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The Seat Theory and the Incorporation Theory
- an Analysis of the Meaning of the Freedom of Establishment

IUR Institutet för Utländsk Rätt

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The Seat Theory and the Incorporation Theory
- an Analysis of the Meaning of the Freedom of Establishment

1. Introduction

Some of the Member States of the European Union apply the seat theory, others the incorporation theory. In a situation, where a limited liability company, formed under the law of a Member State applying the incorporation theory, has its actual seat in a state that applies the seat theory, the meaning of the notion secondary establishment is brought to a head.

According to the seat theory, the law applicable to a limited liability company is determined by the location of its actual seat. When according to German law the actual seat of a foreign limited liability company is considered to be located in Germany, Germany has not recognised this company as existing.[1] In the *Überseering* case[2], the Court of Justice of the European Communities ruled on one consequence of the application of the seat theory. This judgement might, to some extent at least, be the end of the long and extensive debate particularly in German doctrine on whether the consequences of the application of the seat theory are compatible with articles 43 EC and 48 EC.

The meaning of secondary establishment is linked to the requirements that according to EC law the Member States may impose on limited liability companies to let them enjoy the freedom of establishment. An analysis of the freedom of establishment according to the *Segers*[3], *Daily Mail*[4] and *Centros*[5] judgements shows that the *Überseering* judgement must not be considered to be "a turning-point of European company law"[6], but instead a confirmation of the three cases. These judgements clarify which requirements a limited liability company has to fulfil to enjoy the freedom of establishment, irrespectively of whether it has been formed under the law of a Member State applying the seat theory or formed under the law of a Member State applying the incorporation theory and whether it wishes to establish a branch in a state applying the seat theory or one using the incorporation theory.[7]

1.1 Terminology

German scholars use different notions for what here will be referred to as "actual seat".[8] The precise meaning of "actual seat" will not be discussed. Briefly stated, decisive for the place of the actual seat of a company is "the place […] where the main decisions of the company leadership are effectively taking the form of current business actions."[9] Below, "actual seat" is assumed to correspond to the connecting factor "central administration".[10]

States applying the incorporation theory will here be referred to as I-states. States applying the seat theory are referred to as S-states. State of origin refers to the state, under the law of which a limited liability company has been formed. Recipient state refers to the state in which such a company has located its actual seat, as well as to the state that, according to its law, considers such a company to have located its actual seat there.

International private law is abbreviated ip law. Freedom of establishment refers to the freedom of establishment according to the EC Treaty. The Court of Justice of the European Communities will be abbreviated the Court of Justice. When quoting scholars who use the German abbreviation "EuGH", the abbreviation ECJ will, however, be used. All references to articles refer to the EC Treaty.

Most authors discuss whether the seat theory as such is compatible with articles 43 and 48. As it is possible that one consequence of its application is not compatible with these articles, whereas others are, the wording "the consequence of the application of the seat theory" will instead be used.

1.2 Delimitation

The statements on the seat theory in this article are based on the application of the seat theory as applied according to German law. German law will, however, only be dealt with if necessary in order to examine the meaning of the practice of the Court of Justice as far as the relationship between the seat theory and the incorporation theory under articles 43 and 48 is concerned. The relationship of the seat theory to other national law will not be analysed.

Attention will not be paid to specific provisions on the transfer of the actual seat found in, for example, bilateral conventions. Possible justifications of restrictions on the freedom of establishment will not be dealt with.

2. The Case Law of the Court of Justice

According to article 48 in the application of the rules on freedom of establishment a company formed under the law of a Member State is put on an equal footing with a national of a Member State, if it has the intention to make profit and has its registered office, its central administration or its principal place of business within the European Union. Fundamental for the meaning of the freedom of establishment to a limited liability company is whether all the connecting factors have to be in one and the same Member State.

In some situations, the actual seat of a company might be its principal place of business.[11] Whether the actual seat of a company is the same as its central administration or its principal place of business is, however, without importance in this context. The fact of interest is whether article 48 requires something more of a limited liability company formed under the law of a Member State to enjoy the freedom of establishment than that its registered office is in its state of origin. Whether that is the case decides which consequences of the application of the seat theory that are incompatible with the rules on the freedom of establishment.

The apprehension that the freedom of establishment of companies is not put on an equal footing with the freedom of establishment of natural persons is widely spread. For that apprehension the *Daily Mail* judgement plays a great role. For instance, the Proposal for a Directive on the Transfer of the Registered Office of a Company refers to the *Daily Mail* judgement that is considered there to state that the different connecting factors make it impossible to put companies on a par with natural persons by application of articles 43 and 48.[12] The *Daily Mail* judgement states, the Regional Appeal Court of Bavaria has held, that the consequences of the application of the seat theory are compatible with EC law. The request of a company formed under British law to register a branch in Germany had been rejected since the company did not have its actual seat abroad. Referring to the *Daily Mail* judgement, the German court found this consequence to be compatible with EC law.[13]

Scholars are split over the meaning of the *Segers*, *Daily Mail* and *Centros* judgements. For instance, some scholars read these judgements as stating that all the consequences of the application of the seat theory are incompatible with EC law, whereas others find them to imply the opposite. An attempt to make the judgements compatible with each other emerges in the conclusion that the seat theory may not be applied to limited liability companies formed under the law of other Member States. This interpretation is based on the *Daily Mail* judgement paragraph 19,[14] i.e. the same paragraph as the one that is seen as an evidence for all the consequences of the seat theory being compatible with articles 43 and 48.[15] The latter opinion is the predominant one of the doctrine. Ebke, for instance stresses that "[a]fter Daily Mail there can be no doubt that the ECJ lets the exercise of the freedom of establishment by a transfer of the actual seat depend on whether the company continues to exist according to the legislation, which according to the ip law of the recipient state is the applicable one."[16] It is concluded that "growing harmonization in some fields of company law will not put the Court in a position to reconsider Daily Mail",[17] i.e. the judgement by which "the ECJ […] confirmed the compliance of the seat theory in a way that cannot be misunderstood".[18]

Thus, the interpretation of the *Daily Mail* judgement is the crucial point for how the state of law has been interpreted as far as the freedom of establishment for companies is concerned and which meaning is attached the *Überseering* judgement. Whereas Kindler concludes the *Centros* judgement to "be of no importance to Member States that apply the seat theory in international company law",[19] but moreover an "encroachment upon the internal ip law of incorporation states",[20] other scholars are of the opinion that by the *Centros* judgement the Court of Justice has given "the application of the seat theory as a breach of the freedom of establishment […] a surprisingly clear rejection."[21] Others conclude the *Überseering* judgement to "open up new ground",[22] i.e. to revolutionize the connection of the applicable legislation at least in those Member States […] that – like Germany – until now applied the seat theory".[23] Below, the *Segers*, *Daily Mail*, *Centros* and *Überseering* cases are accounted for.

