OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 4 December 2001 [1]

Introduction

1. This reference for a preliminary ruling gives the Court of Justice the opportunity to clarify the meaning of the *Centros* judgment, [2] and to specify, in general terms, the extent to which Community law influences determination of the legal status of bodies corporate.

2. The main proceedings raise the issue of a legal order which precludes a company validly incorporated in a Member State and having its head office and pursuing its activity in Community territory, and which can expect, in consequence, to enjoy the freedom of establishment under the EC Treaty, from asserting its rights in another Member State in which it has established its actual head office. [4]

3. The issue is essentially to determine whether, and to what extent, Community law directly impacts on the organisation of national private international law rules on the international personality of companies.

That controversy has occasioned lively debate in European, and in particular German, academic circles. [3]

Facts and procedure of the main action

4. The following is a summary of the facts and procedural stages of the main action as set out in the order for reference.

1 — Original language: Spanish.

2 — Case C-212/97 [1999] ECR I-1459 (hereinafter 'the *Centros* judgment').

3 — See, amongst others, Behrens, P., 'Das internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH', *Praxis des internationalen Privat- und Verfahrensrecht*, 1999, Vol. 5, p. 323; Ebke, F., 'Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH', *Juristenzeitung*, 1999, Vol. 13, p. 656; Roth, W.-H., 'Gründungstheorie, ist der Damm gebrochen?', *Zeitschrift für Wirtschaftsrecht*, 1999, Vol. 21, p. 861; Sandrock, O., 'Centros: ein Etappensieg für die Überlagerungstheorie', *Betriebsberater*, 1999, Vol. 26, p. 1337; Steindorff, E.O., 'Centros und das Recht auf die günstigste Rechtsordnung', *Juristenzeitung*, 1999, Vol. 23, p. 1140; Wouters, J., 'Private International Law and Companies' Freedom of Establishment', *European Business Organisation Law Review*, 2001, Vol. 2, p. 101; Zimmer, D., 'Mysterium "Centros": von der schwierigen Suche nach der Bedeutung eines Urteils des Europäischen Gerichtshofes', *Zeitschrift für das gesamte Handelsrecht und Wirschaftsrecht*, 2000, Vol. 1, p. 23.

4 — I shall henceforth use expressions such as 'actual head office', 'actual centre of administration' or 'centre of management' synonymously. I am referring, by each of these, to the place where the running of the company takes place and where it concludes a substantial proportion of its dealings with third parties (see Kegel, G., *Internationales Privatrecht*, Beck, Munich, 1995, p. 416).

5. The plaintiff, Überseering BV (hereinafter 'Überseering'), has since 1990 been registered in the Amsterdam and Haarlem business register as a 'Besloten Vennootschap met beperkte aansprakslijkheid' (BV).[5] It appears in the German land register as the proprietor of a parcel of land in Düsseldorf on which a large motel and carparking complex have been built.

6. Under a project managership agreement of 27 November 1992, the defendant company, Nordic Construction Company Baumanagement GmbH (hereinafter 'NCC'), whose registered office is in Germany, contracted with the plaintiff to refurbish those two buildings. It carried out that work, but the plaintiff considered there to be defects in the paintwork. In 1995, it required the defendant, without success, to remedy those defects.

7. On 1 January 1995, two individuals acquired the entirety of the shares in the plaintiff. According to the finding of the Düsseldorf Oberlandesgericht (Higher Regional Court), the appeal court, the company's actual centre of administration was, from the time of that acquisition, in Düsseldorf.

5 — The conventional form of limited liability companies under Netherlands law.

8. In 1996, Überseering filed a claim against NCC for DEM 1 163 657.77 plus interest, as the cost of remedying the defects and resulting loss and damage. The Landgericht (Regional Court) dismissed the action as inadmissible. The Oberlandesgericht dismissed the appeal brought against the judgment at first instance, upholding the argument that the plaintiff, as a Netherlands company, lacked capacity to bring legal proceedings in Germany. Under Paragraph 50 of the German Zivilprozeßordnung (Code of Civil Procedure, hereinafter 'the ZPO'), capacity to bring legal proceedings attaches to persons with legal capacity, which, in relation to companies, is determined according to the law applicable to them, governed by the law of the State in which they have their principal centre of administration. The same applies to a company validly incorporated in the Netherlands which moves its head office to the Federal Republic of Germany.

9. The plaintiff lodged an appeal on a point of law (Revision) against that judgment, in which it reiterated its claim for damages.

Relevant national law

10. Under the German law of civil procedure, a court must dismiss as inadmissible any action brought by a person that, on account of lack of capacity, cannot be a

main party (plaintiff or defendant) or a secondary party (intervener) to legal proceedings. Under Paragraph 50(1) of the ZPO, persons who have legal capacity have capacity to bring legal proceedings. That provision also applies to companies. Capacity to bring legal proceedings which is the ability to enjoy rights and to be subject to obligations.

