JUDGMENT OF THE COURT

5 November 2002 *

In Case C-208/00,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Überseering BV

and

Nordic Construction Company Baumanagement GmbH (NCC),

on the interpretation of Articles 43 EC and 48 EC,

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Überseering BV, by W.H. Wagenführ, Rechtsanwalt,

— Nordic Construction Company Baumanagement GmbH (NCC), by F. Kösters, Rechtsanwalt,

— the German Government, by A. Dittrich and B. Muttelsee-Schön, acting as Agents,

— the Spanish Government, by M. López-Monís Gallego, acting as Agent,

— the Italian Government, by U. Leanza, acting as Agent, assisted by F. Quadri, avvocato dello Stato,

— the United Kingdom Government, by R. Magrill, acting as Agent, and by J. Stratford, barrister,

— the Commission of the European Communities, by M. Patakia and C. Schmidt, acting as Agents,

— the EFTA Surveillance Authority, by P. Dyrberg and J.F. Jónsson and E. Wright, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Überseering BV, represented by W.H. Wagenführ, of Nordic Construction Company Baumanagement GmbH (NCC), represented by F. Kösters, of the German Government, represented by A. Dittrich, of the Spanish Government, represented by N. Díaz Abad, acting as Agent, of the Netherlands Government, represented by H.G. Sevenster, acting as Agent, of the United Kingdom Government, represented by R. Magrill, assisted by J. Stratford, of the Commission, represented by C. Schmidt, and of the EFTA Surveillance Authority, represented by P. Dyrberg, at the hearing on 16 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 4 December 2001,

gives the following

Judgment

1 By order of 30 March 2000, received at the Court Registry on 25 May 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 43 EC and 48 EC.

2 Those questions were raised in proceedings between (i) Überseering BV ('Überseering'), a company incorporated under Netherlands law and registered on 22 August 1990 in the register of companies of Amsterdam and Haarlem, and (ii) Nordic Construction Company Baumanagement GmbH ('NCC'), a company established in the Federal Republic of Germany, concerning damages for defective work carried out in Germany by NCC on behalf of Überseering.

National law

3 The Zivilprozessordnung (German Code of Civil Procedure) provides that an action brought by a party which does not have the capacity to bring legal proceedings must be dismissed as inadmissible. Under Paragraph 50(1) of the Zivilprozessordnung any person, including a company, having legal capacity has the capacity to be a party to legal proceedings: legal capacity is defined as the capacity to enjoy rights and to be the subject of obligations.

4 According to the settled case-law of the Bundesgerichtshof, which is approved by most German legal commentators, a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established ('Sitztheorie' or company seat principle), as opposed to the 'Gründungstheorie' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany.

5 Since a company's legal capacity is determined by reference to German law, it cannot enjoy rights or be the subject of obligations or be a party to legal proceedings unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law.

The main proceedings

6 In October 1990, Überseering acquired a piece of land in Düsseldorf (Germany), which it used for business purposes. By a project-management contract dated 27 November 1992, Überseering engaged NCC to refurbish a garage and a motel on the site. The contractual obligations were performed but Überseering claimed that the paint work was defective.

7 In December 1994 two German nationals residing in Düsseldorf acquired all the shares in Überseering.

8 Überseering unsuccessfully sought compensation from NCC for the defective work and in 1996 it brought an action before the Landgericht (Regional Court), Düsseldorf, on the basis of its project-management contract with NCC. It claimed the sum of DEM 1 163 657.77, plus interest, in respect of the costs incurred in remedying the alleged defects and consequential damage.

9 The Landgericht dismissed the action. The Oberlandesgericht (Higher Regional Court), Düsseldorf, upheld the decision to dismiss the action. It found that Überseering had transferred its actual centre of administration to Düsseldorf once its shares had been acquired by two German nationals. The Oberlandesgericht found that, as a company incorporated under Netherlands law, Überseering did not have legal capacity in Germany and, consequently, could not bring legal proceedings there.

10 Therefore, the Oberlandesgericht held that Überseering's action was inadmissible.

11 Überseering appealed to the Bundesgerichtshof against the judgment of the Oberlandesgericht.

