Freedom of Establishment and the Effective Participation of Companies in Economic Life

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‘For business purposes the boundaries that separate one nation from another are no more real than the equator. They are merely convenient demarcations of ethnic, linguistic and cultural entities.’

KEY WORDS
European corporate law; freedom of establishment; internal market; mobility of companies.

ABSTRACT
Though the freedom of establishment has its roots in the provisions of the Treaty of Rome, it is the work of the Court of Justice of the European Union (the Court) that has been instrumental in the evolution of this freedom.

In a succession of cases, the Court has transformed this otherwise largely theoretical concept into a functional tool responsive to the needs of business. By so doing, the Court has transformed this freedom into one that is attractive not only to businesses based in the European Union (EU) but also to those based outside it.

This paper starts off with a look at the scope of this freedom and its evolution as a consequence of the work of the Court (part I) before proceeding to look at the restraints (substantive and practical) on this freedom (part II).

INTRODUCTION
One of the most important freedoms from the point of view of companies, besides the free movement of goods, capital and persons and the freedom to provide services, the freedom of establishment is a necessary corollary to the fundamental freedoms of the internal market and an essential component element of the legal order in the EU.

Central to the elimination of national barriers – put into place by Member States or resulting from the different regulatory systems found in the various Member States - this freedom sets out to create a ‘European’ space within which companies can participate in economic life fully and effectively, enjoying those freedoms and rights which are essential to their viability and their ability to compete, namely the ‘free movement of goods, services, capital and business life in general’ as well as ‘the general right to create permanent institutions necessary for the independent operation of business activities and, in particular, the right to set up corporations.’

Guaranteed as a fundamental right, this freedom is intended to attain a number of divergent objectives.

It aims to facilitate and encourage cross-border business activity within the EU, to promote inward investment therein and to enhance market access through the creation of ‘a single European market, with regard to the conditions to take up and pursue an economic activity on that market’. This state of affairs in turn permits the EU to compete more effectively in the globalised economy against other jurisdictions, whilst simultaneously improving the competitiveness of EU-based businesses on the global marketplace.

In order to achieve these objectives, the freedom of establishment sets out to generate the needed prerequisite for a free and economic choice of location, by removing the barriers that nations consciously erect in order to hinder foreign investment by nationals and companies based and/or operating in other Member States and (to a degree alongside the harmonisation of domestic
company law) the hindrances that exist due to the presence of different regulatory systems in the various Member States that result primarily from the different theories adopted by them in the context of corporate law.

The freedom of establishment, coupled with the freedom to provide services and the free movement of capital, sets out to place ‘natural persons and companies of other Member States in the same position as their own nationals and their own companies by establishing the same rights’. 

In a broader sense, this freedom intends to advance the objective of a more effective utilisation of available resources in an enlarged market, notably through industrial specialisation.

PART I – SCOPE OF THE FREEDOM OF ESTABLISHMENT

Governed by provisions of the Treaties as supplemented by the case law of the Court, the freedom of establishment is presently addressed in Articles 49 to 55 of the Treaty on the Functioning of the European Union (TFEU).

The use of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, including the use of impediments on the ability to set-up an agency, branch or subsidiary by nationals of any Member State established in the territory of any Member State, is prohibited under Article 49 TFEU.

According to Article 54 TFEU, companies or firms established under the laws of a Member State with a registered office, central administration or principal place of business within the Union are entitled to receive the same treatment as natural persons who are nationals of Member States. This Article effectively imposes an obligation on each Member State to extend a company or firm, formed in line with the laws of another Member State and with a permanent presence in the EU, the same treatment extended to natural persons who are nationals of Member States.

This freedom, it has been said, covers entities that enjoy separate legal personality as well as partnerships formed under the national laws of a Member State that do not necessary enjoy separate legal personality.

Though the existence of a company is still a matter that is left for determination by the national laws of the individual Member States, once the company comes into existence, the provisions governing freedom of establishment confer certain rights upon it. In contrast with natural persons, companies are creatures of the law and in the absence of European law on this matter, such companies are creatures of national law. As such they exist only by dint of ‘the varying national legislation which determines their incorporation and functioning’.

I. MULTIFACETED IMPACT OF THE FREEDOM OF ESTABLISHMENT

The freedom of establishment is multifaceted in its impact. Beyond the fact that this freedom benefits natural and legal persons alike, it imposes prohibitions on Member States which in turn benefit nationals of the various Member States, whilst at the same time bestowing rights on the same nationals.

In the first place, this freedom prohibits the use of certain restrictions: firstly, on the freedom of establishment of nationals of a Member State in the territory of another Member State, and secondly, on the creation of agencies, branches and subsidiaries by nationals of a Member State established in the territory of another Member State.

Agencies, branches, or subsidiaries are examples of secondary establishments that companies established in one Member State are permitted to create in another Member State.
It has been argued that this list of secondary establishments is by no means limited to agencies, branches and subsidiaries. A fact supported by the decision in the case Commission v Germany, in which the Court states that in order to come within the scope of the right of establishment it is sufficient for there to be a permanent presence by an undertaking of one Member State in another Member State, even if this presence ‘does not take the form of a branch or agency, but consists merely of an office managed by the undertaking’s own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking.’

A representative office of a permanent nature is arguably capable of falling within the scope of the provisions of the Treaty on the right of establishment, whether the office is overseen by staff of the undertaking or by persons who though independent of it are permitted to act on a permanent basis for it (for example a distributor exclusive or otherwise).

Whilst the terms ‘agency’, ‘branch’ and ‘subsidiary’ are not defined, some guidance is given on the first two terms in the case law of the Court.

Though no guidance is given by the Court on the third term (‘subsidiary’), Professor Edwards argues that ‘effective control may be thought to be a sensible yardstick’ when making a determination as to whether an undertaking is indeed a subsidiary.

In the second place, this freedom extends certain rights to nationals of other Member States. These rights fall into two categories.

In the first category are the rights that result from the aforementioned prohibitions (‘default rights’). In the second category are those rights that are directly granted to nationals of the Member States by the provisions governing freedom of establishment (‘direct rights’).

A. Default Rights

The aforementioned prohibitions confer a general right to create permanent establishments necessary for the independent operation of business activities by nationals of a Member State (home Member State) in the territory of another Member State (host Member State or target Member State) in particular the right to set-up companies, agencies, branches and subsidiaries.

B. Direct Rights

The rights in the second of the two categories are rooted in the need to create a space within which entities (natural and legal) enjoy an equality of competitive conditions. This is achieved by ensuring that Member States extend the same conditions to foreign entities (natural or legal) that they would extend to their own nationals (the principle of equal treatment).

This notion can arguably be likened to the principle of national treatment enshrined in international trade treaties such as the General Agreement on Tariffs and Trade (GATT agreement) and the North American Free Trade Agreement (NAFTA agreement).