11. According to the settled case-law of the Bundesgerichtshof, whether or not a company has legal capacity is determined by the law applicable in the place where it has its actual centre of administration (the 'Sitztheorie' or company seat principle). The same is true where a company is validly incorporated in a different State and has subsequently transferred its actual centre of administration to the Federal Republic. The legal capacity acquired by virtue of its creation does not automatically persist in Germany, but depends on whether the company continues to exist under the law of the State where it was incorporated and whether, in addition, it has legal capacity under German law. The prevailing view of academic commentators shares that approach by the case-law.

12. Taking the actual head office as the connecting factor has the effect that a company validly incorporated abroad, which on an initial analysis has legal capacity in Germany, loses that capacity when it moves its permanent head office to the Federal Republic. In so far as it is subject to the German legal order, it cannot be entitled to rights or subject to obligations, nor party to legal proceedings. In order to have legal dealings, it would have to dissolve itself and reincorporate in a way enabling it to acquire legal capacity under German law. [6]

13. As the Bundesgerichtshof (Federal Court of Justice) itself admits, however, its case-law is the subject of controversy amongst German commentators. One can discern two main lines of thinking:

In the first, determination of a company's legal relations and also, therefore, its capacity, should be according to the law of the State in which the company was incorporated (the place of incorporation principle). That connecting factor has the advantage of being more precise and predicable, thus favouring legal certainty. It also fosters the cross-border mobility of undertakings.

For other commentators, a company's legal status should not be assessed according to a single legal order, but in different ways depending on a number of factors. It is therefore the law of the State where it was incorporated which should determine a

6 — There is doubt as to whether, instead of reincorporating, the company in question could merely alter its status.

company's existence and legal capacity and the legal relations between shareholders ('internal relations'), whilst it should be the law of the State where it has its head office which governs the activities of the company and protection of its creditors ('external relations').

Applicable Community law

14. The main proceedings have given rise to questions as to the interpretation, essentially, of Articles 43 EC and 48 EC, in conjunction with the third indent of Article 293 EC.

'*Article 43 EC*

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

'*Article 48 EC*

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

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

'*Article 293 EC*

Member States shall, so far as is necessary, enter into negotiations with each other

with a view to securing for the benefit of their nationals:

...

— the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries;

....'

The questions referred

15. The Bundesgerichtshof, the highest civil court, finds it unclear from the case-law of the Court of Justice whether, in the event of an undertaking transferring its head office abroad, the freedom of establishment enshrined in Articles 43 EC and 48 EC precludes the actual centre of administration from being taken as the connecting factor for the purpose of determining the law applicable to the undertaking. Under those circumstances, the national court stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Are Articles 43 EC and 48 EC to be interpreted as meaning that there is an infringement of the right to freedom of establishment of companies where the legal capacity and capacity to bring legal proceedings of a company validly incorporated under the law of one Member State are determined according to the law of another State to which the company has moved its actual centre of administration and the law of that second State does not, as a result, allow the company to bring legal proceedings in respect of claims in that second State?

(2) If the Court answers the first question in the affirmative, does the right to freedom of establishment of companies (Articles 43 EC and 48 EC) mean that a company's legal capacity and capacity to bring legal proceedings must be determined according to the law of the State where the company is incorporated?'

Proceedings before the Court of Justice

16. The application for a preliminary ruling was received at the Registry of the Court of Justice on 25 May 2000.

17. In addition to both parties to the main proceedings, the German, Spanish and United Kingdom Governments, the Commission and the European Free Trade Association (EFTA) Surveillance Authority submitted written and oral observations. The Italian Government filed only written submissions, whilst the Netherlands Government confined itself to attending the hearing, which took place on the morning of 16 October 2001.

18. The plaintiff, together with the United Kingdom and Netherlands Governments and the Commission, advocated an affirmative answer to both questions, whilst the EFTA Surveillance Authority called for such a reply as regards the first. The other parties appearing argued for the opposite response.

Analysis of the questions referred

19. It is desirable, at this initial stage, to define the case-law background to the questions raised by the Bundesgerichtshof. Having determined the relevant principles of general application, it is necessary to examine how to apply them to the present case.

Definition of the applicable case-law principles

20. The assertions of the parties concentrate, rightly in my view, on the judgments in *Daily Mail and General Trust* [7] and that referred to above in *Centros*.

21. The *Daily Mail* case had a rather peculiar legal background. English commercial law in force at the time the case was brought provided that a company incorporated in accordance with the legislation of England and Wales and having its registered office in the United Kingdom could move its central management and control and central administration to another country without losing its nationality.

Undertakings resident in the United Kingdom were liable to corporation tax. Tax legislation therefore prevented companies and firms resident, for tax purposes, in the United Kingdom from transferring abroad their central management and control without the prior consent of the Treasury.