12 It also appears from Überseering's observations that, in parallel with the proceedings currently pending before the Bundesgerichtshof, an action was brought against Überseering before another German court based on certain unspecified provisions of German law. As a result, it was ordered by the Landgericht Düsseldorf to pay architects' fees, apparently because it was entered on 11 September 1991 in the Düsseldorf land registry as owner of the land on which the garage and the motel refurbished by NCC were built.

The questions referred for a preliminary ruling

13 Although it notes that the case-law referred to at paragraphs 4 and 5 of this judgment is disputed in various respects by certain German legal commentators, the Bundesgerichtshof considers it preferable, in view of the current state of Community law and of company law within the European Union, to continue to follow that case-law for a number of reasons.

14 First, it is appropriate to discount any solution which entails (through taking account of different connecting factors) assessing a company's legal situation by reference to several legal systems. According to the Bundesgerichtshof, such a solution leads to legal uncertainty, since it is impossible to segregate clearly the areas of law to be governed by the various legal orders.

15 Second, where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated.

16 Third, and by contrast, where the connecting factor is taken to be the actual centre of administration, that prevents the provisions of company law in the State in which the actual centre of administration is situated, which are intended to

protect certain vital interests, from being circumvented by incorporating the company abroad. In the present case, the interests which German law is seeking to safeguard are notably those of the company's creditors: the legislation relating to 'Gesellschaften mit beschränkter Haftung (GmbH)' (limited liability companies under German law) provides such protection by detailed rules on the initial contribution and maintenance of share capital. In the case of related companies, dependent companies and their minority shareholders also need protection. In Germany such protection is provided by rules governing groups of companies or rules providing for financial compensation and indemnification of shareholders who have been put at a disadvantage by agreements whereby one company agrees to manage another or agrees to pay its profits to another company. Finally, the rules on joint management protect the company's employees. The Bundesgerichtshof points out that not all the Member States have comparable rules.

17 The Bundesgerichtshof nevertheless wonders whether, on the basis that the company's actual centre of administration has been transferred to another country, the freedom of establishment guaranteed by Articles 43 EC and 48 EC does not preclude connecting the company's legal position with the law of the Member State in which its actual centre of administration is located. The answer to that question cannot, according to the Bundesgerichtshof, be clearly deduced from the case-law of the Court of Justice.

18 It points out, in that regard, that in Case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483 the Court, having stated that companies could exercise their right of establishment by setting up agencies, branches and subsidiaries, or by transferring all their shares to a new company in another Member State, held that, unlike natural persons, companies exist only by virtue of the national legal system which governs their incorporation and operation. It is also apparent from that judgment that the EC Treaty has taken account of the differences in national rules on the conflict of laws and has reserved resolution of the problems associated therewith to future legislation.

19 In Case C-212/97 *Centros* [1999] ECR I-1459, the Court took exception to a Danish authority's refusal to register a branch of a company validly incorporated in the United Kingdom. However, the Bundesgerichtshof points out that the company had not transferred its seat, since, from its incorporation, its registered office had been in the United Kingdom, whilst its actual centre of administration had been in Denmark.

20 The Bundesgerichtshof wonders whether, in view of *Centros*, the Treaty provisions on freedom of establishment preclude, in a situation such as that in point in the main proceedings, application of the rules on conflict of laws in force in the Member State in which the actual centre of administration of a company validly incorporated in another Member State is situated when the consequence of those rules is the refusal to recognise the company's legal capacity and, therefore, its capacity to bring legal proceedings in the first Member State to enforce rights under a contract.

21 In those circumstances, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?

2. If the Court's answer to that question is affirmative:

Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?'

The first question

22 By its first question, the national court is, essentially, asking whether, where a company formed in accordance with the legislation of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity, and therefore the capacity to bring legal proceedings before its national courts in order to enforce rights under a contract with a company established in Member State B.

Observations submitted to the Court

23 For NCC and the German, Spanish and Italian Governments, the Treaty provisions on freedom of establishment do not preclude the legal capacity, and the capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined under the rules of law of another Member State, to which that company is found to have moved its centre of administration: nor, depending on the circumstances, do they preclude the company from being prevented from enforcing before the courts of the second Member State rights under a contract entered into with a company established in the second State.