2. 1 The Segers Case

The *Segers* case[24] concerned the issue whether it was in accordance with EC law that sickness insurance benefits for a director depended on whether his employer, a private limited company, was Dutch or foreign. The fact that the company was formed according to British law and did not conduct any business in the United Kingdom, the Court of Justice found to be of no importance.

For the application of the provisions on the freedom of establishment nothing more is required than that the company is formed under the law of a Member State and has its registered office, central administration or principal place of business within the Community. Provided those requirements in article 58 (now article 48) are fulfilled, the Court of Justice stated, it is immaterial for a company's right to enjoy the freedom of establishment that the company conducts its business through an agency, branch or subsidiary solely in another Member State.

2.2 The Daily Mail Case

The *Daily Mail* [25] judgement is a preliminary ruling issued in a dispute between the British tax authority and the company Daily Mail. The latter claimed not to be obliged to obtain fiscal consent to its change of residence from the United Kingdom to the Netherlands. Under UK law, only companies resident for tax purposes in the United Kingdom were as a rule liable to British corporation tax. A company was resident for tax purposes at the place of its central management and control. Companies resident for tax purposes were prohibited from ceasing to be so resident without the consent of the Treasury.

In paragraph 19, the Court of Justice emphasised that "it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning." The

connecting factor to the national territory required for the incorporation of a company and whether a company may subsequently modify that connecting factor varies widely in the laws of the Member States. The Court of Justice stressed that "[t]he Treaty has taken account of that variety in national legislation. In defining, in Article 58, the companies, which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company. Moreover, Article 220 […] provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another."[26] The Court of Justice found that a company incorporated under the law of a Member State and having its registered office there is not entitled to transfer its central management and control to another Member State.

2.3 The Centros Case

In the preliminary ruling *Centros*[27], a private liability company registered in England and Wales was refused to register a branch in Denmark. Centros, which had been formed by two Danish nationals, had not conducted any business since its formation. British law did not impose any requirement on limited liability companies to have a minimum paid-up share capital. Centros' application for registering a branch was rejected by the Danish authorities inter alia since Centros was considered in fact to seek to establish a principal establishment, and, accordingly, to circumvent the national rules concerning, in particular, the paying-up of a minimum share capital.

Referring to its *Segers* judgement the Court of Justice stated it to be immaterial for the right of a company to set up a branch in another Member State that the company had been formed in a Member State merely for the purpose of establishing business in another Member State, where its main, or entire, business was to be conducted. The location of a registered office, central administration or principal place of business, the Court of Justice stressed, serves as the connecting factor of a company to the legal system of a Member State in the same way as the nationality is decisive as far as natural persons are concerned.

2.4 The Überseering Case

The *Überseering*[28] judgement is a preliminary ruling in a case referred to the Court of Justice by the Bundesgerichtshof. The dispute was between Überseering BV, a Dutch company, and the German company Nordic Construction Company Baumanagement GmbH (NCC). In 1996, Überseering brought an action against NCC. This action was dismissed since Überseering was considered to have transferred its actual seat to Germany as two Germans residing in Germany had acquired all its shares.

In accordance with German law, an action shall be dismissed as inadmissible if a party lacks the capacity to be a party to legal proceedings. A party has such capacity if it has legal capacity. The legal capacity of a company is determined by reference to the law applicable in the place where its actual centre of administration is established.

The first question referred to the Court of Justice was whether it is compatible with articles 43 and 48 that a company, formed under the law of a Member State in which its registered office is located, is denied legal capacity in another Member State and, accordingly, the capacity to bring legal proceedings before national courts in order to enforce rights under a contract with a company established in the latter Member State, on the ground the company is deemed to have moved its actual centre of administration to that state. If it would not be compatible, the national court asked whether the freedom of establishment of a company requires that the company's legal capacity and its capacity to be a party to legal proceedings are determined according to the law of its state of origin.

The Court of Justice found articles 43 and 48 to be applicable. Article 293 does not constitute a reserve of legislative competence vested in the Member States. "So far as is necessary" in article 293 refers to "if the provisions of the Treaty do not enable its objectives to be attained."[29] Consequently, the exercise of freedom of establishment is not conditioned by conventions entering into force pursuant to article 293. Nor does it depend on the adoption of such harmonisation directives provided for in article 44.

According to articles 43 and 48 companies formed under the law of a Member State have the right to conduct business in another Member State. Thereby their registered office, central administration or principal place of business decides their affiliation to a Member State in the same way as nationality does for natural persons. Accordingly, there is an obligation on a Member State to recognise a company's legal capacity and its capacity to be a party to legal proceedings according to that Member State's law under which it was formed and where it has its articles of association, when it exercises its freedom of establishment in the former state.

3. The Relationship between the Judgements

In the doctrine, the relationship between the *Daily Mail* and *Centros* judgements has been concluded to imply that all the consequences of the application of the seat theory are compatible with articles 43 and 48. The reasoning by Neville et al. may illustrate how this predominant part of the doctrine puts the leading cases in relation to each other. *Segers* is considered to support the application of the incorporation theory. According to this judgement, the entitlement of a company to freedom of establishment is not affected by the fact that the company does not maintain a link to the Member State, under the law of which it is formed. The *Daily Mail* judgement was, however, issued after *Segers.* In contrast to the *Daily Mail* judgement, conflicts of law rules were not referred to in the *Segers* judgement. Rules on conflicts of company law were explicitly dealt with in the *Daily Mail* judgement. The *Centros* judgement that in time and order followed the *Daily Mail* judgement is considered to be of no importance to S-states since the *Daily Mail* judgement was not mentioned in the *Centros* judgement, the *Centros* judgement did not deal with rules on conflicts of company law and Denmark applies the incorporation theory.[30]

Since the Court of Justice in the *Daily Mail* judgement is considered to have held that the consequences of the application of the seat theory are compatible with EC law and the *Centros* judgement is assumed not to have changed that state of law,[31] the relationship between the *Daily Mail* and *Centros* judgements will be dealt with. At first, the argument will be examined that the *Daily Mail* judgement concerned rules on conflicts of company law[32]. Then the two other arguments submitted for the consequences of the application of the seat theory being compatible with EC law will be dealt with, i.e. that the *Daily Mail* judgement was not mentioned in the *Centros* judgement[33] and that Denmark applies the incorporation theory[34].