22. Daily Mail, with a view to a major restructuring operation, sought to move its

7 — Case 81/87 [1988] ECR 5483 (hereinafter 'the *Daily Mail* judgment').

central management and control to the Netherlands in order to obtain significant tax advantages and applied, unsuccessfully, for the requisite authorisation.

The question referred for a preliminary ruling arose in the context of the procedure challenging that refusal. The Court of Justice found that the current Articles 43 EC and 48 EC, in the then current state of Community law, conferred no right on a company incorporated in accordance with the legislation of a Member State where it had its registered office to move its central management and control to another Member State.

23. In reaching that finding, the Court took account of the fact that the freedom of establishment precludes the State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. [8] It also held that, unlike natural persons, companies are creatures of the law and exist only by virtue of the varying national legislation which governs their incorporation and functioning. [9]

24. After observing that, despite the express invitation contained in the current Article 293 EC, the Community had not adopted any measures in that regard, the Court held that the EC Treaty regarded the disparity in the national legislation of States relating to the connecting factor required for companies belonging to those States (registered office, central administration or principal place of business) and as to whether and, if so, how the registered office or real head office of a company incorporated under national law could be transferred from one Member State to another, as problems not resolved by the rules concerning the freedom of establishment, but ones which had to be addressed by future legislation or treaty. [10]

25. The wording of that latter statement is particularly clear and unconditional. Were that on its own to reflect the current state of case-law, the answer to the first question raised for a preliminary ruling would probably have to be in the negative. [11]

26. However, several of the parties appearing, notably the Commission, have taken pains to minimise the relevance of the arguments in the *Daily Mail* judgment to these proceedings. Basing their agreement on the facts of the main proceedings in that case and on a principle that the host Member State should provide enhanced protection of the freedom of establishment, they seek to confine the significance of that judgment to a mere recognition that it is exclusively the Member State of origin which has power to determine the rules for the incorporation and legal existence of companies in accordance with any provision on the conflict of laws which may prove applicable.

8 — *Daily Mail* judgment, paragraph 16.
9 — Ibid., paragraph 19.
10 — Ibid., paragraph 23.
11 — On that point, see Behrens, P., op. cit., p. 323.

That interpretation is based on wishful, but mistaken, thinking. The judgment suggests no differentiation in the degree of protection, depending on whether it is to be afforded by the State of origin or the host State, nor is limiting its effect to recognising any one exclusive legislative competence in keeping with the statement in paragraph 23 of that judgment.

On the contrary, again according to what is stated in that paragraph, Community rules on the freedom of establishment do not (or did not at that time) affect the power of Member States to define the criteria for determining the status of legal persons or issues relating to the transfer of the registered office or real head office from one Member State to another.

27. One must bear in mind, however, that what was established in the *Daily Mail* judgment held good only 'in the [then current] state of Community law'. That reservation shows the concern of the Court at the disparity of provisions, reflected by the legislature in what is now Article 293 EC, which invites Member States to reduce that disparity 'so far as is necessary'.

28. It must therefore be examined whether, since that time, there have been any material changes in the legal position which allow a new approach.

29. I agree with all the parties expressing a view on that point that the progress seen in the harmonisation of companies legislation has not affected the issues relating to cross-border transfers of the registered office or real head office of bodies corporate. There has not, therefore, been any significant development in the legislation.

30. The same does not pertain as regards developments in case-law. In that regard, the parties are again in agreement, although they do not all draw the same conclusions as to the consequences of the changes they refer to.

31. The *Centros* judgment referred to above emerges as easily the most important precedent.

At issue in that case was whether the refusal to register in the companies register of a Member State a branch of a foreign Community company, incorporated under the law of another Member State and created with the aim of carrying on its entire activity in the country where the branch was established, was compatible with the rules on the freedom of establishment. The referring Danish court found, furthermore, that the method used sought to circumvent the, more onerous, obligations for the incorporation of companies in force in Denmark.

32. The Court's reasoning was in three stages, distinguishing from the outset between (a) the issue of the application of provisions on the freedom of establishment and (b) the measures a Member State can take to prevent persons, using the remedies offered by the EC Treaty, improperly to evade certain national rules (prevention of abuse of right), and adding (c) a number of observations on fulfilment of the grounds put forward by the Danish authorities (imperative requirements in the general interest).