24 They base their view, first, on the provisions of the third indent of Article 293 EC, which provides:

'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...'.

25 In NCC's submission, Article 293 EC is founded on the recognition by all the Member States of the fact that a company incorporated in one Member State does not automatically retain its legal personality in the event of its seat being transferred to another Member State and that it is necessary for the Member States to enter into a specific convention to that effect — a convention which has not as yet been adopted. NCC concludes that the fact that a company may lose its legal personality in the event of its transferring its actual centre of administration to another Member State is compatible with the Community rules on freedom of establishment. The refusal by one Member State to recognise the foreign legal personality of a company incorporated in another Member State, where the company has moved its actual centre of administration to the first State, does not amount to a restriction on freedom of establishment since the company is able to reincorporate itself under the law of the host State. The only rights safeguarded by the freedom of establishment are the right to reincorporation in that State and the right to establish a presence there.

26 According to the German Government, the framers of the Treaty included Articles 43 EC and 48 EC with full knowledge of the significant differences in company law between the Member States and with the intention of leaving intact national competence and the authority of national law as long as there has been no approximation of laws. Even though there are many harmonising directives in the sphere of company law adopted under Article 44 EC, there are currently no directives of that kind regarding the transfer of a company's seat and no multilateral convention has been adopted in that regard pursuant to Article 293 EC. Consequently, as Community law now stands, the application in Germany of the actual or real centre of administration principle and the implications thereof as regards recognition of a company's legal capacity and its capacity to be a party to legal proceedings are compatible with Community law.

27 Likewise, for the Italian Government, the fact that Article 293 EC contemplates the conclusion of conventions by the Member States with a view, in particular, to ensuring that a company retains its legal personality if its seat is transferred from one Member State to another, shows that the question of the retention of legal personality following the transfer of a company's seat is not conclusively dealt with by the provisions of Community law relating to freedom of establishment.

28 The Spanish Government, for its part, points out that the Convention on the Mutual Recognition of Companies and Legal Persons, signed in Brussels on 29 February 1968, has never entered into force. Therefore, in the absence of a convention concluded between the Member States on the basis of Article 293 EC, there is no harmonisation at Community level such as to settle the question whether a company retains its legal personality in the event of a transfer of its seat. Articles 43 EC and 48 EC are silent in that regard.

29 NCC and the German, Spanish and Italian Governments also submit that their view is endorsed by *Daily Mail and General Trust*, in particular paragraphs 23 and 24 thereof, which read as follows:

'... 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.

Under those circumstances, Article 52 [of the EEC Treaty (now, after amendment, Article 43 EC)] and Article 58 of the Treaty [(now Article 48 EC)] 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.'

30 The German Government submits that, although it is not disputed that *Daily Mail and General Trust* concerned relations between a company and the Member State under whose legislation it was incorporated in a case in which the company was moving its actual centre of administration to another Member State, the Court's reasoning in that judgment may be applied to the issue of the relations between a company validly incorporated in one Member State and another Member State (the host State as opposed to the State in which the company was incorporated) to which the company has moved its actual centre of administration. On that basis, it submits that, where a company validly incorporated in one Member State has availed itself of its right of establishment in another Member State by virtue of transferring all its shares to nationals residing in the host State, the question whether, in the host Member State, the law applicable

under the rules on conflict of laws allows the company to continue to exist does not fall within the scope of the provisions on freedom of establishment.

31 The Italian Government also claims that it is apparent from *Daily Mail and General Trust* that the criteria by reference to which companies' identities are determined do not pertain to the exercise of the right of establishment, regulated by Articles 43 EC and 48 EC, but fall to be dealt with under national law. Consequently, the rules relating to freedom of establishment cannot be relied on for the purpose of harmonising the connecting factors, which, as Community law now stands, are determined solely by the national law of the Member States. Since there may be factors connecting a company with several States, it is important that each national legal system determines the circumstances in which companies are to be subject to its particular rules.

32 In the Spanish Government's submission, there is no conflict with Article 48 EC where a company incorporated in accordance with the law of a Member State is required to have its actual centre of administration there in order to be capable of being considered in another Member State as a company entitled to freedom of establishment.