3.1 The Issue Dealt with in the Daily Mail Judgement

In the doctrine is has been debated whether the *Daily Mail* judgement concerned tax law or company law. Ebke is of the opinion that it dealt with company law matters only as an obiter dictum.[35] Roth is of the same opinion as Ebke. He puts forward that the Court of Justice deviated from the core issue of the case, i.e. whether the fiscal requirement for consent was compatible with the freedom of establishment, and commented on company conflicts of law rules only in an obiter dictum.[36] Ståhl and Österman are of the opinion that the Court of Justice dealt with this consent from a company law perspective rather than from a tax law perspective. Since it focused on the issue whether a company has a right to migrate to another Member State, it did not directly take a stand whether it is compatible with the freedom of establishment to tax a company changing residence on profits accrued but not realized. Accordingly, they conclude, the *Daily Mail* judgement does not give an answer to whether exit taxation of a company changing residence is compatible or not with the articles on freedom of establishment.[37] Given that the Court of Justice ruled from a company law perspective and stated that a company does not have a Treaty right to migrate to another state, it might, however, be questioned how the tax consequences arising due to its migration from a private law perspective would be incompatible with articles 43 and 48.

According to paragraphs 11 and 26, the Court of Justice does not seem to have considered the obligation to apply for consent. In paragraph 11 the Court of Justice found the first question referred to it to seek "in essence to determine whether Articles 52 and 58 […] give a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and control to another Member State." The Court of Justice noted "[i]f that is so, [i.e. the first part of the first question is affirmed] the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company's tax position".[38] In paragraph 26, the Court of Justice found, due to its answer to the first part of the first question, it not to be necessary to reply to the second part of the first question. Still, the issue ruled on was a tax issue; the change of tax residence by a transfer of the central administration and control. The first question was thus answered with "that in the present state of Community law Articles 52 and 58 […], confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State."[39]

A UK company could establish its central management and control abroad without losing legal personality or ceasing to be a company incorporated in the United Kingdom.[40] UK applies the incorporation theory. The way the Court of Justice dealt with the framing of the problem, however, resembles the issue arising, from a private law perspective, when a limited liability company migrates from a state of origin applying the seat theory, i.e. transfers its actual seat abroad. For instance, at paragraph 24 the Court of Justice stressed that there is no right according to articles 43 and 48 for companies to retain their status as companies incorporated under the law of a Member State while transferring their central management and control and their central administration to another Member State.

Zimmer puts forward that important passages of the arguments for the decision were held in such a general form that if one so also wished could derive from them the compatibility of the seat theory with EC law.[41] As best representing the view that the *Daily Mail* judgement states all the consequences of the application of the seat theory being compatible with articles 43 and 48, Sonnenbergers and Großerichters reasoning may be referred to. They say that before the *Daily Mail* judgement, the list in article 48 was understood to mean that a correct foundation of a company and the fulfilment of one of the connecting factors anywhere within the European Community were sufficient to provide a company with a comprehensive freedom of establishment. According to them, the *Daily Mail* judgement makes it clear that the Court of Justice does not share this opinion. It found article 48 to consider the different connecting factors of international company law. Companies merely exist by virtue of the law under which they were formed. The Treaty, the Court of Justice furthermore stated, had not solved the issue of the different connecting factors.[42] In the *Daily Mail* judgement, however, the Court of Justice considered the law of the state of origin and not the law of the recipient state. Accordingly, the Court of Justice did not make any statement concerning the situation where a recipient state applies the seat theory or when consequences arise similar to those arising when a recipient state applies the seat theory.

3.2 The Importance of the States in the Centros Case Being I-States

The two other closely connected arguments put forward for the relationship between the *Daily Mail* and *Centros* judgements emerging in all the consequences of the application of the seat theory being compatible with EC law will now be dealt with; the fact that Denmark applies the incorporation theory and the fact that the *Daily Mail* judgement was not mentioned in the *Centros* judgement.

Starting with the latter, the Court of Justice is not obliged to communicate any changes of its established practice. The potential reason for the Court of Justice not mentioning the *Daily Mail* judgement is of more importance than the fact

that it did not mention it. The main explanation given in the doctrine for the Court of Justice not mentioning the *Daily Mail* case is that the two states in the *Centros* case both applied the incorporation theory.

Among others, Sonnenberger and Großerichter are of the opinion that the question submitted to the Court of Justice by the national court did not enable the Court of Justice to withdraw its statements pronounced in the *Daily Mail* judgement. According to Danish law, Centros had legal capacity once the law at the place where it was formed had been paid attention to. Therefore, it is submitted, such a company was a bearer of the comprehensive freedom of establishment. The issue of rules on conflicts of company law could not arise.[43] However, both the states concerned in the *Centros* case as well as the two states concerned in the *Daily Mail* case applied the incorporation theory. Notwithstanding that fact, the *Daily Mail* judgement is taken as a substantiation of the compatibility of all the consequences of the application of the seat theory with articles 43 and 48 whereas the *Centros* judgement is held to affect I-states only as the states concerned in the *Centros* judgement were I-states.

There is an additional reason speaking against the conclusion that the *Centros* judgement has no impact on S-states due to the fact that the two states in the *Centros* case were I-states. That is that the Court of Justice did not mention the incorporation theory in the *Centros* judgement. It merely referred to, what it designated "practice", cf. the *Centros* judgement at paragraphs 21, 22, 31, 35 and 38.

4. The Meaning of the Case Law to the Relationship between the Connecting Factors

It follows from the reasoning supra that the relationship between the *Daily Mail* judgement and the *Centros* judgement does not speak for all the consequences of the seat theory being compatible with EC law. The issue now is what is required for a limited liability company formed under the law of a Member State to be entitled to the freedom of establishment, regardless of it being formed in an I-state or an S-state, or whether it wishes to establish business in an I-state or an S-state. The question of which requirements have to be fulfilled by such a company to enjoy the freedom of establishment may be reworded as a question of when a conflict of the different connecting factors applied by the Member States arises and how the Treaty settles this conflict.

One argument put forward for the conformity of all the consequences of the application of the seat theory with articles 43 and 48 is that article 48 contains an alternative list, which puts registered office, central administration and principal place of business on an equal footing. These connecting factors referred to in article 48 are said to indicate that the seat theory as well as the incorporation theory is compatible with articles 43 and 48.[44] The application of the incorporation theory as such can certainly not cause a consequence as the one in question in the *Centros* case. When the incorporation theory is applied, the location of the actual seat is immaterial. It is not easily understood, however, in which way the connecting factors would be on a par, if all the consequences of the application of the seat theory were compatible with articles 43 and 48. If all its consequences were compatible, the connecting factor of the seat theory would always prevail over the connecting factor of the incorporation theory in situations where a conflict between the connecting factors occurs.