The first of the rights in the second category is the initial right to take-up activities as self-employed persons, whilst the second right in the same category is the right to pursue such activities. Both rights (the right to take-up activities and pursue such activities) must take place under the same conditions put into place by the host Member State for its own nationals.

The third of the rights in the second category is the right to set-up an undertaking in any Member State, including but not limited to companies or firms, whilst the fourth right in this category is the right to manage such undertakings in the host Member State. Once again both rights (the right to set-up and manage an undertaking) must take place under the same conditions put into place by the host Member State for its own nationals.

II. THE WORK OF THE COURT IN WIDENING THE SCOPE OF THIS FREEDOM

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When looking at the development of the freedom of establishment, one cannot ignore the pioneering spirit of the Court.

Using the preliminary referral procedure, the Court has been able to effectively extend the remit of this freedom, in ways that were arguably not provided for in the provisions of the Treaties (principally the Treaty of Rome now the TFEU) and in ways that the European legislature has not been able to provide for and is probably not going to be able to provide for.

Building around the provisions governing the freedom of establishment (primarily articulated in the Treaty of Rome), the Court has developed the scope of this freedom, relatively unhindered by the political constraints that impede the European legislature.xlii

For a number of reasons, the Court is a unique position that enables it to act in ways that the legislature is not able to.

Firstly, much of its power as a Court is rooted in its autonomy, which results from ‘the separation of law and politics and the inherent legitimacy of courts as legal actors’.xliii

Secondly, its legitimacy as an institution means that its decisions and the ideas on which these decisions are based are more easily accepted by society at large and policy-makers.

Speaking generally of courts and the judiciary, Professor Renaud Dehousse states that whilst the capacity to innovate is not in itself sufficient to ensure the successful acceptance of the ideas formulated: the necessity still remains of ensuring that these ideas are adopted by society at large or at least by the policy-makers. Judicial organs are ideally equipped for this task. Their traditional role as interpreters of the law serves to confer on their judgements a unique authority. Courts, unlike policy entrepreneurs, do not propose a range of possible options: they state the law. On occasion, this authority allows them to successfully introduce notions which would be difficult for any other actor to impose.xliv

Due to these unique features, recourse to the Court in general has become part of the political game, argues Professor Dehousse.xlv The legitimacy of the Court has and is aptly used by the Commission, states Professor Dehousse, weary of the member states’ procrastinations.xlvi

Notwithstanding the Court’s campaign to widen the scope of application of the freedom of establishment and in the process to enhance integration within the EU (‘the push force’), this freedom has not been without the occasional retreat and retraction as the freedom is effectively contained by the Court (‘the pullback’).xlvi

The Court’s campaign to widen this freedom’s scope of application and to enhance European integration in the process (‘the push force’) is principally exemplified in the Centros’ trilogy of cases (the cases of Centros, Überseering and Inspire Art), whilst the pullback is exemplified in cases such as Daily Mail and Cartesio.xlvii

Through its rulings, the Court has made efforts to extend the reach of the freedom of establishment, by applying the freedom in situations that were arguably not foreseen by the drafters of the Treaty of Rome.

A. Centros -

The Freedom of Secondary Establishment

The founders of Centros (both Danish nationals) decide to incorporate under English law in order to avoid the Danish requirement of minimum capitalisation. Under English law, there is no minimum
share capital for limited liability companies. Post-incorporation, the founders of Centros seek to conduct their business in Denmark using a branch established for that purpose in Denmark.

The Danish government refuses to recognise the branch of the UK-based company in Denmark, arguing that this set-up was an egregious abuse of the freedom of establishment as it was done for the sole purpose of evading the requirements of Danish law.

Centros challenges the refusal to register its branch before the Ostre Landsret (which upholds the refusal) and then before the Hojesteret on the grounds that under UK law it had been lawfully formed and as such had a right to establish a branch in Denmark.

On referral the Court accepts that this scenario – a company formed in line with the law of a Member State in which it had a registered office (England) intends to set up a branch in another Member State (Denmark) - falls squarely within the scope of Community law (as it was at the time of the decision), even though the company has incorporated in the first Member State only for the purpose of establishing itself in the second Member State where the entirety of its operations would be conducted.

Accepting of the fact that a Member State is entitled to adopt measures intended to prevent certain of its nationals from attempting to improperly circumvent national law (under the guise of the rights created by the Treaty) or preventing individuals from improperly or fraudulently taking advantage of the provisions of European law, the Court emphasises the importance of the underlying objectives pursued by the provisions on the freedom of establishment.

According to the Court, the provisions of the Treaty governing freedom of establishment intend to allow companies formed in line with the law of a Member State and having their registered office, central administration or principal place of business within the Union to pursue their activities in other Member States through an agency, branch or subsidiary.

The fact that a national of a Member State wishes to select a jurisdiction, in which to set up a company, with rules of company law which are the least restrictive and to then establish a branch or branches in another Member State, the Court states, cannot constitute an abuse of the right of establishment. From the point of view of the Court, the right that a company has to form in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise - in a single market - of the freedom of establishment guaranteed by the Treaty.

B. Überseering -

Mutual Recognition of Validly Incorporated Companies and Equality of Treatment

Pursuant to the German Code of Civil Procedure, any person (including a company) having legal capacity has the capacity to be a party to legal proceedings. An action must be dismissed as inadmissible if brought by a party lacking the capacity to bring legal proceedings.

According to settled case-law of the Bundesgerichtshof, the legal capacity of a company is decided by reference to the law applicable in the place where the actual centre of administration of the company is established (Sitztheorie or company seat principle). This rule also extends to situations where a company validly incorporated outside Germany has subsequently transferred its actual centre of administration to Germany. Since the legal capacity of a company is determined by reference to German law, unless a company has reincorporated in Germany in such a way as to obtain legal capacity under German law, the company can neither enjoy rights nor be the subject of obligations nor be a party to legal proceedings.

In the case at hand, Überseering (a company incorporated in the Netherlands) unsuccessfully sought compensation from a company incorporated in Germany (Nordic Construction Company Baumanagement GmbH) for defective work carried out by it for Überseering.
Überseering brought an action before the Landgericht (Regional Court), which subsequently dismissed Überseering’s action. On appeal, the Oberlandesgericht (Higher Regional Court) upheld the decision of the lower court and dismissed the action brought by Überseering, ruling that Überseering had transferred its *actual centre of administration* (to Düsseldorf) once its shares had been acquired by two German nationals. The Oberlandesgericht stated that, as a company incorporated under Netherlands law, Überseering did not have legal capacity under German law. Accordingly, the Oberlandesgericht ruled that Überseering could not bring legal proceedings in Germany.

On an appeal brought by Überseering to the Bundesgerichtshof, the latter stayed the case and referred the following question to the Court, where a company formed, in accordance with law of 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, do Articles 43 and 48 EC Treaty (now Articles 49 and 54 TFEU respectively) 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?

