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## Uberseeing: A European Company Passport

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# ÜBERSEERING: A EUROPEAN COMPANY PASSPORT

## INTRODUCTION

Today more than ever, market players realize that entering into business transactions with “foreigners” involves more than a mere exchange of goods and services....freedom of establishment and the abolition of national barriers bring intensified competition. Consequently, company managers are urged to take daring initiatives: a complete transfer of business undertakings might well turn out to be necessary in order to survive.<sup>1</sup>

One of the fundamental goals of the European Community (EC) is the establishment of a common market,<sup>2</sup> an objective codified in the Treaty Establishing the European Community.<sup>3</sup> During the last ten years, European nations have taken boundless steps to remove the physical, fiscal, and technical barriers that divided them.<sup>4</sup> The results have been rewarding. The common market has already created over 2.5 million jobs

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1. STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW 1 (2001) [hereinafter RAMMELOO].

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, part 1 art. 2, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. Under the Treaty:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

*Id.* At present, the following countries are Member States of the EC: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Europa, The European Union at a Glance, at [http://europa.eu.int/abc/index\\_en.htm](http://europa.eu.int/abc/index_en.htm) (last visited Oct. 5, 2004).

3. EC TREATY, *supra* note 2, part 1 art. 2.

4. See generally Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final (describing the completion of the European market in terms of the removal of “physical, technical and fiscal” barriers).

and added about 900 billion euros to the economy.<sup>5</sup> Studies show that if integration is completed, an additional five billion euros will flow into the economy.<sup>6</sup> Nevertheless, this goal may not be realized if member states do not continue to take the necessary steps to integrate.<sup>7</sup>

Company law is one area of law that is criticized for not keeping up with the integration process.<sup>8</sup> By treaty, EC citizens have the right to set up a business in any member state and receive the same treatment as a national doing business in that state.<sup>9</sup> This is referred to as the freedom of establishment,<sup>10</sup> and

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5. *A Healthy EU Single Market: Frits Bolkestein and Anne-Marie Michel* (Radio Netherlands broadcast, Jan. 14, 2003), at <http://www.rnw.nl/hotspots/html/eu030114.html>.

6. *Id.*

The IMA's study, prepared by the Centre for European Economic Research, a German institute whose initials are ZEW, estimates that a single market could bring Euro 5 billion (\$5.8 billion) or more than a year in added economic benefits, and increase Europeans' pension pots by about 9%. Such sums may be largely guesswork, but the obstacles to trading are clearly formidable and costly.

*Id.*

7. *Id.*

8. Report of the High Level Group of Company Law Experts on Modern Regulatory Framework for Company law in Europe, Letter from the Chairman, (Nov. 4, 2002) [hereinafter High Level Group Report].

9. EC TREATY, *supra* note 2, art. 48 (ex 58). It states that:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

*Id.* States and member states, in this Note, refer to the EC states.

10. EC TREATY, *supra* note 2, art. 42 (ex 52). It states that:

Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

*Id.*

is codified in Articles 42 and 48 of the Treaty Establishing the European Community (The EC Treaty).<sup>11</sup> However, companies with headquarters in more than one member state or companies that want to move from one state to another still face substantial barriers.<sup>12</sup> Article 293 of the EC Treaty<sup>13</sup> requires member states to negotiate and secure cross-border recognition for companies, but states' attempts to secure such recognition have been fruitless. In 1956, member states negotiated the Hague Conference on the Mutual Recognition of Companies, which would have made recognition mandatory between signatories.<sup>14</sup> The Convention, however, was defeated.<sup>15</sup> A similar draft treaty was defeated in 1968.<sup>16</sup> Currently, member states are deadlocked on this issue. Lack of consensus about corporate recognition is neither consistent with the goal of a single market<sup>17</sup> nor practical in an economic area where business transactions often involve more than one member state<sup>18</sup> and corporations are major players in the economy.<sup>19</sup>

Not surprisingly, companies have found themselves at the center of the multi-national corporate recognition dispute. For this reason, changes in the law have been prompted by litiga-

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11. *Id.*

12. Uwe Blaurock, Berger Lecture, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377, 379 (1998).

13. EC TREATY, *supra* note 2, art. 293 (ex 220). This article states that:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: the mutual recognition of companies or firms within the meaning of the second paragraph of Art. 48 (ex 58), the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries.

*Id.*

14. RAMMELOO, *supra* note 1, at 24 ("The 1956 Draft Treaty of the Hague Conference on the Mutual Recognition of the Legal Personality of Companies").

15. *Id.*

16. CHARLOTTE VILLIERS, EUROPEAN COMPANY LAW – TOWARD DEMOCRACY? 16 (1998) [hereinafter VILLIERS]. This treaty was defeated because it was not ratified by the Netherlands. *Id.*

17. *See generally* RAMMELOO, *supra* note 1.

18. *See* High Level Group Report, *supra* note 8, at 101 ("There is wide demand for community law to facilitate cross frontier restructuring.").

19. RAMMELOO, *supra* note 1, at 1.

tion initiated by companies. This Note examines the most recent European Court of Justice (ECJ) decision on the recognition of companies in the matter of *Überseering v. Nordic Construction Company*.<sup>20</sup> This case, decided in June 2002, arises out of Germany's refusal to recognize a Dutch corporation with its headquarters in Germany. In the decision, the court held that the freedom of establishment preempts certain national laws that preclude recognition. The decision is significant because it expands the scope of the freedom of establishment and prohibits member states from refusing to recognize companies that move their headquarters from one state to another.

Part I of this Note provides background on corporate recognition theory in Europe and explains the legal and social importance of recognition theories. Also, Part I illustrates attempts by the ECJ and the European legislature to alleviate legal problems that arise when a European corporation wants to move its headquarters to a new member state. Next, Part II of this Note discusses *Überseering* and the court's reasoning in that case. Part III examines the practical implications of the *Überseering* decision and how the *Überseering* decision requires member states to recognize companies that are formed in the European Union under certain circumstances. Finally, this Note concludes that although the *Überseering* decision does not entirely solve the problem of corporate recognition, it instructs new companies to forum-shop for a jurisdiction that will later allow them to emigrate to a new member state. A new company must carefully choose its state of registration because the *Überseering* court interprets the freedom of establishment as giving a company the right to move to a new state, but not to emigrate from its home state.

While the court could have gone further in its holding and made corporate recognition mandatory in all circumstances, the *Überseering* result is ultimately favorable to the goal of a single market because a recent European law creating a corporate form<sup>21</sup> that is recognized throughout Europe largely excludes

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

21. Council Regulation (EC) No. 2167/2001 (Oct. 8, 2001) [hereinafter SE Statute].

new companies.<sup>22</sup> Thus, the *Überseering* ruling at least partially fills the vacuum left by that law.

## I. BACKGROUND: THE STATE OF CORPORATE LAW IN EUROPE

### A. An Overview of European Corporate Recognition Doctrines

Each EC member state adheres to one of two fundamental corporate recognition doctrines: either the “real seat” or “place of incorporation” theory.<sup>23</sup> Under the “place of incorporation” doctrine, the laws of the member state where the company is registered govern the company’s internal affairs.<sup>24</sup> Those laws will govern the company’s legal personality even if it moves into another state.<sup>25</sup> Under this theory, courts in the new state will recognize the company’s legal personality and apply the foreign laws that govern the company’s internal affairs if an internal affairs issue arises.<sup>26</sup> This doctrine is subscribed to in Ireland, the U.K., Denmark, the Netherlands, and Switzerland.<sup>27</sup>

The “place of incorporation” doctrine is beneficial for several reasons. First, it allows a company to move its headquarters freely from one state to another state without losing its legal identity.<sup>28</sup> If desirable, a company can move to a more competi-

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22. *Id.* at arts. 4(2), 17, 32, 35–37. The requirements under the statute are also described *infra* in Part I (D) of this Note.

23. See generally Eddy Wymeersch, *The Transfer of the Company’s Seat in European Company Law*, (European Corporate Governance Institute, Working Paper No. 08/2003, 2003), available at <http://www.ecgi.org/wp>.

24. Christian Kersting, *Corporate Choice of Law—a Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT’L L. 1, 37 (2002).

25. *Id.*

26. *Id.*

27. See David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the “Race to the Bottom” in the European Communities*, 423 HARV. INT’L L.J. 423, 428 (1991). See also Werner F. Ebke, *The “Real Seat” Doctrine in the Conflict of Corporate Laws*, 36 INT’L LAW. 1015, 1016 (2002) [hereinafter Ebke, *The “Real Seat” Doctrine*]. This doctrine is also adhered to in the United States. See REV. MODEL BUS. CORP. ACT 15.05(c) (1984) (“This Act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State.”). Note that Switzerland is not an EU Member State.

