

14. Where credit institutions which are subsidiaries of foreign companies seek to enter the market of a Member State, competing by means of the rate of remuneration paid on sight accounts constitutes one of the most effective methods to that end. Access to the market by those establishments is thus made more difficult by such a prohibition ...
17. It is clear from settled case law that where, as in the case at issue in the main proceedings, such a measure applies to any person or undertaking carrying on an activity in the territory of the host Member State, it may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective it pursues and does not go beyond what is necessary to attain it ...

The Court nevertheless found that the restriction could not be justified by the protection of consumers or the need to encourage long-term saving. These admirable goals, it asserted, could be met by less restrictive measures.

While the Court in *Caixa Bank France* speaks about foreign companies wishing to enter the French market, and the problems which the rule may cause them, the Court does not make it obvious that the rule would affect them more than it would an emerging French competitor. Nor does the Court make any such comparison part of its reasoning. The core of the objection is that the rule disadvantages would-be market entrants. This could be presented in terms of nationality discrimination, since incumbents are being protected and they are usually national. However, it seems that this is not the way the Court wants to frame the law.

The Court may therefore be moving towards a position that in substance is similar to its position concerning the free movement of goods. Restrictions which do not actually prevent an actor from entering the market are only likely to fall within Articles 45 and 49 if they discriminate against market entrants.⁹³ Equal impact market regulation will not be caught. In *Caixa Bank France*, therefore, offering rewards on a current account would be a central route for any new bank, be it foreign or French, to build up market share. The bank is denied this important marketing strategy, and in a market in which it cannot differentiate itself, it will struggle to win clients. The basis for such reasoning is that participation in the single market necessitates that Member States allow sufficiently vibrant competition on their markets. This is not unreasonable, but it is a very imprecise goal to realise. Secondly, measures will only actually violate Articles 45 and 49 if they are unjustifiably heavy-handed. Thus, *Caixa Bank France* involves a measure which deprives banks of an important marketing tool and element of a business model, namely the right to offer interest on current accounts, and the reasons given for the deprivation are fairly weak.

5 THE FREE MOVEMENT OF COMPANIES

(i) Discrimination and foreign companies

Freedom of establishment is granted not merely to EU citizens, but also to non-natural legal persons. In this respect, it is quite different from Article 45 on the free movement of workers. The beneficiaries of the right to establishment are set out in Article 54 TFEU.

⁹³ See Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB* [2001] ECR I-1795; see pp. 774–5.

Article 54 TFEU

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.

Companies have to be formed in accordance with the laws of one of the Member States and have their registered office, central administration or principal place of business within the European Union if they are to have the right to freedom of establishment. Therefore, whilst the prohibition on discrimination in Article 49 forbids discrimination on the grounds of nationality in the case of individuals, it forbids discrimination on the grounds of the place of registered office, central administration or principal place of business in the case of companies.⁹⁴ As Marenco has pointed out, there is, however, an important difference between these grounds of discrimination and that of nationality.

G. Marenco, 'The Notion of Restriction on the Freedom of Establishment and Provision of Services in the Case-law of the Court' (1991) 11 *Yearbook of European Law* 111, 113-14

[T]here can never be more than a partial equivalence of the nationality condition and that of the company's registered office on a national territory. The former indeed uses a purely formal criterion, with no concrete or substantial content, to exclude equality of treatment. Thus it cannot be justified on economic grounds, which is where freedom of establishment operates. By contrast, the registered office as criterion of the connection of a company with a State is simultaneously a concrete situation which might justify a difference in treatment. Thus it cannot be equated purely and simply with nationality.

This emerges in Case 270/83 *Commission v France* [[1986] ECR 273], which dealt with a French tax provision that denied tax credits in respect of dividends on shares in French companies held by branches or agencies of companies, the registered office of which was in another Member State. The Court, having found that this provision led to a difference in treatment between French companies and those in other Member States, took into consideration the French Government's arguments that this difference in treatment was in the circumstances justified by objective differences in the situations of the two types of company. While in the end finding in favour of the Commission, the Court observed, in refuting the French Government's arguments, that 'the possibility cannot altogether be excluded that a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain circumstances, be justified in an area such as tax law'. The registered office is thus compared first with the nationality of physical persons and then with their residence. This double comparison reveals that the registered office condition plays a role at once formal and substantial.