Though the Court in this case reserves certain matters to national company law, it admits that other matters fall within the scope of the freedom of establishment.

As to the question of how Member States deal with their own nationals especially as to whether or not legal personality is awarded, the Court states that it is for national law to determine if a given company type is to be regarded as a separate legal entity and hence a Community citizen. As such the question of whether or not an entity qualifies for EU privileges is left to the Member State itself.

Notwithstanding this, the Court states that a company that is validly incorporated in one Member State (here the Netherlands) and has its registered office there, is entitled under Articles 43 and 48 EC Treaty (now Articles 49 and 54 TFEU respectively) to exercise its freedom of establishment in another Member State (here Germany) as a company incorporated under Netherlands law. In this context, it is immaterial whether post-formation, all the shares of the company were bought by German nationals residing in Germany, as this did not have the effect of causing Überseering to cease to be a legal person under Netherlands law.

The ruling in Überseering establishes that notwithstanding the fact that there has been no harmonisation of the laws governing the connecting factor for incorporation, a company validly incorporated under the laws of one Member State (here the Netherlands), which then moves its *actual centre of administration* to another Member State (here Germany), must not be denied recognition as a legal entity by the latter Member State (here Germany).

The very existence of the company is inseparable from its status as a company incorporated under the law of a particular Member State. The requirement under German law that the same company reincorporate in Germany, state the Court, is tantamount to outright negation of freedom of establishment ... the refusal by a host Member State (‘B’) to recognise the legal capacity of a company formed in accordance with the law of another Member State (‘A’) in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

Whilst the Court recognises the need for legal certainty and states that the protection of the interests of creditors, minority shareholders, employees and even the tax authorities may, in certain
circumstances and subject to certain conditions, justify restrictions on the freedom of establishment,

it states that such objectives cannot justify denying 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.

C. Inspire Art

Application of the Laws in the Host Member State to a Company Formed under the Laws of Another

Member State

Reaffirming its ruling in Centros, the Court reiterates its view that an undertaking is allowed freedom

of secondary establishment in another Member State.

Under Dutch law, pseudo-foreign companies (companies having a foreign registered office but
conducting a majority of operations in the Netherlands) fall under a special regulatory regime under

the WFBV.

In this case, the company concerned (Inspire Art) is a company formed under the law of

England and Wales as a private company limited by shares with a registered office in the UK and a

sole director domiciled in the Netherlands who is authorised to act alone and independently in the

name of the company. Inspire Art is registered in the commercial register of the Chamber of

Commerce in the Netherlands without any indication of the fact that it is a formally foreign company

within the meaning of Article 1 WFBV.

As Inspire Art trades exclusively in the Netherlands, the Chamber of Commerce takes the

view that Inspire Art must note its status as a formally foreign company on the commercial register.

Accordingly the Chamber of Commerce applies to the Kantongerecht for an order that there should be

added to that company’s entry on the commercial register a note that it is a formally foreign company.

Such a registration would oblige Inspire Art to comply with additional requirements imposed by the

WFBV.

Inspire Art denies that its registration is incomplete arguing firstly that it does not fall foul of

the conditions set out in Article 1 WFBV and secondly that even if the Kantongerecht decides that it

meets these conditions, the WFBV violates Articles 43 and 48 EC Treaty (now Articles 49 and 54

TFEU respectively).

In its order the Kantongerecht states that Inspire Art is indeed a formally foreign company

within the meaning of Article 1 WFBV. In relation to the question of the compatibility of the WFBV

with Community law (as it was at the time) it decides to stay proceedings and refer certain questions

to the Court for a preliminary ruling. Inter alia it asks the Court to comment on whether Articles 43

and 48 EC Treaty (now Articles 49 and 54 TFEU) must be interpreted as precluding national

legislation (such as the WFBV) that attaches further conditions (in this case Articles 2 to 5 WFBV) to

the establishment in Member State (‘B’ here the Netherlands) of a branch of a company which has

been set up in another Member State (‘A’ here the UK) with the sole aim of securing certain benefits

which Member State A offers when compared to incorporation in Member State B, given that the rules

imposed under the laws of Member State B are far stricter than those applied in Member State A with

regards in particular to minimum capital and the paying up of shares. Put another way, the question

the Court is asked to comment on is whether a foreign company (formed in Member State A) setting

up a branch in Member State B can be subjected to further requirements under the laws of Member

State B just by virtue of the fact that it is a foreign company.

Repeating its earlier comments in Segers and Centros, the Court states that it is

irrelevant if a company is formed in one Member State (Member State A) only for the purpose of

establishing itself in a second Member State (Member State B) where it conducts the totality or a main

part of its business.
In reply to the aforementioned question (posed by the Kantongerecht), the Court states that the reasons for which a company chooses to be formed in a certain Member State (Member State A) have no bearing on the application of the rules governing the freedom of establishment, except where fraud exists.xlxxx

There is no abuse when a company is formed in a Member State (‘A’) ‘for the sole purpose of enjoying the benefit of more favourable legislation’ even if the company conducts the entirety or the main thrust of its activities in another Member State (‘B’) or carries on its business in another Member State (‘B’) using a branch. With this in mind, the Court states that even though Inspire Art is formed in the United Kingdom for the purpose of circumventing the stricter rules of Dutch company law, this does not mean that the establishment of a branch in the Netherlands, by Inspire Art, is not covered by the freedom of establishment.xxciv

Re-endorsing the notion of regulatory competition (first addressed in Centros), the Court states that it is inherent in the exercise of the freedom of establishment that a national of one Member State who wishes to form a company may select to do so in a Member State with company law rules which seem to him the least restrictive (Member State A) and then to create a branch or branches elsewhere in the EU. This is so even if the company does not conduct any business in the Member State in which it has its registered office (Member State A) instead pursuing its activities solely or mainly in the Member State where the branch is established (Member State B).xxxi

Nationality (in the case of a natural person) and the location of a registered office, central administration or principal place of business (in the case of a company) both serve as, what the Court terms, a connecting factor with the legal system of a particular Member State.xxcvii

The Court rejects the arguments that the freedom of establishment is not infringed by the WFBV (since foreign companies are in fact fully recognised in the Netherlands and are not refused registration in the business register of the Netherlands) and the WFBV simply lays down a number of supplementary (administrative) obligations. According to the Court, the impact of the WFBV is that Dutch company law rules are applied in a mandatory fashion to ‘foreign companies … when they carry on their activities exclusively, or almost exclusively, in the Netherlands.’ Legislation, such as the WFBV, that requires a branch of a foreign company (a company formed in line with the law of Member State A) to comply with the rules of the host Member State (Member State B), the Court remarks, effectively hinders the exercise by such companies of the freedom of establishment bestowed by the Treaty.xc

Addressing the argument – based on the Daily Mail case – that Member States are allowed to decide the law applicable to a company, in the absence of the harmonisation of the provisions of the private international law of the Member States, and retain the right to take action against, what the Court terms, brass-plate companies lacking any real connection with the State of formation, the Court states that the facts in present case can be distinguished from the facts in Daily Mail. Whilst Daily Mail concerns ‘relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation’, the present case concerns ‘whether the legislation of the State where a company actually carries on its activities applies to that company when it was formed under the law of another Member State.’