28. RAMMELOO, *supra* note 1, at 16.

tive market without being dissolved.<sup>29</sup> Second, the “place of incorporation” theory gives management the autonomy to choose a jurisdiction that has laws most conducive to the company’s purpose.<sup>30</sup> Finally, this theory makes it easy to ascertain the law applicable to a company’s internal affairs because the applicable law does not change even if the company moves to a new jurisdiction.<sup>31</sup> This is a positive result for third parties such as creditors who want predictability as to which law will apply to an entity with a head-office in more than one state.<sup>32</sup> Also, this is a positive result for companies because they avoid complicated *res judicata* issues when all European courts apply a uniform set of laws to their internal affairs.<sup>33</sup>

By contrast, under the “real seat” doctrine, a company’s internal affairs are governed by the laws of the member state where the company has its “real seat,” or headquarters. German courts have described the “real seat” as “the location where the internal management decisions are transformed into day-to-day activities of the company.”<sup>34</sup> A company must register or incorporate in the member state where it has its center of administration; and if it does not, the company will not be recognized as a legal entity.<sup>35</sup> Under this view, if a company wants to move its headquarters to a new member state, it must dissolve and reincorporate.<sup>36</sup> Dissolution is costly and impractical because of taxes and legal fees.<sup>37</sup> Germany, France, Italy and Austria subscribe to the “real seat” doctrine.<sup>38</sup>

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29. *Id.*

30. See Wymeersch, *supra* note 23, at 2.

31. RAMMELOO, *supra* note 1, at 17.

32. See *id.*

33. See Werner F. Ebke, *Centros—Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623, 654 (2000) [hereinafter Ebke, *Centros Mysteries*].

34. Wolf-Hennig Roth, *From Centros to Ueberseering, Free Movement of Companies, Private International Law, and Community Law*, 52 INT'L & COMP. L.Q. 177, 181 (2003) citing BGH 21 Mar 1986, BGHZ 97, 269 at 272.

35. See generally *Überseering*, [2002] E.C.R. I-9919.

36. See Ebke, *Centros Mysteries*, *supra* note 33, at 624–25.

37. See Jens C. Dammann, *The U.S. Concept of Granting Corporations Free Choice among State Corporate Law Regimes as a Model for the European Community*, at 10 (Social Science Research Network Electronic Library, Working Paper File No SSRN\_ID418660\_code030715560.pdf, Aug. 04, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=418660](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=418660) (“If a U.K. company moves its headquarters to Germany without reincorporating under German law, German courts will usually treat the organization as a

The “real seat” doctrine is favorable for a number of reasons. First, it does not burden local creditors with the task of researching foreign corporate law.<sup>39</sup> Second, the “real seat” doctrine allows member states to apply their laws to all companies headquartered in their territory.<sup>40</sup> Presumably local lawmakers have the greatest interest in the activities of local companies, and they will enforce policy that is beneficial to the community as well as to the company.<sup>41</sup> Finally, the “real seat” doctrine keeps companies from seeking out foreign legal systems that are more favorable to management and less favorable to shareholders, workers, or creditors.<sup>42</sup> In fact, the “real seat” doctrine was originally conceived for this purpose.<sup>43</sup> Contemporary scholars still fear that if the “real seat” doctrine ceased to exist, many managers would reincorporate under lenient foreign legal systems to the detriment of local constituencies.<sup>44</sup>

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partnership, subjugating all its shareholders to unlimited liability.”) [hereinafter Dammann, *Corporations Free Choice*].

38. RAMMELOO, *supra* note 1, at 174-217. Wymeersch, *supra* note 23, at 10.

39. Roth, *supra* note 34, at 202. According to Roth:

Conflicts rules allocate the burden of and the expenditures for information with regard to legal orders potentially unknown to parties. In this respect, the incorporation and the real seat doctrine obviously reflect strongly *divergent conflicts policies* with regard to adequate allocation of information costs considering the company as a legal product.

*Id.*

40. See Wymeersch, *supra* note 23, at 2.

41. See RAMMELOO, *supra* note 1, at 14.

42. *Id.* at 18. This argument is known as a “race to the bottom” argument. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974) (coining the phrase “race to the bottom” in the corporate context).

43. See Charny, *supra* note 27, at 423, 428.

44. See, e.g., Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union From Delaware?*, 25 EURO. L. REV. 57 (2000) (examining the “Delaware theory” in the European context). See also Werner F. Ebke, *The Limited Partnership and Transnational Combinations of Business Forms: “Delaware Syndrome” Versus European Community Law*, 22 INT’L LAW 191 (1988) (arguing that the liberal “incorporation doctrine” is not as workable in Europe as it is in the United States). See also Catherine Holst, *European Company Law after Centros: Is the EU on the Road to Delaware?*, 8 COLUM. J. EUR. L. 323 (2002) (questioning whether the Delaware effect will take place in Europe and suggesting that member states change their laws to achieve greater efficiency). See also Wymeersch, *supra* note 23, at 4.

*B. Multi-State Business and the Transfer of the Seat*

The practical differences between “place of incorporation” jurisdictions and “real seat” jurisdictions materialize when a company moves from one jurisdiction to another. If a company wants to move its headquarters to a different European state, a few important legal questions arise.<sup>45</sup> First, whether the original home state will allow the company to move without dissolution; second, whether the new state (the host state) will recognize the company as a legal entity; and third, whether the new state will apply the laws of the place of incorporation, thus recognizing the company’s legal personality.

Let us suppose company X sets up a branch in neighboring member state Y. Its operation in Y is very successful. Company X opens a factory and an office building in state Y to handle its business there, and soon its sales in state Y account for most of its business. In addition, a new shareholder from state Y becomes a 51% stakeholder in company X. The growth in business seems to have shifted the real seat of company X to state Y.<sup>46</sup>

In another hypothetical, suppose a company in state J decides to move its headquarters to a new office building in state K because property taxes are lower in state K (which may be only a few miles away from the old building in state J). Again, a company has transferred its seat or headquarters from one member state to another. The consequences of these changes differ depending on whether the states follow the “place of incorporation” doctrine or the “real seat” doctrine.

If the companies in the hypothetical moved from one “place of incorporation” state to another (from the U.K. to the Netherlands, for example), the legal consequences are few. The companies will have to settle with local tax authorities in the origi-

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45. Other legal questions may also arise, such as taxation, creditor’s rights or the treatment of contracts in the host state. These issues are important but they are beyond the scope of this Note.

46. These facts are very similar to the facts of *Überseering*. See generally *Überseering*, [2002] E.C.R. I-9919.

nal state,<sup>47</sup> but, otherwise, the new state will recognize the companies as foreign legal entities.<sup>48</sup>

If the companies moved their headquarters from a “real seat” state to a “place of incorporation” state, the “place of incorporation” state will recognize the companies’ identities.<sup>49</sup> The “place of incorporation” state will apply the laws of the original place of incorporation to the company. However, most “real seat” states will not allow companies to move abroad without forcing the company to wind up and dissolve. For this reason, it is usually impracticable, if not impossible, for a company to move from a “real seat” state to a “place of incorporation” state.<sup>50</sup>

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47. See Case 81/87, *The Queen v. H.M. Treasury and Commissioners of Internal Revenue, ex parte Daily Mail and General Trust PLC*, [1988] E.C.R. 5483 [hereinafter *Daily Mail*].

48. See Ebke, *The “Real Seat” Doctrine*, *supra* note 27, at 1015, 1016. See Dammann, *Corporations Free Choice*, *supra* note 37, at 19-21. Some “place of incorporation” states, including the U.K. and Ireland, do not simply allow corporations to change their domicile and retain the laws of their home state. *Id.* Corporations from those states will have to move by effecting a merger. *Id.*

49. See Roth, *supra* note 34, at 184. The Roth piece gives this example:

A German limited company (*GmbH*) that moves its centre of administration, but not its registered seat, to England (*moving out*) will be treated as a company still governed by German law: The German conflicts rule leads to an application of the English conflicts rule, which in turn calls for the application of the law of incorporation (in this case German law).

*Id.*

50. See RAMMELOO, *supra* note 1. German law prohibits a company from moving out of Germany. *Id.* at 192. France may allow such a transfer after a unanimous shareholders vote and an agreement with the host state, but it is uncertain that such a transfer is actually envisioned under French law. *Id.* at 215-16. Italian law allows domestic companies to emigrate, but does not allow foreign companies to immigrate without dissolution. *Id.* at 224. See also Wymeersch, *supra* note 23, at 10, 11. She states that:

In other jurisdictions [apart from Germany, where it is never allowed], the emigration is allowed under certain conditions. These vary according to jurisdictions: In Spain, there should be a treaty in force between the exit and the entry state...In France, the majority opinion defends that the seat may be transferred without dissolution of the company...This rule allows the supermajority decision only in case France has concluded an international convention with the entry state about the maintenance of legal personality. However, as obviously France has not entered into any such convention, the rule is inapplicable.

If the companies moved their headquarters from a “place of incorporation” state to a “real seat” state, the result will be just as severe. The “real seat” state will refuse to recognize the companies unless they dissolve and reincorporate under its laws.<sup>51</sup> Dissolution entails paying legal fees and, in most cases, capital gains taxes on all assets.<sup>52</sup>

The most complicated scenario arises if the companies moved from one “real seat” state to another. The original states of incorporation probably will not permit the companies to emigrate without dissolving.<sup>53</sup> Then, even if the companies move, the host state will deny recognition and require the companies to reincorporate. Companies wanting to move their headquarters in or out of a “real seat” state face considerable obstacles and may find such a move impossible. EC law does little to alleviate the disadvantage that those companies face.

