The ECJ's *Inspire Art* Decision of 30 September 2003 and its Effects on Practice

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A. Introduction[*]

In its most recent judicature the European Court of Justice (ECJ) continued its tendency of deciding in favor of the freedom of establishment by holding that rules submitting pseudo-foreign companies to the company law of the host state were inadmissible. It clarified that a foreign company is not only to be respected as a legal entity having the right to be a party to legal proceedings, but rather has to be respected as such, i.e. as a foreign company that is subject to the company law of its state of incorporation. Any adjustment to the company law of the host state is, hence, not compatible with European law. In addition to commenting on the decision and its effects, this article points out potential for corporate restructuring in the field of codetermination.

Questions concerning the freedom of establishment of companies have always been both a central and controversial area of Community law. After the previous landmark decisions *Daily Mail*,[1] *Centros*[2] and *Überseering*,[3] the ECJ decided in the case

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[1] ECJ Case 81/87 of 27 September 1988, ECR 1988, 5483.

[2] ECJ Case C-212/97 of 9 March 1999, ECR 1999, I-1459. A comprehensive list of German articles on the *Centros* decision has been compiled by Thomas Bachner & Martin Winner, Das österreichische internationale Gesellschaftsrecht nach Centros, Der Gesellschafter (GesRZ) 2000, 73, 76, note 31.

[3] ECJ Case C-208/00 of 5 November 2002, ECR 2000, I-9919; *see,* for an early assessment: *Bälz/Baldwin*, The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Überseering of 5 November 2002 and its Impact on German and European Company Law, No.12, available at: http://www.germanlawjournal.com/current_issue.php?id=214; *Mock*, Harmonization, Regulation and Legislative Competition in European Corporate Law, No.12, available at: http://www.germanlawjournal.com/current_issue.php?id=216; *Wooldridge*, Überseering: Freedom of

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Inspire Art[4] once again in favor of the freedom of establishment resulting in a now discernable consistent judicature.[5] The place of incorporation theory, which deter-

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Establishment of Companies Affirmed, 14 European Business Law Review [EBLR] 227-235 (2003); Wulf-Henning Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law*, 52 International and Comparative Law Quarterly (2003), 177-208; in German see the commentaries by Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art*, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2003, 193; Ernst Biebl, *Niederlassungsfreiheit und Zuzug doppelt ansässiger Kapitalgesellschaften*, Steuer und Wirtschaft International (SWI) 2003, 168; Arno Brauneis, *EuGH zur Niederlassungsfreiheit von Gesellschaften*, Zeitschrift für Gesellschafts- und Steuerrecht (GeS) 2003, 4; Werner F. Ebke, Die *Würfel sind gefallen: Die Sanktionen der Sitztheorie sind europarechtswidrig!*, Betriebsberater (BB) 2003, Heft 01, „Die erste Seite"; Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa*, Zeitschrift für Wirtschaftsrecht (ZIP) 2002, 2233; Ulrich Forsthoff, *Internationales Gesellschaftsrecht im Umbruch*, Der Betrieb (DB) 2003, 979; Volker Geyrhalter & Peggy Gänßler, *Perspektiven nach „Überseering" - wie geht es weiter?*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2003, 409; Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung „Überseering"*, Deutsches Steuerrecht (DStR) 2003, 159; Bernhard Großfeld, *Recht der Internationalen Wirtschaft* (RIW) 2002, Heft 12, „Die erste Seite"; Wilhelm Haarmann, *Die Überseering-Entscheidung – ein Anstoß zur Entrümpelung und Flexibilisierung des deutschen Gesellschaftsrechts?*, BB 2003, Heft 16, „Die erste Seite"; Christoph Hack, *Die Sitztheorie nach dem EuGH-Urteil Überseering*, GesRZ 2003, 29; Harald Halbhuber, *Das Ende der Sitztheorie als Kompetenztheorie*, Zeitschrift für Europäisches Privatrecht (ZEuP) 2003, 418; Christian Handig, *EuGH zur Niederlassungsfreiheit von Gesellschaften*, ecolex 2003, 87; *Christian Kersting, Rechtswahlfreiheit im Europäischen Gesellschaftsrecht*, NZG 2003, 9; Stefan Leible & Jochen Hoffmann, *„Überseering" und das deutsche Gesellschaftskollisionsrecht*, ZIP 2003, 925; Stefan Leible & Jochen Hoffmann, *„Überseering" und das (vermeintliche) Ende der Sitztheorie*, RIW 2002, 925; Marcus Lutter, *„Überseering" und die Folgen*, BB 2003, 7; Wienand Meilicke, *Die Niederlassungsfreiheit nach „Überseering"*, GmbH-Rundschau (GmbHR) 2003, 793; Hanno Merkt, *Die Gründungstheorie gewinnt an Einfluß*, RIW 2003, 458; Hans-W. Micklitz, *Überseering – die geschenkte Chance …*, Europäisches Wirtschafts- und Steuerrecht (EWS) 2002, Heft 12, „Erste Seite"; Hans-Werner Neye, *Anmerkung, Entscheidungen zum Wirtschaftsrecht* (EWiR) Art 43 EG 1/02, 1004; Walter G. Paefgen, *Auslandsgesellschaften und Durchsetzung deutscher Schutzinteressen nach „Überseering"*, DB 2003, 487; Wulf-Henning Roth, *Internationales Gesellschaftsrecht nach Überseering*, IPRax 2003, 117; Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122; Martin Schulz & Peter Sester, *Höchstrichterliche Harmonisierung der Kollisionsregeln im europäischen Gesellschaftsrecht: Durchbruch der Gründungstheorie nach „Überseering"*, EWS 2002, 545; Erich Schanze & Andreas Jüttner, *Anerkennung und Kontrolle ausländischer Gesellschaften - Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH*, Die Aktiengesellschaft (AG) 2003, 30; Stephan Stieb, GmbHR 2002, R 473; Manfred P. Straube & Thomas Ratka, *Nach "Centros" und "Überseering" folgt nun "Inspire Art": Nationales Gesellschaftsrecht (fast) chancenlos?*, GeS 2003, 148; Volker Triebel, Nach Überseering (und demnächst Inspire Art): Verdrängen die englische Ltd. und PLC die deutsche GmbH und AG?, BB 2003, Heft 36, „Die erste Seite"; Marc-Philippe Weller, IPRax 2003, 207; Daniel Zimmer, *Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH*, BB 2003, 1.