The application of the seat theory would, considering the *Segers*, *Daily Mail* and *Centros* judgements, not in all situations be incompatible with articles 43 and 48 given that for a limited liability company to enjoy the freedom of establishment it is not sufficient that it once was formed under the law of a Member State, but it still has to exist. With this approach, the application of the seat theory is at least compatible with these judgements when applied by a recipient state to an association once formed under the company law of an S-state, if it leaves no business behind in its state of origin. If a limited liability company as long as it exists under the law of its state of origin is entitled to the freedom of establishment, then, however, the application of the seat theory to such a company formed in an I-state having its actual seat in an S-state must be incompatible with articles 43 and 48. A limited liability company formed in an I-state having its actual seat in an S-state still exists according to the law under which it was formed.

Those who are of the opinion that the application of the seat theory is compatible with articles 43 and 48 do not seem to attach importance to the consequences of its application. The explanation for the *Centros* judgement having no impact on S-states is that a company such as Centros, from the perspective of an S-state, is not formed in accordance with the law.[45] It is stressed that the decision on which national company law will apply depends on the conflict of law rules applied by the national court. In the *Daily Mail* judgement paragraph 19, the Court of Justice is considered to confirm the different connecting factors of the Member States to be compatible with the Treaty. Accordingly, it is concluded, EC law does not determine according to which Member State's company law the legal capacity is to be decided.[46] According to the *Centros* judgement, I-states would therefore have to extend their provisions for protection of creditors to include foreign companies pursuing business in I-states or to start applying the seat theory instead of the incorporation theory.[47] Neither the *Daily Mail* judgement nor the *Centros* judgement supports the position that the exercise of the freedom of establishment by a limited liability company depends on the law of the recipient state. In the *Centros* judgement, the law of a recipient state was indeed concerned. Denmark applies the incorporation theory. From the wording of this judgement, the law of the recipient state does not seem to be decisive, however. In addition, if the freedom of establishment would depend on the law of the recipient state, the freedom of establishment for a limited liability company would be fairly meaningless in situations where a conflict occurs between the connecting factors applied by the Member States. The condition to fulfil for, for instance, a Swedish limited liability company having its actual seat located in Germany in order to enjoy the freedom to secondary establishments there would then be that it had been formed under German company law.

The determining issue is, consequently, the meaning of article 48(1), i.e. the meaning of "[c]ompanies […] 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" and which meaning may be attached to the notion of secondary establishment.

4.1 A Recipient State May not Apply the Seat Theory to Secondary Establishments

The provisions on freedom of establishment are intended specifically to enable companies formed under the law of a Member State to pursue activities in other Member States through an agency, branch or subsidiary.[48] According to article 43, which has direct effect,[49] restrictions on the freedom of establishment of nationals of a Member State in another Member State are prohibited.

In judging which consequences of the application of the seat theory are incompatible with articles 43 and 48, the classification of an establishment according to EC law as primary or secondary is significant. One argument submitted for the consequences of the application of the seat theory being compatible with EC law is that the Court of Justice in the *Centros* case had no reason to question the statement by the national court presupposing that the establishment constituted a branch. The matter considered by the Court of Justice would therefore leave out whether it is compatible with articles 43 and 48 to reject an application to register a branch since the branch is intended to be the principal place of business of a company,[50] i.e. a connecting factor under the seat theory. Moreover, an obstacle that impedes the setting up of a branch, is concluded to be compatible with article 43 if the obstacle is caused by a conflict of law rule referred to in article 48.[51] If an establishment of a limited liability company formed under the law of a Member State is classified as a branch, it is not easily seen, however, why it would not fall under the application scope of article 43. Here, at first, the circumstances of the *Centros* case are of interest since nothing, as concluded above, speaks for it not being applicable to S-states.

Centros' entire business was to be conducted in the Member State, in which Centros desired to establish a branch.[52] The meaning of the concept actual seat may not be the same in the laws of the Member States. Carrying on the entire economic activity of a company in the Member State, in which the branch of the company is established, however, implies that the actual seat of the company is located there.

A branch of a mailbox company cannot be registered in an S-state, since a company having its registered office abroad must be able to demonstrate its existence. Here, by existence is meant legal existence. Legal existence presupposes that either domestic law or that foreign law, which, according to domestic law, is the applicable one, supports the legal capacity.[53] The Court of Justice in the *Centros* judgement established it to be incompatible with articles 43 and 48 "for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State […] where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created".[54] Thus, the Court of Justice paid regard to that fact which according to the seat theory would lead to the company not being recognised to exist.[55] Accordingly, the condition for all the consequences of the application of the seat theory to be compatible with articles 43 and 48 would be that the consequence, which according to the *Centros* judgement is incompatible with them, would be compatible with them when caused by the application of this theory.

Roth, however, attaches decisive importance to the fact that it was not a connecting factor, but substantive law, which caused the consequence in the *Centros* case.[56] The *Centros* judgement leaves no doubt according to him "that setting up a (secondary) establishment in a Member State other than the Member State of the registered office is protected by Articles 43, 48, even if the company lacks a *principal* establishment in the State of foundation. Whether in such a case the establishment should be regarded as a 'secondary' establishment (Article 43(1) 2nd sentence), or rather as a 'principal' establishment (Article 43(1) 1st sentence, is not touched upon. Whatever the appropriate characterization may be, for the Court it seems beyond dispute that a company legally formed and with a registered office in a Member State may set up an establishment – whether principal or secondary – in any other Member State."[57] At the same time, Roth considers the consequences of the application of the seat theory to be compatible with EC law and the *Centros* judgement only to have impact on I-states.[58] If a limited liability company formed under the law of a Member State according to the *Centros* judgement may set up a principal establishment in another Member State, it is not easily understood why this judgement would have impact on I-states only. It is in S-states that the issue of importance to the existence of a foreign limited liability company arises; the issue, whether it may be classified as an internal association due to the fact that its principal place of business or its central administration is located there.