33 The Spanish Government observes, in that regard, that the first paragraph of Article 48 EC sets out two conditions which must be met if the companies defined in the second paragraph of that article are to enjoy the right of establishment in the same way as nationals of other Member States. First, they must be formed in accordance with the law of a Member State and, second, they must have their registered office, central administration or principal place of business within the Community. It submits that the second condition has been modified by the General Programme for the abolition of restrictions on the freedom of establishment, adopted in Brussels on 18 December 1961 (OJ, English Special Edition, Second Series (IX), p. 7, 'the General Programme').

34 Title I, 'Beneficiaries', of the General Programme provides:

'... the persons entitled to benefit from the abolition of restrictions on freedom of establishment... are:

...

— companies and firms formed under the law of a Member State... and having either the seat prescribed by their statutes, or their centre of administration, or their main establishment situated within the Community or in an overseas country or territory,

who wish to establish themselves in order to pursue activities as self-employed persons in a Member State;

...

— companies and firms as above, provided that, where only the seat prescribed by their statutes is situated within the Community or in an overseas country or territory, their activity shows a real and continuous link with the economy of a Member State or of an overseas country or territory; such link shall not be one of nationality...

who wish to set up agencies, branches or subsidiaries in a Member State.'

35 The Spanish Government submits that, although the General Programme imposes the requirement for a real and continuous link only for the purpose of the exercise of the freedom to set up a secondary establishment, such a requirement should also apply in the case of the principal establishment, in order to ensure uniformity as regards the connecting factors required for the right of establishment to be enjoyed.

36 In the submission of Überseering, the Netherlands and United Kingdom Governments, the Commission and the EFTA Surveillance Authority, where a company validly incorporated under the law of one Member State ('A') is found, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC, read together, preclude the conflict rules applying in Member State B from providing that the company's legal capacity, and its capacity to be a party to legal proceedings, are to be determined by reference to the law of Member State B. That would be so where, under the law of Member State B, the company is denied all possibility of enforcing before the national courts rights under a contract with a company established in Member State B. Their arguments in that regard are as follows.

37 First, the Commission argues that under Article 293 EC entry into negotiations with a view to reducing the discrepancies between national laws regarding the recognition of foreign companies is provided for by that article only 'so far as is necessary'. If in 1968 there had been a relevant body of case-law, it would have not been necessary to have recourse to Article 293 EC. That explains the decisive importance of the Court's case-law today in establishing the substance and scope of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.

38 Second, Überseering, the United Kingdom Government, the Commission and the EFTA Surveillance Authority submit that *Daily Mail and General Trust* is irrelevant in the present case.

39 They argue that, as is apparent from the facts at issue in that judgment, the Court was considering the legal consequences, in the Member State in which a company was incorporated, of transferring the company's actual centre of administration to another Member State: accordingly, the judgment cannot form a basis for examining the legal consequences, in the host Member State, of such a transfer.

40 *Daily Mail and General Trust* applies only to the relationship between the Member State of incorporation and the company which wishes to leave that State whilst retaining the legal personality conferred on it by the legislation thereof. Since companies are creatures of national law, they must continue to observe the requirements laid down by the legislation of their State of incorporation. *Daily Mail and General Trust* therefore formally acknowledges the right of the Member State of incorporation to set rules on the incorporation and legal existence of companies in accordance with its rules of private international law. It does not, in contrast, decide the question whether a company formed under the law of one Member State must be recognised by another Member State.

41 Third, in the submission of Überseering, the United Kingdom Government, the Commission and the EFTA Surveillance Authority, to answer the question raised in this case, it is appropriate to refer not to *Daily Mail and General Trust* but rather to *Centros*, since the dispute in *Centros* concerned, as in the Überseering case, the treatment in the host Member State of a company incorporated under the law of another Member State, which was exercising its right of establishment.

42 They observe that *Centros* concerned a secondary establishment in Denmark, the host Member State, of a company, Centros Ltd, which was validly incorporated in the United Kingdom where it had its registered office but did not carry on business. Centros Ltd wished to set up a branch in Denmark in order to carry on its main business activities there. The Danish authorities did not question the company's existence under English law but denied it the right to exercise its freedom of establishment in Denmark by setting up a branch there, since it was not disputed that that form of secondary establishment was intended to avoid Danish rules on company formation, in particular the rules relating to the paying-up of a minimum share capital.