[4] ECJ Case C-167/01 of 30 September 2003, in: DB 2003, 2219. First case notes by: Heribert Hirte, *Wettbewerb der Rechtsordnungen nach „Inspire Art": Auch das Beurkundungserfordernis für GmbH-Anteilsübertragungen steht zur Disposition*, GmbHR 2003, R 421; Wienand Meilicke, *GmbHR-Kommentar*, GmbHR 2003, 1271; Jens Kleinert & Peter Probst, *Endgültiges Aus für Sonderanknüpfungen bei (Schein-)Auslandsgesellschaften*, DB 2003, 2217; Thomas Wachter, *Errichtung, Publizität, Haftung und Insolvenz ausländischer Kapitalgesellschaften nach „Inspire Art"*, GmbHR 2003, 1254; Marc-Philippe Weller, *„Inspire Art": Weitergehende Freiheiten beim Einsatz ausländischer Briefkastengesellschaften*, DStR 2003, 1800.

mines the applicable law according to the statutory seat of a company,[6] seems to be gradually replaced by the real seat theory, which regards the law of that state to be applicable where the actual center of administration, i.e. headquarters, of the company is located.[7]

B. *Inspire Art*

I. Facts of the Case

Opponent in the Dutch proceedings was Inspire Art Ltd., a private company limited by shares established in Great Britain and having its statutory seat in Folkestone. Immediately after its formation, the company, which was dealing in *objets d'art*, started doing business in the Netherlands, where its sole shareholder and director was domiciled. No business was ever to be conducted in the UK. In fact, from the very beginning the shareholder only intended to take advantage of the liberal rules of British company law. A branch of the company was registered in the commercial register of the Amsterdam Chamber of Commerce without the indication that Inspire Art was a pseudo-foreign company. Such an indication, however, was necessary according to the *Wet op de formeel buitenlandse vennootschappen* (WFBV) (Dutch law on pseudo foreign companies). The Chamber of Commerce applied for an order of the competent court of justice that the registration of the defendant be completed according to Article 1 WFBV by the indication "pseudo-foreign company." As a pseudo-foreign company, Inspire Art Ltd. would have been obliged to comply with the provisions of Article 2 to 5 WFBV which, besides numerous further disclosure requirements, *de facto* stipulated a minimum capital. According to Article 4 (1) WFBV the company's subscribed capital had to be at least equal to the minimum amount that Article 178 *Burgerlijk Wetboek* (Dutch Civil Code) required for Dutch companies with limited liability. If the minimum capital requirements were not complied with, Dutch law requires the directors of the company to be jointly and severally liable for the debts of the company.
The *Kantongerecht Amsterdam* (Amsterdam district court) held in its decision of 5 February 2001 that Inspire Art Ltd. was a pseudo-foreign company within the

[5] Whereas *Daily Mail* and *Überseering* were cases of the primary freedom of establishment, *Inspire Art* and *Centros* relate to the secondary freedom of establishment. Contrary to *Centros*, *Inspire Art* was not about the registration of a branch, but about the admissibility of a special regime dealing with pseudo foreign companies.

[6] Cf. Peter Kindler, *in* MÜNCHENER KOMMENTAR (1999), Internationales Gesellschaftsrecht, para. 265 et seq.; or Bernhard Großfeld, *in* STAUDINGER (1998), Internationales Gesellschaftsrecht, para. 20, 22.

[7] Cf. Peter Kindler, *in* MÜNCHENER KOMMENTAR (1999), Internationales Gesellschaftsrecht, para. 312 et seq.; or Bernhard Großfeld, in Staudinger[13] (1998), Internationales Gesellschaftsrecht, para. 20, 26.

meaning of Article 1 WFBV and referred to the ECJ the following questions for a preliminary ruling:
"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?
2. If, on a proper construction of those articles, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?"[8]

II. The Decision of the Court

As mentioned earlier, the ECJ decided again clearly in favor of the freedom of establishment. The Court ruled that Article 1 WFBV, stating that Dutch branches of pseudo-foreign companies must disclose the fact that they are pseudo-foreign companies, was in breach of the 11th directive,[9] because the latter did not permit any disclosure rules going beyond the rules contained in it. It reasoned that, since the directive gave the Member States discretion to introduce specifically enumerated additional disclosure requirements, the listing of potential disclosure requirements was exhaustive.[10] The Court held that a requirement corresponding to the Dutch provision could be found neither in the list of the obligatory nor of the facultative

[8] ECJ Case C-167/01 (*supra* note 4), para. 39.

