward-bound mergers with corporations from other Member States. Case C-411/03, SEVIC Systems AG, 2005 E.C.R. I-10805. On this discussion, see Grundmann, supra note 14, § 25 ¶ 35; Carsten Gerner-Beuerle & Michael Schillig, The Mysteries of Freedom of Establishment after Cartesio, 59 Int'l & Comp. L.Q. 303, 306 (2010) (noting that *Lasteyrie* raised doubts, but was not a clear departure from *Daily Mail* as it concerned individual taxation).

another Member State."[134] The court, led by reporting Judge Christiaan Timmermans – who twenty years earlier announced the death of the real seat theory shortly after *Segers*[135] – managed to reconcile the lines of cases started with *Segers* and Daily Mail in a very thorough opinion.

If the case law on corporations applied to natural persons, the law would now be as if Member States were permitted to decree that its citizens could not take up residence in another EU country while retaining their national citizenship. To move to another state, one would have to renounce one's citizenship and take up that of the host state, which would be required to grant it, and which the state of origin could not prevent. Contrariwise, Member States would be required to permit citizens of Member States to take residence, irrespective of whether they wish to retain their original citizenship. While such a policy may seem absurd for human beings,[136] it may be explicable in the corporate context with the difficulty for a country to police its corporations across the entire Union in ways that are not necessary for natural persons. However, it might be advantageous for a Member State to make its own law available also for activities abroad: for example, a French firm setting up a subsidiary in Romania might want to use a French SARL[137] for that purpose, with whose laws the French parent will no doubt be familiar. Nevertheless, not all countries seem to be willing to provide that option.[138]

THE NEW EUROPEAN DISCOURSE IN CORPORATE LAW

More than a decade after the *Centros* triad, and six years after the last important case in that matter, what can we take away from this development? Has the ECJ fundamentally transformed corporate law in Europe? At least one thing is certain: it seems safe to say that Member States have to consider the possibility of flight to other Member States when they attempt to impose a specific policy on newly founded firms.

[134] Opinion of Advocate General Maduro, Cartesio, Case C-210/06, ¶ 36(4).

[135] Supra note 57 and accompanying text.

[136] See Gutman, supra note 132, at 390 (explaining that individuals and corporations are different in that the latter first need to satisfy conditions to be regarded as established under national law).

[137] Supra note 18.

[138] An example would be Austria. See GmbHG § 5(2) [Austria] (requiring that the seat most be identical to the place of the firm's central office or place of business, and that deviations are only permissible for exceptional reasons). This provision was interestingly introduced with this wording only in 2005, apparently because of concerns of differing regional sets of practices within Austria that the enabled some forum shopping within the country. By contrast, Germany abolished this requirement with the *MoMiG* of 2008. See GmbHG § 4a (Germany).

In part as a consequence of a generally stronger international orientation in legal scholarship combined with the effects of the internationalization of capital markets and corporate governance practices,[139] corporate law has become a much more international field, both in terms of practice and academic discourse. Today there are a number of journals that specifically deal with European and comparative corporate law,[140] and academic books on corporate law with a pan-European readership are published on a regular basis. The transnational discussion, infused with a healthy dose of law and economics, has become more sophisticated compared to the 1990s, when comparative research tended to be more descriptive and was typically limited to country reports on specific legal issues. While not the main cause, the development of corporate law may have contributed to this development

At the height of the discussion about *Centros*, Halbhuber provocatively suggested that the German legal profession as well as German law professors were defending the real seat theory to protect their home turf, namely their prerogative to consult on German corporate law, in the case of academics, in the form of lucrative legal opinions.[141] Clearly, that business has not moved to UK law firms or English academics, and it would not have gone away if the most marginal of firms had continued to flock to the Companies House in Cardiff. To the contrary, Continental Europeans have colonized the United Kingdom: almost every law school in the United Kingdom has at least one German and one Italian on their faculty, which adds to a smattering of other Continental Europeans.[142] Of course not all, but a number of them work in corporate law. Moreover, a group of Continental European academics and lawyers (some of them based at UK faculties) has published a German-style

[139] On convergence in corporate governance, see e.g. Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439 (2001); Jeffrey N. Gordon & Mark J. Roe (eds.), Convergence and Persistence in Corporate Governance (2004); Mathias M. Siems, Convergence in Shareholder Law (2008).

[140] This includes the *European Business Organization Law Review* (started in 2000), the *Journal of Corporate Law Studies* (2001), the *European Company and Financial Law Review* (2004) and *European Company Law* (2004).