43 In *Centros* the Court held that a Member State (the host State) must allow a company validly incorporated in another Member State where it has its registered office to register another establishment (in that case, a branch) in the host State, from which it may develop its entire business. On that basis, the host Member State cannot impose on a company which has been properly formed in another Member State its own substantive company law, in particular the rules on share capital. The Commission submits that the position must be the same where the host Member State invokes its private international law governing companies.

44 For the Netherlands Government, the Treaty provisions on freedom of establishment do not preclude application of the company seat principle as such. However, the consequences which German law attaches to what it regards as a transfer to Germany of the seat of a company which has, moreover, legal personality by virtue of its incorporation in another Member State constitute a restriction on the freedom of establishment where they lead to a refusal to recognise that company's legal personality.

45 The Netherlands Government observes that in the Treaty the three connecting factors, namely the registered office, the actual centre of administration (central

administration) and the principal place of business, are on an equal footing. There is no indication in the Treaty that, to be able to invoke the principle of freedom of establishment, the registered office and the central administration must be located in one and the same Member State. The Netherlands Government consequently contends that a company whose actual centre of administration is no longer in the State in which the company was incorporated is also entitled to the right of establishment. It is therefore contrary to the Treaty provisions on freedom of establishment for a Member State to refuse to recognise the legal capacity of a company validly incorporated in another Member State, which is exercising its freedom to set up a secondary establishment in the host Member State.

46 The United Kingdom Government submits that the provisions of German law at issue in the main proceedings are contrary to Articles 43 EC and 48 EC since their effect is to prevent a company in Überseering's position from carrying on its business through an agency or branch in Germany, if that agency or branch is regarded, under German law, as the actual centre of administration of the company, since those provisions entail the loss of legal capacity, without which a company cannot operate.

47 The EFTA Surveillance Authority adds that freedom of establishment includes not only the right to set up a secondary establishment in another Member State, but also the right, where a company moves its actual centre of administration to another Member State, to retain its original establishment in the Member State of incorporation. The effect of the provisions of German law being applied in the main proceedings is to turn freedom of establishment into an obligation of establishment if the company's legal capacity, and consequently its capacity to be a party to legal proceedings, are to be preserved. They thus constitute a restriction on the freedom of establishment enshrined in the Treaty. That conclusion does not imply that the Member States do not have the power to establish the connecting factors between a company and their territory but that they must exercise that power consistently with the Treaty.

48 Furthermore, the Netherlands and United Kingdom Governments and the EFTA Surveillance Authority stress the fact that Überseering did not intend to transfer

to Germany its actual centre of administration in the sense contemplated in German law. Überseering maintains that it did not intend to wind up its activities in the Netherlands in order to reincorporate itself in Germany and that it wishes to remain a Netherlands-law limited-liability company (BV). Furthermore, it is paradoxical that German law should regard it as such for the purpose of legal proceedings brought against it for payment of architects' fees.

49 The Netherlands Government argued at the hearing that Netherlands law regards a case such as that in the main proceedings as involving the formation of a branch, hence of a secondary establishment. It is wrong to consider the present case on the premiss that Überseering's actual centre of administration has moved to Germany merely because there has been a transfer of shares to German nationals residing in Germany. Such a view is peculiar to German private law. There is nothing to suggest that Überseering intended to move its actual centre of administration to Germany. Furthermore, to argue on the basis that the case concerns a primary establishment is to seek to negate the relevance of *Centros*, in which secondary establishments were at issue as the result of the setting-up of a branch, and to attempt to align this case with *Daily Mail and General Trust*.

50 The United Kingdom Government points out that Überseering was validly incorporated in the Netherlands, has always been registered in the Amsterdam and Haarlem register of companies as a company incorporated under Netherlands law and has not attempted to move its actual centre of administration to Germany. Since 1994, following a transfer of ownership, it has simply carried on the greater part of its business in Germany and has held certain meetings there. It must therefore be regarded in practice as having acted in Germany through an agency or branch. That situation is quite different from the situation in *Daily Mail and General Trust*. That case concerned a deliberate attempt to transfer the registered office and management of a company incorporated under English law from the United Kingdom to another Member State, whilst preserving the company's status as a company validly incorporated in the United Kingdom but avoiding the tax-law requirements associated in the United Kingdom with the transfer to another country of a company's management and control.