The Court states in conclusion that Articles 43 and 48 EC Treaty (Articles 49 and 54 TFEU) prohibit national legislation (such as the WFBV) which imposes certain conditions, provided for in national law, on the exercise of the freedom of secondary establishment in that Member State. The reasons for which the company is formed in Member State A and the fact that it carries on its activities exclusively or almost exclusively in Member State B do not deprive it of the right to invoke the freedom of establishment except when an abuse can be proven on a case-by-case basis.xcv
Though the Court accepts that derogations from the freedom of establishment – under Article 46 EC Treaty (now Article 52 TFEU) - are justifiable in certain situations, attempts by the Dutch government (in the present case) to justify the measures, the subject matter of this case, by arguing that they aim to protect creditors, combat improper recourse to the freedom of establishment and protect effective tax inspections and fairness in business dealings, are rejected by the Court.xcvi

PART II – RERAINTS ON THE FREEDOM OF ESTABLISHMENT

Certain substantive restraints exist that limit and confine the parameters of this freedom.

Not intended to be an absolute freedom, the freedom of establishment is qualified by a number of exceptions permitted by Article 52 TFEU.xcvi Beyond these exceptions, this freedom is also curtailed in a number of other ways. Such restraints result from the artificial nature of the corporate entity, the limited scope of the obligation contained in the Treaty, the persisting regulatory divergences, the presence of the establishment requirement and the different approaches adopted in the national jurisdictions making up the EU with regards to the recognition of legal personality.

Beyond these substantive restraints, this freedom is further curtailed by practical impediments linked to the legislative process, the assertion of national sovereignty and the self-restraint practiced by the Court.

I. SUBSTANTIVE RESTRAINTS

A. Artificial Nature of the Corporate Entity

The first constraint on the freedom of establishment is linked to the artificial nature of the corporate entity. Certain concepts that can be applied with relative ease to natural persons cannot be extended to legal persons in an identical manner and with the same level of facility. Due to the artificial nature of the corporate entity, it is difficult to simply project onto companies the same principles that one would utilise in relation to individuals.xcvi Freedom of establishment and freedom of mobility are two such examples.

As seen above, the freedom of establishment applies generally to nationals of a Member State, whether the nationals are natural persons or indeed legal ones.xcix Though the provisions governing the freedom of establishment set about assimilating the position of a legal person with that of a natural person, this is not always feasible in practice. If one were to try to extrapolate this aforementioned principle to corporate entities, one would expect that a corporate entity looking to establish itself in a Member State, other than the one in which it has been incorporated, either by transferring its operations there (primary establishment) or by setting up an agency, subsidiary or branch (secondary establishment) there, would meet with no resistance, as the prohibition on restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State would effectively require the removal of impediments on the right to establish a primary or secondary establishment.cii This is not however the case. The Court has taken a strict line when dealing with companies exiting their jurisdiction of origin (emigration) as demonstrated in the decisions in Daily Mailciii and Cartesiociv.

Another example relates to the freedom of mobility. Though afforded to a natural person, the freedom of mobility cannot be applied in exact the same way to a legal person. A natural person, who generally has an unequivocal nationality, can physically move across borders and is unlikely to be met by a refusal to recognise his legal existence.civ This is not always the case for legal persons. Whilst a legal person, for the sake of argument a company, may exist under the laws of one Member State, the company may be met by a refusal in another Member State to recognise its legal existence.

In the case of Überseering, the Court addresses the question of whether a Dutch company is a person having legal capacity under German law and as such the requisite capacity needed to become a
party to legal proceedings in the German courts. In this context, the Court states that notwithstanding the fact that there has been no harmonisation of the laws governing the connecting factor for incorporation, a company validly incorporated under the laws of one Member State which moves its actual centre of administration to another Member State must not be denied recognition as a legal entity by the latter Member State. The very existence of the company being inseparable from its status as a company incorporated under the law of a particular Member State.59

B. Limited Scope of the Obligation in the Treaty

A second potential constraint on the freedom of establishment relates to the scope of the obligation contained within Article 49 TFEU. Pursuant to this Article, the freedom of establishment includes ‘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 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected’.59 Member States are accordingly obliged to extend to foreign nationals (natural and legal persons) the freedom of establishment under the same conditions as those laid down by the law of the host Member State for its own nationals thereby ensuring an equality of competitive conditions.59

The difficulty here is that the conditions that are laid down by the laws of the host Member State for its own nationals may not necessarily be extrapolated with ease to foreign nationals. A dual burden could potentially emerge in such a scenario in the absence of the harmonisation of national corporate laws.

Firstly, nationals that already comply with existing laws of the host Member State will have a competitive edge vis-à-vis the incoming foreign national. Secondly, a foreign national may need to change its procedures and internal structures in order to comply with this separate and distinct set of laws imposed by the host Member State, which are different from the laws of its home Member State.

Taken together these two factors can arguably have a dampening effect on the integration process as a whole and more specifically on the freedom of establishment, whilst also undermining the ability of the EU to attract inward investment.

C. Regulatory Divergences

Divergences in the regulatory systems in the various Member States may mean that the foreign entity is less than free, bearing in mind the need of the foreign entity to comply with national rules in the target Member State.59

Such rules may lack in transparency. Their formulation may involve limited participation by foreign nationals and their application may be ambiguous. What is more compliance with such rules may mean the expenditure of time and money for an incoming foreign national looking to set up and run an establishment.

D. Establishment Requirement

The existence of the establishment requirement acts as a further constraint limiting the applicability of the freedom of establishment. In order to benefit from this freedom, the establishment requirement must be fulfilled. In this context, Articles 49 and 54 TFEU should be read alongside each other.

According to Article 49 TFEU to benefit from the prohibition on restrictions in the context of a secondary establishment there must exist an establishment in the territory of a Member State. This Article 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.’59
According to Article 54 TFEU, a Member State is only obliged to treat a company or firm in the same way as natural persons who are nationals of Member States if the company or firm is formed in accordance with the laws of a Member State and has a registered office, central administration or principal place of business in the EU. Article 54 TFEU reads ‘[c]ompanies 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 Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.’