[141] Halbhuber, supra note 51, at 1412–14; but see Wienand Meilicke, Die Niederlassungsfreiheit nach "Überseering," 94 GmbH-Rundschau 793, 798 (2003) (suggesting that the introduction of parity codetermination in 1976 as the reason for the popularity on the real seat theory); see also Enriques, supra note 13, at 58–64 (explaining the interest of legal academics and lawyers in harmonizing company law on the EU level).

[142] See the list of German academics at UK law faculties compiled by Mathias Siems, at https://web.archive.org/web/20130611053408/http:/siemslegal.blogspot.com/2013/06/germans-in-uk-law-schools-updated.html (accessed December 6, 2016).

commentary on the Companies Act of 2006 in the German language, thus establishing UK Company Law within the turf of German academia.[143]

THE ECJ'S ACCIDENTAL VISION FOR CORPORATE LAW

With respect to the actual subject matter, the entire line of cases exposes the inherently political character of the ECJ's mandate in corporate law, but particularly *Centros* and *Inspire Art*. In both cases, the core issue was clearly capital regulation. Continental European countries traditionally relied on an intricate doctrinal system based on minimum capital and capital maintenance provisions that was enforced with a varying degree of seriousness. In both cases, the national legislation was intended to prevent a circumvention of minimum capital by using an English type of business organization that was not subject to the Second Directive. In both cases, the intention was to shield an *ex ante* creditor protection system from circumvention. While there are many, maybe overwhelming, arguments against legal capital, the court avoided a deep policy discussion and, in a rather simplistic manner, applied its *Gebhardt*[144] test. Thus, national measures hindering or making less attractive the exercise of the freedoms "must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it."[145]

In applying these criteria, the Court inevitably engaged in a superficial policy analysis, most of all with respect to the suitability of national measures for attaining the objective, and whether it is possible to find a less restrictive mechanism. First, as to suitability, the Court found that creditors are on notice that they are dealing with a company governed by the law of England and Wales instead of Danish law.[146] Second, regarding restrictiveness, the *Centros* court states that other mechanisms could be implemented, e.g. by "making it possible for public creditors to obtain the necessary guarantees".[147] In other words, the Court assumes that creditors are informed and capable of self-protection. In policy debates on creditor protection, it is usually pointed out

[143] Alexander Schall (ed), Companies Act Kommentar (2014), with contributions by Walter Doralt, David Günther, Veronika Korom, Michael Lamsa, Wolf-Georg Ringe, Mathias Siems, Michael Stöber, Christoph Thole and Christoph Wiegand.

[144] Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1995] E.C.R. 4165.

[145] Centros, C-212/97, at ¶ 34; Inspire Art, C-167/01, at ¶ 133.

[146] Id., ¶ 36; Inspire Art, id., ¶ 135. [147] Centros, id., ¶ 37.

that only so-called "adjusting" creditors have this capability and can e.g. withhold credit, ask for securities, or adjust interest rates to risk.[148] While the Court seems to be somewhat concerned with public creditors, such as tax authorities, which typically have strong enforcement capabilities, it overlooks other creditors, such as tort creditors, as well as potential unsophisticated contract creditors. While it is debatable the extent to which creditor protection is desirable, the court, in the guise of doctrinal analysis, takes a clear position against paternalism. Ultimately, it refers Member States to "appropriate measures for preventing or penalizing fraud, either in relation to the company itself . . . or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligation toward private or public creditors".[149]

So far, no case has clarified what kind of mechanisms would pass muster under this test. However, it appears that the vision toward which the court has thus nudged the Member States is characterized by two elements. First, creditors (and possibly other parties) interacting with a firm cannot, as a first approximation, expect uniform protection that applies to an entire set of companies, such as legal capital or the liability provisions in the Dutch law scrutinized in *Inspire Art*. They are thus expected to rely on information they receive and to process it accordingly. To what extent creditors in fact have this capability is widely debated in the literature, which the ECJ conveniently ignores. This self-protection model is certainly a change in culture for paternalistic Continental European models that tend to rely on an assumption of bounded rationality.[150]

Second, the court is pushing Member States from an *ex ante* to an *ex post* approach that largely corresponds to the distinction between rules and standards.[151] It is thought that the court would not object to measures imposed *ex post in an individualized fashion*, such as criminal penalties or veil piercing, or possibly bankruptcy doctrines holding directors liable by continuing to operate a company putting creditors further at risk.[152]

[148] See e.g. John Armour, Legal Capital: An Outdated Concept?, 7 Eur. Bus. Org. L. Rev. 5, 11 (2006).

[149] Centros, C-212/97, at ¶ 38.

[150] Günter H. Roth & Peter Kindler, The Spirit of Corporate Law 30–31 (2013).

[151] On the distinction see generally Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992).