Furthermore, given that a company lacking principal establishment in its state of origin and only having its registered office there would have the right to set up a principal place of business in another Member State, the consequence of the application of the seat theory to domestic companies would be incompatible with articles 43 and 48. An explanation for Roth's conclusion and his opinion that the *Centros* judgement is without importance to S-states may, however, lay in the notion "legally formed" that he uses.[59] Friis Hansen, who in contrast to Roth is of the opinion that this judgement affects the application of the seat theory,[60] concludes from the *Segers* and *Centros* judgements that the foundation of a company is considered to be the original primary establishment, even though the company does not carry on any business activity in its state of foundation.[61] That statement also implies that the seat theory may not be applied to domestic companies having their actual seat abroad. There is, however, support for such a point of view in the *Centros* judgement. The provisions the Danish nationals sought to circumvent were rules governing the foundation of companies. The Court of Justice stated that a national of a Member State has the right to set up a com-

pany in the Member State that has the company law rules which he deems to be the most advantageous to him and to set up branches in other Member States.[62]

In fact, the Court of Justice in the *Centros* judgement does not state that a company has the right to transfer its actual seat.[63] It, however, makes the concept "secondary establishment" a broad notion. Leible puts forward that it is not clarified whether the Court of Justice holds on to its statements in the *Daily Mail* judgement on transfer of the seat and questions if it can make a difference, as far as EC law is concerned, whether the seat is transferred abroad or whether the registered office is kept but a branch established abroad is re-modelled into the actual seat.[64] Friis Hansen concludes that a subsequent primary establishment, which he defines as a change of nationality without the legal capacity ceasing, "in the present state of Community law", as settled in the *Daily Mail* judgement, is not protected by the freedom of establishment.[65] From article 48, it follows that the subject of law, which may enjoy the freedom of establishment, is considered to be the primary establishment. Accordingly, the way by which it exercises the freedom of establishment that devolves upon it as a primary establishment, is considered its secondary establishment. The consequence of a transfer of the actual seat to an S-state might be seen as a change of nationality of the limited liability company as far as this foreign company is not recognised by the recipient state as a limited liability company anymore. What the Court of Justice seems to have established is that limited liability companies have a right not to get their nationality changed, i.e. that the original primary establishment according to the Treaty should be considered as such an establishment by the recipient state. Thus, being sufficient for a limited liability company to enjoy the freedom of establishment that it was formed under the law of a Member State and still is recognised to exist by this state, its establishments in other Member States fall within the application scope of secondary establishments.

Accordingly, a limited liability company formed under the law of an I-state having its actual seat located in an S-state has to be recognised as exiting by the recipient state.[66] So far, the issue of the compatibility of the consequences of the application of the seat theory with articles 43 and 48 might be seen as an issue of conflict of company conflicts of law rules.

4.2 Some Consequences of the Seat Theory Are Still Compatible with EC Law

The basic condition for a limited liability company to enjoy the freedom of establishment is pursuant to article 48 that it was formed in accordance with the law of a Member State and fulfils one of the connecting factors mentioned in this article within the European Union. Whether this is a sufficient condition or not, determines whether the seat theory according to articles 43 and 48 may be applied at all to companies formed under the law of a Member State.

Some scholars conclude from the *Centros* judgement that all the consequences of the application of the seat theory are incompatible with articles 43 and 48 and that only the incorporation theory may be applied within the EU.[67] According to another understanding, which is based on the *Daily Mail* judgement paragraph 19, the seat theory may only be applied to domestic companies. The outcome in the three cases is thus reconciled by considering as a decisive difference the fact that the *Daily Mail* judgement deals with an obstacle imposed by a state of origin whereas the *Centros* and the *Segers* cases deal with an obstacle imposed by another state.[68] It is not easy to see why the seat theory must not at all be applied and why the consequences of its application only would be compatible with articles 43 and 48 when applied to domestic companies. The application of the seat theory to a foreign limited liability company must not result in it being considered not to exist.

Friis Hansen's position that the seat theory may not be applied to companies originating in other Member States seeking to exercise the freedom to set up a secondary establishment,[69] may be regarded as a precise expression of the interpretation that it may not be applied to foreign companies, since it seems to be based on when the application of the seat theory to a limited liability company originating in another Member State may lead to it not being recognised to exist. If great importance is attached to paragraph 19, but at the same time, for the reasons put forward above, not all the consequences of the application of the seat theory are considered compatible with articles 43 and 48, it may be noted that the incompatibility as well as the compatibility of its consequences agree with it being applied by a recipient state or a state of origin. Considering the establishment of the internal market, it is not easily understood why it would be a matter of decisive importance whether a recipient state or a state of origin applies the seat theory.[70]

Of particular interest is Leible's apprehension since he deals with a connecting factor referred to in article 48. He argues that no Member State may prevent a company formed in another Member State and having its registered office there, from exercising its entire economic activities through a branch. Since the statements by the Court of Justice in the *Centros* judgement only concerned the obligations of the state, in which the branch was to be located, he, however, considers it an open question how the Court of Justice would rule in a situation in which the management of a German company is located to its foreign branch.[71] Considering the wording of article 48 more than one connecting factor of a limited liability company must not necessarily be in one and the same Member State. As concluded above, however, much speaks for it not being enough that such a company was formed under the law of a Member State to enjoy the freedom of establishment. Article 48(2) refers to internal law of the Member States in defining which subjects may enjoy the freedom of establishment. When a limited liability company transfers its actual seat from its state of origin, being an S-state, without conducting any business there, the subject of law conferred the freedom of establishment ceases to exist.

Another conclusion than the one, according to which the condition for the freedom of establishment of a limited liability company is that its state of origin recognises it to exist, seems to imply a deviation from the *Daily Mail* judgement. Therein, the Court of Justice found the Treaty to have

taken into account the variety in the national legislation, i.e. the fact that "the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law."[72] The transfer of the central administration of a company from one Member State to another, the Court of Justice held, is "not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions."[73]

Accordingly, for a company formed in an S-state to enjoy the freedom of establishment it is not a sufficient condition to have the registered office in its state of origin. Whether it enjoys the freedom of establishment when it fulfils only one of the connecting factors in its state of origin depends on whether that state recognises it to exist. The consequence of the seat theory when applied to a domestic company is thus compatible with articles 43 and 48.

It is not easy to see how a situation would occur, in which an S-state has to decide whether to register a branch of a limited liability company formed under the law of an S-state having its actual seat located in the recipient state. According to the ip law of the state of origin, the law applicable to the company is determined by the location of its actual seat. Consequently, according to that law as well as to the law of the recipient state the law of the recipient state is the applicable one. It does not seem likely that it has been formed in accordance with the provisions of the recipient state governing the formation of limited liability companies.[74] The consequence of the seat theory when applied to a limited liability company formed under the law of an I-state would likewise be compatible with articles 43 and 48 provided its actual seat is located in its state of origin or in another I-state. The application of the seat theory refers to the state in which the actual seat of the company is located and the law of that state, in its turn, refers to the law of the state of origin.

In the German doctrine, opinions differ on the consequence of the transfer of the actual seat of a German limited liability company to another state. For example, according to one opinion, which seems to be the predominant one, a company that locates its actual seat to another state must be dissolved, regardless of whether the other state applies the seat theory or the incorporation theory.[75] Another opinion is that it might be possible for a German limited liability company to locate its actual seat to an I-state without being dissolved if it preserves an economic link to Germany through, for example, a permanent establishment.[76] Accordingly, in the latter, but not in the former case, the recipient state would be obliged to register a branch of this association as a company.