[9] Directive 89/666/EWG of 22 December 1989, Official Journal L 395/36. Cf. GÜNTER CHRISTIAN SCHWARZ, EUROPÄISCHES GESELLSCHAFTSRECHT (2000), para. 367 et seq.

[10] This statement of the ECJ refers, however, only to the provisions in question. Dissenting: Wienand Meilicke, *GmbHR-Kommentar*, GmbHR 2003, 1271, 1273.

disclosure requirements and was therefore inadmissible.[11] Given this fact, the Court deduced that justification of such provisions was not possible.[12]

Concerning the second question submitted for a preliminary ruling, the ECJ referred to its earlier judicature and held, except in cases of fraud,[13] it was immaterial for the applicability of the freedom of establishment that a company had been set up in a certain Member State with the sole aim of establishing itself in a another Member State, where its main, or indeed entire, business was to be conducted.[14] It also held that it did not constitute an abuse to choose a jurisdiction only for its liberal rules[15] and that it was a different question whether Member States could prevent the abusive reliance on Community law in spite of that.

The Court decided that the provision, which requires pseudo-foreign companies to have a capital at least equivalent to the minimum capital prescribed for Dutch companies with limited liability in order to exclude the personal liability of their directors, constituted a violation of the freedom of establishment in any case. Such a provision could not be justified by an imperative requirement in the public interest because neither Article 46 EC nor the protection of creditors, the prevention of an improper recourse to freedom of establishment, the enforcement of fairness in business dealings nor the efficiency of tax inspections could be invoked in this case[16]. The Court pointed out that Inspire Art Ltd. held itself out to be a *foreign* and not a *Dutch* company and that therefore its creditors were sufficiently informed that it was subject to other provisions than a company with limited liability formed under Dutch law.[17]

The ECJ further concluded that the incompatibility of the minimum capital provisions with the freedom of establishment inevitably resulted in the relevant sanctions being incompatible with Community law as well and that no further examination was necessary in this respect.[18]

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[11] ECJ Case C-167/01 (*supra* note 4), para. 69 et seq.

[12] *Id.* para. 106. In his opinion of 30 January 2003, Advocate Genderal Alber examined the additional disclosure requirements on the basis of Article 43 et seq. EC. He also concluded that they breached European Law.

[13] Cf. ECJ Case C-212/97 (*supra* note 2), para. 24.

[14] The only relevant factor for the application of the freedom of establishment is therefore the incorporation in a Member State and not the existence of economic activities in the state of incorporation.

[15] ECJ Case C-167/01 (*supra* note 4), para. 95 et seq.

[16] *Id.*, para. 142.

[17] *Id.*, para. 135.

[18] *Id.*, para. 141.

C. Effects of the Decision

I. Real Seat Theory Incompatible with European Law

The decision ousts the real seat theory for inbound cases. After *Überseering* some scholars still doubted this and pointed out that according to the ECJ in *Überseering* it was sufficient to respect the company as a legal entity and that this requirement was complied with if the pseudo-foreign company was *ex lege* transformed into a German partnership.[19] The predominant opinion, already deduced from *Überseering* and *Centros*, is that a re-qualification of the foreign company into a domestic partnership was not permitted under European law.[20]

For outbound cases, i.e. cases of domestic companies wanting to leave their state of incorporation, *Inspire Art* does not result in any change. The state of incorporation as the "creator" of the company continues to be at liberty[21] to prohibit the transfer of the head office and/or the statutory seat to another state.[22] In *Überseering* the ECJ

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[19] Landgericht (Regional Court) Frankenthal, 6 December 2002, 1 HK T 9/02, BB 2003, 542 et seq.; Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung „Überseering"*, DStR 2003, 159, 166; Peter Kindler, *Auf dem Weg zur Europäischen Briefkastengesellschaft?*, Neue Juristische Wochenschrift (NJW) 2003, 1073, 1077 et seq. Cf. also Wulf-Henning Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law*, 52 International and Comparative Law Quarterly (2003), 177, 195 et seq., 207 et seq.