Passing a “corporate headquarters transfer” directive could solve the problems presented by the “real seat” and “place of incorporation” doctrines. Scholars and the European Commission have considered this solution.<sup>54</sup> The High Level Group on Company Law Experts, part of the European Commission,<sup>55</sup> requested the creation of a 14<sup>th</sup> directive dealing exclusively with

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*Id.*

51. See Dammann, *Corporations Free Choice*, *supra* note 37, at 10.

52. *Id.* at 9.

53. See RAMMELOO, *supra* note 1, at 192, 215. See also Wymeersch, *supra* note 23, at 10, 11. Dammann, *Corporations Free Choice*, *supra* note 37, at 16 (for a company to successfully transfer and reincorporate under a new state’s legal system, a state must either “allow corporations to perform a so-called identity-preserving transfer of domicile” or reincorporate through a cross boarder merger but, “in the European Community... corporations will often find that neither of the two above-described options [are] available”). Germany, for example, does not allow domestic companies to transfer their domicile or to merge with a foreign corporation. *Id.* at 19, 21.

54. See Kersting, *supra* note 24, at 67. See also High Level Group Report, *supra* note 8, at 111. Ebke proposed another possible solution to the problem of divergent corporate law theories in Europe in his response to the *Centros* case. He suggested that, as in the U.S., European academics, judges and lawyers could create a code of best practices or a model law for Europe to propel the movement toward integration. See Ebke, *Centros Mysteries*, *supra* note 33, at 658, 659. He points particularly to the ALI’s Principles of Corporate Governance and the ABA’s Revised Model Business Corporation Act. *Id.*

55. Press Release, EU Institutions, Commission Welcomes Experts’ Report on Company Law and Corporate Governance (Nov. 4, 2002).

the seat-transfer issue.<sup>56</sup> The Commission plans to present a proposal for the directive sometime within the near future.<sup>57</sup> However, there is no guarantee that a directive will be ratified or that it will completely solve the conflict between the “real seat” and “place of incorporation” doctrine. Recent legislation dealing with similar issues has been vetoed<sup>58</sup> or badly compromised by competing interests within the Union.<sup>59</sup>

*C. Beyond Recognition: The “Real Seat” Doctrine and the Protection of Labor Laws and Minimum Capital Contributions*

European states have different linguistic, cultural, historical, and legal backgrounds, and thus, have an interest in preserving their local values through the use of local law.<sup>60</sup> States follow the “real seat” approach because they want to protect other national laws from being sidestepped by forum-shopping. At the center of the *Überseering* dispute are laws requiring minimum capital deposits<sup>61</sup> and laws requiring labor participation in management.<sup>62</sup> Although laws concerning labor mainly affect large companies and minimum capital requirements mainly

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56. High Level Group Report, *supra* note 8, at 111.

57. Europa, Company Law and Corporate Governance, at [http://europa.eu.int/comm/internal\\_market/company/seat-transfer/2004-consult\\_en.htm](http://europa.eu.int/comm/internal_market/company/seat-transfer/2004-consult_en.htm) (last visited Oct. 8, 2004).

58. Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, 1989 O.J. (C 64) 8. See generally Christian Kirchner and Richard W. Painter, *Takeover Defenses Under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform*, 50 AM. J. COMP. L. 451 (2002) (analyzing the failed 13<sup>th</sup> Directive on Takeover Bids and comparing it to the more defensive German and American regimes).

59. SE Statute, *supra* note 21. See also Stefano Lombardo and Piero Passetto, *The ‘Societas Europaea’: a Network Economics Approach*, at 8 (European Corporate Governance Institute, Working Paper No. 19/2004, 2004), available at <http://www.ecgi.org/wp>.

60. See James L. Gibson and Gregory A. Caldeira, *The Legal Culture of Europe*, 30 LAW & SOC’Y REV. 55, 80 (1996) (“We fully expect that differences in legal cultures will play an even greater role in the ways in which EC law gets implemented within each of the Member States.”). See also Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT’L L. 477, 485–87 (2004).

61. *Überseering*, [2002] E.C.R. I-9919, paras. 87, 89.

62. *Id.*

affect smaller, less capitalized companies, both laws protect other constituents such as workers and creditors, respectively.

Many European states impose a minimum capital requirement on entities that request limited liability.<sup>63</sup> Theoretically, the requirement protects creditors and potential tort victims by assuring that assets are paid into the company.<sup>64</sup> European Union law also provides minimum capital requirements for public companies.<sup>65</sup> Moreover, a recent law passed by the legislature establishing a European corporate form imposes a minimum capital requirement of 120,000 Euros.<sup>66</sup> In recent years, however, the ECJ has cast a skeptical eye on minimum capital requirements imposed by member states. In the *Centros* case, for example, the court suggested that minimum capital requirements did not achieve the goal of protecting creditors<sup>67</sup> because concerned creditors could easily protect themselves by asking for some type of security interest or personal guarantee.<sup>68</sup> Nevertheless, the current state of European Community law does not indicate that minimum capital requirements will soon

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63. Minimum capital requirements are imposed in Belgium, Denmark, France, Germany, Greece, Ireland (only public companies), Italy, Luxembourg, the Netherlands, Portugal and Spain. SETTING UP A COMPANY IN THE EUROPEAN COMMUNITY: A COUNTRY BY COUNTRY GUIDE (1989) [hereinafter SETTING UP A COMPANY IN THE EUROPEAN COMMUNITY]. Similar laws exist in the U.S. if corporations have stock with par value. See, e.g., N.Y. BUS. CORP. LAW §§ 504, 506, 513(a) ("Upon issue by a corporation of shares with a par value, the consideration received therefore shall constitute stated capital to the extent of the par value of such shares."). However, corporations often have the option to issue no-par stock. See, e.g., N.Y. BUS. CORP. LAW § 501(a) ("Each class shall consist of either shares with par value or shares without par value.").

64. Überseering, [2002] E.C.R. I-9919, para. 16. But see Luca Enriques and Johnathan R. Macey, *Creditors Versus Capital Formation: The Case Against the European Union*, 86 CORNELL L. REV. 1165 (2001) (arguing that minimal capital requirements are a "costly and inefficient" mechanism that provide little protection for creditors).

65. Second Council Directive 77/91/EEC, of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 1977 O.J. (L 26).

66. *Id.*

67. Case C-212/97, *Centros Ltd. V. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-1459, para. 35.

68. SE Statute, *supra* note 21, art. 4(2).

not indicate that minimum capital requirements will soon be a thing of the past.

Many EC member states also have laws requiring some form of labor participation in corporate management.<sup>69</sup> France, the Netherlands, Belgium, and a number of other member states have groups called “works councils”<sup>70</sup> that allow workers informational and consulting rights within companies.<sup>71</sup> However, Germany hosts the most debated system of worker participation in Europe.<sup>72</sup> Co-determination is the German practice by which large companies are required to have labor representation on

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69. See generally SETTING UP A COMPANY IN THE EUROPEAN COMMUNITY, *supra* note 63. In Belgium, public and private companies that have more than 100 employees must have a “Works Council” that meets once per month to review employment policies. *Id.* at 28, 35. In Denmark, in public and private companies with more than thirty five workers, employees can demand representation on the board of directors, and if the majority of the employees are in favor, labor can demand equal representation on the board. *Id.* at 48, 61. In Ireland, in semi-state-owned public and private companies, employees can participate in some board activities. *Id.* at 124, 128. In Luxembourg, public and private companies with more than fifteen employees must have a workers delegation and must hold at least six meetings per year. In companies with more than 150 employees, there must be a joint works council that is comprised of an equal number of employees and employers. *Id.* at 166-167, 174. In the Netherlands, public and private companies with more than thirty-five employees must create a “Works Council” whose approval is necessary for certain actions. *Id.* at 186, 194. Finland, Austria, and Sweden also have laws that require workers in a public limited liability company to be represented by an administrative organ of the company. See also CARLA TAVARES DA COSTA & ALEXANDER DE MEESTER BILREIRO, THE EUROPEAN COMPANY STATUTE 73 (2003) [hereinafter COSTA].

70. GROUPS OF COMPANIES IN THE EEC 17, 147, 253 (Eddy Wymeersch ed. 1993) [hereinafter GROUPS OF COMPANIES]. In Belgium: “The Law of 20 September 1948 provides for the installation of a works or ‘enterprise council’ in the more important enterprises when there [are]...100 or more employees.” *Id.* at 17. In the Netherlands: “The right of employees to have a say in corporate policy is concerned-is mainly embodied in the so-called ‘structural provisions’ and the Works Councils Act 1979.” *Id.* A company with more than 100 employees must have a works council. *Id.* at 253.