33. It therefore began by determining whether there was an obstacle to that fundamental freedom.

It established that there was merely by pointing out that the right to freedom of establishment covers companies incorporated in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business (primary establishment) within the Community, leading to the conclusion that such companies are entitled to conduct their activity in another Member State through an agency, branch or subsidiary (secondary establishment), and that the location of a company's registered office, central administration or principal place of business serves as the connecting factor with the legal system of a Member State in the same way as does nationality for natural persons. [12]

It then dismissed the argument that the refusal to register the branch may have been a measure intended to prevent abuse of the right of establishment, as referred to in the *Van Binsbergen* case-law. [13] It held, on the contrary, that the right to incorporate a company in accordance with the legislation of a Member State, in particular of one whose company law regulations were less strict, and to set up branches in other States, is inherent to the exercise, in a single market, of the freedom of establishment guaranteed by the EC Treaty. [14]

Lastly, the Court considered whether the national practice at issue could be justified on the grounds of imperative requirements in the general interest. The Danish authorities had advanced two grounds — the protection of non-contractual public creditors (such as the tax authorities or the Department of Social Security) and the protection of creditors in general by requiring a minimum initial share capital. The

12 — Ibid., paragraphs 19 and 20. In relation to that same case, Advocate General La Pergola drew the conclusion that the current Articles 43 EC and 48 EC give a right to incorporate companies in accordance with the legislation of a Member State to operate in that State or, *equally, in any other Member State*. The company thus formed must be entitled to *set up its principal* and, as the case may be, any secondary establishment, wherever it wishes within the Community (Opinion in *Centros* ECR I-1461, point 20). It is of no surprise that the Advocate General himself was in favour of the Court applying the '*Cassis de Dijon*' doctrine on mutual recognition to corporate mobility (ibid., point 20).

13 — Case 33/74 [1974] ECR 1299, paragraph 13.

14 — Paragraph 27 of the *Centros* judgment.

Court referred to the conditions attaching to that type of restrictive measure, defined in *Gebhard*, [15] and held that they were not fulfilled in the case before it. [16]

34. There is a pleasing simplicity to the argument in the *Centros* judgment. It applies, in their terms, the provisions of Articles 43 EC and 48 EC. That approach is in line with the traditional interpretation of the fundamental freedoms under the EC Treaty which, on expiry of the transitional period, become directly or immediately effective.

I would like to single out the following two aspects of the *Centros* judgment — one an omission and one an inclusion.

35. The significant omission is that of any reference to Article 293 EC, or to the *Daily Mail* judgment, which used that article as a guideline. The Advocate General does not address that issue in his Opinion, nor do the parties to those proceedings seem to have done so in their submissions.

36. There is one obvious explanation — that in the *Centros* case the issue under examination was the opening of a *branch* and not the transfer of a *company head office*. That theory would, however, be excessively formalist, would fail to take into account that *head office* (sede) can refer not only to the registered office but to the place where the actual administration takes place, and would be distinguishing, on no apparent grounds, between a — very qualified — right of primary establishment and a practically unlimited right of secondary establishment. [17] Further, the Court cannot have been unaware that by upholding such a wide-ranging freedom to set up branches (which, strictly, have little of a true branch about them, in the normal sense of the word, since they can comprise the entire assets of a company) [18] it was providing a loophole in the legislation on cross-border transfers of company registered offices or actual head offices which, in the absence of harmonisation, is the

15 — Case C-55/94 [1995] ECR I-4165 (hereinafter 'the *Gebhard* judgment'), paragraph 37, according to which national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.

16 — In general terms, there was no justification for the national practice on the grounds that it was intended to protect creditors, since had Centros conducted business in the United Kingdom, its branch would have been registered in Denmark, without putting Danish creditors in any better position. Further, Centros held itself out to operators as a company governed by the law of England and Wales and not as a Danish company. As regards public creditors, a less restrictive measure than refusing registration would have been to allow them to obtain the necessary guarantees. Lastly, nothing prevented the Danish authorities from taking any appropriate measure to prevent or penalise fraud (paragraphs 34 to 38 of the *Centros* judgment).

17 — Although it is indeed true that primary freedom of establishment is liable to affect Member States more than secondary freedom of establishment, since the registered or actual head office is the connecting factor for application of tax or surveillance regulations. In that regard, see Zimmer, D., op. cit., p. 33. See also, although more critical, Steindorff, E., op. cit., p. 1141. These considerations are not, however, referred to in the texts of the judgments, nor do they find any foundation in the EC Treaty.

18 — That is the view of Freitag, R., 'Der Wettbewerb der Rechtsordnungen im internationalen Gesellschaftsrecht', *Europäische Zeitschrift für Wirtschaftsrecht*, 1999, Vol. 9, p. 267, in particular p. 268.

province of Member States.[19] The invitation by the Danish authorities to exclude from the benefit of the right of establishment those circumstances in which a company's sole aim is to circumvent a particular legislation should have led the Court to examine that possible form of evasion, in that instance of its own case-law, namely the *Daily Mail* judgment. The Court based its reasoning, nevertheless, on the hypothesis that, for the purposes of Community law, Centros was seeking to exercise the secondary form of freedom of establishment.[20]

37. A second explanation would consist of stressing the differences between the factual circumstances of the main proceedings in each case. On that view, the conditions contained in the *Daily Mail* judgment pertain only in relation to the ability of the State *of origin* to restrict the freedom of establishment of companies incorporated in accordance with its law, whilst the *Centros* judgment addresses the obstacles which the *host* State could impose. Alternatively, one could argue that the background to the first is an issue of tax law, whereas the subject-matter of the second is one of company law. Those appear to me to be artificial distinctions intended to justify divergent judicial results. They have no foundation, clearly, in any express statement in the judgments.