Whilst the establishment requirement may not necessarily have a dampening effect on the expansion or relocation plans of an EU-based business, it is likely to limit the ability of the EU to attract inward investment from outside the EU. In turn adversely affecting the ability of the EU to compete against other jurisdictions for inward investment. The facility to relocate and expand operations throughout the EU is a factor that a foreign business will take into account when deciding whether or not to invest in the EU. The freedom of mobility and the freedom to expand one’s operations with facility are clear benefits for a business, which is able to save time and money, whilst minimising its exposure to risks.

E. Recognition of Legal Personality

Freedom of establishment can only really exist if ‘the legal personality of a corporation in a particular state is also recognized in other member States.’

This constraint on the freedom of establishment stems from the disparate approaches adopted by the various Member States with regards to the recognition of legal personality. Due to the lack of convergence between the Member States in this context, companies in the EU ‘face potentially conflicting conditions with respect to their freedom of movement, depending on the state in which the corporation was established and the state to which it intends to relocate.’

1. Enterprise versus legal entity

Two elements are central to the issue of the recognition of legal personality. Firstly the distinction drawn between an enterprise and a legal entity and secondly the relationship that each has with the nation-state. Due to the centrality of these elements, a short review of the same will follow.

The legal entity is ‘a creation of the law, that is, of a jurisdiction.’ For this reason, an obvious and indisputable legal nexus exists between the legal entity and its jurisdiction of incorporation. In other words ‘the jurisdiction which gives it existence.’

Notwithstanding this nexus, however, the legal entity may have a link to a jurisdiction, other than its jurisdiction of incorporation, in the event that ‘its human actors conduct activities there.’

The enterprise utilises legal entities as its legal representation, as such it may have real-world links to multiple jurisdictions. Such links may come about as a result of its business activities and diverse business interests. An enterprise is ‘essentially non-national’ and is ‘only artificially definable by reference to a nation-state. As the privatising governments of the Thatcher era discovered, in a globalised world without foreign exchange, ownership, or management restrictions, capital has neither nationality nor passport, and management can be of any nationality, as can employees.

Enterprises may in theory select their incorporation law and in turn the degree of control exercised by the jurisdiction of incorporation, so long as the host jurisdiction is prepared to permit them to incorporate there.

2. The relationship of the enterprise and the legal entity with the nation-state
The fact that an enterprise is non-national and a legal entity is national poses a problem from a regulatory vantage point. Corporate regulation is largely national in origin, argue Foster and Ball, varying quite significantly from one jurisdiction to another. Notwithstanding this fact, two distinct regimes emerge in this context each sharing certain key traits. These two regimes are the Civilian regime and the Commoner regime.

The Civilian regime, found in most countries in Continental Europe, is able to trace its genealogy to France and later to Germany, whilst the Commoner regime, found in England, Ireland and the Netherlands, can trace its lineage to England and more recently to the United States.

Much of the divide, argue Foster and Ball, is linked to the different mental, cultural and ideological worlds that these regimes inhabit. Commoners view the enterprise as largely a private grouping concerning only the individuals who make it up. In contrast, Civilians view the enterprise as a quasi-public entity powerful enough to affect non-participants. These divergent stances on the societal role of the enterprise result in different views on the enterprise itself. Commoners take the view that the private interests of investors and/or owners ‘should be allowed free rein unless there are pressing reasons to restrict them’, whilst Civilians give priority to public interests over private ones.

In jurisdictions affiliated with the Civilian regime, the enterprise is but ‘part of a regulated economy in which one of its functions is to provide social benefits, such as employment, for citizens.’ As such, Civilians endeavour to ensure that legal entities have an enterprise, or something resembling it, underlying them, notably by imposing minimum capital requirements (intended to ensure that the underlying enterprise is properly capitalised, thereby protecting creditors from the risks of an insufficiently funded venture); a recognition criterion based on the place of activity rather than on the place of incorporation (the doctrine of the ‘seat’, based on the assumption that the attempt to ensure that there is an enterprise underlying the legal entity has worked); and extensive involvement and protection of employees.

In jurisdictions affiliated with the Commoner regime, the enterprise itself is viewed differently, in turn in such jurisdictions a different stance is taken on the question of corporate regulation. Foster and Ball give the example of English law (affiliated with the Commoner regime) which they suggest is not concerned to ensure that the legal entity has any significant ‘reality’ in the sense of there being a substantial enterprise underlying it, so long as the formal minimum requirements are met…. Nor does it base any control mechanism on any requirements for, or assumptions about, such a reality. A prime example of this attitude is the complete absence of any minimum capital requirement for private companies. Recognition of foreign legal entities is based on their place of incorporation and there is no concept of the seat, let alone any attempt to use such a concept to regulate the enterprise by ensuring that the legal entity is subject to the control of the incorporation law of the jurisdiction concerned. There is little, if any, employee participation or protection. These attitudes result in considerable advantages for the incorporator.

Beyond the lack of a minimum capital requirement for private companies (which make up the bulk of companies incorporated in England), under English law, shares need not be fully paid up, formation is comparatively rapid and sunk costs are minimal (a private limited liability company may, for example, be set up overnight using an off-the-shelf company), no preliminary examination of the company’s constitution is needed, revision of the company’s constitutive documents is a straightforward affair as is a transfer of its shares.
3. Legal personality

Two key approaches exist in the EU in relation to the question of legal personality of a company, namely the incorporation theory and the real seat theory. These two theories are arguably rooted in two distinct schools of thought, each with its own divergent views on the function of groups in general, on the role of enterprises more specifically and on the resulting notion of corporate regulation.\textsuperscript{cxxxii}


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Incorporation theory

Established in England in the eighteenth century,\textsuperscript{cxxxiii} the incorporation theory, which is alternately referred to as the foundation or state of incorporation theory, permits companies to choose their jurisdiction of incorporation. In other words, the jurisdiction which gives them existence.\textsuperscript{cxxxiv}

This theory hinges on the incorporation process. According to this theory, the founders of the company are able to ‘freely choose the legal system they think most appropriate: once the choice is made, it can be maintained throughout the company’s life.\textsuperscript{cxxxv} As such, the company is governed by the company law of the state in which the founders of the company file the documents of formation\textsuperscript{cxxxvi} and its constitution is subject to the laws of the state in which it is incorporated.\textsuperscript{cxxxvii}

Formation of a company in compliance with the laws of the state of incorporation has a number of consequences. These are important not only from the point of view of the company, but also from the stance of the state of incorporation and from the perspective of any state in which the company operates or in which it chooses to establish a primary or secondary establishment.

Firstly, once a company is established in compliance with the laws of the state of incorporation, it is ‘attributed with a legal personality, and all the rights and liabilities of a corporate existence, in other states.’\textsuperscript{cxxxviii} As such the legality of the company in question should also be recognised by other states in which the company in question operates.