71. *Id.*

72. GROUPS OF COMPANIES, *supra* note 70, at 90-92. In Germany, “in contrast to other legal systems, workers are entitled to co-determination in accordance with German Business Constitution Law 47(1).” *Id.* at 91. See also Benjamin A. Streeter, III, *Co-Determination in West Germany – Through the Best (and Worst) of Times*, 58 CHI.-KENT L. REV. 981, 984, 998 (1982).

the board of directors.<sup>73</sup> Under German law, a company must have a two-tiered board, composed of the *Aufsichtsrat* (the upper level or supervisory board) and a *Vorstand* (lower level or management board).<sup>74</sup> If a company has more than 500 employees, one third of the members of the *Aufsichtsrat* must be labor representatives.<sup>75</sup> Half of the *Aufsichtsrat* must be comprised of labor representatives in companies that are either in the iron, coal or steel industry or have more than 2,000 employees.<sup>76</sup> Co-determination in Germany began in the hard times after the Second World War as a concession to employees to compensate for the lack of cash available for wages.<sup>77</sup> In the contemporary setting, co-determination is viewed as a political arrangement that affects wealth distribution and extends the value of democracy to the private sphere.<sup>78</sup> German company law is designed not only to maximize shareholder wealth, but also to serve the workforce.<sup>79</sup> The “real seat” doctrine is a tool that preserves Germany’s demanding co-determination provisions by preventing companies from incorporating under more lenient legal systems where workers have no place in corporate governance.<sup>80</sup>

#### D. *The Societas Europaea*

Since the commencement of the European Union, lawmakers have suggested that a European corporate form would be useful

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73. Eddy Wymeersch, *The Corporate Governance Discussion in Some European States*, in CONTEMPORARY ISSUES IN CORPORATE GOVERNANCE 11 (DD. Prentice & P.R.J. Holland eds., 1993).

74. *Id.*

75. SETTING UP A COMPANY IN THE EUROPEAN COMMUNITY, *supra* note 63, at 93, 101. This includes both public and private companies. *Id.*

76. *Id.*

77. See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 IOWA J. CORP. L. 657, 719 (1996) (arguing that participatory management is highly effective).

78. Interest Groups, Co-determination at <http://xroads.virginia.edu/~MA98/pollklas/thesis/codglossary.html> (last visited July 4, 2004) (paraphrasing *Bundesregierung Deutschland*).

79. See Jens Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the US Model?*, 8 FORDHAM J. CORP. & FIN. L. 607, 608 (2003) (arguing that the *Centros* decision does not destroy co-determination but will bring changes in European corporate law) [hereinafter Dammann, *Codetermination After Centros*].

80. COSTA, *supra* note 69, at 5.

in the common market.<sup>81</sup> The European Commission submitted drafts of a *Societas Europaea* (“SE”) corporate form in 1970, 1975, 1989,<sup>82</sup> and 1991.<sup>83</sup> The original SE proposal was vetoed<sup>84</sup> by member states because the draft was too far beyond the reach of national corporate law.<sup>85</sup> The 1989 and 1991 versions of the SE statute were grounded in national law, but still were unsatisfactory to states because of disagreements about co-determination in Germany under the SE system.<sup>86</sup> Finally, a compromise was reached. On October 8, 2001, the Council passed regulation 2157/2001 establishing the SE.<sup>87</sup>

The SE statute provides an alternative international corporate form that is recognized throughout Europe. Its primary purpose is to provide companies with the means to expand over state lines without the high transaction costs associated with setting up subsidiaries in multiple states and legal systems.<sup>88</sup> Unlike other national corporate forms (especially those in “real seat” states), a SE can transfer its headquarters from one member state to another without dissolution.<sup>89</sup> Also, the SE could provide a company in a “real seat” jurisdiction with the means to move to another member state.<sup>90</sup>

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81. See, e.g., Johan de Bruycker, *EC Company Law—The European Company v. the European Economic Interest Grouping and the Harmonization of the National Company Laws*, 21 GA. J. INT’L & COMP. L. 191, 192, 199-200 (1991). See also *Modernizing Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward: Communication from the Commission to the Council and The European Parliament*, COM (2003) final at 284 1.1. Thus far, no directive dealing with these conflict of laws issues has been agreed upon, but a European corporate form has been passed. The 10<sup>th</sup> and 14<sup>th</sup> directives would have dealt with harmonization in merger and acquisition law, but they did not pass. High Level Group Report, *supra* note 8, at 111. See also Blaurock, *supra* note 12, at 384.

82. *Id.*

83. COSTA, *supra* note 69, at 5.

84. *Id.*

85. *Id.*

86. *Id.* at 5. Terence L. Blackburn, *The Societas Europaea: The Evolving European Corporation Statute*, 61 FORDHAM L. REV. 685, 708, 750-52 (1993).

87. SE Statute, *supra* note 21. See also COSTA, *supra* note 69, at 5.

88. See COSTA, *supra* note 69, at 11.

89. SE Statute, *supra* note 21, art. 1(3). See also Lombardo and Pasotti, *supra* note 59, at 4.

90. Luca Enrique, *Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage*, at 5 (European Corporate Governance Institute, Working Paper No. 07/2003, March 2003), available at

However, the availability of the SE is limited. A SE can be formed in only four ways: by a merger of companies from different member states;<sup>91</sup> by the creation of a holding company with components in different member states;<sup>92</sup> by the creation of a SE subsidiary of companies from at least two member states;<sup>93</sup> or by the conversion of a public limited company that has, for at least two years, had a subsidiary in another member state.<sup>94</sup> Additionally, the SE imposes a minimum paid-in capital requirement of 120,000 Euros.<sup>95</sup> Because of these formation requirements, the SE is mainly a viable option for large companies.<sup>96</sup>

Unlike the corporate forms used in the individual member states, the SE statute resolves the difficulties related to recognition and the choice of applicable law if the SE moves its headquarters. Recognition is mandatory under the SE statute<sup>97</sup> but the SE must register in the state where it has headquarters.<sup>98</sup> The company laws of the state of registration govern the company. If the SE wishes to move its headquarters to a new member state, it can do so without dissolution.<sup>99</sup> However, the company must re-register and subject itself to the laws of the new member state.<sup>100</sup> If the company fails to register in the state of its headquarters, the statute imposes sanctions such as

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<http://www.ecgi.org/wp> ("Hence, for instance, the formation by a merger of an SE of the Irish type between an 'active' Portuguese company and a newly formed Irish shell company totally owned by the former would be legal.") [hereinafter Enriques, *Arbitrage*].

91. SE Statute, *supra* note 21, art. 17.

92. *Id.* at art. 32.

93. *Id.* at arts. 35-36.

94. *Id.* at art. 37.

95. *Id.* at art. 4(2). 120,000 Euros = 151,416 U.S. Dollars as of October 21, 2004. Oanda, the Currency Site, at <http://www.oanda.com/convert/classic> (last visited Oct. 13, 2004).

96. High Level Group Report, *supra* note 8, at 114, 117. See also Charles de Navacelle, *Legislative Development: Council Regulation No. 2157/2001 of October 8, 2001 Establishing the European Company Statute*, 9 COLUM. J. EUR. L. 199, 201 (2002).

97. SE Statute, *supra* note 21, art. 1(3) ("The SE shall have legal personality.").

98. *Id.* at art. 5.

99. *Id.* at art. 8.

100. Companies can object to laws of a new member state unless those laws are considered part of public interest. *Id.* at art. 8(14).

liquidation.<sup>101</sup> Therefore, the SE is probably the only type of company that can move its headquarters from one “real seat” state to another without dissolution.<sup>102</sup> Conversely, a company formed under the laws of a “place of incorporation” member state can move to another “place of incorporation” member state without dissolution and without changing the laws applicable to its internal affairs. Thus, companies in a “place of incorporation” member state may find that their national corporate form is more versatile than the SE form.<sup>103</sup>

In addition to providing a minimum capital requirement, the SE statute also provides guidelines for labor participation. These guidelines are located in a supplemental directive.<sup>104</sup> In the directive, priority is given to the agreements between management and employees before the entity became a SE.<sup>105</sup> The directive has a default provision if an agreement cannot be reached because the SE spans jurisdictions where different groups of workers have different rights of participation.<sup>106</sup> The default provision includes mandatory worker participation if most of the employees of the combined entities of the SE had participation rights before the SE was formed.<sup>107</sup> The law is structured so that a company domiciled in a state where worker participation is mandatory cannot escape this requirement by becoming a SE.<sup>108</sup>

The SE simplifies some multinational corporate activities, but it is not a viable solution for all companies. First of all, transaction costs associated with the SE will initially be restrictive since the statute has yet to be interpreted by courts. The statute leaves room for interpretation because it does not draw

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101. *Id.* at art. 64.

102. *See* Navacelle, *supra* note 96, at 200.

103. *See* Wymeersch, *supra* note 23, at 31–32 (“Before the court rendered its opinion in the *Überseering* case, [the SE was a] considerable innovation[]. One will have to determine to what extent *Überseering* will have a dampening effect of the innovative function of the Statute’s rule.”).

104. EC Directive 2001/86/EC (Oct. 8, 2001) (Supplementing the Statute for a European Company with Regard to the Involvement of Employees).

105. *Id.* at Preamble, section 18.

106. *Id.* at Annex.

107. *Id.* at Preamble, section 18.

