

## NOTE

# THE FUTURE OF CODETERMINATION AFTER CENTROS: WILL GERMAN CORPORATE LAW MOVE CLOSER TO THE U.S. MODEL?

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### INTRODUCTION

Despite some dissenting voices,<sup>2</sup> most U.S. scholars agree that the maximization of shareholder wealth is by far the most important goal of U.S. corporate law.<sup>3</sup> The same cannot be said

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2. See, e.g., Trevor S. Norwitz, "The Metaphysics of Time": A Radical Corporate Vision, 46 *BUS. LAW.* 377 (1991) (arguing that other constituencies are just as important as shareholders).

3. See, e.g., MICHAEL P. DOOLEY, *FUNDAMENTALS OF CORPORATION LAW* 97 (1995) (focusing on managerial duties); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 *WASH. & LEE L. REV.* 1423, 1423-25 (1993) (arguing that the "mainstream of corporate law" remains committed to the idea that a corporation exists primarily for shareholder profit); Kenneth B. Davis, Jr., *Discretion of Corporate Management To Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 *CAN.-U.S. L.J.* 7, 8 (1988) (focusing on managerial decision-making); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 *HARV. L. REV.* 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors remains, in our view, the principal function of corporate law"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 *J. CORP. L.* 277, 278 (1998) (noting that most legal

with regard to German corporate objectives.<sup>4</sup> While scholars have recently noted a global trend towards the maximization of shareholder wealth as the primary goal of corporate law,<sup>5</sup> German corporate law continues to attach considerable importance to the interests of other stakeholders.<sup>6</sup> Most importantly, German corporate law is designed to serve the interests of employees as well as those of shareholders.<sup>7</sup> Under German codetermination

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scholars believe that the shareholder wealth maximization norm is one of the most important factors in corporate board decisions); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 36–39 (1991) (arguing against non-shareholder constituency statutes and in favor of corporate managers and directors owing their primary fiduciary obligations to shareholders).

4. See, e.g., KARSTEN SCHMIDT, *GESELLSCHAFTSRECHT [CORPORATE LAW]* 813–814 (3d ed. 1997); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 52 (1999) (“[C]orporate law in Germany makes it abundantly clear that shareholders are only one of the many stakeholders on whose behalf the managers must operate the firm.”); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1157 (1999) (noting that “German law takes more seriously the idea that beneficiaries of directors’ duties include corporate constituents other than shareholders . . . .”); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT’L L. 829, 846 (2000) (“German corporate law clearly shows that managers must operate the firm for the benefit of multiple stakeholders, not just shareholders.”); Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT’L REV. L. & ECON. 203, 208 (1994) (“Maximization of shareholders’ wealth has hardly ever been the objective of German stock corporations . . . .”).

5. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–42, 449 (2001). With regard to Germany, see Brian R. Cheffins, *The Metamorphosis of “Germany Inc.”: The Case of Executive Pay*, 49 AM. J. COMP. L. 497, 497–505 (arguing that German corporate law may be in a period of transition towards the U.S. model).

6. See, e.g., Bradley et al., *supra* note 4, at 52 (noting that shareholders remain only one type of stakeholder that corporate managers must consider); Cunningham, *supra* note 4, at 1157 (stating that although German law forbids directors from acting contrary to shareholder interests, the interests of other constituencies are also taken quite seriously).

7. See Thomas Lee Hazen, *Corporate Directors’ Accountability: The Race to*

law, employees are represented on the boards of corporations, thereby participating in their management.<sup>8</sup> This difference between U.S. and German corporate law is closely connected to the countries' respective conflicts of law rules.

In the U.S., corporate internal affairs are governed by the law of the state of incorporation.<sup>9</sup> Consequently, a corporation can select the corporate law it finds most desirable simply by incorporating in the corresponding state.<sup>10</sup> Some scholars have expressed doubt as to whether this system actually serves to maximize shareholder wealth, arguing that the U.S. system allows managers to pick corporate law rules that benefit them, rather than the corporation, at the expense of shareholders.<sup>11</sup> These scholars identify a "race to the bottom" phenomenon as states, eager to collect incorporation fees, pass ever more management-friendly rules in an effort to attract corporations.<sup>12</sup> Others have criticized

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*the Bottom—The Second Lap*, 66 N.C. L. REV. 171, 176 n.35 (1987).

8. See *infra* Part II.

9. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971) (stating general rule); see also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987) ("It . . . is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 30–32 (1987) (discussing *CTS Corp.*); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 350 (2001) ("[I]n the United States a corporation's internal affairs . . . [are] governed by its state of incorporation . . ."); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1162 (2000) ("In the United States, the law of a corporation's state of incorporation almost always governs its management and control arrangements.").

10. See O'Hara & Ribstein, *supra* note 9, at 1162.

11. This view was first advanced in detail by William L. Cary. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665–66 (1974).

12. See, e.g., Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 3, 63 (1989) (theorizing that Delaware's laws will cause corporations to incorporate in Delaware, and will cause other states to change their laws to compete); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 72 (1995) (stating that "commentators . . . view corporate law standards as a 'race to the bottom' in which states scramble over one another to impose the fewest

this “race to the bottom” theory on the ground that it does not account for the influence of capital markets: Managers have a strong incentive to make a corporation’s shares attractive to shareholders, lest capital markets punish the corporation and, by extension, its managers.<sup>13</sup> Regardless of the theories that have developed with regard to this topic,<sup>14</sup> one thing has never been in dispute: The state of incorporation doctrine, if applied without exception, does not allow state legislatures to impose rules that would allow workers to benefit at the expense of shareholders. Even if some states adopted such rules, corporations would easily avoid them by reincorporating elsewhere.<sup>15</sup>

Unlike the U.S., most states in the European Community,<sup>16</sup>

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obligations upon corporate management in an attempt to keep and attract incorporations that will bring valued tax revenue to the jurisdiction.”).

13. The first proponent of this view was Ralph K. Winter, Jr. See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 257 (1977).

14. Some scholars have suggested that there is neither a race to the bottom nor a race to the top. See, e.g., Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 U. KAN. L. REV. 541, 543 (1995) (suggesting that even if managers demand value-maximizing corporate law, state competition may not yield optimal results); Lucian Aryc Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1461–70 (1992) (arguing that managers choose value-increasing rules to govern insignificantly redistributive issues, and value-decreasing rules to govern significantly redistributive issues as well as issues that directly affect market discipline).

15. See Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 3, 65 (1988) (stating that “a corporation can avoid the effect of a particular state’s law simply by reincorporating in a state that has no such restriction.”).

16. In the context of the *Centros* decision, some scholars use the expression “Member States of the European Union.” See, e.g., José Christian Cascante, *Niederlassungsfreiheit contra Sitztheorie—Goodbye “Daily Mail”? [Freedom of Establishment v. Real Seat Doctrine—Goodbye “Daily Mail”?]*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 447, 450 (1999); Robert Freitag, *Der Wettbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht [Regulatory Competition in International Corporate Law]*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 267, 268 (1999); Catherine Holst, Note, *European Company Law After Centros: Is the EU on the Road to Delaware?*, 8 COLUM. J. EUR. L. 323, 324 (2002). However, it should be noted that the European Union has not replaced the European Community. Rather,

including Germany, have traditionally adhered to what is known as the “real seat doctrine”<sup>17</sup> According to this doctrine, the internal matters of a corporation are governed by the law of the country in which its headquarters is located.<sup>18</sup> Thus, a corporation cannot choose the more attractive corporate law of another member state unless it is also willing to move its headquarters.<sup>19</sup> Since headquarter relocation costs will usually outweigh the advantages of a more attractive corporate law, corporations usually have no choice but to accept the corporate law of the state where their headquarters are located.<sup>20</sup> It is for this reason that Germany has

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the European Community continues to exist and constitutes one of the pillars of the European Union. See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1, 25 n.3 (1997) (noting that “the European Economic Community . . . is a constituent part of the European Union . . .”). While the Member States of European Union are necessarily identical with those of the European Community, the freedom of establishment is guaranteed in the Treaty Establishing the European Community (“EC”). See Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter EC Treaty], incorporating changes made by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. Hence, in the context of this paper, reference will be made to the European Community and not to the European Union.

17. See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 132 (1993). Only a few Member States of the European Community adhere to the state of incorporation doctrine. In particular, the U.K., the Netherlands, and the Scandinavian countries adhere to the state of incorporation doctrine. See Holst, *supra* note 16, at 323 (stating that “[t]he Netherlands, the UK, and Denmark subscribe to incorporation theory . . .”). With regard to Italy, the situation does not seem to be entirely clear. See Hans Jürgen Sonnenberger & Helge Großrichter, *Konfliktlinien zwischen internationalem Gesellschaftsrecht und Niederlassungsfreiheit [Conflicts Between Rules Governing Conflicts of Laws in Corporate Matters and the Freedom of Establishment]*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 721, 724 n.24, 732 (1999) (stating that the Centros decision will influence the future decisions of states now complying with the real seat rule).

18. See ROMANO, *supra* note 17, at 132.

19. See *id.*

20. See, e.g., William J. Carney, *Federalism and Corporate Law: A Non-Delaware View of the Results of Competition*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 153, 169 (William Bratton et al. eds., 1996);

been able to develop its codetermination laws, which allow workers to participate in the management of corporations.<sup>21</sup> While shareholders and managers tend to resent codetermination, the real seat doctrine does not allow them to easily avoid the relevant laws by reincorporating elsewhere.