38. A third possible explanation would see the *Centros* judgment as superseding the *Daily Mail* precedent, if only as regards its practical legal consequences: a company wishing to establish its actual centre of administration in a different Member State would only need to apply for registration of a branch. The precepts of the *Daily Mail* judgment would then serve solely to prevent the State of origin, under whose law the company was incorporated, from being able to retain a degree of control over the body corporate, which remains a fiction created by that legal system. Control would encompass, for example, determining the connecting factor for liability to a tax obligation, as in the *Daily Mail* case, or, generally, for the exercise of administrative surveillance.

That interpretation admittedly compels one to discount a number of statements made in the broadest terms in the judgment in question, in particular those in paragraph 23.[21]

39. It is, to my mind, rather a matter of *supplementing* the former decision; issues regarding definition of the connecting factor determining the law applicable to a company and questions concerning cross-border transfers of companies' head offices were and are governed, in the absence of harmonising measures, by the legal systems of Member States which must, none the

19 — See paragraph 23 of the *Daily Mail* judgment.

20 — That omission may reflect the fact that the Community court is implying that there are no differences in the provisions governing the primary and secondary expressions of the freedom of establishment. On that point, see Behrens, P., op. cit., p. 327.

21 — See point 24 above.

less, *comply with substantive Community law*. [22]

40. From that point of view, European law still does not directly affect the ability of Member States each to organise its rules on the conflict of laws as it wishes, beyond the requirement that they respect the principles of that law.

41. The significant inclusion in the *Centros* judgment is that it introduces, in relation to companies' freedom of establishment, the general criteria for assessing whether restrictions on a fundamental freedom are compatible with EC Treaty provisions, which the Court described in the judgment in *Kraus* [23] and set definitively in the *Gebhard* judgment cited above.

42. Inclusion of that type of analysis impliedly acknowledges that the provisions on the freedom of establishment are immediately effective in relation to the movement of companies which presupposes, in turn, the abandonment or, in any event, a qualification, of the reservation contained in Article 293 EC. [24]

That stance is desirable from a point of view of dynamic European integration and finds support in the wording of the provision. Unlike Article 295 EC ('[t]he Treaty shall not prejudice in any way...') which, without the slightest doubt, excludes from application of the EC Treaty the rules governing the system of property ownership, [25] Article 293 EC contains only an invitation to Member States to enter into negotiations and, what is more, only 'so far as is necessary'. Article 293 EC is not therefore comparable to a true exclusion from the legislation and is rather an admonition to Member States to overcome the inevitable problems which will arise from the disparity of legislation on the mutual recognition of companies, on the retention of their legal capacity in the event of cross-border transfers of their head office and on mergers. Being thus an admonition it cannot, as such, hinder the effectiveness of one of the fundamental freedoms.

43. I submit, therefore, that existing authorities do permit an analysis of whether restrictions intended to limit or having the effect of limiting the exercise of the freedom of establishment by bodies corporate protected by Article 48 EC are compatible with the EC Treaty, according to the general guidelines defined by the Court of Justice, that is, that they are in themselves non-discriminatory, that they are justified by imperative requirements in the general interest and that they are suitable and

22 — On that point, see Wouters, J., op. cit., p. 122 et seq.

23 — Case C-19/92 [1993] ECR I-1663, paragraph 34.

24 — A view already voiced, albeit obliquely, in Case 79/85 *Segers* [1986] ECR 2375, paragraph 16.

25 — See, in that regard, my Joined Opinion delivered in Cases C-367/98 *Commission* v *Portugal*, C-483/99 *Commission* v *France*, and C-503/99 *Commission* v *Belgium* [2002] ECR I-4731, point 39 et seq.

proportionate for attaining the objective which they pursue.

As with other legal disciplines, that type of analysis — which is strictly Community in nature — cannot aspire to shape the national law in question, particularly private international law. Having said which, the resulting national rules must be subject to interpretation in accordance with Community law or must, otherwise, meet the criteria for restrictions imposed on the grounds of imperative requirements in the general interest.

Analysis of the first question

44. By the first question referred for a preliminary ruling, more restricted in scope than the second, the Bundesgerichtshof seeks essentially to ascertain whether Community law precludes a national provision which prevents a company validly incorporated in accordance with the legislation of a Member State from relying on contractual rights in the courts of another Member State on the ground that it has its actual centre of administration in that second State.

45. That deprivation of the capacity to sue arises, according to the Bundesgerichtshof, because the company's legal capacity and capacity to bring legal proceedings are assessed according to the law of the Member State in which it had established its actual centre of administration, which law, not being acquainted with the foreign corporate vehicle, is, it asserts, bound to refuse to recognise the company as having such capacity. The only option available to the company affected would be to dissolve itself and to reincorporate in accordance with the law of the host State.