[152] See, e.g. Erik Werlauff, The Consequences of the Centros Decision: Ends and Means in the Protection of Public Interests, 2000 Eur. Tax. 542, 545; de Kluiver, supra note 89, at 131–32. For the distinction between ex ante and ex post strategies, see e.g. Federico M. Mucciarelli, The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU, 20 Tul. J, Int'l & Comp. L. 421, 447–48 (2012). "Relabeled" corporate law doctrines that were

Whatever one thinks about the questionable benefits of legal capital as a creditor protection mechanism,[153] *ex ante* mechanisms are not ineffective by necessity. A Member State might abolish legal capital and instead require Private Limited Companies to take out insurance to satisfy tort creditors in insolvency. Yet, it is very unlikely that the court would permit Member States to apply such a requirement to pseudo-foreign corporations.

It is true, of course, that the legal capital system cannot be entirely characterized as standard-based.[154] However, veil piercing – the ultimate private law strategy that would likely survive the ECJ's scrutiny, as it applies on an individualized basis – relies entirely on an ex post assessment by the Court about whether it would be equitable for limited liability to be respected. This is not to say that veil piercing doctrine has developed on the Continent as a result of Centros and Inspire Art, but the Court has done its best to push Member States toward greater reliance on mechanisms such as this one. Again, the Court does not consider the advantages and disadvantages of either legal strategy, each of which may be more or less desirable depending on the circumstances.

CONCLUSION: CORPORATE LAW VISIONARIES AND THE COURT'S ACCIDENTAL VISION FOR CORPORATE LAW

In the end, the impact of Centros has been relatively small. Full-scale regulatory competition has not arrived in Europe, in part – as several scholars predicted in the early 2000s – because no Member State developed strong

transferred to insolvency law would, however, still likely be considered impermissible restrictions of the freedom of establishment by the Court, at least if they do not fall under the European Insolvency Regulation. See Enriques & Gelter, supra note 105, at 640–44.

[153] For criticism see, e.g. John Armour, Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law, 63 Mod. L. Rev. 355, 371–72 (2000); Luca Enriques & Jonathan R. Macey, Creditors versus Capital Formation: The Case Against the European Legal Capital Rules, 86 Cornell L. Rev. 1165 (2001); Peter O. Mülbert & Max Birke, Legal Capital – Is There a Case against the European Legal Capital Rules?, 3 Eur. Bus. Org. L. Rev. 695, 732 (2002); Jonathan Rickford (ed.), Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance, 2004 Eur. Bus. L. Rev. 919; Bayless Manning & James J. Hanks, Legal Capital (4th ed. 2013)

[154] The "concealed distributions" doctrine, which is an important element of legal capital in the German-speaking countries, is largely standard-based, since it requires an *ex post* assessment about whether a transaction's terms were at arm's length. See, e.g. Holger Fleischer, Disguised Distributions and Capital Maintenance in European Company Law, in Legal Capital in Europe 94, 95–98 (2006); Roth & Kindler, supra note 150 at 58–61. The United Kingdom has developed a similar doctrine in some cases. See Thomas Bachner, Creditor Protection in Private Companies 97–115 (2009) (comparing UK and German law).

incentives to provide a "popular" legal form for the entire union. The main accomplishment of regulatory competition at this point is the erosion of legal capital, or more precisely minimum capital, as other elements of the legal capital system have remained largely in place. While this is an important issue for small, typically newly founded firms, it is largely irrelevant for the large firms that are the primary subject of the convergence debate. However, it is indeed an element of a larger trend in corporate law as well as in other fields that reflects Anglo-Saxon modes of business regulation more than Continental European ones.

Did the Court intend this result? It is unlikely, given its relatively limited understanding of business law policies. However, we can see the outline of an interesting story that spans five decades, beginning with European visionaries hoping to open up a market for corporations while taming it with harmonization. It continues with a failed harmonization project that results in the retrenchment of corporate law policymakers and academics on their home turfs, seeking to protect national corporate laws from a Delaware effect with the real seat theory. A fluke case poses a mild threat in 1986, as it is interpreted by a future ECJ judge as overruling the real seat theory, but it is swiftly repudiated by the mainstream when a plenary decision seemingly reaffirms the theory's compatibility with the Treaty less than two years later. From 1999 to 2003, the Court uses a move out of the internal market playbook to put its largely accidental vision for corporate law in place. Finally, under the leadership of the same judge, in 2008 the Court reconciles the case law by putting a distinction between "incoming" and "outgoing" cases in place that seems to perfectly explain the conflicting cases of the 1980s. Even if the Court's vision for corporate law was accidental, a certain vision for the freedom of establishment of companies has been put into place.

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