[20] Oberster Gerichtshof (OGH) (Austrian Supreme Court for Civil Law), 15 July 1999, 6 Ob 123/99b and 6 Ob 123/99b, RdW 1999, 719 (for a detailed analysis see Thomas Ratka, Grenzüberschreitende Sitzverlegung von Gesellschaften (2002) 137 et seq. Bundesgerichtshof (German Supreme Court for Civil Law) (BGH), 13 March 2003, VII ZR 370/98, DStR 2003, 948; Ulrich Forsthoff, *EuGH fördert Vielfalt im Gesellschaftsrecht*, DB 2002, 2471, 2475 et seq.; Stefan Leible & Jochen Hoffmann, *„Überseering" und das (vermeintliche) Ende der Sitztheorie*, RIW 2002, 925, 930 et seq.; Curt Christian von Halen, *Das internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH*, Wertpapiermitteilungen (WM) 2003, 571, 575; Heribert Hirte, EWS-Kommentar, EWS 2002, 573, 574; Christian Kersting, *Rechtswahlfreiheit im Europäischen Gesellschaftsrecht*, NZG 2003, 9, 9 et seq.; Marcus Lutter, *„Überseering" und die Folgen*, BB 2003, 7, 9; Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122, 122 et seq.; Martin Schulz, *(Schein-)Auslandsgesellschaften in Europa - Ein Schein-Problem?*, NJW 2003, 2705, 2706; Daniel Zimmer, *Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH*, BB 2003, 1, 5 et seq.

[21] Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa*, ZIP 2002, 2233, 2243, considers that restrictions in outbound cases equally require justification, although a more lenient standard than in inbound cases applies. See also Daniel Zimmer, *Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH*, BB 2003, 1, 3, who concludes that the state of incorporation is not immune to the freedom of establishment. Incorrect seems to be the opinion of Jens Kleinert & Peter Probst, Endgültiges *Aus für Sonderanknüpfungen bei (Schein-)Auslandsgesellschaften*, DB 2003, 2217, 2217 et seq., who from *Überseering* and *Daily Mail* derive arguments for the inadmissibility of restrictions in outbound cases.

[22] Already Wolfgang Schön, DIE NIEDERLASSUNGSFREIHEIT VON KAPITALGESELLSCHAFTEN IM SYSTEM DER GRUNDFREIHEITEN, FESTSCHRIFT LUTTER (2000), 685, 702 et seq. Cf. also Ulrich Forsthoff, *EuGH fördert*

confirmed[23] its previous decisions[24] and again held that the state of incorporation could dissolve a company trying to leave the country "at the border." Thus, the state of incorporation is not obliged to continue to respect the legal personality it had granted before the relocation of the company's seat.[25] If, on the other hand, the state of incorporation allows the transfer, the host state is obliged to acknowledge the foreign company as such[26]. Consequently, depending on the state of incorporation's legal system, national company forms may not be able to benefit from the ECJ's judicature since being able to leave the state of incorporation is the logical precondition for moving into another Member State. As of autumn 2004, the European Company[27] whose statute[28] provides for the possibility of transferring the company's registered office while retaining its legal identity thus guaranteeing the primary freedom of establishment in the entire Community[29], offers an advantageous alternative.

II. Application of Host State Law

In case notes on *Überseering* the question has been often raised as to what extent national law can be applied to a pseudo-foreign company in other areas, independently of the legal personality or the capacity to be a party to legal proceedings. The

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Vielfalt im Gesellschaftsrecht, DB 2002, 2471, 2474; Christian Kersting, *Rechtswahlfreiheit im Europäischen Gesellschaftsrecht*, NZG 2003, 9, 9; Stefan Leible & Jochen Hoffmann, *„Überseering" und das (vermeintliche) Ende der Sitztheorie*, RIW 2002, 925, 927 et seq.; Marcus Lutter, *„Überseering" und die Folgen*, BB 2003, 7, 10; Walter G. Paefgen, *Gezeitenwechsel im Gesellschaftskollisionsrecht*, WM 2003, 561, 564, 567 et seq.; Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122, 123.

[23] ECJ Case C-208/00 (*supra* note 3), para. 81.

[24] ECJ Case 81/87 (*supra* note 1), para. 18 et seq.

[25] ECJ Case C-208/00 (*supra* note 3), para. 62 et seq. In *Überseering* the Court repeated its previous observation (ECJ Case 81/87 (*supra* note 1), para. 19) "that a company, which is a creature of national law, exists only by virtue of that national legislation and the latter therefore determines its incorporation and functioning".

[26] Cf. Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122, 123.

[27] For a comprehensive overview over this new company form, cf. CLEMENS PH. SCHINDLER, DIE EUROPÄISCHE AKTIENGESELLSCHAFT (2002) or MANUEL RENÉ THEISEN & MARTIN WENZ (EDS.), DIE EUROPÄISCHE AKTIENGESELLSCHAFT (2002).

[28] Regulation 2157/2001 of 8 October 2001, Official Journal L 294/1.

[29] Cf. Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122, 124 et seq., und CLEMENS PH. SCHINDLER, DIE EUROPÄISCHE AKTIENGESELLSCHAFT 49 (2002).

starting point for this discussion was a paragraph in the *Überseering* decision, in which the ECJ acknowledged that the interests of creditors, minority shareholders, employees, and the treasury could be considered imperative requirements in the public interest, which under certain circumstances and considering certain prerequisites can justify restrictions of the freedom of establishment.[30] This led some authors to the conclusion that host state law could be applied to foreign companies if they were regarded as being pseudo-foreign.[31]