108. *Id.* at Preamble, section 3.

bright lines between SE law and national law.<sup>109</sup> Second, the problem of cross-border recognition still exists because the SE form is not available for all companies and excludes less capitalized companies.<sup>110</sup> Third, companies in “place of incorporation” states may find that their national laws are more flexible than the SE.<sup>111</sup> Finally, companies in “real seat” states may avoid the SE in order to pursue creative ways to avoid worker participation. Thus, even with the introduction of a SE statute, most European companies will still face difficulties if they desire to move their headquarters to a new state.

*E. Case Law Interpreting Corporate Mobility Under The EC Treaty*

1. The *Daily Mail* Case

In recent years, the ECJ has made several important rulings interpreting the effect of the freedom of establishment on corporate entities. In the *Daily Mail* case, Daily Mail and General Trust (“Daily Mail”), an investment holding company, sought to change its principal place of business from the U.K. to the Netherlands.<sup>112</sup> The U.K., which is a “place of incorporation” state, permits a U.K. company to move its principal place of business to another state without dissolution. However, a company must obtain permission from the local government to move its head office<sup>113</sup> because in the U.K., a company is liable for taxes in the jurisdiction of its headquarters.<sup>114</sup> Daily Mail asked local officials for permission to move, but moved without an answer<sup>115</sup> because it believed that the freedom of establishment permitted it to move its headquarters to a new member

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109. Enriques, *Arbitrage*, *supra* note 90, at 10, 11 (“The boundaries between nations and EU law will have to be determined.”). See also Lombardo and Pasotti, *supra* note 59, at 18.

110. High Level Group Report, *supra* note 8, at 117 (admitting a need for a statute dealing with small and midsize companies, called “SME’s”).

111. *Id.* at 114 (“Opponents [to the SE] also argue that the European corporate environment should not be cluttered up with yet another legal form”).

112. *Daily Mail*, [1988] E.C.R. 5483.

113. *Id.* at para. 5.

114. *Id.* at paras. 6, 7.

115. *Id.* at para. 6.

state without authorization from its home state.<sup>116</sup> Its purpose for moving, as perceived by the court, was to avoid British capital gains taxes.<sup>117</sup>

In this case, the ECJ ruled that the freedom of establishment did not apply to a company that transfers its headquarters to another member state.<sup>118</sup> Therefore, the tax authorities had the right to decline Daily Mail's request to move out of the U.K.<sup>119</sup> The court reasoned that corporations are unlike humans in that corporations only exist because of a privilege extended by national law. Thus, the freedom of establishment provides them only limited rights.<sup>120</sup> Although the *Daily Mail* court narrowly defined the effect of the freedom of establishment on companies, subsequent decisions suggest that the *Daily Mail* interpretation was colored by the possible existence of tax evasion. *Daily Mail* has not been completely overturned, but has been viewed narrowly by the ECJ in subsequent decisions.

## 2. The *Centros* Case

In the *Centros* case,<sup>121</sup> Danish nationals Mr. and Mrs. Bryde registered a company in the U.K. in order to do business through a branch in Denmark. They structured the corporate entity in this way to avoid the minimum capital requirement imposed in Denmark.<sup>122</sup> When the Brydes attempted to register their branch, Danish authorities refused their application based on the conclusion that the U.K. wing of the business existed only as a fraudulent holding company for the Danish branch.<sup>123</sup> The court disagreed and ruled that registering a company in another member state to avoid minimum capital laws is not fraud, even if the company does not intend to do business in the

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116. *Id.* at para. 8.

117. *Id.* at para. 8.

118. *Id.* at para. 25.

119. *Id.* at para. 24.

120. *Id.* at para. 19 (“Unlike natural persons, companies are creatures of the law and in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.”).

121. *Centros*, [1999] E.C.R. I-1459.

122. *Id.* at paras. 3, 4, 14.

123. *Id.* at paras. 7, 23.

state of incorporation.<sup>124</sup> Under the freedom of establishment, when a company is properly formed in accordance with the laws of a member state, other member states must recognize a branch of that company.<sup>125</sup> After the *Centros* decision, proponents of the “real seat” doctrine wondered if allowing foreign companies to operate branches in “real seat” states would undermine their doctrine.<sup>126</sup> They feared any company could incorporate abroad and operate in a “real seat” state under the guise of a branch to avoid local law.<sup>127</sup>

In *Centros*, the court also ruled that member states have the right to make laws that impose additional requirements on foreign corporations, so long as those laws are “applied in a non-discriminatory manner, justified by imperative requirements in the general interest [of society], do not go beyond what is necessary,” and “are suitable for securing the attainment of the objective which they pursue.”<sup>128</sup> The court held that because creditors were already on notice that the Brydes’ company was a foreign corporation, and thus could have asked for a guarantee or security interest if they were concerned, Danish minimum capital requirements did not meet this four-part “necessity” test.<sup>129</sup>

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124. *Id.* at paras. 17, 18, 29. The court has reaffirmed this test in a recent case. See Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, [2003] ECJ CELEX LEXIS 444, at para. 133.

125. *Centros*, [1999] E.C.R. I-1459, at para. 39.

126. See generally Dammann, *Codetermination After Centros*, *supra* note 79 (arguing that codetermination will probably survive the scrutiny of the European Court of Justice). See also Ebke, *Centros Mysteries*, *supra* note 33 (discussing the effects of *Centros* on national law). But see Holst, *supra* note 44 (arguing that *Centros* may not change the conflict of laws in the EU, but member states probably should change them voluntarily to increase efficiency).

127. RAMMELOO, *supra* note 1, at 72. In regard to *Centros* he explains that:

A number of German commentators seem to be convinced that this ruling means that member states are obliged to relinquish the *Sitztheorie*...From now on, natural and legal foreign persons alike should be welcomed in Germany or any other member state of the European Union; the latter category would no longer have to worry about adjusting their structure to the company laws of the state of establishment. Germany had better get used to...companies established abroad, having their real seat on German territory.

*Id.*

128. *Centros*, [1999] E.C.R. I-1459, para. 33.

129. *Id.* at para. 37.

This part of the decision left member states wondering whether worker participation requirements would pass the four-part test in *Centros*.<sup>130</sup> Their question was answered in part by the *Überseering* decision.

## II. THE *ÜBERSEERING* DECISION AND THE CONTINUED EXPANSION OF THE FREEDOM OF ESTABLISHMENT

### A. *The Factual Background*

*Überseering* BV (Besloten Vennootschap), a company that was registered under Dutch corporate law in August, 1990,<sup>131</sup> was acquired by two German citizens in December, 1995.<sup>132</sup> Three years earlier, *Überseering* had hired Nordic Construction Company Baumanagement GmbH (“NCC”), the defendants in this case, to paint a structure on a piece of property that it acquired in Germany.<sup>133</sup> Claiming that the work was defective, *Überseering* sued NCC for breach of contract in a German regional court.<sup>134</sup> The court dismissed the case, ruling that *Überseering* lacked standing to bring the suit.<sup>135</sup> Under German conflict of laws, which follows the “real seat” doctrine, a court must apply German law to a company with its headquarters or center of administration in Germany.<sup>136</sup> The court concluded that when German nationals purchased the shares of *Überseering*, the company’s center of administration inadvertently shifted to Germany.<sup>137</sup> Since the company did not register in Germany, the court refused to recognize the entity. Although this conclusion is not codified, it is strictly adhered to in German courts.<sup>138</sup> It is also worth noting that German law will recognize an unregistered foreign corporation as a defendant. Before bringing

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130. See generally Dammann, *Codetermination After Centros*, *supra* note 79.

131. *Überseering*, [2002] E.C.R. I-9919, para. 2.

132. *Id.* at para. 7.

133. *Id.* at para. 6.

134. *Id.* at paras. 6, 8. *Überseering* sued in the lower German court, which is called the *Landgericht*. *Id.*

135. *Id.* at paras. 8, 9.

136. *Id.* at para. 4.

137. *Id.* at para. 9.

138. *Id.*

this case, *Überseering* defended a case in a German court against one of its architects.<sup>139</sup>

The German appeals court, the *Oberlandesgericht*, affirmed the decision of the lower court.<sup>140</sup> The *Bundesgerichtshof*,<sup>141</sup> the highest court, requested a preliminary ruling from the ECJ.<sup>142</sup> The question was framed as follows:

whether, where a company formed in accordance with the legislation of a Member State (A) in which it has its registered office is deemed, under the law of another Member State (B), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity, and therefore the capacity to bring legal proceedings before its national courts in order to enforce rights under a contract with a company established in Member State B.<sup>143</sup>

The court concluded that Articles 43 and 48 preclude member state B (or Germany, in this case) from refusing to recognize company A (*Überseering* in this case).<sup>144</sup> Thus, a company can move its headquarters from an “incorporation” state to a “real seat” state and gain recognition if the company was properly formed in accordance with the laws of any member state. The court found *Überseering* analogous to *Centros* because both examine the relationship between a host state and a corporation.<sup>145</sup> The court held that despite the broad language in the *Daily Mail* decision, it is distinguishable from this case because<sup>146</sup> it applies to restrictions on a company’s ability to move

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139. *Id.* at para. 12.

140. *Id.* at para. 10.

141. *Id.* at para. 11.

142. *Id.* at para. 21.