⁹⁴ Case 270/83 *Commission v France* [1986] ECR 273.

(ii) Relocation of company activity from one Member State to another

Companies may wish to move their principal place of business or head office to another Member State or to reincorporate in another Member State. This would seem the type of relocation of business activity that the single market is intended to stimulate. However, there is a double context which complicates matters.

The first difficulty is a formal legal one. The company's incorporation within its home Member State is the feature which allows it to claim rights under Article 49. If companies lose their legal personality within that state, either by dissolving or not meeting its corporate law requirements, they would lose their right to establish under Article 49.

The second is the policy context. Companies may wish to evade their fiscal and corporate responsibilities in states where they carry out their principal business by creating a legal shell in another Member State, which has lower fiscal obligations and less demanding corporate law (e.g. lower minimum capital requirements or less protection of minority shareholders). There are, moreover, incentives for states to attract these legal shells because, at very little cost to themselves, they can attract taxes that would otherwise go to the state where the company carries out its principal place of business. This can lead to a 'race to the bottom' where the tax base and basic company law requirements are eroded as states compete to attract investment.⁹⁵

These issues were first addressed in the *Daily Mail* judgment. Under UK law, companies could not transfer their central management from the United Kingdom and still retain their legal personality without first obtaining the consent of the Treasury. The *Daily Mail* newspaper wished to transfer its central management to the Netherlands so that it might sell off some of its shares without being subject to UK capital gains tax. After negotiations with the Treasury broke down, it brought an action claiming that the UK regime breached Article 49. The case therefore raised both of the concerns outlined above.

The Court found that there was no violation of Article 49. The United Kingdom was not preventing the *Daily Mail* from emigrating and becoming a Dutch company, if it so wanted. Rather, the *Mail* wanted to remain a UK company, while moving its headquarters abroad, whereas UK law said that to be a UK company entailed that its headquarters were in the United Kingdom. Thus the case, in the view of the Court, was not so much about whether the *Mail* could move, as about the right of the United Kingdom to define what it meant to be a UK company. In the absence of harmonisation of the rules concerning incorporation, this was for the United Kingdom to decide.

Case 81/87 *R v HM Treasury, ex parte Daily Mail* [1988] ECR 5483

18. The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above [reincorporation in another Member State]. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and,

⁹⁵ This is sometimes called the 'Delaware effect' after a so-called 'race to the bottom' in state company laws in the United States was believed to have been initiated by the State of Delaware in the 1960s. W. Gary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 *Yale Law Journal* 663. On this within the European Union, see C. Barnard, 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?' (2000) 25 *ELRev.* 57. See also pp. 706-8.

consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company.

19. In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.
20. As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law. The legislation of other states permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another.
21. The Treaty has taken account of that variety in national legislation. In defining, in Article [54 TFEU], the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company ...
22. It should be added that none of the Directives on the coordination of company law adopted under Article 54(3)(g) of the Treaty deal with the differences at issue here.
23. It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.
24. Under those circumstances, Articles [49 and 54 TFEU] cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

Daily Mail has been recently confirmed in *Cartesio*. The facts were similar, but concerned Hungary and Italy rather than the United Kingdom and the Netherlands. The company *Cartesio* argued that *Daily Mail* was no longer good law in the light of subsequent cases, but the Court rejected this, repeating its arguments above in almost identical terms, and emphasising that it was for states to determine the conditions for incorporation in their jurisdiction, and the presence of headquarters was a perfectly legitimate condition. Nevertheless, although this did not arise in *Cartesio*, it would be wrong to think that conditions for incorporation are outside the scope of Article 49. If, for example, they discriminate, they will still violate the Treaty.⁹⁶

⁹⁶ Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761. See also H. Schneeweiss, 'Exit Taxation after *Cartesio*: The European Fundamental Freedom's Impact on Taxing Migrating Companies' (2009) 37 *Intertax* 363.