1. The Characteristic of being "Pseudo-Foreign" as a Reason for the Application of Host State Law

Without referring to its statement in paragraph 92 of the decision in *Überseering*, the ECJ states in *Inspire Art* that the protection of creditors cannot justify the limitations of the freedom establishment imposed by the provisions under scrutiny.[32] In making this statement, the Court unconvicingly went beyond the case at bar and *de facto* denied any applicability to the statement made in *Überseering*. The ECJ henceforth referred lapidary and generally to the recognizability of the foreignness of a company making it clear to creditors that different rules apply.[33] A comparison between Austria and Germany can show that this argument is not entirely convincing. Whereas Section 6 (1) of the Austrian law on private limited companies (GmbHG) stipulates a minimum capital of EUR 35.000, EUR 25.000 would be sufficient in Germany (Section 5 (1) of the German law on private limited companies, GmbHG). In both Member States companies use the acronym "GmbH" to indicate their legal form. Does a creditor therefore always know that he contracts with a foreign company? Although the ECJ's market transparency argument may be applied to contractual creditors, it is absolutely inappropriate for tort creditors.[34] Moreover, the

[30] ECJ Case C-208/00 (*supra* note 3), para. 92.

[31] Ulrich Forsthoff, *EuGH fördert Vielfalt im Gesellschaftsrecht*, DB 2002, 2471, 2477; *Volker Geyrhalter & Peggy Gänßler, Perspektiven nach „Überseering" - wie geht es weiter?*, NZG 2003, 409, 413; Curt Christian von Halen, *Das internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH*, WM 2003, 571, 576 et seq.; Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung „Überseering"*, DStR 2003, 159, 168 et seq.; Daniel Zimmer, *Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH*, BB 2003, 1, 4. Cf. also *infra* note 57.

[32] Incorrect therefore *Amtsgericht* (Court of First Instance) Hamburg, 14 May 2003, 67g IN 358/02, BB 2003, 1457.

[33] ECJ Case C-167/01 (*supra* note 4), para. 135.

[34] Cf. with reference to Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa*, ZIP 2002, 2233, 2236, *Clemens Ph. Schindler, Vor einem Ausführungsgesetz zur Europäischen Aktiengesellschaft*, ecolex 2003, Heft 6, Script 26, 1, 9 et seq.

observation that "*other* legal provisions apply" cannot be considered a sufficient protection of the creditors because the latter either expect the personal liability of the partners or a minimum capital. A layperson may not be aware that a foreign company form may also indicate that *neither* rule applies.[35]

A better argument is that a special regime for pseudo foreign-companies is disproportionate because real foreign companies often raise similar problems. A different treatment of pseudo-foreign companies could be explained by pointing to the necessary delineation of competences between sovereign states.[36] It seems doubtful whether a purely Austrian case should be exempted from the Austrian jurisdiction on the sole basis of incorporation under British law. In the end this cannot, however, be a justification for a restriction of the freedom of establishment, because all Member States have agreed and subjected themselves to the freedom of establishment and thus cannot point to a conflict with the democratic principle in this context.

Considering the interests of minority shareholders, employees and tax authorities, the ECJ has given a very short opinion. The Court limits its holding to the statement that the Dutch government has not shown that the measures taken in the interest of fair-trading and the effectiveness of tax controls fulfill the criteria of effectiveness, proportionality and non-discrimination.[37] Therefore, it remains unclear whether restrictions of the freedom of establishment can be justified with the interests of the minority shareholders or employees. Because of the lack of such restrictions at the moment, there is considerable room for corporate restructuring in the field of codetermination. If the rigid rules of codetermination were to be evaded, it would be sufficient to found a Ltd. and install the latter by virtue of a capital increase as the parent company of a codetermined company.[38] Section 110 (6) of the Austrian law

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[35] Cf. Volker Geyrhalter & Peggy Gänßler, *Perspektiven nach „Überseering" - wie geht es weiter?*, NZG 2003, 409, 412. For the aspect of informational costs see *Wulf-Henning Roth, From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law*, 52 International and Comparative Law Quarterly (2003), 177, 202 et seq.

[36] Cf. Christian Kersting, *Corporate Choice of Law - A Comparison between the United States and European Systems and a Proposal for a European Directive*, 28 Brooklyn Journal of International Law 1, 13 et seq. (2002); Christian Kersting, *Rechtswahlfreiheit im Europäischen Gesellschaftsrecht*, NZG 2003, 9, 10.

[37] ECJ Case C-167/01 (*supra* note 4), para. 140.

[38] In the subsidiary the rules on codetermination will continue to apply. The legislators introduced Austrian Section 110 (6) ArbVG and German Section 5 (1) MitbestG so that decisions in a group of companies are not taken by a parent company that is not codetermined. The consequences of the remaining codetermination in the subsidiary will have to be observed in practice. In any case, this constellation is an advantage for those subsidiaries which were only codetermined via a parent company, but which do

on codetermination (ArbVG) and Section 5 (1) of the German law on codetermination (MitbestG), which require the codetermination of a parent company which *per se* would not be codetermined, do not apply to foreign companies. Thus, a Ltd moving to Austria or Germany cannot be forced into codetermination.[39] In the light of the previous judicature, it seems doubtful that the ECJ would accept an extension of the national codetermination rules to foreign parent companies.[40]