Due to recent developments in the law of the European Community, namely the decision of the European Court of Justice (“Court”) in *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*,<sup>22</sup> it is unlikely that the real seat rule will continue to persist in the European Community. It is not surprising that *Centros* has provoked an avalanche of publications.<sup>23</sup>

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Daniel C. Esty & Damien Geradin, *Regulatory Co-Optation*, 3 J. INT’L ECON. L. 235, 243 (2000).

21. See discussion *infra* Part III.

22. Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

23. See, e.g., Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH*, PRAXIS DES INTERNATIONALEN PRIVATRECHTS 19 [IPRAX] 323 (1999); Georg Borges, *Die Sitztheorie in der Centros-Ära: Vermeintliche Probleme und unvermeidliche Änderungen [The Real Seat Doctrine in the Centros-Era: Alleged Problems and Inevitable Changes]*, 46 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 167 (2000); Cascante, *supra* note 16, at 451 (1999); Werner Ebke, *Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH [The Fate of Real Seat Doctrine After European Court of Justice’s Centros-Decision]*, 54 JURISTENZEITUNG [JZ] 646 (1999). ; Freitag, *supra* note 16, at 267 (1999); Stefan Korn & Christian Thaler, *Das Urteil des EuGH in der Rs Centros: Ein Meilenstein für das europäische Gesellschaftskollisionsrecht? [The Centros-decision of the European Court of Justice—a Landmark Decision Regarding the Rules Governing Conflicts of Laws in Corporate Matters?]*, WIRTSCHAFTSBLÄTTER [WiBL] 247 (1999); Ulrich Forsthoff, *Niederlassungsrecht für Kapitalgesellschaften nach dem Centros-Urteil des EuGH: Eine Bilanz [Freedom of Establishment for Corporations After the Centros-decision of the European Court of Justice: A Survey]*, EUROPARECHT [EUR] 176 (2000); Horst Hammen, *Zweigniederlassungsfreiheit europäischer Gesellschaften und Mitbestimmung der Arbeitnehmer auf Unternehmensebene [Branch Offices of European Corporations and Codetermination on the Level of the Enterprise]*, 45 WERTPAPIER-MITTEILUNGEN [WM] 2487 (1999); Barbara Höfling, *Die Sitztheorie, Centros und der österreichische OGH*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 145 (2000); Otto Sandrock, *Centros: Ein Etappensieg für die Überlagerungstheorie [Centros: A Stage Victory for the Theory of Superimposition]*, 54 BETRIEBSBERATER [BB] 1337 (1999); Ernst Steindorff, *Centros und das Recht auf die günstigste Rechtsordnung [Centros and the Right to*

What is surprising, however, is that scholars have all but ignored what may be the single most relevant question in the wake of *Centros*: Will Germany be able to keep its codetermination laws, thereby ensuring that German corporate law focuses on the interests of workers as well as shareholders?<sup>24</sup> The most extensive discussion of the question, in an article by Horst Hammen (“Hammen”), does not exceed three pages.<sup>25</sup> Hammen, whose approach will be discussed in detail in Part Three, comes to a negative conclusion.<sup>26</sup> He argues that under *Centros*, corporations are free to choose their state of incorporation and that the German legislature cannot impose codetermination on corporations incorporated in another member state.<sup>27</sup>

This article holds the opposite to be true. It argues that the

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*Choose the Most Attractive Legal System*], 54 JURISTENZEITUNG [JZ] 1140 (1999); Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Gewerbstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz* [Protective Mechanisms Against the Risks Resulting from the Activities of Domestic Branch Offices of Pseudo-Foreign Corporations], 54 JURISTENZEITUNG [JZ] 662 (1999); Daniel Zimmer, *Internationales Gesellschaftsrecht und Niederlassungsfreiheit: Das Rätsel vor der Lösung?* [Rules Governing Conflicts of Laws in Corporate Matters and the Freedom of Establishment: A Riddle About to be Solved?], 55 BETRIEBS-BERATER [BB] 1361 (2000); Gilson, *supra* note 9, at 350–56; Klaus Eicker, *In the Centros Case the ECJ Delivered a Decision with Far-reaching Implications for Company Law and Tax Law*, 27 INTERTAX 391 (1999).

24. Relatively few of the articles dealing with *Centros* address the decision’s implication for the German law of codetermination. *But see* Zimmer, *supra* note 23, at 1365–66 (voicing doubts that the German system of codetermination is justified by an imperative requirement in the sense of the European Community law). According to Ulmer, *supra* note 23, at 663, it is hard to imagine that individuals intending to form a corporation large enough to fall under the statutes on codetermination would opt to form a pseudo-foreign corporation under the law of a state following the state of incorporation doctrine; *see also* Gilson, *supra* note 9, at 356 (stating that the combination of German tax and corporate law make it hard to imagine that, for large German corporations, “the value of the more attractive governance features of the corporate law of another EC member state would be worth the tax cost of the shift”).

25. *See* Hammen, *supra* note 23, at 2493–95.

26. *See id.*

27. Hammen, *supra* note 23, at 2495; *see also* Lucian Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 165 n.61 (1999).

German legislature could legally, and with only minor modifications, extend the German system of codetermination to cover pseudo-foreign corporations, thereby protecting the German system of codetermination from the effects of the state of incorporation doctrine. Hence, there is no reason to believe that German corporate law will have to follow the U.S. example of focusing solely on the maximization of shareholder wealth. Rather, German corporate law will be able to continue to focus on the interests of both workers and shareholders.

Part I of this article summarizes the *Centros* decision and the resulting controversy in European and U.S. legal scholarship. Part II provides a short overview of the German system of codetermination. Part III argues that the German law of codetermination restricts the freedom of establishment. Part IV focuses on the question of justification and comes to the conclusion that the German system of codetermination is likely to pass scrutiny by the European Court of Justice. The Conclusion contains a brief summary of the preceding parts.

#### I. THE REAL SEAT RULE AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 43(1)(1) of the Treaty Establishing the European Community ("EC Treaty") gives European Citizens the right of "freedom of establishment," allowing them to establish themselves in the territory of other Member States.<sup>28</sup> Article 48 of the EC Treaty extends this right to corporations by providing that "[c]ompanies . . . formed in accordance with the law of a Member State . . . [must] be treated in the same way as natural persons who are nationals of Member States."<sup>29</sup>

The real seat doctrine can have rather harsh consequences for a corporation moving its headquarters from one Member State to another. For example, if a U.K. company moves its headquarters to Germany without reincorporating under German law, German courts will usually treat the organization as a partnership, exposing all its shareholders to unlimited liability under section 128 of the

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28. EC Treaty, *supra* note 16, art. 43(1)(1).

29. *Id.* art. 48.



German Commercial Code.<sup>30</sup>

Against this background, European scholars have long been discussing the question of whether the real seat rule is compatible with the law of the European Community.<sup>31</sup> Some argued early on that the real seat doctrine violates the freedom of establishment.<sup>32</sup> In 1989, the Court's famous *Daily Mail* decision<sup>33</sup> seemed to reject

30. See, e.g., Carsten Thomas Ebenroth & Achim Sura, *Das Problem der Anerkennung im Internationalen Gesellschaftsrecht – Feststellung der Rechtsfähigkeit und Bestimmung des Personalstatuts* [The Problem of Recognition the Conflict of Law Rules Regarding Corporations – Confirmation of Legal Capacity and Determination of Personal Statute], 43 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT [RABELSZ] 315, 317 (1979); Gerfried Fischer, *Haftung für Scheinauslandsgesellschaften (zu LG Stuttgart, 31.7.1989–7 O 64/89)* [The Liability for Debts of Pseudo-Foreign (A Comment on LG Stuttgart 31.7.1989–7 O 64/89)], 11 PRAXIS DES INTERNATIONALEN PRIVATRECHTS [IPRAX] 100, 101 (1991); see generally Gilson, *supra* note 9, at 356.

31. See, e.g., DOMINIK SCHNICHEL, REICHWEITE DER NIEDERLASSUNGSFREIHEIT [THE SCOPE OF APPLICATION OF THE FREEDOM OF ESTABLISHMENT] 155–99 (1995) (arguing that the real seat doctrine violates the freedom of establishment); Carsten Thomas Ebenroth, *Neuere Entwicklungen im deutschen internationalen Gesellschaftsrecht* [Recent Developments Regarding the German Rules Governing Conflicts of Laws in the Field of Corporate Law], 43 JURISTENZEITUNG [JZ] 18, 24 (1988) (suggesting that the real seat doctrine does not violate Article 43 EC); Bernhard Großfeld, *Die "ausländische juristische Person & Co. KG"* [The Limited Partnership with a Foreign Corporation as General Partner], 6 PRAXIS DES INTERNATIONALEN PRIVATRECHTS [IPRAX] 351, 355 (1986) (arguing that the real seat doctrine does not violate Article 43 EC); Rainer Deville, *Anmerkung zum Beschluß des Bayerischen Obersten Landesgerichts vom 18.7.1985 – BReg. 3Z 62/85* [A Comment On the Decision of the Bavarian Supreme Court from July 18, 1985 – BReg. 3Z 62/85], 32 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 298, 298–99 (1986) (opining that the real seat rule never complied with the Zeitgeist of the European Union); see also Werner F. Ebke, *Centros – Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623, 624 (2000) (describing potential conflicts between the real seat law and Articles 43 and 48 of the EC Treaty); Maria Chetcuti Cauchi, *The European Company Statute: Freedom of Movement of the Societies Europea*, at <http://www.chetcuticauchi.com/mcc/research/freedom-of-movement-european-company.htm> (2001) (discussing tensions between the real seat doctrine and the incorporation theory in determining what system of law governs a company's activities) (last visited October 25, 2002).