Most cases involve a different scenario: where a company is incorporated in state X, but does most of its business in state Y. The reason for such a construction is often to avoid strict rules on incorporation in Y, and for this same reason state Y is usually inclined to view the incorporation in X as an abusive attempt to avoid its rules. These cases raise the concerns about regulatory competition raised above.

This scenario was addressed in *Centros*. Two Danish nationals registered a company in the United Kingdom. Although it never traded from the United Kingdom, it was registered there because the UK authorities impose no minimum share capital requirement for companies whilst in Denmark there was a requirement of a minimum of 100,000 Danish kroner. They were refused permission to register a branch in Denmark and challenged this under Article 49. The Danish government argued that there was no violation as they were simply refusing the setting up of a primary establishment and not the setting up of a branch. The Court of Justice disagreed.

Case C-212/97 *Centros v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459

21. Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles [49 and 54 TFEU].
22. Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.
23. According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.
24. It is true that according to the case law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law ...
25. However, although, in such circumstances, the national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions ...
26. In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies 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 to pursue activities in other Member States through an agency, branch or subsidiary.
27. That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set

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up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

28. In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article [50(3)(g) TFEU], to achieve complete harmonisation.
29. In addition ... the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.
30. Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles [49 and 54 TFEU], insofar as it prevents any exercise of the right freely to set up a secondary establishment which Articles [49 and 54 TFEU] are specifically intended to guarantee.

Centros reaffirms the right of companies to secondary establishment in other states. Whilst a company retains corporate status within its home Member State, other Member States must recognise it as validly incorporated under Article 54 and therefore entitled to the benefits of Article 49. Needless to say, this does not meet the policy concerns about regulatory competition whereby companies will simply incorporate in the state whose fiscal and corporate regime is most favourable to them. States have attempted to prevent this practice in a number of cases before the Court of Justice.

In *Überseering*,⁹⁷ a challenge was made to the German law which stated that a company's legal capacity is governed by the law of the territory in which its central place of administration is based. What this meant in substance was that German law would only recognise the existence of a company whose administration and incorporation were in the same state. *Überseering*, however, had its central administration in Germany, but was incorporated in the Netherlands. Dutch law permitted this, but when *Überseering* sought to bring legal action in Germany over a business dispute it discovered that it had no standing because in the eyes of German law it did not exist. The Court found this to be a violation of Article 49. Where a company is validly incorporated in one state according to the laws of that state, other states are required to recognise that incorporation, notwithstanding that their own conditions for incorporation may be different. Not to recognise *Überseering*'s Dutch legal status would be to greatly deter establishment in the Netherlands.

In *Inspire Art*,⁹⁸ the Netherlands rather clumsily attempted to avoid *Centros*. Companies incorporated abroad, but which conducted almost all their business in the Netherlands

⁹⁷ Case C-208/00 *Überseering v NCC* [2002] ECR I-9919.

⁹⁸ Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art* [2003] ECR I-10195.

through branches or agencies, had to register their agencies or branches in the Netherlands as 'foreign companies'. These were then required to meet Dutch company law requirements on directors' duties and minimum share capital for companies. Inspire Art was a company which conducted almost all its business in objets d'art, but which had incorporated in the United Kingdom specifically to avoid these requirements. It challenged the obligation to satisfy them under Article 49. The Dutch government argued that Inspire Art was engaged in an abuse of Article 49 as it was deliberately incorporating in another Member State in which it did no business to evade and thereby undermine Dutch company law. The Court disagreed. It found that the formation of a company in one Member State for the sole purpose of enjoying the benefit of more favourable legislation was not abusive behaviour even where that company conducted all its activities in another Member State. Thus, insofar as the Dutch government was imposing restrictions on companies validly incorporated within the European Union and thereby preventing them from trading in the Netherlands unless they met certain conditions concerning directors' duties and minimum share capital, it was engaged in a breach of Article 49.⁹⁹

This case law reflects two potent dangers between which it is difficult to navigate. On the one hand, if companies could only trade in another Member State where they met all that state's company law requirements, there would be a grinding halt to economic activity across the Union. In effect, no foreign companies could operate in the state with the most restrictive company law as they would not meet these standards. On the other hand, allowing foreign companies who do not meet the state's company law standards to operate on local markets has the effect of completely undermining local company and tax laws, as it is easy and inexpensive for companies to locate in the state with the least onerous requirements.