51 For the EFTA Surveillance Authority, the refusal to recognise Überseering's right to be a party to legal proceedings in Germany by reason of the apparently unsolicited transfer of its actual centre of administration to Germany is indicative of the lack of certainty which may be caused in cross-border transactions when the different private international law rules of the Member States are applied. Since characterisation as a company's actual centre of administration turns, to a large extent, on the facts, it is always possible that different national legal systems and, within them, different courts may have divergent views on what is an actual centre of administration. Moreover, it is increasingly difficult to identify a company's actual centre of administration in an international, computerised economy, in which the physical presence of decision-makers becomes increasingly unnecessary.

Findings of the Court

As to whether the Treaty provisions on freedom of establishment apply

52 *In limine* and contrary to the submissions of both NCC and the German, Spanish and Italian Governments, the Court must make clear that where a company which is validly incorporated in one Member State ('A') in which it has its registered office is deemed, under the law of a second Member State ('B'), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment.

53 In that regard, it is appropriate to begin by rejecting the arguments based on Article 293 EC, which were put forward by NCC and the German, Spanish and Italian Governments.

54 As the Advocate General maintained at point 42 of his Opinion, Article 293 EC does not constitute a reserve of legislative competence vested in the Member States. Although Article 293 EC gives Member States the opportunity to enter into negotiations with a view, *inter alia*, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, it does so solely 'so far as is necessary', that is to say if the provisions of the Treaty do not enable its objectives to be attained.

55 More specifically, it is important to point out that, although the conventions which may be entered into pursuant to Article 293 EC may, like the harmonising directives provided for in Article 44 EC, facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions.

56 In that regard, it must be borne in mind that, as the Court has already had occasion to point out, the freedom of establishment, conferred by Article 43 EC on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, according to the actual wording of 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 [the provisions of the Treaty concerning the right of establishment], be treated in the same way as natural persons who are nationals of Member States'.

57 The immediate consequence of this is that those companies or firms are entitled to carry on their business in another Member State. The location of their registered office, central administration or principal place of business constitutes the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person.

58 The Court's reasoning in *Centros* was founded on those premisses (paragraphs 19 and 20).

59 A necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves.

60 Accordingly, it is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC, which have been directly applicable since the transitional period came to an end. It follows that no argument that might justify limiting the full effect of those articles can be derived from the fact that no convention on the mutual recognition of companies has as yet been adopted on the basis of Article 293 EC.

61 Second, it is important to consider the argument based on the decision in *Daily Mail and General Trust*, which was central to the arguments put to the Court. It was cited in order, in some way, to assimilate the situation in *Daily Mail and General Trust* to the situation which under German law entails the loss of legal capacity and of the capacity to be a party to legal proceedings by a company incorporated under the law of another Member State.

62 It must be stressed that, unlike *Daily Mail and General Trust*, which concerned relations between a company and the Member State under whose laws it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation, the present case concerns the recognition by one Member State of a company incorporated under the law of another Member

State, such a company being denied all legal capacity in the host Member State where it takes the view that the company has moved its actual centre of administration to its territory, irrespective of whether in that regard the company actually intended to transfer its seat.

63 As the Netherlands and United Kingdom Governments and the Commission and the EFTA Surveillance Authority have pointed out, Überseering never gave any indication that it intended to transfer its seat to Germany. Its legal existence was never called in question under the law of the State where it was incorporated as a result of all its shares being transferred to persons resident in Germany. In particular, the company was not subject to any winding-up measures under Netherlands law. Under Netherlands law, it did not cease to be validly incorporated.

64 Moreover, even if the dispute before the national court is seen as concerning a transfer of the actual centre of administration from one country to another, the interpretation of *Daily Mail and General Trust* put forward by NCC and the German, Spanish and Italian Governments is incorrect.