Secondly, the legal status of the company concerned may be ‘determined regardless of the state in which its activity is effectively deployed. Other states would therefore have to accept this “foreign” element in their social fabric.’\textsuperscript{cxxxix} In turn its status as a legally operating entity would also need to be acknowledged in the event that the company emigrates to another state.\textsuperscript{cxl}

The incorporation theory which is the prevailing theory in the United Kingdom, Ireland, the Netherlands, the United States and Switzerland,\textsuperscript{cxli} ‘was not a predominant mode of corporate choice of law in Europe until relatively recently.\textsuperscript{cxlii}

This theory has been subject to criticism as it has been said that it ‘facilitates the creation of mere letter box companies, and hence contributes to locate important – and sometimes rather controversial - transactions in more or less fictitious companies, located in exotic places. Unhealthy practises might result, the more so as the incorporation technique is often applied by jurisdictions that are considered tax havens.\textsuperscript{cxliii} Certain jurisdictions that use the incorporation theory have freely chosen to implement structures that address this potential risk to their reputation by, inter alia, enacting special legislation for ‘quasi’ or ‘formally foreign companies’ and introducing supervision measures and disclosure rules for overseas companies.\textsuperscript{cxliv}

The main advantage associated with the incorporation theory, argue its advocates, is its certainty, due to the ease with which the place of registration of the company can be ascertained and the clarity associated with such a determination.\textsuperscript{cxliiv} Proponents of this theory also argue that it enhances corporate mobility, encourages trade and the conclusion of business worldwide.\textsuperscript{cxlii}

Real seat theory
Prevalent in Europe prior to 1999, the real seat theory emphasizes the relevance of the seat of a corporation by requiring a company to ‘be incorporated in accordance with the laws of the state in which the actual administrative center of the corporation exists, or the location of the decision-making center of the corporation’. As such where a company registered in a foreign state has its real seat in the domestic country the law either disregards the corporate legal entity or applies the domestic company law. In Germany, for example, if a foreign company refuses to register, the company will have no legal personality, its shareholders will be personally liable and the activities of the company will be prohibited.

The real seat of a company is defined as ‘the place of central control where the fundamental governance decisions are effectively transformed into ongoing managerial acts’. At any one time, a company is only capable of having one seat.

Developed in France and Germany in the nineteenth century as a backlash to the wave of re-incorporations by continental companies looking to benefit from the more relaxed systems of law in jurisdictions such as the United Kingdom, Belgium and Switzerland, this theory revolves around the notion that ‘the law of the state economically and politically most affected by the company’s activities should apply.’

Where a company relocates its real seat from one state (state of origin) to another (target state), then in accordance with this theory, the relocation would result in the application of the law of the target state to the company. By way of an illustration, the relocation of a limited liability company’s operations would effectively mean that the relocating company would have to adhere to the laws of the target state as they apply to comparable national corporate forms and would in turn need to reincorporate in accordance with the laws of the said state. In default, such a company would not be recognised as a legal body and in turn would have no legal capacity and would lose the benefit of limited liability.

Two methods exist to set up this new company in the target state. Through incorporation of a new company in the said jurisdiction, which then acquires the shares of the old company (in exchange for its own shares or by buying them). Alternatively, by transferring all the assets of the old company to the new company.

Whichever one of the methods is used, the result is likely to be the same, namely that the shareholders of the old company or the company itself become liable for taxes on the gains generated by the transfer of the shares or assets.

The real seat theory is strengthened by two constraints generally employed by jurisdictions using this theory. These constraints, which impede the ability of companies to move across borders (corporate mobility or corporate migration), affect companies entering the given jurisdiction (entry rights or immigration) and companies leaving the given jurisdiction (exit rights or emigration).

A company looking to enter a real seat jurisdiction without reincorporation under the laws of the target state runs the risk of being treated by the said state as a partnership, leading to exposure of its shareholders to unlimited liability.

A company looking to exit a real seat jurisdiction for the purpose of reincorporating in another state may be treated as liquidated. Professor Sandrock gives the example of the German company looking to relocate its seat from Germany to either the Netherlands or England. In such a situation, he states, the company would effectively be dissolved. Meaning that its reserves would become subject to taxation and it would need to reincorporate under the laws of the Netherlands or England in order to regain its status as legal entity.
In contrast with the incorporation theory, the real seal jurisdictions ‘are more oriented towards exercising close control over the entities that operate within their jurisdiction. Said jurisdictions will refuse these companies, whether by disqualifying them, or by submitting them to their own legal order, when in fact the company is being managed from their own territory.’

Those who favour the real seat theory argue that it addresses the shortfalls commonly associated with the incorporation theory, namely that the incorporation theory permits companies to circumvent ‘the domestic company law which is most affected by the activities of the company’ and allows for ‘the creation of mere letterbox companies with the consequence that government authorities cannot control business transactions properly’.

It is also said that in the absence of the real seat theory ‘the most undemanding company law would prevail and a “race to the bottom” would take place.’ As such this theory is viewed as a ‘firewall’ by those jurisdictions that use it, enabling these jurisdictions to protect their domestic company laws against ‘any attempts which could possibly be launched against them from abroad.’

Professor Sandrock gives the example of the German codetermination rules, which permit supervisory codetermination by employees. He argues that these rules were effectively protected against attempts to erode their effectiveness from abroad by the real seat theory.

The focus on the place of registration has a dampening effect on the free movement of companies. ‘By eliminating the ability of a corporation to choose its governing corporate law without substantial relocation costs to the company and inconvenience to the individuals involved, continental Europe … eliminated, or at least greatly curtailed, regulatory competition.’

II. PRACTICAL RESTRAINTS

Like most aspects of European integration, the development of the freedom of establishment has faced a number of obstacles.

Beyond the substantive constraints on the freedom of establishment, discussed above, this freedom is further curtailed by practical circumstances such as the shortfalls associated with the legislative process, the persistence of barriers at the national level, the influence of Member States on the implementation of this freedom, the resistance of the Member States to Europeanisation and the self-restraint exercised by the Court.

A. The Legislative Process and its Shortfalls

The different forms of lawmaking, asserts Professor Dr. Ulrich Klinke, ‘suffer from the same inconvenience. Firstly, the process of adopting new directives and amending existing ones takes time, as does the creation of autonomous company law through the introduction of regulations. Beyond the time factor, each form of law has its own unique shortfalls.

Harmonisation through the introduction of new directives and, where relevant, the modification of existing directives, argues Professor Klinke, has come to a ‘relative standstill.’ What is more, Member States do not favour uniform law and autonomous company law as laid down by regulations, as such the number of regulations introduced by the EU legislature is small and only a nominal number of autonomous corporate entities have been created at the European level.