Deakin has noted that *Centros* creates a potent example of what he calls 'competitive federalism'. If the case is not balanced by other measures it will undermine national diversity. The regime most attractive to companies will become the default law for the European Union as either they will incorporate there or other states will be quick to adopt parallel laws to prevent this. The typical solution of competitive federalism is therefore to develop laws at a federal, or pan-European, level. But Deakin notes that this is just as restrictive of national diversity as regulatory competition and instead suggests an alternative, that of 'reflexive harmonisation'.¹⁰⁰ The starting point for this model is the assumption that competition between regimes will take place. What is important in such circumstances is to secure the terms of competition in order to ensure that they do not eliminate diversity or lead to clearly undesirable outcomes, but rather act as a positive force where regimes learn from each other and unsatisfactory regimes are jettisoned. The central pillars of such an approach are that EU law would provide a floor of rights which act to prevent outcomes collectively agreed as undesirable. Beyond that, this approach would require Member States to put in place institutions at local level which secure as wide a

⁹⁹ There is substantial literature on this case law. See particularly M. Siems, 'Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century' (2002) 27 *ELRev.* 47; W.-H. Roth, 'From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law' (2003) 52 *ICLQ* 177; E. Micheler, 'Recognition of Companies Incorporated in Other EU Member States' (2003) 52 *ICLQ* 521; C. Kersting and C. Philipp Schindler, 'The ECJ's Inspire Art Decision of 30 September 2003 and its Effects on Practice' (2004) 4(12) *German Law Journal* 1277.

¹⁰⁰ See pp. 710–11.

scope for deliberation and interest representation as possible, so that outcomes are considered in the context of both the wider EU environment and broad internal social needs.¹⁰¹

S. Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation: A Law and Economics Approach to Centros' (1999) 2 *Cambridge Yearbook of European Legal Studies* 231, 245–6

Reflexive law, therefore, has a procedural orientation. What this means, in the context of economic regulation, is that the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes. This type of approach finds a concrete manifestation in legislation which seeks, in various ways, to devolve or confer rule-making powers to self-regulatory processes. Examples are laws which allow collective bargaining by trade unions and employers to make qualified exceptions to limits on working time or similar standards ...

The purpose of harmonisation would not be to substitute for state-level regulation; hence the transnational standard would not operate to 'occupy the field' ... Rather, transnational standards would seek to promote diverse, local-level approaches to regulatory problems by creating a space for autonomous solutions to emerge when, because of market failure, they would not otherwise do so. This may involve what some regard as a restriction of competition, in the sense of ruling out certain options which could be associated with a 'race to the bottom' whilst leaving others open. This is now a familiar technique within the European Community ... Directives in the areas of labour law, consumer protection and environmental law are mostly interpreted as setting basic standards in the form of a 'floor of rights'. Although 'downwards' derogation is prohibited, Member States are allowed and implicitly encouraged to improve on the standards set centrally. Far from being a 'straitjacket', then, which restricts local autonomy, Community-level intervention may be the precondition for local-level experimentation.

6 THE SERVICES DIRECTIVE AND FREEDOM OF ESTABLISHMENT

Directive 2006/123/EC ('Services Directive') applies not only to cross-border service provision but also to those establishing in a Member State. They benefit from the Directive's Chapter on establishment, as well as from its rules on administrative simplification. These latter, and the material scope of the Services Directive, were discussed in Chapter 19.¹⁰²

The Chapter on freedom of establishment addresses three categories of national measures.¹⁰³ The first articles in this Chapter deal with authorisation schemes – rules which require that a person cannot establish or begin their activity without an authorisation. Such rules are fairly

¹⁰¹ Some are sceptical whether, even with such safeguards, such experimentation could take off, arguing that the broader context is still one in which local communities are being forced into quick decisions by the demands of multinational enterprises. W. Scheuerman, 'Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy' (2004) 17 *Canadian Journal of Law and Jurisprudence* 101; C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *ELRev.* 461, 482.

¹⁰² See pp. 823–8.

¹⁰³ Directive 2006/123/EC on services in the internal market, articles 9–15.