5. Conclusion

In the *Centros* judgement the Court of Justice referred neither to the incorporation theory nor to the seat theory. Danish practice resulted in the same consequence as the application of the seat theory would have resulted in under equivalent circumstances. The Court of Justice stated this consequence to be incompatible with articles 43 and 48. Nothing in the *Centros* judgement indicates that the Member States would not at all be allowed to apply the connecting factor actual seat. Although one consequence of the application of the seat theory according to the *Centros* judgement is incompatible with articles 43 and 48, it does not imply that the Court of Justice has deviated from its ruling in the *Daily Mail* judgement.

The decisive factor for the *Segers*, *Daily Mail* and *Centros* judgements seems to be an outflow of a consideration of the connecting factors referred to in article 48. The issue of recognition of a limited liability company formed under the law of a Member State due to the location of one of the connecting factors referred to in article 48 will not be brought to a head in an I-state. If a limited liability company transfers its actual seat, the entire business activity included, from a state of origin that applies the seat theory, the company will cease to exist according to the law by virtue of which it exists.

If a limited liability company transfers its actual seat from a state of origin that applies the incorporation theory, the company will not cease to exist according to the law under which it was formed. Article 48 refers to companies formed under the law of a Member State. Due to this reference, when applied to a limited liability company formed under the law of an I-state having its actual seat located in an S-state, the seat theory is incompatible with articles 43 and 48. It is consequently not the direct, but the indirect explanation that the issue is whether it is a recipient state that applies the seat theory. The direct explanation is that the conflict of the connecting factor occurs, i.e. the issue of recognition arises, when a limited liability company formed in an I-state transfers its actual seat to an S-state.

There is no support for a limited liability company being entitled to a subsequent primary establishment. On the contrary, another Member State than the one in which the limited liability company was formed, is obliged to recognise the legal personality of the limited liability company as long as its legal personality is maintained under the law according to which the company was formed. No change of nationality shall occur in the recipient state. As little as natural persons have a Treaty right to change their nationality, limited liability companies are required to change theirs. Instead, the business conducted by the limited liability company in this other Member State falls under the application scope of secondary establishments.

In the *Segers* and *Centros* cases, the Court of Justice did not deal with a change of residence of a limited liability company. In the *Centros* judgement, the Court of Justice merely dealt with the situation that the entire business activity was to be conducted in the state in which the branch would be located. The matter to consider for the Court of Justice was not any preceding transfer of the business. Nor did such a

situation occur in the *Segers* case. In the *Daily Mail* case, the Court of Justice dealt with a change of residence of a limited liability company. None of the three judgements holds that a limited liability company has the right to migrate from one Member State to another.

In the *Überseering* judgement, the Court of Justice established that "where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B."[77] This settlement implies it to be enough for Überseering to enjoy the freedom of establishment that the company according to the law of its state of origin was considered to have its primary establishment there.

Since Überseering is considered the primary establishment according to Dutch law, German law constitutes a restriction on Überseering's right to secondary establishment. The Court of Justice holds that "where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognize the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A')."[78] Accordingly, in the *Überseering* judgement the Court of Justice follows its established practice in the *Segers*, *Daily Mail* and *Centros* judgements. The law of the state of origin is decisive for the freedom of establishment of a limited liability company.

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Fotnoter

[1] Cf. Großfeld, B, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einführungsgesetz zum Bürgerlichen Gesetzbuche, IPR 1998 Rz 606; Jacobs, O H, Internationale Unternehmensbesteuerung. Deutsche Investitionen im Ausland. Ausländische Investitionen im Inland, München, 1999, C.H. Becksche Verlagsbuchhandlung p. 1019; Lutter, M, The Cross-Border Transfer of a Company's Seat in Europe, ERT 2000 pp. 62; Sonnenberger, H J, Großerichter, H, Konfliktlinien zwischen internationalem Gesellschaftsrecht und Niederlassungsfreiheit. Im Blickpunkt: Die Centros-Entscheidung des EuGH als gesetzgeberische Herausforderung, RIW 1999 p. 725; Zimmer, D, Mysterium "Centros". Von der schwierigen Suche nach der Bedeutung eines Urteils des Europäischen Gerichtshofes, ZHR p. 24.

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

[3] 79/85, D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen 1986 E.C.R. 2375.

[4] 81/87, The Queen v H. M. Treasury and Commissioners of Irland Revenue, ex parte Daily Mail and General Trust plc 1988 E.C.R. 5483.

[5] C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen 1999 E.C.R. I-1459.

[6] Leible, S, Hoffmann, J, "Überseering" und das (vermeintliche) Ende der Sitztheorie, RIW 2002 p. 936. Translated from German by the author.

[7] Nelson, M, Aktiebolags etableringsrätt i EU – en studie utifrån målen Segers, Daily Mail och Centros, SvSKT 2002 p. 635-656.

[8] For instance "effektiver Verwaltungssitz", "tatsächlicher Verwaltungssitz" and "tatsächlicher Sitz der Hauptverwaltung" respectively. See von Falkhausen, J, Durchgriffshaftung mit Hilfe der Sitztheorie des Internationalen Gesellschaftsrechts, RIW 1987 p 818; Sonnenberger, Großerichter, supra n. 1 at 72, Leible, S, Kapitalgesellschaftsrecht. EuGH: Eintragung der Zweigniederlassung einer in einem anderen Mitgliedstaat ansässigen und rechtmässig gegründeten Gesellschaft, die dort keine Geschäftstätigkeit entfaltet, NZG 1999 p. 301, and see Hoffmann, J, Neue Möglichkeiten zur identitätswahrenden Sitzverlegung in Europa? Der Richtlinienentwurf zur Verlegung des Gesellschaftssitzes innerhalb der EU, ZHR p. 44, Kindler, P, Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die „Centros"-Entscheidung des EuGH und das internationale Privatrecht, NJW 1999 p. 1994; Zimmer, supra n. 1 at 24, and Sedemund, J, Hausmann, F L, Gesellschaftsrecht. Niederlassungsfreiheit contra Sitztheorie – Abschied von Daily Mail? BB-Kommentar, BB 1999 p. 810 respectively.

[9] von Falkhausen, supra n. 8 at 818. Translated from German by the author. See also Ebenroth, C, Auer, T, Grenzüberschreitende Verlagerung von unternehmerischen Leitungsfunktionen im Zivil- und Steuerrecht, RIW Beilage 1 zu Heft 3/1992 at Rz 6; Kaligin, T, Das Internationale Gesellschaftsrecht der Bundesrepublik Deutschland, DB 1985 p. 1449.