46. However, it is preferable, in my view, to adhere to the most objective expression of the problem raised, so as not to rule on a subject which it is for national law to interpret; the German legal system does not confer capacity to sue on foreign companies whose real head office is located, under German law, in its territory.

I believe that, on the one hand, the German provisions fit uneasily with any autonomous Community interpretation of the concepts of legal capacity and capacity to bring proceedings since, whilst denying capacity to sue to companies whose real head office is not in the State of incorporation, they do accept, as Überseering has described to this Court, that they have capacity to be sued under the same circumstances. [26] Further, the referring court itself, which in its order for reference defines legal

26 — In other proceedings, according to the submission of Überseering, which was not contested, the Landgericht Düsseldorf ordered Überseering to pay the fees of the architects who worked on the refurbishment, and registered a preventive attachment against the real property in Germany owned by the plaintiff in the main proceedings.

capacity as the capacity to enjoy rights and bear obligations, admits that Überseering is the owner of real property. [27] That gives rise, in my view, to an artificial separation of concepts foreign to the traditional definition of legal capacity, one which seems to correspond rather to a deterrent or penalising mechanism.

So, the question admits of different interpretations in terms of the precise legal order applicable to the triggering circumstance, that is, the transfer of the company head office, [28] or of the criteria for assessing whether that transfer has taken place.

On the other hand, nor is it inconceivable that application of the company seat principle might not inevitably lead to the dramatic consequences which German law attributes to it. [29]

For those reasons, it seems more sensible to avoid any legal assessment of the internal law and to consider the national rule in question as an instance of a restriction on a company's capacity to bring legal proceedings, which seeks to prevent a particular primary corporate activity in a State other than that in which the company was incorporated.

47. That restriction is, on a first analysis, incompatible with the freedom of establishment laid down by the EC Treaty, and Article 293 EC cannot, as I have stated previously, lead to the opposite conclusion.

48. It is necessary, therefore, to ascertain whether the restriction fulfils the other conditions laid down by the case-law.

49. Contrary to the assertions of various parties, the measure is not of itself discriminatory. A company incorporated under German law which had transferred its administrative centre to another Member State would have received similar treatment. That transfer would, in any event, have affected its legal capacity, in the meaning given to it in German law. [30]

27 — See point 5 above.

28 — At the hearing, the Netherlands and United Kingdom Governments agreed that a situation such as that in the present proceedings would under their laws be classified as the creation of a branch.

29 — To that effect, see Wouters, J., op. cit., p. 132. One could think, for example, of the application to the company of certain compulsory provisions laid down in relation to the corresponding company vehicle under domestic law.

30 — See, in that regard, the reference for a preliminary ruling in Case C-86/00 *HSB-Wohnbau* [2001] ECR I-5353, disposed of by an order of inadmissibility of 10 July 2001 (on the grounds that the referring body lacked jurisdiction), at paragraph 7 whereof the order states that, under German law, 'a company has legal existence only if it has its establishment in the country under whose law it has been incorporated. From that viewpoint, the transfer abroad of a company's registered office necessarily entails its dissolution and liquidation, that is to say, in particular, the loss of its legal personality in Germany, and the formation of a new company abroad'.

50. It emerges from the order for reference that the company seat principle, as applied in Germany, serves to protect the rights of creditors (through the requirement of a minimum paid-up share capital, with rules on how it can be disposed of), of dependent companies and minority shareholders (by enhancing the weight given to their interests by requiring qualified majorities, or providing for indemnification or compensation in particular circumstances) and of workers (by requiring co-determination on the terms laid down by law). The German Government adds protection of the interests of the tax authorities (by means of reducing the incidence of double liability to tax).

Those reasons must be deemed to be imperative requirements in the general interest for the purposes of the case-law of the Court of Justice. [31]

51. It remains to be ascertained whether the measure should be considered to be suitable for and proportionate to the objectives it pursues.

52. The answer here must be in the negative. The expedient consisting of denying capacity to sue to a company validly incorporated in another Member State is not a suitable measure to attain the legitimate objectives it claims to pursue and, therefore, goes beyond what attainment of those objectives requires.

53. The Court of Justice has already had occasion to qualify the protection which the minimum paid-up share capital requirement can afford the creditors of a company. [32] In other respects, there has been no examination of whether Überseering actually did offer lesser guarantees to creditors. In any event, it is clear that to deny capacity to sue, which prevents a party from relying before a court on rights against third parties, rather than enhancing the position of creditors of the company, would seem to operate to the benefit of its debtors.

54. None of the other three interests supposedly protected by the measure in question has been articulated sufficiently to warrant consideration.

There is no indication of the rights of minority shareholders allegedly protected, nor is it on record even whether Überseering has any such holdings or that the law governing the company does not give them

31 — See, on the protection of the creditors of a company, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 30, and, by implication, the *Centros* judgment, paragraph 35, and also, on the protection of the rights of workers, notably, Case 279/80 *Webb* [1981] ECR 3305, paragraph 19.