143. *Id.* at para. 22.

144. *Id.* at para. 94. The decision states:

Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment.

*Id.*

145. *Id.* at 40.

146. *Centros*, [1999] E.C.R. I-1459, paras. 39, 62, 65.

out of its home state, not a company's right to recognition in a host state.<sup>147</sup>

*B. Überseering's Holding and Reasoning*

The defendant, NCC, was joined in its argument by Germany, Spain and Italy. These parties gave three major arguments in favor of the German interpretation of the freedom of establishment. First, they claimed that corporate recognition is not mandatory under current EC law without individual state consent.<sup>148</sup> Second, they maintained that the facts of *Daily Mail*, and not *Centros*, are analogous to the present proceeding.<sup>149</sup> And third, they argued that protecting German substantive labor and capital laws justified sanctions against foreign companies that operated in Germany.<sup>150</sup>

The defendants further argued that a state is under no obligation to recognize a foreign company unless it consents by convention or treaty.<sup>151</sup> According to the Treaty Establishing the European Community, "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals...the mutual recognition of companies or firms."<sup>152</sup> The negotiations that followed the Treaty produced the Convention on the Mutual Recognition of Companies and Legal Persons,<sup>153</sup> but it was never entered into force.<sup>154</sup> The defendants maintained that the text of the Treaty Establishing the European Community proves that the framers of the EC acknowledged differences in recognition standards

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147. *Id.* at paras. 69-71.

148. *Id.* at paras. 23, 24.

149. *Id.* at paras. 29, 31.

150. *Id.* at paras. 88, 89.

151. *Id.* at para. 23.

152. EC TREATY, *supra* note 2, art. 293 (ex 220). The Treaty states that:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: the mutual recognition of companies or firms within the meaning of the second paragraph of Art. 48 (ex 58), the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries.

*Id.*

153. Überseering, [2002] E.C.R. I-9919, paras. 25, 26.

154. *Id.* at paras. 26-28.

within the Community and elected to keep those differences intact.<sup>155</sup> Therefore, the defendants asserted that Germany has no obligation to recognize a foreign company's existence.<sup>156</sup>

The court rejected this argument<sup>157</sup> and agreed with the European Commission which joined the Netherlands, the U.K. and the European Free Trade Surveillance Authority ("EFTA") in making arguments on behalf of *Überseering*. These parties asserted that ECJ case law should facilitate harmonization in areas when it is necessary to uphold the freedom of establishment.<sup>158</sup> Article 293 affords states the opportunity to negotiate for the mutual recognition of companies, but not the right to deny recognition.<sup>159</sup> The court found that the right to recognition falls within the freedom of establishment<sup>160</sup> and that companies that are formed in accordance with the law of a member state and have their central administration and principal place of business in a member state are entitled to the same benefits as natural persons.<sup>161</sup> Likewise, in the EC, commercial establishments can set up and manage a business under the same conditions as domestic businesses without losing their legal personality. This mandatory recognition approach to the freedom of establishment is consistent with *Centros*.

The defendants also encouraged the court to follow its precedent in the *Daily Mail* case, which restricts the application of the freedom of establishment to companies. In *Daily Mail*, the court plainly stated that the freedom of establishment does not extend to the transfer of a company's seat.<sup>162</sup> In *Überseering*,

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155. *Id.* at para. 26.

156. *Id.* Spain also argues that the "General Programme for the abolition of restrictions on the freedom of establishment, adopted in Brussels on Dec. 18, 1961," mentions that companies should have a continuous link with the economy of a member state in order to take advantage of the abolitions of restrictions on freedom of establishment. *Id.* at paras. 33, 34. The court holds that this requirement only applies to companies that do not have a link to the EU. *Id.* at para. 74.

157. *Id.* at para. 60 ("It is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC.").

158. *Id.* at para. 37.

159. *Id.* at paras. 54, 55, 56, 98.

160. *Id.* at para. 54.

161. *Id.* at para. 56.

162. *Id.* at para. 24.

the court distinguished *Daily Mail* because that case “concerned relations between a company and the Member State under whose laws it had been incorporated” and “the present case concerns the recognition by one Member State of a company incorporated under the law of another Member State.”<sup>163</sup> Also, it noted that *Daily Mail* was not a case about the denial of a company’s legal personality. Therefore, *Daily Mail* is still good law when applied to a company and its home state, but not when applied to a company and a foreign state.<sup>164</sup>

Finally, the defendants argued that the restrictions on *Überseering* were justified by the need to protect third parties through German labor law, tax law, minimum capital law, and private company law.<sup>165</sup> While the court gave a nod to these interests, it concluded that none of them outweighed the fundamental right of recognition provided for by the freedom of establishment.<sup>166</sup> The court also noted that “it is not certain that requirements associated with a minimum amount of share capital are an effective way of protecting creditors,” and German capital laws are, “in some respects less strict” than those in other states.<sup>167</sup> However, the decision concedes that in some instances laws that protect the “general good” could justify a restriction on a corporation’s the freedom of establishment.<sup>168</sup>

### III. EFFECTS AND ANALYSIS OF *ÜBERSEERING*

#### *A. The Practical Effects of Überseering on SE’s and Domestic Companies*

In *Überseering*, the court expanded *Centros* by once again finding that the freedom of establishment preempts state con-

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163. *Id.* at para. 62.

164. *Id.* at para. 62.

165. *Id.* at paras. 87-90.

166. *Überseering*, [2002] E.C.R. I-9919, paras. 36, 92, 93. *See also* *Centros*, [1999] E.C.R. I-1459, para. 37 (the laws must “be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest” [of society], “they must not go beyond what is necessary” and they must “be suitable for securing the attainment of the objective which they pursue”).

167. *Überseering*, [2002] E.C.R. I-9919, paras. 87, 91.

168. *Id.* at para. 92.

flict of laws theories.<sup>169</sup> Before *Überseering*, many scholars believed that the freedom of establishment only preempted laws that applied to a company's secondary establishment.<sup>170</sup> The *Überseering* court did not view the freedom of establishment in such narrow terms. It held that "Article 48 provides for the progressive abolition of restrictions on the freedom of establishment of individuals,"<sup>171</sup> and companies, not just their subsidiaries, are to be treated the same as individuals.<sup>172</sup> However, the holding is ambiguous when applied to companies that are registered in "real seat" states. Also, the combination of the *Überseering* holding and the SE statute presents new questions.<sup>173</sup>

### 1. Moving From a "Place of Incorporation" State to Another "Place of Incorporation" State

Prior to *Überseering*, a company from a "place of incorporation" state could move its center of administration to another "place of incorporation" state and the new state would recognize the company as a legal entity.<sup>174</sup> The *Überseering* decision does not change this result, but it does confirm the assertion in *Centros* that "it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even taxation authorities may, in certain circumstances and

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169. See generally Dominic E. Robertson, *Überseering, Nailing the Coffin on Sitztheorie?*, 24 THE COMPANY LAWYER 184 (2003) (arguing that the *Überseering* decision supports an expansive view of the freedom of establishment and narrows the validity of the "real seat" doctrine).

170. Ebke, *Centros Mysteries*, *supra* note 33, at 654.

171. VILLIERS, *supra* note 16, at 18.

172. *Überseering*, [2002] E.C.R. I-9919, para. 56.

173. See Wymeersch, *supra* note 23, at 31. See also Jamie Dorman Storey, *The European Company Statute: The Vision v. The Reality and the Challenges Lying Ahead*, at 7 (Leiden University, The Netherlands, Working Paper, 2002), available at [http://www.juridix.net/eu\\_soc/essay3\\_se.htm](http://www.juridix.net/eu_soc/essay3_se.htm) (last visited Sept. 27, 2004).

174. Ebke, *The "Real Seat" Doctrine*, *supra* note 27, at 36. But see Dammann, *Corporations Free Choice*, *supra* note 37, at 19. Some states, even those that adhere strictly to the place of incorporation doctrine do not allow corporations to change their "statutory domicile and retain their legal personality." *Id.* This is probably because the states do not want to forgo tax collection.

subject to certain conditions, justify restrictions on the freedom of establishment<sup>175</sup> so long as the restrictions do not negate the freedom of establishment.<sup>176</sup> Presumably, a host state could impose special guarantees for creditors<sup>177</sup> or special capital regulations<sup>178</sup> on foreign companies, but it cannot require companies to reincorporate as a prerequisite to recognition.<sup>179</sup> Companies would be wise to consider the possible range of requirements that may fall under the “general good” exception before moving to a new state.<sup>180</sup> For example, after the decision in *Centros*, the Danish government imposed a tax requirement on foreign companies in lieu of a minimum capital requirement.<sup>181</sup> Likewise, Germany still may find a way to require labor participation in foreign companies that are doing business in Germany without offending the freedom of establishment.<sup>182</sup>

However, in the recent *Inspire Art*<sup>183</sup> case, the ECJ gave a strict interpretation to the “general good” exception. This strict interpretation, along with the court’s refusal to apply the “general good” exception in *Überseering*, may indicate a high bar for the application of the exception. In *Inspire Art*, a pseudo-foreign company that was registered in the U.K. and operating in the Netherlands<sup>184</sup> argued that aggressive Dutch laws demanding additional requirements for foreign corporations<sup>185</sup> en-

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175. *Überseering*, [2002] E.C.R. I-9919, para. 92.