[10] The German equivalent to the connecting factor "central administration" is according to article 48 "Hauptverwaltung". In the *Daily Mail* case at para 20 the Court of Justice explains the "real head office" / "der wahre Sitz" to be the "central administration" / "die Hauptverwaltung". In the *Überseering* case the notion "tatsächlicher Verwaltungssitz" is translated to the "actual centre of administration". At para 65, however, the Court of Justice puts forward that the issue in the *Daily Mail* case was the transfer of the "actual centre of administration" / "tatsächlicher Verwaltungssitz".

[11] Sonnenberger/Großerichter and Ebke presuppose that the actual seat of a company is its principal place of business. (Sonnenberger, Großerichter, supra n. 1 at 723, Ebke, F, Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH, JZ p. 658)

[12] Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office of a Company from One Member State to Another with a Change of Applicable Law, XV/02/6002/97-EN Rev. 2 p. 2.

[13] BayObLG, Beschluss v. 26.8.1998 – 3Z BR 78-98, reprinted in NJW 1999, 401.

[14] Neville, M, Winther-Sørensen, N, Engsig Sørensen, K, Free Movement of Companies under Company Law Tax Law and EU Law, in The Internationalisation of Companies and Company Law, Copenhagen, 2001, DJØF p. 223.

[15] Cf. Kindler, supra n. 8 at 1996 et seq; Sonnenberger, Großerichter, supra n. 1 at 726.

[16] Ebke, supra n. 13 at 660. Translated from German by the author.

[17] Roth, W-H, Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, Judgment of the 9 March 1999, CML Rev. 2000 p. 154

[18] Kindler supra n. 8 at 1997.

[19] Kindler, supra n. 8 at 1996. Translated from German by the author.

[20] Kindler supra n. 8 at 1999. Translated from German by the author.

[21] Sedemund, Hausmann, supra n. 8 at 810. Translated from German by the author. After the *Centros* judgement, the Supreme Court of Austria has dealt with the incompatibility of one consequence of the application of the seat theory with articles 43 and 48. A limited liability company formed

under British law sought to register a branch in Austria. Since it did not prove that it conducted business at the location of its principal place of business, the lower instances presupposed its business activity only to be conducted in Austria. As in the *Centros* case, the authorities asserted that the company attempted to circumvent the provisions governing the formation of private limited companies, which were more restrictive than the British ones. The court ruled this consequence of the application of the seat theory to be incompatible with the freedom of secondary establishment. The legal capacity of the company should be decided under the law according to which it was formed, if its registered office, central administration or principal place of business was located in a Member State. Accordingly, the lack of business activity in the state of origin did not prevent the company from registering a branch in Austria. (OGJH, 15.7.1999-6Ob 123/99z.) The court, however, interpreted the legal state of the freedom of establishment of limited liability companies from the erroneous premise that Denmark applies the seat theory. (OGJH, 15.7.1999-6Ob 123/99z at p. 7) See also the case OGJH, 15.7.1999-6Ob 123/99b wherein the application of the seat theory was found incompatible under similar circumstances.

[22] Deininger, R, Körperschaftssteuerrechtliche Auswirkungen der Überseering-Entscheidung des EuGH, IstR 2003 p. 214. Translated from German by the author.

[23] Leible, Hoffmann, supra n. 6 at 925. Translated from German by the author.

[24] 79/85 Segers 1986 E.C.R. 2375.

[25] 81/87 Daily Mail 1988 E.C.R. 5483.

[26] 81/87 Daily Mail 1988 E.C.R. 5483 para 21. Article 220 is the current article 293.

[27] C-212/97 Centros 1999 E.C.R. I-1459.

[28] C-208/00 Überseering, 2002 E.C.R. I-9919.

[29] C-208/00 Überseering, 2002 E.C.R. I-9919. at para 54.

[30] Neville, Winther-Sørensen, Engsig Sørensen, supra n. 16 at 222 et seq. See also the footnotes to the single arguments put forward in the doctrine in the second paragraph following this one.

[31] Neville, Winther-Sørensen, Engsig Sørensen, supra n. 16 at 223.

[32] Neville Winther-Sørensen, Engsig Sørensen, supra n. 16 at 222; Roth, supra n. 19 at 153; cp. Ebke, supra n. 13 at 660; cp. Sonnenberger, Großerichter, supra n. 1 at 722.

[33] Hoffmann, supra n. 8 at 48; Neville, Winther-Sørensen, Engsig Sørensen, supra n. 16 at 222 et seq; Sonnenberger, Großerichter, ibidem.

[34] See for instance Ebke, supra n. 13 at 658 and 660; Hoffmann, supra n. 8 at 49; Kindler, supra n. 8, at 1997; Roth, supra n. 19 at 154; Sonnenberger, Großerichter, ibidem.

[35] Ebke, supra n. 13 at 658.

[36] Roth, W-H, ECLR „Centros": Viel Lärm um Nichts? Besprechung der Entscheidung EuGH EuZW 1999, 216 – Centros Ltd. ./. Erhvervs- og Selskabstyrelsen, ZGR 2000 p. 321 et seq.

[37] Ståhl, K, Österman, P R, EG-skatterätt, Uppsala, 2000, Iustus Förlag AB p. 96 et seq.

[38] The words in bracket are added by the author.

[39] 81/87 Daily Mail 1988 E.C.R. 5483 at para 25.

[40] 81/87 Daily Mail 1988 E.C.R. 5483 at para 3.

[41] Zimmer, supra n. 1 at 27.

[42] Sonnenberger, Großerichter, supra n. 1 at 726.

[43] Sonnenberger, Großerichter, supra n. 1 at pp. 724. See for instance also Hoffmann, supra n. 8 at 49; Kindler, supra n. 8 at 1996 et seq.

[44] Kindler, supra n. 8, at 1997; Neville, Winther-Sørensen, Engsig Sørensen, supra n. 16 at 216; Roth, supra n. 19 at 153.

[45] Kindler, supra n. 8 at 1996 et seq; Sonnenberger, Großerichter, supra n. 1 at 726; cf. Ebke, supra n. 13 at 660.

[46] Kindler, ibidem; Sonnenberger, Großerichter, ibidem.

[47] Roth, supra n. 19 at 154.

[48] Cf. C-212/97 Centros 1999 E.C.R. I-1459 at para 26.

[49] 2/74, Jean Reyners v Belgian State 1974 E.C.R. 631 at para 32.

[50] See for instance Sonnenberger, Großerichter, supra n. 1 at 723.

[51] See for instance Roth, supra n. 19 at 153.