32 — See paragraph 35 of the *Centros* judgment and, especially, point 21 of the Advocate General's Opinion.

an equivalent level of protection. Nor, as in relation to creditors, can denying the company capacity to sue be of benefit to minority shareholders.

It has emerged from the discussions ensuing before this Court that co-determination applies to undertakings with more than 2 000 workers and there is nothing to suggest that the transfer of the centre of management and control of the plaintiff in the main proceedings has affected such a high number of employees, rather the reverse.

The German Government has not made it clear what tax provisions would be circumvented if Überseering exercised its rights before the German courts. [33]

55. However unsuitable the measure may be deemed to be for attaining the stated objectives, its incompatibility with the EC Treaty is particularly apparent when one examines whether the denial of capacity to sue is proportionate.

At the hearing, the German Government stressed one point to which it had referred in passing in its written observations — the fact that a company in Überseering's position can continue to rely on its rights before a court by appearing as an unincorporated association. Its submission, in itself less than clear, was refuted by counsel for the parties in the main proceedings, who each proffered a different account of the mechanism referred to and its legal consequences.

Under those circumstances, the Court has insufficient evidence to determine whether Überseering, or any other company in the same position, can prosecute a claim before the courts and on what terms. What does indeed appear to be common ground is that a company in the situation under consideration could not appear in proceedings whilst retaining its separate legal personality.

One must be guided, therefore, by the terms of the question referred, as raised by Germany's highest civil court, from which it emerges that the sanction laid down by that country's legal regime is that the company concerned 'cannot rely on contractual rights before the courts'. [34]

33 — As counsel for the EFTA Surveillance Authority has observed, the fact that Überseering is located in Germany could, on the contrary, be advantageous to the German tax authorities, in that it could be liable to local taxes.

34 — In other respects, it is apparent from the documents in the proceedings that the lack of capacity to sue extends to claims arising from causes other than those in contract.

56. A measure of that nature presents, in practice, an enormous obstacle to companies' freedom of establishment.

57. The measure truly undermines the legal remedies available to a company validly incorporated in accordance with the legislation of a Member State. It is, in any event, a serious interference with the fundamental right to a fair hearing enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'). Interpreting the first of those precepts, as early as *Golder v. United Kingdom*, [35] the European Court of Human Rights had held that access to the courts in civil matters was a corollary of the rule of law, a principle which, in its turn, is part of the common spiritual heritage of European countries. [36] It is true that, given its particular nature and as pertains with so many other fundamental rights, that of access to the courts is not an absolute right. [37] In *Ashingdane v. United Kingdom*, [38] the Strasbourg court found, however, that limitations on the right may not impair its very essence, must be justified in terms of pursuing a legitimate aim and must be reasonably proportionate to that aim. [39]

The Strasbourg institutions have therefore accepted that measures which rendered legal actions subject to a specified time-limit for the bringing of the action [40] or to a summary examination of their prospects of success [41] or which required provision of security for costs [42] were compatible with the Convention. None of those conditions impairs the essence of the principle, but they accommodate its exercise to the requirements of reasonableness. Those institutions have also accepted that national legislation can apply restrictive measures on the basis of the personality of the litigant. These are long-established situations where the legal order tolerates diminished exercise of legal or procedural capacity, as occurs with minors, [43] abusive litigants, [44] convicted persons [45] or persons declared bankrupt. [46] None of those categories bears any resemblance to the pres-

35 — European Court of Human Rights., judgment of 2 February 1975, Series A No 18.

36 — Ibid., § 34.

37 — Ibid., § 38.

38 — European Court of Human Rights., judgment of 28 May 1985, Series A No 93.

39 — Ibid., § 57.

40 — European Commission of Human Rights., *X. v. Sweden*, decision of 6 October 1982, No 9707/82, Decisions and Reports, (DR) 31, p. 2.

41 — *Ashingdane v. United Kingdom*, cited above, § 59.

42 — European Court of Human Rights., *Tolstoy Miloslavsky v. United Kingdom*, judgment of 13 July 1995, Series A No 316-B.

43 — See the judgment in *Golder v. United Kingdom*, cited above.

44 — European Commission of Human Rights., *H. v. United Kingdom*, decision on admissibility of 2 December 1985, No 11559/85, DR 45, p. 281.

45 — European Court of Human Rights., *Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, Series A No 80.

46 — European Commission of Human Rights., *M. v. United Kingdom*, decision on admissibility of 4 May 1987, No 12040/86, DR 52, p. 269.

ent case. One should also observe that, even in those situations, the right to seek judicial relief was merely limited, never removed, and that limitation was made subject, as a general rule, to obtaining prior leave from a representative of the public interest.