32. See, e.g., SCHNICHEL, *supra* note 31, at 19; Ebke, *supra* note 31, at 649.

33. Case C-81/87, *The Queen v. HM Treasury and Commissioners of Inland*

this view, confirming the legality of the real seat doctrine under European Community law.<sup>34</sup>

However, in 1999, the *Centros* decision profoundly changed the landscape of German incorporation law. The facts of the case are simple: Two Danish nationals, Mr. and Mrs. Bryde, decided to start a corporation.<sup>35</sup> However, under Danish law, this would have required a minimum capital of 200,000 Danish Crowns (about \$23,500 U.S. dollars).<sup>36</sup> Given that no such minimum capital requirement existed in the U.K.,<sup>37</sup> Mr. and Mrs. Bryde abstained from forming a corporation in Denmark and instead set up a company in the U.K.<sup>38</sup> However, the newly formed company, Centros Ltd., never conducted any business in the U.K.<sup>39</sup> Rather, it directly requested that an office branch be registered in Denmark.<sup>40</sup> The competent Danish authorities rejected this request, arguing *inter alia*, that the whole scheme was aimed at the circumvention of

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Revenue *ex parte* Daily Mail & General Trust plc, 1988 E.C.R. 5483.

34. See Clark D. Stith, *Federalism and Company Law: A "Race to the Bottom" in the European Community*, 79 GEO. L. J. 1581, 1603 (1991) (discussing *Daily Mail's* holding that "although the 'freedom of establishment constitutes one of the fundamental principles of the Community,' the question of company recognition remains essentially one of national and not community law" (quoting *Daily Mail* 1988 E.C.R. ¶15 )); Holst, *supra* note 16, at 328 (noting that, under the *Daily Mail* decision, companies did not have "a right to transfer their central management to another Member State while retaining their legal status in the first Member State"); Cf., e.g., Uwe Kindler, *Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die Centros-Entscheidung des EuGH und das internationale Privatrecht [Freedom of Establishment for Pseudo-foreign Corporations? The Centros-decision of the European Court of Justice and the Rules Governing Conflicts of Laws in Corporate Matters]*, 52 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1993, 1996 (1999).

35. Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 3.

36. *Id.* ¶ 7.

37. *Id.* ¶ 3.

38. Mr. and Mrs. Bryde never actually admitted an intention to circumvent Danish law, but Mr. Bryde conceded that "it is certainly easier to find £ 100 than DKK 200 000." See the Opinion of Advocate General La Pergola, *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 3.

39. *Centros Ltd.*, 1999 E.C.R. I-1459, ¶¶ 3-7.

40. *Centros Ltd.* was registered on May 18, 1992 in England and Wales, and requested registration of its Danish branch in the summer of 1992. See *id.* ¶¶ 2, 6.

Danish corporate law.<sup>41</sup>

Centros Ltd. sued, alleging a violation of the freedom of establishment.<sup>42</sup> The Court agreed. It held that:

It is contrary to Articles [43 (ex-Article 52)] and [48 (ex-Article 58)] of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital.<sup>43</sup>

The *Centros* decision has provoked an avalanche of responses in legal publications.<sup>44</sup> Most of them deal with the question of whether the decision effectively puts an end to the real seat doctrine.<sup>45</sup> According to the prevailing view, this question must be answered in the affirmative: Once a corporation has been validly established in one Member State, other Member States must recognize the corporation as validly formed, lest they violate the corporation's freedom of establishment.<sup>46</sup> The minority view in the

41. *Id.* ¶ 7.

42. *Id.* ¶ 3.

43. *Id.* ¶ 14.

44. See sources cited *supra* note 23.

45. See, e.g., Cascante, *supra* note 16, at 450–51; Ebke, *supra* note 23, at 660; Thaler, *supra* note 23, at 250–54; Zimmer, *supra* note 23, at 1364–65; Eicker, *supra* note 23, at 392.

46. See, e.g., Freitag, *supra* note 16, at 268–69 (stating that Member States must recognize a corporation formed in any other Member State provided that the corporation was validly formed according to the laws of its home State); Sandrock, *supra* note 23, at 1341 (arguing that with respect to corporations from other Member States of the European Community, the real seat doctrine belongs to the realm of “legal history”); Korn & Thaler, *supra* note 23, at 254 (stating that many corporations will take advantage of freedom of establishment by establishing outside of their home state). Some authors, while critical vis-à-vis the legality of the real seat doctrine under European Community law, adopt a more careful position. See, e.g., Borges, *supra* note 23, at 176 (suggesting that the real seat doctrine will have to be modified); Cascante, *supra* note 16, at 451

literature interprets *Centros* more narrowly. According to this view, the Court's holding is only relevant to those Member States that, like Denmark and the U.K., generally adhere to the state of incorporation doctrine.<sup>47</sup>

This article does not aim to resolve this controversy. Rather, it simply assumes the validity of the prevailing view that the Court's holding in *Centros* applies to all Member States, not just to those adhering to the state of incorporation doctrine. Against the background of this assumption, the focus of this article is on the implications of *Centros* for the German system of codetermination.

## II. THE GERMAN CODETERMINATION LAW

As scholars often note, German codetermination law is highly complicated.<sup>48</sup> For the purpose of this article, however, it is

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(arguing that it will not be possible to continue to apply the real seat doctrine "in its present form"); Eicker, *supra* note 23, at 392 (suggesting that it is time to "rethink" the applicability of the real seat doctrine).

47. See, e.g., Ebke, *supra* note 31, at 658, 660; Kindler, *supra* note 34, at 1996. Cf. also Holst, *supra* note 16, at 327 (stating that legal scholars such as Wulf-Henning Roth and Werner Ebke read *Centros* narrowly). The arguments advanced in support of this view vary. The most popular line of reasoning can be summed up as follows: In *Centros*, the Court held that if a Member State follows the state of incorporation doctrine, and hence chooses to recognize the legal personality of a foreign corporation, then the Member State cannot restrict the corporation's freedom of establishment without justification. *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459. However, the Court has not addressed the question of whether a Member State has to recognize the legal personality of foreign corporations in the first place. See Ebke, *supra* note 23, at 658 (arguing that *Daily Mail* leaves open the question of when a Member State must recognize an out-of-state corporation); Holst, *supra* note 16, at 329 (acknowledging Ebke's argument).

48. See, e.g., ALFRED HUECK, *GESELLSCHAFTSRECHT [CORPORATE LAW]* 32, § 4 ¶ 2 (19th ed. 1991); Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures*, 17 ARIZ. J. INT'L & COMP. L. 555, 562 (2000) (noting the potentially numerous requirements of codetermination laws and how they affect supervisory boards in Germany); Friedrich Kübler, Comment, *Corporate Governance: On Mark Roe, German Codetermination and German Securities Market*, 5 COLUM. J. EUR. L. 213, 218 (1999) (noting that codetermination has become an "increasingly complex and ambivalent issue").

sufficient to summarize a few basic principles. To begin with, the German system of codetermination functions by giving workers a voice in the supervisory boards of corporations.<sup>49</sup> It should be recalled in this context that under sections 76–117 of the German Stock Corporation Act,<sup>50</sup> German public corporations have a two-tier board structure. The managing board is responsible for day-to-day operations.<sup>51</sup> By contrast, the supervisory board is, *inter alia*, responsible for appointing and supervising the managing board.<sup>52</sup> The corporation's shareholders generally elect at least half of the members of the supervisory board.<sup>53</sup> The remaining members are elected by the corporation's employees. The exact number of board members elected by the workers depends on which codetermination statute is applicable. Limited liability companies usually have a single board.<sup>54</sup> However, inasmuch as they fall under one of the codetermination statutes, they are legally obliged to form a supervisory board, so that the above-described system can apply to them as well.

At present, the German law of codetermination is contained in several different statutes. The oldest one is the Coal and Steel Codetermination Act of 1951,<sup>55</sup> which was supplemented by the Supplementary Act to the Coal and Steel Codetermination Act in 1956.<sup>56</sup> It applies to public corporations and limited liability

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49. See Hazen, *supra* note 7, at 176 n.35.

50. Aktiengesetz from September 6, 1965, BGBl. I 1089 [hereinafter Stock Corporation Act].

51. See *id.* § 76(1).

52. See *id.* §§ 84(1), 111(1).

53. Cf. *id.* §§ 101(1), 118(1) (stating that the shareholders of a public corporation can only elect those members of the supervisory board who are not elected as workers' representatives under the codetermination statutes).

54. See Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG) [Limited Liability Company Act] § 52.

55. Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie [Law Pertaining to the Participation of Workers in the Supervisory Boards and Managing Boards of Companies in the Coal, Iron and Steel Industries] from May 21, 1951, Bundesgesetzblatt I 341 [hereinafter Coal and Steel Codetermination Act].

56. Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des

companies in the steel, iron, coal and supporting industries, provided that these companies employ more than 2,000 workers.<sup>57</sup> Under section 4(1) of the statute, the supervisory board of the corporation consists of eleven members.<sup>58</sup> Five of them are elected by the shareholders,<sup>59</sup> and five are elected by the workers.<sup>60</sup> The eleventh member, the so-called "neutral member," is elected by the shareholders, but must also be confirmed by at least three of the five shareholders' representatives and, more importantly, by three of the five workers' representatives.<sup>61</sup>

The most recent statute on codetermination is the Codetermination Act of 1976.<sup>62</sup> It applies to various types of legal entities formed under German law including public corporations and limited liability companies,<sup>63</sup> provided that these entities employ more than 2,000 workers.<sup>64</sup> Exempt are entities that fall under the Coal and Steel Codetermination Act<sup>65</sup> as well as political or charitable organizations, and news media organizations.<sup>66</sup> Every corporation falling under the Codetermination Act has to form a supervisory board, if it does not already have one.<sup>67</sup> The supervisory board has an equal number of shareholder and employee members.<sup>68</sup> However, for two reasons, the supervisory board will tilt toward the interests of the shareholders rather than

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Bergbaus und der Eisen und Stahl erzeugenden Industrie [Supplementary Act to the Law Pertaining to the Participation of Workers in the Supervisory Boards and Managing Boards of Companies in the Coal, Iron and Steel Industries] from August 7, 1956, Bundesgesetzblatt I 707 [hereinafter Supplementary Act to the Coal and Steel Codetermination Act].

57. *Id.* § 3(II)(2).

58. Coal and Steel Codetermination Act, *supra* note 55, §4(1).

59. *Id.* §§ 4(1)(a), 5.

60. *Id.* §§ 4(1)(b), 6(1).

61. *Id.* §§ 4(1), 8(1).

62. Gesetz über die Mitbestimmung der Arbeitnehmer of May 4, 1976, Bundesgesetzblatt BGBI I 1153 [hereinafter Codetermination Act].

63. *Id.* § 1(1)(1).

64. *Id.* § 1(1)(2).

65. *Id.* § 1(2).

66. *Id.* § 1(4).

67. *Id.* § 6(1).

68. *Id.* § 7(1).

the workers.<sup>69</sup> First, the voting mechanism in the supervisory board favors the shareholders' representatives. If the board members cannot agree on a chairperson, the shareholders' representatives elect the chairperson.<sup>70</sup> This is significant because the chairperson has an additional vote whenever the supervisory board is deadlocked.<sup>71</sup> Second, at least one of the workers' representatives is elected by managerial employees as a separate group. Obviously, the interests of managerial employees are not necessarily in line with those of "ordinary" workers.<sup>72</sup>

Legal entities that do not fall under either of the two above-mentioned statutes may be subject to the so-called Industrial Constitution Act of 1952.<sup>73</sup> The Industrial Constitution Act of 1952 applies to most legal entities, including public corporations and limited liability companies.<sup>74</sup> The threshold number of workers is 500.<sup>75</sup> The legal consequences of falling under the Industrial Constitution Act of 1952 are comparatively mild. The statute gives the corporation's employees the right to elect one third of the members of the supervisory board.<sup>76</sup>

Under *Centros*, the German statutes on codetermination in their present form are easy to avoid. The relevant German statutes only apply to specific types of corporations formed under German law.<sup>77</sup> This does not only follow from the wording of the various

69. Cf., e.g., FRIEDRICH KÜBLER, GESELLSCHAFTSRECHT [CORPORATE LAW] 551 § 32(III)(2)(c) (5th ed. 1999).

70. Codetermination Act, *supra* note 62, § 27(2).

71. *Id.* § 29(2).

72. See, e.g., MANFRED LIEB, ARBEITSRECHT [LABOR LAW] 270 § 9(I)(4)(b) (1996).

73. Betriebsverfassungsgesetz of Jan. 15, 1952, BGBI I 13 [hereinafter Industrial Constitution Act of 1952].

74. *Id.* §§ 76(1), 77(1).

75. *Id.* §§ 76(6), 77. However, there is a fine difference between different types of organizations. Public corporation falls under the Codetermination Act if the number of its employees is greater than or equal to 500. *Id.* § 76(6). By contrast, other types of entities including the limited liability company only fall under the statute if the number of employees is greater than 500. *Id.* § 77.

76. *Id.* §§ 76(1), 77.

77. See, e.g., RAISER, MITBESTIMMUNGSGESETZ [THE CODETERMINATION ACT] § 1 ¶ 10 (3d ed. 1998); Ulmer, *supra* note 23, at 663 (stating that because there is no common codetermination law in the European Community, German

statutes on codetermination, which all refer to specific types of legal entities, but also from the legislative history of the statutes in question.<sup>78</sup> In the legal literature, it has been suggested that the codetermination statutes could be applied to pseudo-foreign corporations by means of analogical reasoning.<sup>79</sup> However, according to German legal doctrine, an analogy may only be used to fill gaps in the texture of law that were not intended by the legislature.<sup>80</sup> Hence, it is extremely unlikely that German courts will apply the German statutes on codetermination to pseudo-foreign corporations.

The crucial question, therefore, is whether the German legislature could extend the German system of codetermination to pseudo-foreign corporations without violating Article 43(1) of the EC. This question will be analyzed in the following parts of this article.

### III. CODETERMINATION AS A RESTRICTION ON THE FREEDOM OF ESTABLISHMENT

Against the background of *Centros*, some scholars seem to consider it obvious that the German system of codetermination restricts the freedom of establishment of pseudo-foreign

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codetermination statutes apply only to corporations formed in Germany); Angel R. Oquendo, *Breaking on Through to the Other Side: Understanding Continental European Corporate Governance*, 22 U. PA. J. INT'L. ECON. L. 975, 980 (2001) (finding that German corporation composition dictates statute application).

78. This is particularly evident with regard to the Codetermination Act of 1976. The relevant committee report of the Committee for Labor and Social Affairs from the year 1976 explicitly states that the Codetermination Statute of 1976 is not applicable to foreign corporations. Drucksachen des Bundestages [BT-Drs.] 7/4845, 4.

79. See, e.g., PETER HANAU & PETER ULMER, MITBESTIMMUNGSGESETZ [CODETERMINATION ACT] § 1 ¶ 33 (1981); RAISER, *supra* note 77, § 1 ¶ 14; Herbert Müffelmann, *Entfällt die Mitbestimmung für eine Kommanditgesellschaft bei Einschaltung einer ausländischen Kapitalgesellschaft?* [Can a Limited Partnership Avoid Codetermination by Including a Foreign Corporation?], 32 BETRIEBS-BERATER [BB] 628, 628 (1977).

80. KARL LARENZ, *METHODENLEHRE* [LEGAL METHODS] 269–279 (6th ed. 1992).



companies.<sup>81</sup> However, it must be kept in mind that the Danish refusal to register Centros Ltd. prevented the company from setting up its “branch office” in Denmark.<sup>82</sup> By contrast, the application of the German statutes on codetermination would have less far-reaching consequences. These statutes, if extended to cover pseudo-foreign corporations, would only regulate the manner in which such corporations can operate.<sup>83</sup> Therefore, the question arises whether this kind of obstacle would also be considered a restriction on the freedom of establishment.

Article 43(1) of the EC Treaty was originally interpreted to prohibit only discriminatory measures,<sup>84</sup> covering both overt and hidden forms of discrimination.<sup>85</sup> In the last decade, the Court

81. See, e.g., Ulmer, *supra* note 23, at 663 (suggesting that because companies formed in Germany must comply with Germany’s strict codetermination law, foreign companies are less likely to use their freedom of establishment to incorporate in Germany); Zimmer, *supra* note 23, at 1365–66.

82. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459, ¶ 7.

83. See *supra* notes 55–72 and accompanying text.

84. See, e.g., Case 182/83, Fearon v. Irish Land Commission, 1984 E.C.R. 3677, [1985] 22 C.M.L.R. 228 (holding that an Irish statute allowing for compulsory acquisition of land where a person owning the land or, in the case of companies, the company directors, had not been resident for more than a year within three miles of that land fell outside Article 43 (ex Article 52) of the EC Treaty because the measure did not discriminate against other Community nationals); see also Case 292/86, Gullung v. Conseil de l’Ordre des Avocats, 1988 E.C.R. 111, [1988] 25 C.M.L.R. 57 (holding that member states cannot refuse to grant the benefit of the provisions of Community law); cf. DERRICK WYATT ET AL., EUROPEAN UNION LAW 431 (2000) (arguing that the Court only started in the last decade to apply the freedom of establishment to non-discriminatory national measures); 2 DAMIAN CHALMERS & ERIKA SZYSZCZAK, EUROPEAN UNION LAW 381–84 (1998) (noting that Article 43 (ex Article 52) was originally interpreted to cover only discriminatory restrictions); MARTIN FRANZEN, PRIVATRECHTSANGLEICHUNG DURCH DIE EUROPÄISCHE GEMEINSCHAFT [THE HARMONIZATION OF PRIVATE LAW BY THE EUROPEAN COMMUNITY] 173 § 5(II)(1)(a) (1999) (stating that Article 43 was originally interpreted to prohibit only discriminatory measures).