[52] Lutter, however, puts forward that the establishment in Denmark at issue in the *Centros* judgement was a subsidiary. (Lutter, supra n. 1 at pp. 68)

[53] Sonnenberger, Großerichter, supra n. 1 at 725. See for instance also the case 31 0 134/98, wherein the action of an Irish limited liability company was dismissed since the company was a mailbox company. The capacity of a subject of law to be a party to a legal dispute, the court stressed, is judged by its legal capacity. The law of the state in which its actual seat is located governs the legal capacity of the subject of law. Since the actual seat was in Germany, the company did not have legal capacity there. (Landgericht Potsdam, Urt. v. 30.9.1998 – 31 0 134/98) A person acting on behalf of a mailbox company may be decided to be personally responsible. See for instance the judgement of the Oberlandesgericht Oldenburg, where the court found a "Non Resident Limited Company" to have been formed under British law to circumvent the German GmbH-law and to have its actual seat in Germany. Accordingly, the person acting on behalf of the company was decided to be personally responsible for a payment liability of the company. (OLG Oldenburg, Urt. v. 4.4.1989 – 12 U 13/89, NJW 1990 p. 1422–1423) Fock, however, suppose this consequence to be compatible with EC law since it concerns private law. The reason for it being compatible, he argues, is that the *Centros* judgement merely dealt with a discriminating decision of an administrative authority. (Fock, H, Sitztheorie im deutschen internationalen Steuerrecht nach der Centros-Entscheidung, RIW 2000 p. 45)

[54] C-212/97 Centros 1999 E.C.R. I-1459 at para 39.

[55] See also Zimmer, who puts forward that the German courts due to the *Centros* judgement may not reject an application of a company formed under the law of another Member State on the ground that the branch constitutes the actual seat of the company. (Zimmer, supra n. 1 at 36)

[56] Roth, supra n. 19 at 154.

[57] Roth, supra n. 19 at 152.

[58] Roth, supra n. 19 at 154.

[59] In the German doctrine, the notion "rechtmässig errichtet" sometimes is used as general notion, which, depending on the situation in the particular case, may mean that a company is legally formed according to the law of an S-state or according to the law of an I-state. Kindler for instance stresses that the Court of Justice in the *Centros* case held that every company that is legally formed in a Member State, is a bearer of the freedom of establishment. A company like Centros, however, is not legally formed from the perspective of an S-state. (Kindler, supra n. 8 at 1996) See also Sonnenberger and Großerichter who conclude that the *Centros* judgement is of no importance to S-states since Centros, from the perspective of an S-state, is not legally formed. (Sonnenberger, Großerichter, supra n. 1 at 726) However, considering the statements by Kindler, Sonnenberger and Großerichter, the distinction made by Roth in advance for the application of the seat theory might be questioned. Kindler puts forward that the non-recognition of a company is not an direct consequence of the connecting factor seat. Like all other ip rules, the connecting factor seat only determines the applicable law. (Kindler, supra n. 8 at 1994) See also Sonnenberger, Großerichter, supra n. 1 at 725.

[60] Friis Hansen, S, Nekrolog over Hovedsaedteorien?, in Juridisk institut, Julebog, København, 1999, Jurist- og Økonomforbundets Forlag p. 173.

[61] Friis Hansen, supra n. 60 at 149. Friis Hansen, however, concludes that the seat theory may not be applied to companies originating in another

Member State seeking to set up a secondary establishment. (Friis Hansen, supra n. 60 at 173 and below)

[62] C-212/97 Centros 1999 E.C.R. I-01459 at paras 26 and 27.

[63] Of a different opinion is Schlossmacher. See Schlossmacher S, Tax Issues Affecting Virtual Enterprises, Intertax 2002 p. 96 et seq.

[64] Leible, supra n. 8 at 301.

[65] Friis Hansen, supra n. 60 at 147 et seq. He considers the *Daily Mail* judgement to deal with a subsequent primary establishment. (Friis Hansen, supra n. 60 at 157) The predominant part of the scholars considering the *Daily Mail* judgement to examine conflict of company law rules are of the opinion that it dealt with a primary establishment. From that perspective, it might be questioned why the judgement is considered to concern a primary establishment, since the two states concerned in the *Daily Mail* case were I-states.

[66] See also Werlauff who considers the *Centros* judgement to be "absolute in its unqualified requirement of the right of establishment and of recognition of the foreign company notwithstanding that its entire activities are conducted in the branch state." (Werlauff, E, EU-Company Law. Common Business Law of 28 States, Copenhagen, 2003, DJØF p 23)

[67] See for instance Sedemund, Hausmann, supra n. 8 at 810. Their article is, however, based on the premise that Denmark applies the seat theory.

[68] Neville, Winther-Sørensen, Engsig Sørensen, supra n. 16 at 223.

[69] Friis Hansen, supra n. 60 at 173.

[70] The provisions on the freedom of establishment constitute a prohibition on the recipient state as well as on the state of origin to restrict the freedom of establishment. In the *Daily Mail* judgement the Court of Justice stressed that the freedom of establishment prohibits the state of origin to prevent its nationals from establishing business in other Member States. See also for instance C-200/98, X AB and Y AB v Riksskatteverket 1999 E.C.R. I-8261.

[71] Leible, supra n. 8 at 301.

[72] 81/87 Daily Mail 1988 E.C.R. 5483 at para 20.

[73] 81/87 Daily Mail 1988 E.C.R. 5483 at para 23.

[74] Cf. Ebenroth, Auer supra n. 9 at Rz 9.

[75] See for instance Großfeld, supra n. 1 at Rz 608-610 and Rz 629; Hoffmann, supra n. 8 at 46. cf. Kruse, V, Sitzverlegung von Kapitalgesellschaften innerhalb der EG. Vereinbarkeit der einschlägigen Regelungen des deutschen Sach- und Kollisionsrechts mit dem EG-Vertrag, Berlin, Bonn, München, 1997, Carl Heymanns Verlag KG p. 35.

[76] Ebenroth, Auer, supra n. 9 at Rz 10; cf. Dreissig, H, Verlegung der Geschäftsleitung einer deutschen Kapitalgesellschaft ins Ausland, DB 2000 p. 893; cf. Kruse, supra not 75 at 36 et seq. The doctrine is, however, discordant about the importance of tax law to the issue, whether such a company has to be dissolved, see Ebenroth, C T, Eyles, U, Die Beteiligung ausländischer Gesellschaften an einer inländischen Kommanditgesellschaft. Komplementäreigenschaft ausländischer Kapitalgesellschaften und europarechtliche Niederlassungsfreiheit, DB 1988 p. 7 et seq; Kruse supra n. 75 at p. 33 et seq.

[77] C-208/00 Überseering 2002 E.C.R. I-9919 at para 94.

[78] C-208/00 Überseering 2002 E.C.R. I-9919 at para 95.

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