176. *Id.* at para. 81.

177. *Centros*, [1999] E.C.R. I-1459, para. 21.

178. *See Roth*, *supra* note 34, at 201.

179. *Überseering*, [2002] E.C.R. I-9919, para. 81.

180. *Wymeersch*, *supra* note 23, at 26.

181. *Kersting*, *supra* note 24, at 63 (“In a reaction to *Centros*, Denmark has enacted a tax law that requires foreign corporations to put up a guarantee,” which is “the equivalent of the minimum capital requirement.”).

182. *Id.*

183. *See Inspire Art*, [2003] ECJ CELEX LEXIS 444.

184. *Id.* at paras. 34, 35.

185. *Id.* at paras. 23-28. Dutch law imposes special requirements on formally foreign companies: companies who are registered outside of the Netherlands, but conduct *no* business in their state of registration. The requirements include “various obligations concerning the company’s registration in the commercial register, an indication of that status in all the documents produced by it, the minimum share capital and the drawing-up, production and publication of the annual documents.” *Id.* The law also imposes “penalties in case of non-compliance with those provisions.” *Id.* at para. 23. The law also states that “directors [are] to be jointly and severally liable with the company for legal acts carried out in the name of the company during their directorship

croached upon the freedom of establishment because they imposed obligations on foreign companies that “render the right of establishment markedly less attractive for those companies.”<sup>186</sup> In its response, the Netherlands claimed that extra requirements for foreign corporations were justified because of “overriding reasons related to the public interest” such as “counter[ing] fraud, protect[ing] creditors and ensur[ing] that tax inspections are effective and that business dealings are fair.”<sup>187</sup> In this case, the court found that the extra requirements imposed by the Netherlands were discriminatory.<sup>188</sup> It held that if national laws treat foreign companies differently from national companies, then those laws are contrary to EC law.<sup>189</sup> Thus, *Inspire Art* and *Überseering* maintain that a “general good” exception exists, but exceptions that are discriminatory or unduly burdensome violate the freedom of establishment.

## 2. Moving From a “Place of Incorporation” State to a “Real Seat” State

Prior to *Überseering*, if a company moved its center of administration from a “place of incorporation” state to a “real seat” state, the “real seat” state would refuse to recognize the company. The court attacked this result and held that denying recognition in such a case would offend the freedom of estab-

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until the requirement of registration in the commercial register has been fulfilled.” *Id.* at para. 25. In addition, the law requires that “it [is] to be indicated that the company is formally foreign and prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person.” *Id.* at para. 26. Moreover, the law says, “the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies.” *Id.* at para. 27. And it requires that “until the conditions relating to capital and paid-up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their directorship which are binding on the company.” *Id.* “The directors of a formally foreign company are likewise jointly and severally responsible for the company’s acts if the capital subscribed and paid-up falls below the minimum required, having originally satisfied the minimum capital requirement...” *Id.* at para. 28.

186. *Id.* at para. 90.

187. *Id.* at para. 109.

188. *Id.* at paras. 127, 128.

189. *Id.* at para. 64.

lishment.<sup>190</sup> However, crucial questions about such a move still remain. For example, the court requires that a “real seat” host state recognize a European foreign company in its territory. But, the court does not specify whether the host state must apply internal affairs law from the state of registration. Thus, it is still unclear how far the host state must go in recognizing the legal personality of the company<sup>191</sup> or whether current case law, taken as a whole, sufficiently requires member states to apply the law of a corporation’s place of registration.<sup>192</sup> In *Überseering*, the court stated that “[t]he location of the[] registered office, central administration or principal place of business constitutes the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person.”<sup>193</sup> Of course states will likely want to assert their own laws wherever possible.<sup>194</sup> However, it is unclear if a member state can refuse to apply the laws of the place of incorporation without offending the freedom of establishment.<sup>195</sup>

Apart from offending the EC Treaty, the possibility that a host state will apply its own law to the internal affairs of a foreign corporation gives rise to practical considerations. If the laws of the original state of registration do not apply to a company residing in a host state, complicated *res judicata* situations could occur if internal affairs issues are adjudicated in both the home and host state.<sup>196</sup> Presumably, these inconsistencies will give rise to burdensome legal expenses and come as a surprise to creditors. This is especially true in a case like *Überseering*, where there is no indication that the plaintiff intentionally moved its center of administration to Germany, or that other member states would consider *Überseering*’s actions a

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190. *Überseering*, [2002] E.C.R. I-9919, para. 82.

191. Luca Cerioni, *The Überseering Ruling: The Eve of a “Revolution” for the Possibilities of Companies’ Migration Throughout the European Community?*, 10 COLUM. J. EUR. L. 117, 125–27 (2003).

192. Dammann, *Corporations Free Choice*, *supra* note 37, at 15.

193. *Id.* at para. 57. *But see* High Level Group Report, *supra* note 8, at 106. Third states are likely not to be involved in the transfer of the seat, but if they are, they should apply the law of the state of incorporation. *Id.*

194. Dammann, *Corporations Free Choice*, *supra* note 37, at 15.

195. Cerioni, *supra* note 191, at 125–27.

196. Ebke, *Centros Mysteries*, *supra* note 33, at 654.

transfer of its seat.<sup>197</sup> In *Überseering*, the EFTA persuasively argued that:

the refusal to recognise *Überseering*'s right to be a party to legal proceedings in Germany by reason of the apparently unsolicited transfer of its actual centre of administration to Germany is indicative of the *lack of certainty* which may be caused in cross-border transactions when the *different private international law rules of the Member States are applied*. Since characterization as a company's actual centre of administration turns, to a large extent, on the *facts*, it is always possible that different national legal systems and, within them, different courts may have divergent views on what is an actual centre of administration. Moreover, it is increasingly difficult to identify a company's actual centre of administration in an international, computerized economy, in which the physical presence of decision-makers becomes increasingly unnecessary.<sup>198</sup>

The EFTA poses a valid issue unsolved by *Überseering*. Under current case law, the issue of "legal personality" and applicable law appear to be at the discretion of the member states so long as states do not negate the freedom of establishment in their interpretation.

### 3. Moving Out of a "Real Seat" State and Into Either a "Place of Incorporation" State or a "Real Seat" State

When a company wants to move its center of administration out of a "real seat" state and into another state, *Überseering* requires the new state to recognize the company. However, the holding does not guarantee a company's ability to move from its original state without permission.<sup>199</sup> Even in the recent *Inspire Art* case, the court continued to distinguish the company-host state relationship interpreted in *Centros*, *Überseering* and *Inspire Art*, and the company-home state relationship interpreted in *Daily Mail*.<sup>200</sup> Writers in this area question the fairness of

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197. *Überseering*, [2002] E.C.R. I-9919, para. 63 ("Überseering never gave any indication that it intended to transfer its seat to Germany.").

198. *Id.* at para. 51 (emphasis added).

199. Wymeersch, *supra* note 23, at 10, 11 ("In Germany, and according to some legal writers in France as well, the emigration results in the company being completely dissolved.").

200. *See Inspire Art*, [2003] ECJ CELEX LEXIS 444, para. 103.

granting EC companies the freedom to immigrate to a new member state, without granting them the broad right to emigrate from their home state.<sup>201</sup>

One scholar suggested that the four-part ‘necessity test’ in *Centros* be used to evaluate state restrictions on the emigration of domestic companies.<sup>202</sup> This proposal is reasonable because it takes into account the valid concerns states may have about companies moving and failing to settle with creditors or tax authorities.<sup>203</sup> However, under current EC law, member states can trap domestic companies that want to move out of their territory without justification. Whether the denial of the right to *emigrate* is a negation of the freedom of establishment will have to be considered in future decisions.

#### 4. Moving with the SE Form

*Überseering* is, in some ways, inconsistent with the SE statute. On one hand, *Überseering* requires a host state to recognize a European company operating within its borders even if the company is incorporated in another state.<sup>204</sup> That requirement follows a “place of incorporation” approach, although it does not endorse all elements of the “place of incorporation” doctrine.<sup>205</sup> On the other hand, the SE statute requires the SE to register in the state of its headquarters, which is synonymous with the “real seat” doctrine.<sup>206</sup> Therefore, if a SE moves its headquarters from one state to another without reregistering in the new state, the *Überseering* court would require recognition under the freedom of establishment,<sup>207</sup> but the SE statute would impose sanctions such as dissolution.<sup>208</sup> The introduction of the SE and the decision in the *Überseering* case were nearly con-

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201. See Roth, *supra* note 34, at 206. See also Wymeersch, *supra* note 23, at 10.

202. Wymeersch, *supra* note 23, at 28–29.

203. *Id.*

204. *Überseering*, [2002] E.C.R. I-9919, para 82.

205. Enriques, *Arbitrage*, *supra* note 90, at 6. See *infra* Part III B (1) of this Note.

206. Lombardo and Pasotti, *supra* note 59, at 10 (“Article 7 SE-Reg. makes a clear choice in favor of the real seat theory as the conflict of law rule to be applied to European Companies registered in the Member States.”).