85. See, e.g., Case C-221/89, The Queen v. Secretary of State for Transport *ex parte* Factortame, 1991 E.C.R. I-3905, ¶¶ 22–39, [1991] 26 C.M.L.R. 589 (noting that although the requirement at issue dealt with the nationality of vessels, it led to unlawful discrimination based on the nationality of persons); Case C-279/89, Commission v. U.K., 1992 E.C.R. I-5785, ¶ 45 (holding that the U.K. had

gradually extended the scope of this provision, applying it to non-discriminatory measures that render the exercise of the freedom of establishment less attractive.<sup>86</sup> However, the exact scope of this principle and the correct interpretation of the pertaining case law

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unlawfully discriminated by “excluding [certain Spanish and Portuguese nationals] from the 75% of the crew of a fishing vessel flying the British flag which must be composed of United Kingdom nationals or nationals of other Member States . . . and by requiring the nationals of other Member States who form part of that 75% . . . to reside ashore in the United Kingdom, Isle of Man or Channel Islands.”); Case C-330/91, *The Queen v. IRC ex parte Commerzbank*, 1993 E.C.R. I-4017, ¶ 20 (“[Articles 43 (ex Article 52) and 48 (ex Article 58)] of the Treaty prevent the legislation of a Member State from granting repayment supplement on overpaid tax to companies which are resident for tax purposes in that State whilst refusing the supplement to companies resident for tax purposes in another Member State.”); Case C-1/93, *Halliburton Services BV v. Secretary of State for Finances*, 1994 E.C.R. I-1137, ¶ 23, [1994] 21 C.M.L.R. 377 (“[Articles 43 (ex Article 52) and 48 (ex Article 58)] of the Treaty preclude the law of a Member State from restricting exemption from the tax on transactions relating to immovable property . . . only to cases where the company qualifying for exemption acquires immovable property from a company constituted under national law, and refusing to grant such relief where the transferor is a company constituted under the law of another Member State.”).

86. See, e.g., Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37 (“National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil [sic.] 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 it.”); Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663 (laying out specific guidelines for when, under the Treaty, a Member State may only prohibit “one of its own nationals, who holds a postgraduate academic title awarded in another Member State, from using that title on its territory without having obtained an administrative authorization for that purpose . . . .”); Case 143/87, *Stanton v. INASTI*, 1988 E.C.R. 3877, ¶ 13, [1989] 26 C.M.L.R. 761 (holding that “[Articles 43 (ex Article 52) and 39 (ex Article 48)] of the Treaty must be interpreted as meaning that a Member State may not refuse to exempt self-employed persons working within its territory from the contributions provided for under the national legislation on social security for self-employed persons on the ground that the employment which is capable of giving entitlement to such exemption is pursued within the territory of another Member State.”).

are still in dispute.<sup>87</sup> Therefore, it seems useful to start with the question of whether the German system of codetermination has a discriminatory effect before examining the likelihood that the Court will consider the German codetermination rules to restrict the freedom of establishment even in the absence of discrimination.

### A. Discrimination

To apply the German system of codetermination to all German and foreign corporations that have their real seat in Germany would not constitute overt discrimination. However, as pointed out above,<sup>88</sup> Article 43 of the EC Treaty is generally interpreted to prohibit hidden forms of discrimination as well.<sup>89</sup> Hidden discrimination occurs when a statute or another measure places the nationals of other Member States at a disadvantage vis-à-vis the Member State's own nationals.<sup>90</sup> The question, therefore, is whether the German system of codetermination places foreign companies at a disadvantage as compared to German companies. In addressing this issue, it is helpful to highlight and distinguish two

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87. See, e.g., SIOFRA O'LEARY, *The Free Movement of Persons and Services*, in *THE EVOLUTION OF EU LAW* (Paul Craig & Gráinne de Búrca eds., 1998) (distinguishing between different kinds of non-discriminatory national measures with regard to the application of Article 43 of the EC Treaty); SCHNICHEL, *supra* note 31, at 115-41 (suggesting that Article 43 of the EC Treaty should generally be applied to non-discriminatory measures that render the exercise of the freedom of establishment less attractive); PETER TROBERG, *Artikel 52*, in GROEBEN ET AL., *KOMMENTAR ZUM EU-/EG-VERTRAG [TREATISE ON THE EU/EC TREATY]* 1331-1338 (5th ed. 1997) (arguing that Article 43 of the EC Treaty is applicable to non-discriminatory measures, but suggesting that one should be particularly careful in looking for a legitimate interest that might justify the relevant non-discriminatory measures); WYATT, *supra* note 84, at 446 (arguing that the existing case law should be interpreted as holding that non-discriminatory national measures are only prohibited if they refer to entry, residence, or the access to self-employed activities).

88. See *supra* text accompanying note 85.

89. See cases cited *supra* note 85.

90. See, e.g., Case C-111/91, *Commission v. Grand Duchy of Luxembourg*, 1993 E.C.R. I-817, ¶ 9 (noting that both overt and covert discrimination are forbidden under the Treaty (citing Case 152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153)); see also SCHNICHEL, *supra* note 31, at 89.

different cases.

In the first case, the foreign corporation does not find it impossible to comply with German law, but the burden from the German system of codetermination is nevertheless greater for the foreign corporation than for the German one. Hammen focuses exclusively on this category.<sup>91</sup> One can easily think of hypothetical cases in which such an additional burden would exist. For example, the U.K. might try to improve the protection of shareholders by decreeing that companies which do not allow their shareholders to elect all the members of the board have to pay higher taxes. However, it is hard to think of actual cases in which such additional burdens exist. Hammen attempts to show that as a consequence of the different board structure of U.K. corporations, workers' representatives would have greater powers in a U.K. company than they currently have in German corporations.<sup>92</sup> Yet his reasoning does not give sufficient weight to the fact that corporations formed under U.K. law can voluntarily adopt a two-tier board structure.<sup>93</sup>

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91. Hammen, *supra* note 23, at 2494.

92. *Id.*

93. Hammen argues that corporations formed under U.K. law are placed at a disadvantage vis-à-vis German corporations if subjected to the German system of codetermination. Hammen, *supra* note 23, at 2494. His reasoning regarding this point can be summed up as follows: Under the German law of codetermination, workers are represented on the supervisory board. Hammen, *supra* note 23, at 2493; see also Tricia Paton, *Codification of Corporate Law in the United Kingdom and European Union: The Need for the Australian Approach*, 11(9) INT'L CO. & COM. L. REV. 309, 316 (2000). The supervisory board cannot, as a rule, represent the Corporation in dealings with third parties. Hammen, *supra* note 23, at 2494; see also Arndt Stengel, *Directors' Powers and Shareholders: A Comparison of Systems*, 9(2) INT'L CO. & COM. L. REV. 49 (1998) (noting that the supervisory board monitors the management board and is not involved in the business of the corporation). Hence, the workers' representatives do not have the capacity to act for the corporation. Hammen, *supra* note 23, at 2494; see also Oquendo, *supra* note 77, at 979-80 (noting that, under German law, half of the supervisory council seats are filled by the workers, and the supervisory board does not act for the corporation). The same is true with regard to limited liability companies. Hammen, *supra* note 23, at 2493-94; see also, Richard D. English, *Company Law in the European Single Market*, 1990 BYU L. REV. 1413, 1430 (1990). U.K. companies—like U.S. corporations—have a one-tier board structure. Hammen, *supra* note 23, at 2494; see also Thomas J. Andre, Jr., *Some Reflections on*

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*German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819, 1821 (1996). The members of the board have the power to jointly represent the company. Hammen, *supra* note 23, at 2494. Workers' representatives would therefore be able represent the corporation, if only by acting together with the other members of the board. Therefore, Hammen reasons, the German system of Codetermination would affect U.K. corporations more strongly than comparable German corporations.

However, this reasoning is unconvincing. As Hammen himself concedes, U.K. companies, too, have the possibility to create a two-tier board system. Hammen, *supra* note 23, at 2494; *see also*, Ben Pettet, *The Combined Code: A Firm Place for Self-Regulation in Corporate Governance*, 13(12) J. INT'L BANKING L. 394, 396 (1998) (noting that while the delegation of power on some boards adopt features similar to those found in two-tier boards, overall there is little support for the two-tier structure in the United Kingdom). U.K. law allows companies to create two classes of board members, one with the power to act for the corporation, the other one without that power. Hammen, *supra* note 23, at 2494; *see also*, Mahmut Yavasi, *Shareholding and the Board Structures of German and U.K. Companies*, 22(2) CO. LAW. 47, 51 (2001) (commenting that due to the delegation of power management by some boards, the unified board structure is often similar to the two-tier system of German corporations). Hammen discounts that possibility on the grounds that such provisions in the corporate charter are without effect vis-à-vis third parties. *See* Hammen, *supra* note 23, at 2494. However, given that under the default rule all board members have to act jointly to represent the company, there is no risk that the workers' representatives will act for the company without the consent of the managing board.

Probably aware of this weakness in his line of reasoning, Hammen also points to the fact that under U.K. law, a single board member may be able to represent the company according to the principles of "apparent authority." Hammen, *supra* note 23, at 2494; *see also* Mark Stallworthy, *Directors' Duties in Selected Markets: England and Wales*, 4(2) INT'L CO. & COM. L. REV. 77, 79 (1993) (stating that while the "authority of individual directors . . . may be subject to a specific delegation [sic], . . . a third party may rely on the principles of agency in circumstances of express authority or ostensible/apparent authority . . ."). At first glance, indeed, this argument seems to make sense. A court in the U.K. might be more likely to find such apparent authority with regard to a board member of a British company than a German Court with regard to the members of the supervisory board of German company. However, this comparison is misleading. The principles governing the concept of apparent authority do not constitute an internal affair and are therefore governed by the law of the "host" state rather than by the law of the state of incorporation. *See, e.g.*, BGHZ 43, 21 (27) (holding that German law governs the question of apparent authority in cases where the appearance of authority was created in Germany and caused its effects in Germany); ZIMMER, *supra* note 23, at 310 (arguing that the law of the

In the second case, the corporate law of another Member State simply does not allow corporations to comply with the German law of codetermination. For example, several other Member States, such as Sweden, have codetermination regimes that differ from, and are often incompatible with, the German system of codetermination.<sup>94</sup> Under Swedish law, workers in companies having twenty-five or more employees have the right to appoint through their local union branches two members and two deputy members to the board of directors.<sup>95</sup> (Like U.S. corporations, Swedish companies have a single board.)<sup>96</sup> This right is incompatible with the German rules that govern the election of the workers' representatives.<sup>97</sup> Consequently, a corporation falling under the Swedish statute in question cannot also comply with the German Codetermination Act and is therefore put at a disadvantage vis-à-vis German corporations.