First, the application of the rules on codetermination to pseudo-foreign companies would have an abstract and general character. However, according to the second answer given by the Court in *Inspire Art*, a restriction on the freedom of establishment can only be justified by showing abuse on the facts of each individual case. As the ECJ continues to emphasize, the choice of a jurisdiction, which in the opinion of the founder has the least restrictive rules, does not constitute an abuse of the freedom of establishment, even if no business activity is intended in that state.[41] There is also doubt whether such an application of host state law satisfies the ECJ's[42] four criteria for justification.[43]

One could probably consider an application of the rules on codetermination that apply to domestic companies to pseudo-foreign companies to be non-discriminating. However, in doing so factual problems only concerning foreign companies are ignored, including questions regarding the representation of foreign employees,[44] the adaptation of the rules on codetermination to the foreign companies' governance structure and the acknowledgement of this application of host state law by other states, especially by the state of incorporation.[45]

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not exceed the relevant thresholds on a stand-alone basis. Regarding the foreign company as a partner in a German partnership cf. Thomas Müller-Bonanni, *Unternehmensmitbestimmung nach „Überseering" und „Inspire Art"*, GmbHR 2003, 1235, 1238.

[39] Along the same lines Thomas Müller-Bonanni, *Unternehmensmitbestimmung nach „Überseering" und „Inspire Art"*, GmbHR 2003, 1235, 1237.

[40] Dissenting: Jens C. Dammann, *The Future of Codetermination after Centros: Will German Corporate Law move closer to the U.S. Model?*, 8 Fordham J. Corp. & Fin. L. 607, 685 (2003).

[41] ECJ Case C-167/01 (*supra* note 4), para. 138 et seq.

[42] ECJ Case C-212/97 (*supra* note 2), para. 34. Cf. auch ECJ Case C-167/01 (*supra* note 4), para. 133.

[43] Cf. Thomas Müller-Bonanni, *Unternehmensmitbestimmung nach „Überseering" und „Inspire Art"*, GmbHR 2003, 1235, 1237.

[44] Cf. Peter Ulmer, *Paritätische Arbeitnehmermitbestimmung im Aufsichtsrat von Großunternehmen - noch zeitgemäß?*, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 166 (2002), 271, 274.

[45] Cf. Jens C. Dammann, *The Future of Codetermination after Centros: Will German Corporate Law move closer to the U.S. Model?*, 8 Fordham J. Corp. & Fin. L. 607, 628 (2003).

Such an application of host state law could surely be considered to be an imperative requirement in the public interest given the protection of employees as its aim. However if one takes the specific rules of the law on codetermination into account the answer is more doubtful because scholars increasingly doubt the usefulness of the German form of codetermination.[46]

At the same time, this raises the question of suitability: Does extending codetermination to pseudo-foreign companies promote the protection of employees? Doubts are not only justified because the usefulness of codetermination is questioned in general. It also has to be noted that an extension of codetermination to pseudo-foreign companies leaves out real foreign companies which can also employ a considerable number of employees without needing to have their center of administration in the host state.[47]

Finally, it is questionable whether such an application of host state law is proportionate, i.e. does not go beyond what is necessary in order to attain its objective.[48] In the first place, a minimum degree of protection of the employees is guaranteed by the Directive on the European Works Council.[49] Furthermore, if other Member States do not need codetermination in order to protect the interests of employees, it is not plausible why this should be different in Austria or Germany. Moreover, the ECJ's information argument applies in this context. The employees know that they conclude their contract of employment with a foreign company. This argument may not be valid in the aforementioned cases of corporate restructuring; yet in these cases a restriction would be disproportionate because only the management function within the group is "freed" from codetermination. Apart from this, code-

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[46] Cf. with additional references Otto Sandrock, *Deutschland als gelobtes Land des Kapitalgesellschafsrechts?*, BB 2002, 1601 et seq.; Peter Ulmer, *Paritätische Arbeitnehmermitbestimmung im Aufsichtsrat von Großunternehmen - noch zeitgemäß?*, ZHR 166 (2002), 271 et seq.

[47] Cf. ECJ Case C-212/97 (*supra* note 2), para. 35. Dissenting: Jens C. Dammann, *The Future of Codetermination after Centros: Will German Corporate Law move closer to the U.S. Model?*, 8 Fordham J. Corp. & Fin. L. 607, 673 et seq. (2003).

[48] Dissenting: Jens C. Dammann, *The Future of Codetermination after Centros: Will German Corporate Law move closer to the U.S. Model?*, 8 Fordham J. Corp. & Fin. L. 607, 679 et seq. (2003).

[49] Directive 94/45/EG of 22 September 1994, Official Journal L 254/64. This directive only deals with informing and consulting employees but does not introduce codetermination. The ECJ does not engross the question whether both measures are equally suitable and can thus be compared under the aspect of proportionality, cf. ECJ Case C-167/01 (*supra* note 4), para. 135 and ECJ Case C-212/97 (*supra* note 2), para.36. In this case, however, this is not a valid counter-argument because already the suitability of codetermination is doubtful. Cf. also Thomas Müller-Bonanni, Unternehmensmitbestimmung nach „Überseering" und „Inspire Art", GmbHR 2003, 1235, 1238.

termination rules continue to apply on the level of the subsidiary. This is exactly what happens in the case of a foreign company taking over a domestic company.

Consequently, it has to be concluded that the application of host state law to a foreign company, which is triggered exclusively by the fact that this company is considered to be pseudo foreign, constitutes a breach of European law.