207. *Id.* at para. 81.

208. SE Statute, *supra* note 21, art. 8. If the company fails to register in the state where it has its real seat, it could be dissolved. *Id.* at art. 64.

temporaneous,<sup>209</sup> therefore a practical application of both regimes is probably necessary to see if this conflict is of any consequence.

Despite inconsistencies with each other, both the SE statute and the *Überseering* holding are beneficial. Some companies may decide that although *Überseering* facilitates mobility for domestic companies, the SE statute is beneficial because its *renvoi* technique to national law provides clarity as to what law applies to the entity's internal affairs.<sup>210</sup> Also, because the SE statute is the result of a political compromise, states are less likely to disfavor SE's.<sup>211</sup> *Inspire Art* provides an illustration of the types of laws that member states pass to restrain disfavored types of foreign corporations. However, since *Überseering* was couched in constitutional terms, the SE statute's registration requirement may turn out to be an anomaly.<sup>212</sup>

### B. Analysis

#### 1. The "Real Seat" Doctrine in the Wake of *Überseering*

Some academics view the *Überseering* decision as a clear message that the "real seat" doctrine is preempted by the freedom of establishment.<sup>213</sup> Authors went so far as to say that the whole idea of a "real seat" or "center of administration" is outdated in today's world of modern technology and superior communication.<sup>214</sup> These conclusions stem logically from *Überseering* because the court ignored German conflict of laws rules stemming from the "real seat" doctrine and because *Überseering's* center of administration was ubiquitous.<sup>215</sup>

However, it is unlikely that the *Überseering* decision is broad enough to eradicate the "real seat" doctrine completely. First, the *Überseering* decision does not allow companies the freedom to move out of their home state. Thus, the free movement asso-

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209. The SE statute was adopted at the end of 2001 and the *Überseering* decision was published in June 2002.

210. Enriques, *Arbitrage*, *supra* note 90, at 10.

211. Lombardo and Pasotti, *supra* note 59, at 8.

212. *Id.* at 12.

213. See, e.g., Dammann, *Corporations Free Choice*, *supra* note 37, at 6.

214. Enriques, *supra* note 90, at 6. See also *Überseering*, [2002] E.C.R. I-9919, para. 51.

215. *Überseering*, [2002] E.C.R. I-9919, para. 63.

ciated with the “place of incorporation” doctrine is still unrealized for many EC companies.<sup>216</sup> Second, the decision does not go so far as to suggest that the use of a “territorial” or “real seat” approach is inappropriate in all circumstances. On the contrary, it signals that either the “location of the[] registered office, central administration or principal place of business” *could* connect a company to a legal system.<sup>217</sup> Moreover, the recent SE Statute, and even the defeated Draft 14<sup>th</sup> directive, endorse some aspects of the “real seat” doctrine.<sup>218</sup> Thus, it cannot be concluded that the *Überseering* decision marks the end of the “real seat” doctrine altogether.

## 2. Forum-Shopping and Arbitrage After *Überseering*

The right to move corporate headquarters or set up a branch in any EC state could cause companies to forum-shop for corporate charters,<sup>219</sup> favorable tax regimes or mobility. Scholars

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216. See Roth, *supra* note 34, at 207 (“It is to be deplored that the Court goes only half the way: The judgment is a disappointment as to the issue of moving out.”). See also Wymeersch, *supra* note 23, at 18 (“The court’s reasoning leaves substantial uneasiness: the argument that freedom of establishment related only to immigration, but leaves the states free to deal with emigration... is rather theoretical and leaves reality aside.”). See also Cerioni, *supra* note 191, at 129. That author states that:

The Court has adopted an halfway approach towards the acceptance of the incorporation system, because this system can be regarded as recognized to be the general rule *just from the point of view of the host Member State* but not from the point of view of the State in which a company is formed and from which this company may wish to migrate. (emphasis in original).

*Id.*

217. *Überseering*, [2002] E.C.R. I-9919, para 57.

218. Lombardo and Pasotti, *Network Economics Approach*, *supra* note 59, at 10. Also, because the *Überseering* decision goes beyond the rights of mobility granted by the legislative body, it may prompt new legislation that protects the “real seat” doctrine.

219. See Dammann, *Corporations Free Choice*, *supra* note 37, at 6–7. See also Cerioni, *supra* note 191, at 129. According to Cerioni:

Second, and as a result, the present state of national company laws after the *Überseering* ruling EC law may essentially offer new opportunities for intra-EC ‘migration’ to those companies formed in countries adopting the incorporation system. In principle, these companies are not prevented from moving their ‘primary establishment’ abroad and, for this reason, could add a new dimension to their ‘fo-

speculate that the *Überseering* decision pushes Europe further towards a regime of free choice in the adoption of corporate charters, although scholars disagree as to whether this phenomenon will cause a negative race-to-the-bottom or a positive race-to-the-top for corporate charters.<sup>220</sup> Scholars also speculate that the *Überseering* decision will prompt existing companies to move their headquarters to host states with the most favorable tax regime.<sup>221</sup> This Note proposes, in addition, that companies will consider forum-shopping for mobility. If a company registers in a state that allows domestic companies to move out, then the company can later relocate for better proximity to labor or natural resources, or to alter its tax regime. Being able to make this type of move is particularly important in the EC context, because the internal market is expanding, and in the future, tax incentives and inexpensive labor or resources may be located in a state that is not even a member of the EC today.

Moreover, as one scholar pointed out “The Member States adopting the incorporation system tend to be—within the EC—the States characterized by a tradition of liberal company law and, at the same time, by the most favorable tax regimes in various respects.”<sup>222</sup> Thus, it is possible that the increased mobility will cause companies to migrate toward liberal states, and cause states that prohibit emigration, impose high taxes, and inflict tough, conservative corporate laws to become more competitive.

### 3. The Result

Although the *Überseering* decision does not dispose of the “real seat” doctrine or give clear rules for corporate mobility, the result is proper considering the goal of a common market, the spirit of compromise within the Union, and the narrow question presented to the court. Corporations are a major force in the

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rum-shopping’ practices involving both the company law and the corporate taxation aspects.

*Id.*

220. *See supra* note 44 and accompanying text.

221. Cerioni, *supra* note 191, at 130, 139 (arguing that companies will try to register so that their places of incorporation are in a states with favorable company laws and their headquarters are in states where taxes are favorable).

222. *Id.*

European economy, and true integration cannot be achieved when companies are denied recognition. However, the court in *Überseering* was not well positioned to solve deep-rooted differences in corporate and conflict of laws doctrines within the European Community. Thus, many questions are left open after the decision.

This Note asserts that *Überseering*, whether intentionally or not, applies the freedom of establishment in a way most beneficial to new companies. This is a positive result because new companies are the very entities that are excluded from the SE statute.<sup>223</sup> Before *Überseering*, a new company that wanted to move its headquarters out of a “real seat” state would have to wait until it had the capital and interstate connections to become a SE.<sup>224</sup> New companies now have another option that old companies, already established in states that restrict emigration, do not have. Based on *Centros*, new entities in “real seat” states can register shell corporations in “place of incorporation” states merely to reap the benefits of the foreign legal regime.<sup>225</sup> After *Überseering*, it is apparent that a company can register a shell corporation in a “place of incorporation” state, set up its headquarters in any state, and move its headquarters to any state.<sup>226</sup> Hence, new companies in “real seat” states will be inclined to register in a member state that permits mobility and emigration of domestic corporations. Without this option, many new companies would be left to register in “real seat” states that will not allow them to move out, even if such a move became economically beneficial. *Überseering* allows new companies to forum-shop for mobility and later move their headquarters to a state with the labor resources, natural resources, consumer markets, tax regime, and/or corporate regulations necessary to ensure continued success in the ever-expanding and ever-changing European marketplace.

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223. High Level Group Report, *supra* note 8, at 114.

224. SE Statute, *supra* note 21, at arts. 4(2), 17, 32, 35, 36, 37.

225. *Centros*, [1999] E.C.R. I-1459, para. 39. *See also* *Überseering*, [2002] E.C.R. I-9919, ruling 1.

226. *But see* Roth, *supra* note 34, at 208 (It is unclear if the “law stands on equal footing with regard to the formation of companies.”). *Id.* at 208.

## IV. CONCLUSION

Unless a European directive is adopted, different national systems of corporate recognition will persist in Europe. Both theories of corporate recognition discussed in this Note have benefits. However, the “place of incorporation” doctrine coexists best with the goal of a single European market because it recognizes foreign companies and the laws that govern their internal affairs and it allows companies to move to a new state. Nonetheless, various European member states prefer the “real seat” doctrine because it gives them control over the legal entities in their territory.

Moreover, both of these national systems of corporate recognition are being chipped away by the decisions of the European Court of Justice and by new statutes and directives. Presently, a hybrid system of recognition exists in Europe. It consists of national rules, EC rules, and a somewhat substantial zone of ambiguity between the two regimes. The *Überseering* decision is important because it sends a clear message that ambiguities will be resolved in favor of the Community and the single market.

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