B. Persistence of Barriers at the National Level

The national systems of the Member States are riddled not only with laws that discriminate against access to economic activities by foreign nationals including companies, but with structures, practices and trade usages that also have the same restraining effect.
Whilst some of these barriers are identifiable, many are hidden and inherent in the systems found at the national level, taking on the form of bureaucratic hindrances.\textsuperscript{clxxxi}

The task of identifying and then loosening these barriers amounts to an undertaking of colossal proportions.\textsuperscript{clxxii}

‘Company law must concern itself with reality’, argues Professor Hopt, ‘not just with concepts and dogmas.’\textsuperscript{clxxxiii}

\textbf{C. The Role of the Member States in Implementation}\textsuperscript{clxxxiv}

Member States wishing to protect their sovereignty as well as their ability to regulate businesses incorporating and operating within their borders have influenced not only the legislative process, but also the implementation of this freedom.

By influencing the substance of the provisions in the Treaties, as well as the legislative measures adopted in this context, Member States have been able to shape the freedom.

By entrenching themselves in the coordination and enforcement of this freedom, Member States have also been involved procedurally in the execution of this freedom.

\textbf{D. Resistance of the Member States to Europeanization}

Differences in the business cultures of the various Member States, as manifested in the bodies of domestic law governing companies, have contributed to the persistence of national barriers to the freedom of establishment and to the mobility of companies within the EU, impeding not only the ability of the EU to compete globally but also the ability of EU-based companies to do so.\textsuperscript{clxxxv}

In part because of this rift and due to the reluctance of Member States ‘to forfeit sovereignty to superior European law’,\textsuperscript{clxxxvi} Member States have shown little political willingness to strengthen the freedom of establishment and to endorse the European level programme to work towards the harmonisation of corporate law.\textsuperscript{clxxxvii}

\textbf{E. The Restraint of the Court (the Pullback)}

In stark contrast with the Court’s liberal, pro-integration stance on the freedom of establishment, it demonstrates a reluctance to overreach in situations that impact on sensitive policy issues. The Court has shown a certain amount of restraint in its willingness to apply this freedom to situations that curtail national sovereignty by limiting the ability of Member States to govern and regulate their own citizens, inter alia corporate citizens. Thus respecting the autonomy of the nations to rule on these issues.\textsuperscript{clxxxviii}

Professor Dehousse states, that since the 1980s, the Court has practiced greater caution in challenging member states’ interests.

Heralded by a series of rulings dealing with delicate issues such as tax matters (see for example case 81/87, Daily Mail) or Sunday trading (case 145/88, Torfaen v. B&Q) this process has developed parallel to a growth in reactions against what appeared as a careless Europeanization process… on the whole, the Court now appears to exercise greater restraint in most of its activities. It is more sensitive to the need to preserve member states’ capacity to conduct their own public policies, even when this may entail (limited) costs in terms of market unity; and it has indicated on several occasions that it cannot substitute its own views for those of Community institutions when the latter enjoy discretionary power.\textsuperscript{clxxix}

\textbf{CONCLUSION}
The Court’s campaign to liberalise the freedom of establishment and to enhance integration within the Union by widening this freedom’s scope of application (‘the push force’) is exemplified in the Centros’ trilogy of cases (consisting of the decisions in Centros, Überseering and Inspire Art), whilst the pullback is exemplified in cases such as Daily Mail and Cartesio. Cases such as Daily Mail and Cartesio demonstrate a willingness by the Court generally and more particularly in relation to the internal market, to exercise an ever greater caution in challenging the interests of the Member States. In this context, arguably the Court has demonstrated a greater sensitivity to the need to respect the autonomy of Member States.


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The most important freedoms for corporations are the free movement of persons, the freedom of establishment and freedom to provide services.’ (U. Blaurock, “Steps Towards a Uniform Corporate Law” (1998) 31 Cornell Int’l L.J. 377, 379).

‘The bases for achieving an internal market are the basic freedoms set out in the EC Treaty. These are the free movement of goods, the free movement of persons and the free movement of payments and capital.’ (Blaurock 1998: 379).

Siems 2007: 308.


‘To create a single European market, with regard to the conditions to take up and pursue an economic activity on that market (‘market access’), the EC Treaty puts, first, natural persons and companies of other Member States in the same position as their own nationals and their own companies by establishing the same rights and, secondly, harmonizes the domestic company law of the Member States.’ (Klinke 2005: 271).


independent from the law of the Member States, but has been rather exceptional until now.’ (Klinke 2005: 271).


xviii The Treaty of Lisbon introduces procedural amendments to the freedom of establishment, rather than substantive ones, renumbering the pertinent articles governing this freedom in the process. Articles 43 to 48 in the Treaty establishing the European Community (TEC) have become Articles 49 to 54 in the Treaty on the Functioning of the European Union (TFEU). Article 294 TEC has been moved and is now Article 55 TFEU.

xviii Article 49 TFEU (formerly Article 43 TEC).

xix Article 54 TFEU (formerly Article 48 TEC).

xx Article 54 TFEU reads ‘[c]ompanies 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 Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.’

xxi Article 54 TFEU defines companies or firms as ‘companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.’

xxii Article 54(2) TFEU (ex Article 48(2) TEC) ’covers entities that enjoy separate legal personality as well as civil or commercial partnerships that under the applicable law are not afforded separate legal personality.’ (Carsten Gerner-Beuerle and Michael Schillig, “The Mysteries of Freedom of Establishment after Cartesio” (2010) 59 ICLQ 303, note 6).


xxv Paragraph 19, ECJ judgement in Daily Mail.

xxvi Pursuant to the provisions of the Treaty establishing the European Community (now the Treaty on the Functioning of the European Union).

xxvii Article 49 TFEU read alongside Article 54 of the same Treaty.


xxvii Paragraph 21, ECJ judgement, Case 205/84 Commission v Germany [1986] ECR 3755. Italics added by writer of this paper.

xxviii The terms ‘agency’ and ‘branch’ are reviewed in case law of the Court relating specifically to Article 5(5) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L304/77 (Brussels Convention). In order to make a determination of applicable jurisdiction, Article 5(5) of the Brussels Convention refers to the operations of branches, agencies or other establishments (Edwards 1998: 223). Article 5(5) of the Brussels Convention reads ‘[a] person domiciled in a Contracting State may, in another Contracting State, be sued: … as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated…’.


xxv The aim in this context being to ‘equalize the competitive conditions in the Community arena.’ (Stein 1971: 27).

xxvii The principle of national treatment is found in Article 3 General Agreement on Tariffs and Trade (GATT) and Article 17, General Agreement on Trade in Services (GATS) as well as Article 301, North American Free Trade Agreement (NAFTA). For a review of this principle, see Peter Van den

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xxxviii Article 49 TFEU.

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Article 49 TFEU.

Article 49 TFEU.

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xli Article 49 TFEU.

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Dehousse 1994: 88. Italics added by writer of this article.

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Dehousse 1994: 89.

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Dehousse 1994: 89.

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Professor Dehousse illustrates this dynamic with reference to the proceedings taken by the Commission against several Member States for their failure to fulfil their obligations under the co-insurance directive (Dehousse 1994: 89-90)

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More later on in this paper.