2. Facts of the Individual Case as a Reason for the Application of Host State Law - Abuse

Treating a pseudo-foreign company generally as a domestic partnership cannot be upheld under European law because such a re-qualification of the company entails the personal liability of its members. Since the ECJ has considered the protection of the creditors to be an imperative requirement in the public interest,[50] the question arises as to the national legislators' means of creditor protection. General interventions that are only based on the establishment of the company and not on concrete findings of abuse will not satisfy the proportionality test.[51] After *Inspire Art* this can hardly be questioned.[52] A piercing of the corporate veil according to host state law will only be upheld by the ECJ if the conditions which the national law stipulates for this are closely linked to a concrete abuse.[53]

In this context, it must be borne in mind, that the setting up of a pseudo-foreign company does not constitute such an abuse. Therefore, the decision whether something constitutes abuse cannot take into account the choice of company law, because the founders are free to choose whichever law suits them best.[54] The choice of a set of general rules can also not be considered abusive, whatever the individual facts of the case may be, because there is no reference point for the qualification as abuse. For example, there is no reason for evaluating English company law rules against the rules of the equal but not higher-ranking Austrian company law if the argument 'pseudo-foreign company' is invalid. If English company law does not

[50] ECJ Case C-208/00 (*supra* note 3), para. 92.

[51] Cf. with additional references Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung „Überseering"*, DStR 2003, 159, 167.

[52] Cf. *supra* C.II.1.

[53] ECJ Case C-167/01 (*supra* note 4), 2nd Answer. A detailed analysis of cases of abuse in European company law is undertaken by Wolfgang Schön, Der "Rechtsmißbrauch" im Europäischen Gesellschaftsrecht, Festschrift Wiedemann (2002), 1271 et seq.

[54] Cf. also Walter G. Paefgen, *Auslandsgesellschaften und Durchsetzung deutscher Schutzinteressen nach „Überseering"*, DB 2003, 487, 488, who sees no possibility of establishing a circumvention of the law because there is no cogent and objective point of reference if the seat of the company is irrelevant.

require a Ltd to subscribe and maintain a minimum capital,[55] a Ltd. cannot be considered as *per se* undercapitalized.[56]

Thus, the question arises if abuse can be established in any case at all. As far as questions of company law are concerned, it follows from the free choice of law that abuse can only be established within the chosen legal system and with reference to this system. In that case, however, it is an abuse of the chosen national law that must be sanctioned within the chosen legal system and not by the substitution of another legal system[57].

If abuse can be established independently from the chosen organizational form, like fraud, the host state can undoubtedly apply its criminal law or general law of torts to foreign companies and their members.[58] The persons concerned could not invoke the freedom of establishment by arguing that the application of the law of torts restricted their exercise of that freedom. Such a reliance on European law would be abusive.

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[55] Besides, English law also has rules on piercing the corporate veil. Cf. Martin Schulz & Peter Sester, Höchstrichterliche Harmonisierung der Kollisionsregeln im europäischen Gesellschaftsrecht: Durchbruch der Gründungstheorie nach „Überseering", EWS 2002, 545, 551; Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz*, Juristenzeitung (JZ) 1999, 662, 664.

[56] Cf. with additional references Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung „Überseering"*, DStR 2003, 159, 169.

[57] Dissenting, and in favor of the applicability of German corporate law provisions: Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa, ZIP 2002, 2233, 2242; Ulrich Forsthoff, EuGH fördert Vielfalt im Gesellschaftsrecht*, DB 2002, 2471, 2477; Curt Christian von Halen, *Das internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH*, WM 2003, 571, 576 et seq.; Heribert Hirte, *EWS-Kommentar*, EWS 2002, 573, 574; Marcus Lutter, *„Überseering" und die Folgen*, BB 2003, 7, 10; Walter G. Paefgen, *Auslandsgesellschaften und Durchsetzung deutscher Schutzinteressen nach „Überseering"*, DB 2003, 487, 488 et seq.; Martin Schulz, *(Schein-)Auslandsgesellschaften in Europa - Ein Schein-Problem?*, NJW 2003, 2705, 2706; with additional references Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz*, JZ 1999, 662, 664 et seq.; Marc-Philippe Weller, *„Inspire Art": Weitergehende Freiheiten beim Einsatz ausländischer Briefkastengesellschaften*, DStR 2003, 1800, 1803 et seq. Concurring: Stefan Leible & Jochen Hoffmann, *„Überseering" und das (vermeintliche) Ende der Sitztheorie*, RIW 2002, 925, 930, who oppose the concept of a liability for undercapitalisation, but consider tort liability possible under European law.

[58] Cf. Walter G. Paefgen, Auslandsgesellschaften *und Durchsetzung deutscher Schutzinteressen nach „Überseering"*, DB 2003, 487, 488 et seq.; Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz*, JZ 1999, 662, 664.