65 In that case, Daily Mail and General Trust Plc, a company formed in accordance with the law of the United Kingdom and having both its registered office and actual centre of administration there, wished to transfer its centre of administration to another Member State without losing its legal personality or ceasing to be a company incorporated under English law. This required the consent of the competent United Kingdom authorities, which they refused to give. The company initiated proceedings against the authorities before the High Court of Justice, Queen's Bench Division, seeking an order that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its actual centre of administration to another Member State without prior consent and without loss of its legal personality.

66 Thus, unlike the case before the national court in this instance, *Daily Mail and General Trust* did not concern the way in which one Member State treats a company which is validly incorporated in another Member State and which is exercising its freedom of establishment in the first Member State.

67 Asked by the High Court of Justice whether the Treaty provisions on freedom of establishment conferred on a company the right to transfer its centre of management to another Member State, the Court observed, at paragraph 19 of *Daily Mail and General Trust*, that a company, which is a creature of national law, exists only by virtue of the national legislation which determines its incorporation and functioning.

68 At paragraph 20 of that judgment, the Court pointed out that the legislation of the Member States varies widely in regard both to the factor providing a connection to the national territory required for the incorporation of a company and to the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor.

69 The Court concluded, at paragraph 23 of the judgment, that the Treaty regarded those differences as problems which were not resolved by the Treaty rules concerning freedom of establishment but would have to be dealt with by legislation or conventions, which the Court found had not yet been done.

70 In so doing, the Court confined itself to holding that the question whether a company formed in accordance with the legislation of one Member State could transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation and, in certain circumstances, the rules relating to that

transfer were determined by the national law in accordance with which the company had been incorporated. It concluded that a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country.

71 By contrast, the Court did not rule on the question whether where, as here, a company incorporated under the law of a Member State ('A') is found, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, that State is entitled to refuse to recognise the legal personality which the company enjoys under the law of its State of incorporation ('A').

72 Thus, despite the general terms in which paragraph 23 of *Daily Mail and General Trust* is cast, the Court did not intend to recognise a Member State as having the power, *vis-à-vis* companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.

73 There are, therefore, no grounds for concluding from *Daily Mail and General Trust* that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State.

74 Third, the Court rejects the Spanish Government's argument that, in a situation such as that in point before the national court, Title I of the General Programme subordinates the benefit of the freedom of establishment guaranteed by the Treaty to the requirement that there be a real and continuous link with the economy of a Member State.

75 It is apparent from the wording of the General Programme that it requires a real and continuous link solely in a case in which the company has nothing but its registered office within the Community. That is unquestionably not the position in the case of Überseering whose registered office and actual centre of administration are within the Community. As regards the situation just described, the Court found, at paragraph 19 of *Centros*, that under Article 58 of the Treaty 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 are to be treated in the same way as natural persons who are nationals of Member States.

76 It follows from the foregoing considerations that Überseering is entitled to rely on the principle of freedom of establishment in order to contest the refusal of German law to regard it as a legal person with the capacity to be a party to legal proceedings.

77 Furthermore, it must be borne in mind that as a general rule the acquisition by one or more natural persons residing in a Member State of shares in a company incorporated and established in another Member State is covered by the Treaty provisions on the free movement of capital, provided that the shareholding does not confer on those natural persons definite influence over the company's decisions and does not allow them to determine its activities. By contrast, where the acquisition involves all the shares in a company having its registered office in

another Member State and the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities, it is the Treaty provisions on freedom of establishment which apply (see, to that effect, Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22).

As to whether there is a restriction on freedom of establishment

78 The Court must next consider whether the refusal by the German courts to recognise the legal capacity and capacity to be a party to legal proceedings of a company validly incorporated under the law of another Member State constitutes a restriction on freedom of establishment.

79 In that regard, in a situation such as that in point in the main proceedings, a company validly incorporated under the law of, and having its registered office in, a Member State other than the Federal Republic of Germany has under German law no alternative to reincorporation in Germany if it wishes to enforce before a German court its rights under a contract entered into with a company incorporated under German law.

80 Überseering, which is validly incorporated in the Netherlands and has its registered office there, is entitled under Articles 43 EC and 48 EC to exercise its freedom of establishment in Germany as a company incorporated under Netherlands law. It is of little significance in that regard that, after the company was formed, all its shares were acquired by German nationals residing in Germany, since that has not caused Überseering to cease to be a legal person under Netherlands law.