#### B. Codetermination Laws as a Non-discriminatory Restriction

In light of the above-described discriminatory effects, one might be tempted to disregard the question of whether the German system of codetermination violates Article 43(1) of the EC Treaty even in the absence of discrimination. However, it must be kept in mind that even if national laws violate European Community law, this violation does not render the national laws invalid,<sup>98</sup> but rather only inapplicable in cases where a violation of Community law would otherwise occur.<sup>99</sup> Therefore, companies formed under U.K.

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state were the appearance of authority was created is applicable).

94. Uwe Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L. J. 377, 390 (1998).

95. Leroy S. Merrifield, *Worker Participation in Decisions within Undertakings*, 5 COMP. LAB. L.J. 1, 13 (1982).

96. *Id.*

97. *See* Codetermination Act, *supra* note 62, §§ 15, 16.

98. *See, e.g.*, RUDOLF STREINZ, *EUROPARECHT [EUROPEAN LAW]* 59 ¶ 200 (4th ed. 1999).

99. *See, e.g., id.* (arguing that community law prevails only if conflicting with national law); THORSTEN KINGREEN, *DIE STRUKTUR DER GRUNDFREIHEITEN DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS [THE STRUCTURE OF THE FUNDAMENTAL FREEDOMS IN EUROPEAN COMMUNITY LAW]* 34 (1999) (stating that national law in case of a conflict with community law will only be suspended

law cannot avoid the application of German codetermination statutes by showing that these statutes violate the freedom of establishment of companies formed under Swedish law. Hence, the German legislature might simply provide that the German codetermination statutes are applicable to pseudo-foreign companies, knowing full well that courts and agencies will not apply these statutes to companies in cases where this would lead to discrimination. Alternatively, the legislature could include a special provision in the codetermination statutes to the effect that these statutes do not apply to those companies that cannot comply with them without facing an additional burden not borne by domestic corporations.

Hence, the question remains whether the German law of codetermination restricts the freedom of establishment even in the absence of discriminatory effects. As mentioned above, the Court originally assumed that only discriminatory national measures could restrict the freedom of establishment.<sup>100</sup> In the last decade, the Court gradually extended the scope of Article 43(1) of the EC Treaty to prohibit non-discriminatory measures as well, holding that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms” need to be justified.<sup>101</sup> However, the exact scope of application of this principle is still in dispute.<sup>102</sup>

Some scholars interpret the existing case law on non-discriminatory restrictions of the freedom of establishment restrictively.<sup>103</sup> In particular, they suggest that Article 43(1) of the

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to the extent of the conflict).

100. See, e.g., sources cited *supra* note 84.

101. See *Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37 (1995); *Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-3219, ¶¶ 26, 27 (1999) (holding refusal of a Member State to register a company formed under the laws of another Member State must be justified); *Case C-19/92, Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 35 (holding restrictions on authorization of academic titles must be justified by a legitimate interest such as to protect the public).

102. See sources cited *supra* note 87.

103. See, e.g., FRANZEN, *supra* note 84, at 176–79 § 5 II 1; WYATT, *supra* note 84, at 446 (discussing the application of Article 43 in existing case law); Jürgen Basedow, *Zwischen Amt und Wettbewerb—Perspektiven des Notariats in Europa*

EC Treaty only prohibits those non-discriminatory national measures that restrict the entry into the territory of another Member State or the access to self-employed activities.<sup>104</sup> According to this interpretation, Article 43 of the EC Treaty does not apply to rules that govern only the conduct of a person's business activities.<sup>105</sup> Given that the German system of codetermination does not prevent pseudo-foreign corporations from entering the market or from entering a certain line of business, it would be able to avoid judicial scrutiny under Article 43 of the EC.

However, most scholars rightly reject the above-described restrictive interpretation of the relevant case law as unconvincing.<sup>106</sup>

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[*Between Public Office and Competition – Perspectives of Notary in Europe*], 55 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 409, 432–33 (1991); Hammen, *supra* note 23, at 2494 (arguing that non-discriminatory restrictions apply only to the freedom of companies to choose its business location); Wulf-Henning Roth, *Grundlagen des gemeinsamen europäischen Versicherungsmarktes*, 54 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 63, 82–83 (1990); Ernst Steindorff, *Reichweite der Niederlassungsfreiheit* [*The Scope of the Freedom of Establishment*], EUROPARECHT [EUR] 19, 20 (1988).

104. See sources cited *supra* note 103.

105. See sources cited *supra* note 103.

106. See, e.g., ASTRID EPINEY, UMGEKEHRTE DISKRIMINIERUNGEN. ZULÄSSIGKEIT UND GRENZEN DER DISCRIMINATION À REBOURS NACH EUROPÄISCHEM GEMEINSCHAFTSRECHT UND NATIONALEM VERFASSUNGSRECHT [REVERSE DISCRIMINATION. THE LEGALITY AND THE LIMITS OF THE SO-CALLED DISCRIMINATION À REBOURS UNDER EUROPEAN COMMUNITY LAW AND NATIONAL CONSTITUTIONAL LAW] 47–49 (1995); ARMIN JUNGBLUTH, DAS NIEDERLASSUNGSRECHT DER RUNDfunkVERANSTALTER IN DER EUROPÄISCHEN GEMEINSCHAFT [THE FREEDOM OF ESTABLISHMENT OF BROADCASTING COMPANIES IN THE EUROPEAN COMMUNITY], 126–27 (1991); KLAUS LACKHOFF, DIE NIEDERLASSUNGSFREIHEIT DES EGV- NUR EIN GLEICHHEITS- ODER AUCH EIN FREIHEITSRECHT [THE FREEDOM OF ESTABLISHMENT IN THE EC—ONLY A PROHIBITION OF DISCRIMINATION OR ALSO A PROHIBITION OF NON-DISCRIMINATORY OBSTACLES] 442 (2000); SCHNICHELS, *supra* note 31, at 140–41; Dieter Blumenwitz, *Rechtsprobleme im Zusammenhang mit der Angleichung von Rechtsvorschriften auf dem Gebiet der Niederlassungsfreiheit der freien Berufe* [*Legal Problems Regarding the Harmonization of Rules in the Field of the Freedom of Establishment for Professional Occupations*], NEUE JURISTISCHE WOCHENSCHRIFT 621, 622 (1989) (arguing that liberties protected by the community law are fundamental



To begin with, the Court has never endorsed the above-described distinction between different categories of rules, but instead the Court has repeatedly stated that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms” need to be justified.<sup>107</sup> If the Court had wanted to refer only to certain kinds of national measures, it could easily have made this clear. Moreover, at least one of the Court’s judgments regarding non-discriminatory obstacles to the freedom of establishment concerned a rule regulating the manner in which a business is operated rather than the access to a profession or the entry into the territory of another Member State.<sup>108</sup> In *Pfeiffer Großhandel*, the Court examined the legality of a restraining order made pursuant to a national statute which prevented an Austrian subsidiary of a German parent operating discount stores in Austria from using the trade name “Plus.”<sup>109</sup> The Court considered this restraining order to render the exercise of the freedom of establishment less attractive and concluded that it needed to be justified.<sup>110</sup> It seems appropriate, therefore, to take the Court literally and consider all those national measures that render the exercise of this Freedom less attractive to restrict the freedom of establishment. It is obvious the German system of codetermination meets this requirement.

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freedoms); Gilbert Gornig, *Probleme der Niederlassungsfreiheit und Dienstleistungsfreiheit für Rechtsanwälte in den Europäischen Gemeinschaften* [*Problems Regarding the Freedom of Establishment and the Freedom to Provide Services of Lawyers in the European Communities*], 42 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1120, 1121 (1989) (discussing that liberties protected by the community law are fundamental freedoms).

107. Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37; Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 35 (holding the protection of the public is a legitimate justification for administrative authorization of academic titles); see also Case T-266/97, *Vlaamse Televisie Maatschappij NV v. Commission*, 1999 E.C.R. II-2329, ¶ 113 (reaffirming the prohibition on national measures that are “liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty.”)

108. Case 225/97, *Pfeiffer Großhandel GmbH v. Löwa Warenhandel GmbH*, 1990 E.C.R. I-2835.

109. See *id.*

110. See *id.* ¶ 20.

IV. THE JUSTIFICATION OF THE GERMAN SYSTEM OF  
CODETERMINATION

It has been argued above that the German system of codetermination, if applied to pseudo-foreign corporations, restricts the freedom of establishment.<sup>111</sup> The question, therefore, is whether this restriction can be justified. A restriction on the freedom of establishment can be justified in basically three different ways. The relevant national measure may be a legitimate attempt by a Member State to prevent its own nationals from circumventing national law.<sup>112</sup> Moreover, the measure can fall under the explicit exception contained in Article 43(1) of the EC Treaty.<sup>113</sup> Finally it can be based on the so-called imperative

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111. See *supra* notes 108–110 and accompanying text.