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

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

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Though the Centros trilogy of cases (namely Centros, Überseering and Inspire Art) has without a doubt contributed to the development of the freedom of establishment, one cannot look at the freedom of establishment, without mentioning the seminal decision in Case 2/74 Reynolds v Belgium [1974] ECR 00631. This case is the first case dealing with the Treaty provisions concerning the freedom of establishment of companies. (Edwards 1998: 224).

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Case C-210/06 Cartesio Oktato es Szolgaltato Bt [2008] ECR I-9641 (Cartesio).

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

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The Danish requirement of minimum capitalisation at the time required the paying up of minimum share capital fixed at DKK 200,000 (approximately £17,000 at the time) (Siems 2002: 49).

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Paragraph 24, ECJ judgement, Centros.

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Paragraph 25, ECJ judgement, Centros.

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Paragraph 26, ECJ judgement, Centros.

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Paragraph 27, ECJ judgement, Centros.

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Paragraph 27, ECJ judgement, Centros.

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German Code of Civil Procedure (Zivilprozessordnung).

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Legal capacity is defined as the capacity to enjoy rights and to be the subject of obligations.

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Paragraph 50(1), German Code of Civil Procedure (Zivilprozessordnung).

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As opposed to the incorporation principle (Gründungstheorie), pursuant to which the legal capacity of a company is determined by reference to the law of the State in which the company was incorporated.

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Paragraph 80, ECJ judgement, Überseering.

Paragraphs 81–82, ECJ judgement, Überseering.

Paragraph 92, ECJ judgement, Überseering.

Paragraph 93, ECJ judgement, Überseering.

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

Pursuant to the Wet op de Formeel Buitenlandse Vennootschappen (the Law on Formally Foreign Companies) of 17 December 1997 (Staatsblad 1997 No 697) (WFBV).

According to paragraph 22, ECJ judgement in Inspire Art, Article 1 WFBV defines a formally foreign company ‘as a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies ....’

In particular Articles 2 to 5 of the WFBV which are reviewed in paragraphs 23 to 33, ECJ judgement in Inspire Art.

The question posed by the Kantongerecht is set out in paragraph 39 subparagraph 1, ECJ judgement in Inspire Art which reads: ‘1. Are Articles 43 EC and 48 EC to be interpreted as precluding the Netherlands, pursuant to the Wet op de formeel buitenlandse vennootschappen of 17 December 1997, from attaching additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?’ The question is reformatted by the Court as follows (in paragraph 52, ECJ judgement in Inspire Art): ‘whether Articles 43 EC and 48 EC must be interpreted as precluding legislation of a Member State, such as the WFBV, which attaches additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in that Member State of a company formed under the law of another Member State with the sole aim of securing certain advantages compared with companies formed under the law of the Member State of establishment which imposes stricter rules than those imposed by the law of the Member State of formation with regard to the setting-up of companies and paying-up of shares....’ Whilst the Kantongerecht refers to the establishment of a branch in the Netherlands by a company set up in the UK, the Court refers to the establishment in Member State B of a company formed under the law of Member State A.

Paragraph 17, ECJ judgement, Centros.

Paragraph 95, ECJ judgement, Inspire Art.

Paragraph 95, ECJ judgement, Inspire Art quoting the comments made in paragraph 18, Centros.
Paragraph 96, ECJ judgement, *Inspire Art* quoting the comments made in paragraph 16, *Segers* and paragraph 18, *Centros*.

Paragraph 97, ECJ judgement, *Inspire Art*.

Paragraph 98, ECJ judgement, *Inspire Art*.

Paragraph 138, ECJ judgement, *Inspire Art*, referring to paragraph 27 of its judgement in *Centros*.

Paragraph 139, ECJ judgement, *Inspire Art*, referring to paragraph 16 of its judgement in *Segers* and paragraph 29 of its judgement in *Centros*.


Paragraph 99, ECJ judgement, *Inspire Art*.

Paragraph 100, ECJ judgement, *Inspire Art*.

Paragraph 101, ECJ judgement, *Inspire Art*.

Paragraph 102, ECJ judgement, *Inspire Art*.

Paragraph 103, ECJ judgement, *Inspire Art*.


Paragraph 105, ECJ judgement, *Inspire Art*.

Paragraph 105, ECJ judgement, *Inspire Art*.

Paragraph 132, ECJ judgement, *Inspire Art*.

Article 52(1) TFEU states that the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'


Article 49 TFEU read alongside Article 54 TFEU.

The terms primary establishment and secondary establishment are used in Edwards 1998.

ECJ judgement in *Daily Mail*.

Case C-210/06 *Cartesio Oktato es Szolgaltato Bt* [2008] ECR I-9641 (*Cartesio*).

In contrast, the Court has taken a more pro-integration line when dealing with companies entering a chosen target jurisdiction (immigration) by means of primary or secondary establishment, as the decisions in *Centros*, *Überseering* and *Inspire Art* exemplify.


Paragraphs 81-82, ECJ judgement, *Überseering*.

Italics added by author of this article.

The aim in this context being to ‘equalize the competitive conditions in the Community arena.’ (Stein 1971: 27).


Italics added by author of this article.

In a similar fashion, Article 55 TFEU states that ‘Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54’.


A review of these theories through the prism of case law can be found in Benjamin Angelette, “The Revolution that Never Came and the Revolution Coming – De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe” (2006) 92 Va. L. Rev. 1189, 1193.
It is suggested that the ‘divide between common law and civil law is very rough, for there is considerable variation.’ (Foster and Ball 2006: 17). Whilst amongst the civilian jurisdictions in the EU, Austria, France, Germany and Luxembourg employ the ‘seat’ doctrine, other civilian jurisdictions in the European Union – including Denmark, Finland, the Netherlands and Sweden – do not utilise this doctrine. What is more, Germany has the unique concept of group liability not found elsewhere. (Foster and Ball 2006 17, citing P.J. Omar, “Centros Revisited: Assessing the Impact on Corporate Organisation in Europe” (2000) 11 ICCLR 407, 407).


Angelette 2006: 1194.


Angelette 2006: 1194; Sandrock 2005: 88


Term used by Professor O. Sandrock (Sandrock 2005: 88).


Angelette 2006: 1194.


Klinke 2005: 272. Even when there is no harmonisation, ‘the national parliaments retain legislative competence, but are bound by the principles derived from the freedoms: national company law is, as any other domestic law falling within the scope of the treaty, subject to the principles set by the provisions concerning free movement, especially the right of establishment and the free movement of capital. These freedoms do not only guide the application of substantive law, but also the rules of conflict of laws.’ (Klinke 2005: 272-273).


Stein 1971: 25.


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


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


Case C-210/06 Cartesio Oktato es Szolgaltatto Bt [2008] ECR I-9641 (Cartesio).