81 Indeed, its very existence is inseparable from its status as a company incorporated under Netherlands law since, as the Court has observed, a company exists only by virtue of the national legislation which determines its incorporation and functioning (see, to that effect, *Daily Mail and General Trust*, paragraph 19). The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment.

82 In those circumstances, the refusal by a host Member State ('B') to recognise the legal capacity of a company formed in accordance with the law of another Member State ('A') in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

As to whether the restriction on freedom of establishment is justified

83 Finally, it is appropriate to determine whether such a restriction on freedom of establishment can be justified on the grounds advanced by the national court and by the German Government.

84 The German Government has argued in the alternative, should the Court find that application of the company seat principle entails a restriction on freedom of establishment, that the restriction applies without discrimination, is justified by overriding requirements relating to the general interest and is proportionate to the objectives pursued.

85 In the German Government's submission, the lack of discrimination arises from the fact that the rules of law proceeding from the company seat principle apply not only to any foreign company which establishes itself in Germany by moving its actual centre of administration there but also to companies incorporated under German law which transfer their actual centre of administration out of Germany.

86 As regards the overriding requirements relating to the general interest put forward in order to justify the alleged restriction, the German Government maintains, first, that in other spheres, secondary Community law assumes that the administrative head office and the registered office are identical. Community law has thus recognised the merits, in principle, of a single registered and administrative office.

87 In the German Government's submission, the German rules of private international company law enhance legal certainty and creditor protection. There is no harmonisation at Community level of the rules for protecting the share capital of limited liability companies and such companies are subject in Member States other than the Federal Republic of Germany to requirements which are in some respects much less strict. The company seat principle as applied by German law ensures that a company whose principal place of business is in Germany has a fixed minimum share capital, something which is instrumental in protecting parties with whom it enters into contracts and its creditors. That also prevents distortions of competition since all companies whose principal place of business is in Germany are subject to the same legal requirements.

88 The German Government submits that further justification is provided by the protection of minority shareholders. In the absence of a Community standard for the protection of minority-shareholders, a Member State must be able to apply to

any company whose principal place of business is within its territory the same legal requirements for the protection of minority shareholders.

89 Application of the company seat principle is also justified by employee protection through the joint management of undertakings on conditions determined by law. The German Government argues that the transfer to Germany of the actual centre of administration of a company incorporated under the law of another Member State could, if the company continued to be a company incorporated under that law, involve a risk of circumvention of the German provisions on joint management, which allow the employees, in certain circumstances, to be represented on the company's supervisory board. Companies in other Member States do not always have such a body.

90 Finally, any restriction resulting from the application of the company seat principle can be justified on fiscal grounds. The incorporation principle, to a greater extent than the company seat principle, enables companies to be created which have two places of residence and which are, as a result, subject to taxation without limits in at least two Member States. There is a risk that such companies might claim and be granted tax advantages simultaneously in several Member States. By way of example, the German Government mentions the cross-border offsetting of losses against profits between undertakings within the same group.

91 The Netherlands and United Kingdom Governments, the Commission and the EFTA Surveillance Authority submit that the restriction in question is not justified. They point out in particular that the aim of protecting creditors was also invoked by the Danish authorities in *Centros* to justify the refusal to register in Denmark a branch of a company which had been validly incorporated in the United Kingdom and all of whose business was to be carried on in Denmark but which did not meet the requirements of Danish law regarding the provision and paying-up of a minimum amount of share capital. They add that it is not certain that requirements associated with a minimum amount of share capital are an effective way of protecting creditors.

92 It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.

93 Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.

94 Accordingly, the answer to the first question must be that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

The second question referred to the Court

95 It follows from the answer to the first question referred to the Court for a preliminary ruling that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').

Costs

96 The costs incurred by the German, Spanish, Italian, Netherlands and United Kingdom Governments and by the Commission and by the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof by order of 30 March 2000, hereby rules:

1. Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

2. **Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Gulmann	Edward
La Pergola	Jann	Skouris
Macken	Colneric	von Bahr
	Cunha Rodrigues	

Delivered in open court in Luxembourg on 5 November 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President