112. The right of Member States to prevent the circumvention of their national legislation is not usually mentioned as a justification for measures that restrict the freedom of establishment. See, e.g., P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 739–41 (3d ed. 1998). The reason is that this doctrine was originally understood to limit the scope of application of the fundamental freedoms rather than to represent justification for restrictions. See the summary of the circumvention doctrine in the Opinion of Advocate General Lenz in Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, 1994 E.C.R. I-4795, ¶ 25 (stressing the ambiguity of existing case law). Only the Court's decision in *TV10 SA* made it clear that even nationals who try to circumvent national legislation do not fall outside of the scope of application of establishment. See *id.* ¶¶ 12–16. Given that the Court nevertheless upheld the circumvention doctrine, *id.* ¶¶ 20–21, the only remaining option is to view the circumvention doctrine as a possible justification for national measures restricting the freedom of establishment; see also Korn & Thaler, *supra* note 23, at 249 (arguing that in the *Centros*-decision the European Court of Justice treats the circumvention doctrine as a possible justification for the behavior of the Danish authorities rather than as a factor determining the scope of application of Article 43 of the EC Treaty).

113. Article 43 of the EC Treaty seems to focus on natural persons rather than on corporations. EC Treaty, *supra* note 16, art. 43(1)(1). However, Article 48 of the EC refers to Article 43 of the EC as one of the provisions that are to be applied to corporations. See EC Treaty, *supra* note 16, art. 48. Hence, there is general agreement that the freedom of establishment of corporations can be restricted on the basis of Article 43 of the EC Treaty. See, e.g., Case 79/85, *Segers v. Bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen*, 1986 E.C.R. I-2375, ¶ 12 (stating that companies within Article 48 are treated under the same conditions as those for nationals

requirements doctrine developed by the Court.<sup>114</sup>

A. Preventing the Circumvention of National Legislation

It is reasonable to assume that a considerable number of corporations conducting all or most of their business in Germany will try to make use of *Centros* with the explicit purpose of avoiding the German law of codetermination.<sup>115</sup> This provokes the question of whether such conduct gives Germany the right to prevent the circumvention of its law.

It is a well-settled principle of European Community law that the citizens of a particular Member State cannot invoke the fundamental freedoms against their own country unless the case involves some form of cross-border activity.<sup>116</sup> For example, a

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under Article 43); LACKHOFF, *supra* note 106, at 449; SCHNICHELS, *supra* note 31, at 98.

114. For cases that set out the imperative requirements doctrine, see Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 34; Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 32; Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37. *See, e.g.*, Case 120/78, *REWE-Zentral AG v. Bundesmonopolverwaltung für Brantwein*, 1979 E.C.R. 649, [1979] 16 C.M.L.R. 494 (1979) (developing the mandatory (or imperative) requirements doctrine in this so-called *Cassis de Dijon* decision with regard to the free movement of goods). The Court soon began to use a similar reasoning with regard to the freedom of establishment. However, the Court originally avoided the expression imperative requirements, using similar terms instead. *See, e.g.*, Case C-250/95, *Futura Participations SA et al. v. Administration des Contribuables*, 1997 E.C.R. I-2471, ¶ 72 (overriding requirement of general interest); Case 71/76, *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris*, 1977 E.C.R. 765, ¶ 12 (“justified by the general good”); Case 106/91, *Ramrath v. Ministre de la Justice*, 1992 E.C.R. I-3351, ¶ 31 (“justified in the general interest”).

115. *But see* Ulmer, *supra* note 23, at 663 (arguing that it is difficult to believe that shareholders intending to form a corporation governed by the law of codetermination would choose an imaginative business seat in one of the member states of the European Union where the doctrine of formation applies).

116. *See, e.g.*, Case C-134/95, *USSL v. INAIL*, 1997 E.C.R. I-195, ¶¶ 19–23 (stating that Article 48, 52 and 59 of the EC Treaty do not apply to activities confined within a single Member State); Case C-370/90, *R v. IAT Surinder Singh ex parte Secretary for The Home Department*, 1992 E.C.R. I-4265, ¶ 23, 3 C.M.L.R. 358 (1992) (stating “when a community national who has availed himself or herself of the rights [of movement and establishment] returns to his or

German manufacturer selling her products in Germany cannot claim that German rules on product labeling restrict her freedom of establishment. Therefore, nationals of Member States with unattractive rules have often tried to create cross-border situations artificially. For example, in *Leclerc v. Au blé vert*, a French company exported and then re-imported books in order to be able to invoke the free movement of goods (Article 23 EC Treaty)<sup>117</sup> and thereby escape a French law that prohibited retailers from selling books at a price more than five percent below the price set by their publishers.<sup>118</sup> So far, such attempts have had little success. In a series of decisions, the Court has established the principle that a Member State is entitled to take measures designed to prevent its nationals from attempting to circumvent their national legislation “under cover of the rights created by the Treaty.”<sup>119</sup> In *TV10 SA v.*

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her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.”); Case 61/91, Cases 35 & 36/82, *Morson & Jhanjan v. Netherlands*, 1982 E.C.R. 3723, ¶ 18, 20 C.M.L.R. 221 (1983) (stating “a member state [may refuse] to allow a relative . . . of a worker employed within the territory of that state who has never exercised the right to freedom of movement with the community to enter or reside within its territory if that worker has the nationality of that state and the relative the nationality of a non-member country.”); see also CHALMERS & SZYSZCZAK, *supra* note 84, at 286–89 (discussing the distinctions in regulating domestic products and those that are part of cross-border activity); SCHNICHEL, *supra* note 31, at 125; GILLIAN MOORE, *The Principle of Equal Treatment, in THE EVOLUTION OF EU LAW* (Paul Craig & Gráinne de Búrca eds., 1998).

117. EC Treaty, *supra* note 16, art. 23.

118. Case 229/83, *Leclerc v. Au blé vert*, 1985 E.C.R. 1, [1985] 22 C.M.L.R. 286 (1985).

119. *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 24. See Case 33/74, *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, 1974 E.C.R. 1299, ¶ 13; Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media*, 1993 E.C.R. I-487, ¶ 12 (reaffirming a Member State’s right to prevent “the exercise by a person whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.”); Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, 1994 E.C.R. I-4795, ¶ 21 (affirming a Member State “may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State’s territory” since the aim of the measure is to prevent organizations

Commissariaat voor de Media, a decision concerning the freedom to provide services (Article 49 EC Treaty),<sup>120</sup> the Court has expressed this circumvention doctrine as follows:

A Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State.<sup>121</sup>

Against this background, it would not have been surprising had the Court allowed the Danish government to invoke the circumvention doctrine in *Centros*.<sup>122</sup> After all, the very purpose of pseudo-foreign corporations such as *Centros Ltd* is to avoid the corporate law of the Member State in the territory of which the corporation is to conduct most of its activities. Yet in *Centros*, the Court explicitly refused to apply the circumvention doctrine.<sup>123</sup> The Court stressed that:

[T]he 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 fact that a national of a Member State who wishes to set up a company

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which establish themselves in another Member State from being able to wrongfully avoid obligations under national laws); Case 229/83, *Leclerc v. Au ble vert*, 1985 E.C.R. 1, ¶ 27 (affirming a Member State may take certain measures to prevent circumvention of national legislation).

120. EC Treaty, *supra* note 16, art. 49.

121. *TV10 SA*, 1994 E.C.R. I-4795, ¶ 20.

122. *But see Steindorff*, *supra* note 23, at 1140–41. Steindorff considers it unsurprising that the Court allowed *Centros Ltd.* to invoke the freedom of establishment despite its attempt to avoid Danish corporate law. This is certainly true, given that the circumvention doctrine concerns the level of justification rather than the scope of application of the fundamental freedoms. *See supra* note 112. However, Steindorff makes no attempt to explain why the Court does not allow Denmark to invoke the doctrine on the level of justification. *Cf. also TROBERG*, *supra* note 87, at 1343, ¶ 67 (arguing that so-called letter box companies should be excluded from the scope of application of Article 43 EC).

123. *Cf. Centros Ltd.*, 1999 E.C.R. I-1459, ¶¶ 26, 27 (discussing the circumvention doctrine).

chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.<sup>124</sup>

In other words, the Court seems to uphold the circumvention doctrine while at the same time limiting its scope of application. Forming a pseudo-foreign company under the less restrictive law of another Member State does not trigger the circumvention doctrine;<sup>125</sup> avoiding rules concerning the carrying on of certain trades, professions or businesses does.<sup>126</sup>

The problem with this distinction lies in its vagueness. This becomes particularly apparent with regard to the rules governing codetermination. While codetermination rules determine the structure of the supervisory board and therefore concern the internal structure of a corporation,<sup>127</sup> they are not, strictly speaking, “rules governing the formation of companies.”<sup>128</sup> Even assuming, however, that one interprets the term “formation” broadly to include all of corporate law, the legal fate of codetermination would still be uncertain. After all, a rule may concern both the formation of a company and the carrying on of a certain trade, profession or business. For example, the Coal and Steel Codetermination Act applies only to firms in the coal, iron and steel industries.<sup>129</sup>

In light of the above, it is clear that the line drawn by the Court between “rules governing the formation of companies” and “rules concerning the carrying on of trades, professions and businesses” needs to be clarified further. In the following, it is argued that the *Centros* decision itself does not provide any

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124. *Id.*

125. *See id.*

126. *See id.*

127. For a definition of the notion “internal affairs” *cf.*, *e.g.*, Matthias Korner, *Das Kollisionsrecht der Kapitalgesellschaften in den Vereinigten Staaten von Amerika* [The Law Governing Conflicts of Law with Regard to Corporations in the United States of America] 90–128 (1989).