58. In relation to commercial undertakings, whose main assets comprise claims against third parties, depriving the undertaking of the right to bring legal proceedings may also amount to a serious restriction on the right to enjoy property, protected by Article 1 of Protocol No 1 to the Convention, and denial of an effective remedy, contrary to the provisions of Article 13 of the Convention.

59. The same idea prevails in the light of Article 47 (right to an effective legal remedy and to a fair trial) and Article 17 (right to property) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, which, whilst not having genuine legislative scope in the strict sense, as 'it is not in itself binding',[47] is an invaluable reflection of the common denominator of the legal values paramount in Member States, from which emanate, in their turn, the general principles of Community law.

60. Finally, the Court has acknowledged that the right to judicial control is paramount in the context of Community matters.[48]

61. Accordingly, it is true to say that to deny the right to bring legal proceedings to a body corporate validly incorporated in accordance with one of the legal systems of the Member States is a serious restriction on a fundamental right. If it is to pass the proportionality test, it must be balanced on the other side of the scales by an imperative requirement in the public interest. Suffice it to say that no evidence has been submitted capable of demonstrating a social need of that order. As I found when examining the question of suitability, the German legal order does not, given such a serious sanction, require any specific assessment of the risk. The legal rights which the measure seeks to protect or, rather, the risks to which those interests may be subject by reason of a company not having its centre of administration in the State in which it was founded do not stand up when measured against the magnitude of the sanction imposed.

47 — Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 27.

48 — See, amongst others, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14.

62. It must be held, under those circumstances, that Articles 43 EC and 48 EC do preclude a national measure which denies a company the right to bring proceedings on the grounds that it has its actual centre of administration in a Member State other than that in which it was incorporated.

Analysis of the second question

63. The second question, raised by the Bundesgerichtshof in case the first warrants an affirmative answer, as I propose it does, is broader in scope by virtue of being more abstract. It seeks to ascertain whether the principles which govern the freedom of establishment require that a company's legal capacity and capacity to bring legal proceedings must always be determined in accordance with the law of the State where it is incorporated.

64. It is not immediately obvious how any answer to that second question raised could be of additional assistance in resolving the issue of the interpretation of Community law which has arisen for the referring court. If, as I suggest, the Court finds that the sanction of depriving a company of the right to bring proceedings is neither suitable for nor proportionate to the aims sought and, consequently, is not justified on imperative grounds of national interest, it is immaterial what was the precise course which the national court took, when it applied the various rules governing the conflict of laws under German law to find, in compliance with its internal law, that the sanction was lawful.

65. It is not for the Community judicature to enter into discussions which are the province of national law. I reiterate that the issue properly under consideration, from the point of view of Community law, is that of whether a measure which restricts a fundamental freedom is justified in the light of supposedly imperative requirements in the general interest.

66. In view of the premisses of the answer to the first question, it is not necessary, in my submission, to reply to the second.

What that means is that the outcome would be the same if denial of the right to bring proceedings were the result not of failure to

recognise legal capacity but of application of an imperative rule.

67. That approach seems to me all the more desirable in that it avoids the need to make bold pronouncements, without detracting in any way from the cooperation which the Community court can be expected to give in resolving the issue raised.

68. In the first place, to answer the second question would involve integrating features specific to German law into an autonomous Community theory, in so far as it would mean accepting — which admission is, at the very least, questionable — that the denial of the right to bring proceedings derived entirely from the failure to recognise legal capacity and the capacity to bring legal proceedings. I believe it is possible, on the contrary, to consider that denial as merely one of the powers available to the legal system to penalise companies seeking to circumvent national law, in the interests of protecting particular legal rights.

69. Secondly, where the Member State where the company is incorporated is also that in which it has its registered office, one would be forcing the Court to opt for one of the connecting factors which, in the absence of any change in legislation, are of equal weight under Article 48 EC, namely, the factor consisting of the registered office of the entity in question, of its centre of administration or of its principal place of business. If the EC Treaty has not given preference to any one factor, it is not the place of the court to do so. [49] In the absence of harmonisation, Member States remain at liberty to organise their rules of private international law in that area, and the national courts to interpret those rules, which must nevertheless comply, in terms of their practical effects, with the requirements of Community law.

70. In the alternative, in the event that the Court considers it desirable to reply to the second question raised, either because it believes to do so would assist the referring court to make a decision, or because it sees fit to reiterate a principle, I propose that, for the reasons set out in the preceding point, the Court should give a negative response to that question.

49 — The principle of the neutrality of the EC Treaty in relation to the power of Member States to define the connecting factor determining the law which applies to the company is also reflected in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ 2001 L 294, p. 1). See, in particular, recital 27 in the preamble thereto.

Conclusion

71. By reason of the foregoing, I suggest that the Court should reply to the question referred by the Bundesgerichtshof as follows:

Articles 43 EC and 48 EC preclude a national provision which leads to denial of the right to bring proceedings to a company validly incorporated according to the law of a Member State which has transferred its actual centre of administration to another Member State.