Thus, *Existenzvernichtungshaftung* (liability for ruining the company) recently developed by the German *Bundesgerichtshof* (BGH) (Supreme Court for Civil Law)[59] or liability for undercapitalization can only be applied to foreign companies if they are understood as institutes of the law of torts or of insolvency law.[60]

D. Evaluation and future prospects

With *Inspire Art*, the ECJ has widely opened the door for corporate restructuring within European company law, hereby undoubtedly increasing the competition among the legal systems. In *Überseering*, the Court held that a company's legal personality and its capacity to be a party to legal proceedings must be respected all over Europe. In *Inspire Art*, the ECJ extends this obligation to the entire legal system of the state of incorporation. If no limited application of host state law is possible for pseudo-foreign companies, the same must, a fortiori, be true for real foreign companies.

In this situation, the Member States must ask themselves to what extent the application of host state law to pseudo-foreign companies makes sense. Regarding the similar harmful potential of real foreign companies, this can be questioned in general. It waits to be seen whether this decision leads to a general decline of the Austrian and German GmbH. The imaginable flood of pseudo-foreign companies could give the harmful potential a new quality. It would then have to be seen to what extent directives could provide relief on a European level; pertinent proposals have already been made.[61]

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[59] BGH, 17 September 2001, II ZR 178/99, BGHZ 149, 10 = ZIB 2001, 1874.

[60] Cf. also Hans-Friedrich Müller, *Insolvenz ausländischer Kapitalgesellschaften mit inländischem Verwaltungssitz* NZG 2003, 414, 417; Erich Schanze & Andreas Jüttner, *Anerkennung und Kontrolle ausländischer Gesellschaften - Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH*, AG 2003, 30, 34; Wienand Meilicke, *GmbHR-Kommentar*, GmbHR 2003, 1271, 1272; Marc-Philippe Weller, *Scheinauslandsgesellschaften nach Centros, Überseering und Inspire Art: Ein neues Anwendungsfeld für die Existenzvernichtungshaftung*, IPRax 2003, 207 et seq.; Marc-Philippe Weller, *„Inspire Art": Weitergehende Freiheiten beim Einsatz ausländischer Briefkastengesellschaften*, DStR 2003, 1800, 1804. Dissenting: Thomas Wachter, Errichtung, *Publizität, Haftung und Insolvenz ausländischer Kapitalgesellschaften nach „Inspire Art"*, GmbHR 2003, 1254, 1257.

[61] Christian Kersting, *Corporate Choice of Law - A Comparison between the United States and European Systems and a Proposal for a European Directive*, 28 Brooklyn Journal of International Law 1, 67 et seq. (2002), Christian Kersting, *Rechtswahlfreiheit im Europäischen Gesellschaftsrecht*, NZG 2003, 9, 11 et seq.; Daniel Zimmer, *Ein Internationales Gesellschaftsrecht für Europa*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 67 (2003), 298, 310 et seq.

Another possibility would be to allow the Member States by an amendment to a directive,[62] to provide an additional disclosure requirement indicating the subscribed and paid-up capital. This would render the ECJ's self-information argument at least for the contractual creditors more plausible. However, the lack of capital maintenance rules can reduce the additional informational value of such an indication and even lead to confusion.

It is also desirable to better harmonize primary and secondary law. The judicature establishing the state of incorporation theory in primary law leads to a discrepancy with some provisions of secondary law. Especially provisions on European company forms have been regarded as being based on the real seat theory and thus were considered to be in conflict with the ECJ's judicature.[63]

In the future, the discussion should concentrate less on pseudo-foreign companies but rather focus on the advantages and disadvantages of specific provisions. There are good reasons for having rules on the subscription and maintenance of a minimum capital,[64] which must now face the market. For entrepreneurs it can still make sense economically to use the domestic company form and thus demonstrate seriousness and sincerity. Incrustations of this system could be removed in order to enhance its attractiveness.[65]

In the field of codetermination, foreign companies such as the Ltd offer higher flexibility than Austrian or German legal forms. Also for reasons of time and economy the Ltd seems to be a favorable alternative. With the introduction of the One-Euro *SARL*[66] France has made available a legal form comparable to the Ltd. and has thus not only prevented a possible "escape to Great Britain" but also secured the application of French law and its chance of designing this law. It will be most interesting to see how each of the Member States will react to the latest judicature of the ECJ. One thing seems very clear, as in the situation in tax law, the era of "company law shopping" has begun.

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[62] A national provision seems to be incompatible with the ECJ's judicature.

[63] Cf. CLEMENS PH. SCHINDLER, DIE EUROPÄISCHE Aktiengesellschaft (2002), 47 et seq.; Clemens Ph. Schindler, *„Überseering" und Societas Europaea: Vereinbar oder nicht vereinbar, das ist hier die Frage*, RdW 2003, 122 et seq.

[64] Cf. the editorial by Wolfgang Schön, *Wer schützt den Kapitalschutz?*, ZHR 166 (2002), 1 et seq.

[65] Cf. Heribert Hirte, *Wettbewerb der Rechtsordnungen nach „Inspire Art": Auch das Beurkundungserfordernis für GmbH-Anteilsübertragungen steht zur Disposition*, GmbHR 2003, R 471. The suggestions of Wienand Meilicke, *GmbHR-Kommentar*, GmbHR 2003, 1271, 1273, probably go a bit too far.

[66] Cf. Patricia Becker, *Verabschiedung des Gesetzes über die französische Blitz-S.A.R.L.*, GmbHR 2003, 1120 et seq.