128. *See, e.g.*, ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* 77–109 (5th ed. 2000) (using the expression “formation of corporations” to describe the process by which corporations are incorporated).

129. *See* Coal and Steel Codetermination Act, *supra* note 55, § 1(2).

guidance for undertaking this clarification.<sup>130</sup> However, it is submitted that irrespective of the nature of the rule to be avoided, the formation of a pseudo-foreign corporation should not trigger the application of the circumvention doctrine.<sup>131</sup>

### 1. The Centros decision

In order to infer the exact scope of the circumvention doctrine from the *Centros* decision, one can essentially choose between two different options. The first is to argue that in referring to “rules concerning the formation of companies” the Court really intended to create a safe haven for all of corporate law. The second option is to argue that the expression “rules governing the carrying on of certain trades, professions, or businesses” only refers to the narrow field of rules relating to professional conduct, thereby excluding rules that govern the internal affairs of corporations.<sup>132</sup> However, neither of these two options is particularly convincing.

#### i. Rules Governing the Formation of Companies

There is little reason to believe that the Court, in referring to “rules governing the formation of companies,” meant to refer to all rules pertaining to the internal affairs of corporations. The expression “formation of companies” is used several times in the Court’s reasoning,<sup>133</sup> which strongly suggests that the Court purposefully chose this terminology. Moreover, to discount the Court’s terminology as accidental would only be justified if no plausible reason existed for the distinction between rules governing the formation of companies and other corporate law rules.

130. See discussion *infra* Part II.

131. See discussion *infra* Part II.

132. See, e.g., EDDY WYMEERSCH, *Centros: A Landmark Decision in European Company Law*, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW. LIBER AMICORUM RICHARD M. BUXBAUM 629, 637 (Theodor Baums et al. eds., 1999) (giving examples referring to professional conduct such as “requirements regarding the qualification and reliability of persons intending to work in a certain business.”).

133. See Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶¶ 26, 36, 39.

However, while such a distinction may not make much sense from an economic perspective, it can plausibly be explained on a doctrinal level.

Article 48 of the EC Treaty explicitly provides that corporations “formed in accordance with the law of a Member State” enjoy the freedom of establishment.<sup>134</sup> In other words, in order for a company to be protected by Article 43(1) of the EC Treaty, it is sufficient that the company is validly formed under any one Member State’s law.<sup>135</sup> This necessarily implies that whatever restrictions other Member States are allowed to impose on foreign corporations, they cannot change the fact that the organization in question is a corporation in its state of incorporation and can therefore invoke Article 43 of the EC Treaty.<sup>136</sup> In this sense, other Member States are indirectly bound by the rules of the state of incorporation governing the formation of companies. It is a small step to conclude that the rules governing the formation of companies enjoy a special status vis-à-vis other corporate law rules. Hence, the fact that the Court exempted rules governing the formation of companies from the circumvention doctrine does not necessarily imply that the Court will extend this safe haven to other corporate law rules.

*ii. Rules Concerning the Carrying on of Certain Trades*

As mentioned above, one could also try to argue that the *Centros* decision has limited the circumvention doctrine to rules governing professional conduct.<sup>137</sup> Such rules would include regulations dealing with the necessary qualification of service providers or with behavioral standards vis-à-vis clients. With the circumvention doctrine limited in such a way, “rules governing the formation of companies” would only be one example of rules to

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134. EC Treaty, *supra* note 16, art. 48.

135. EC Treaty, *supra* note 16, art. 43(1)(1). *See, e.g.*, SCHNICHEL, *supra* note 31, at 55; TROBERG, *supra* note 87, at 1425; Forsthoff, *supra* note 23, at 174.

136. *But see* Kindler, *supra* note 34, at 1997 (arguing that the law of the host state—including the host state’s conflict of law rules—determines whether or not the foreign corporation has been validly founded and therefore enjoys the protection of Article 52 EC).

137. *See, e.g.*, WYMEERSCH, *supra* note 132, at 8.



which the circumvention doctrine does not apply.<sup>138</sup> Given that codetermination rules go far beyond regulating the professional conduct of a corporation, they would not fall under the circumvention doctrine either.

However, there is little to suggest such a reading of the *Centros* decision. The Court has not stated that it wishes to *limit* the circumvention doctrine to “rules concerning the carrying on of certain trades, professions, or businesses,”<sup>139</sup> but has simply juxtaposed those rules with “rules governing the formation of companies.”<sup>140</sup> Therefore, the decision’s wording leaves open the question of whether “rules concerning the carrying on of certain . . . businesses” are the only field of application of the circumvention doctrine, or whether they are only one example of rules to which the doctrine applies.<sup>141</sup> Moreover, to limit the circumvention doctrine’s scope of application to “rules concerning the carrying on of certain trades, professions, or businesses” would amount to a radical departure from the Court’s prior case law. In earlier decisions, the Court had formulated the circumvention doctrine in very general terms.<sup>142</sup> The Court has also applied the doctrine to rules governing the internal affairs of corporations. A striking example is the Court’s *TV10 SA* decision.<sup>143</sup> There, a broadcasting firm had established itself in Luxembourg in order to circumvent the requirements that the Dutch Media Law (“Mediawet”) imposed on broadcasting companies.<sup>144</sup> Article 31 of the Mediawet prescribed that airtime for radio and television programs on the national network could only be allocated to so-called broadcasting

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138. See *Centros Ltd.*, 1999 E.C.R. I-1459.

139. *Id.* ¶ 26.

140. *Id.*

141. *Id.*

142. For examples of the court defining the circumvention in general terms, see Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, 1994 E.C.R. I-4795, ¶ 21; Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media*, 1991 E.C.R. I-487, ¶ 12; Case 205/84, *Commission v. Germany*, 1986 E.C.R. 3755, ¶ 22, [1987] 24 C.M.L.R. 69 (1987); Case 33/74, *Van Binsbergen v. Bedrifsvereniging Metaalnijverheid*, 1974 E.C.R. 1307, ¶ 13, [1975] 12 C.M.L.R. 69 (1975) ¶ 13.

143. See *TV10 SA*, 1994 E.C.R. I-4795.

144. *Id.*

associations.<sup>145</sup> Article 14 of the Mediawet defined broadcasting associations as associations of listeners or viewers having legal personality, established to represent a particular social, cultural, religious or philosophical persuasion set out in their statutes.<sup>146</sup> While the provisions in question did not contain typical corporate law rules, they clearly regulated the internal affairs of the organizations in question by imposing restrictions regarding both the organizations' membership (viewers/listeners) and their purpose (non-commercial). Nevertheless, the Court applied the circumvention doctrine, allowing the Netherlands to deny access to its network to the Luxembourg corporation.<sup>147</sup> Moreover, the Court formulated the circumvention doctrine in very general terms, referring to "rules which would be applicable to [the person] if he were established within that State."<sup>148</sup> Therefore, if the *Centros* decision had been intended to limit the circumvention doctrine to rules of a certain type, one could have expected a clear statement to that effect.

In addition, it should not go unmentioned that to limit the circumvention doctrine to "rules concerning the carrying on of certain trades, professions or businesses" would lead to considerable doctrinal problems.<sup>149</sup> What distinguishes such rules from other national legislation in such a way as to justify a difference in treatment? Admittedly, the Court, renowned for its apodictic reasoning,<sup>150</sup> does not always justify its decisions in a satisfactory manner. Nevertheless, the fact that a particular position is hard or impossible to defend on a doctrinal level hardly makes it more likely that the position in question is the one that the Court had in mind when choosing an ambiguous wording.

Finally, even if the *Centros* decision were to be interpreted as limiting the circumvention doctrine to "rules concerning the carrying on of certain trades, professions or businesses," this would

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145. *Id.*

146. *Id.*

147. *See id.* ¶¶ 20–22.

148. *Id.* ¶ 20.

149. *See Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 26.

150. *Cf. WYATT, supra* note 84, at 201 (pointing out that the Court often cites earlier decisions only if they support its argument).

not allow the conclusion that only rules governing professional conduct fall under the circumvention doctrine. After all, the term “carrying on of certain trades, professions, or businesses” suggests a much broader understanding.

In summary, it is not particularly plausible to interpret the *Centros* decision as stating that the circumvention doctrine shall only apply to rules governing professional conduct.

## 2. Carving an Exemption from the Circumvention Doctrine

As explained above, the *Centros* decision does not provide any guidance in defining the exact scope of application of the circumvention doctrine.<sup>151</sup> The challenge, therefore, is to clarify the scope of the circumvention doctrine as it relates to the German system of codetermination in a way that is not only consistent with the Court’s holding in *Centros*, but also doctrinally defensible.

In my view, the simplest and doctrinally most convincing option is to focus on the distinction between the corporation and its shareholders/incorporators. The circumvention doctrine is based on the idea that citizens should not be allowed to make use of the fundamental freedoms with the sole purpose of evading the national legislation of their own Member States.<sup>152</sup> One may argue

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151. See *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 27.

152. See, e.g., Case 33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, ¶ 13 (holding, in relation to Article 59, that a Member State “cannot be denied the right to take measures to [prevent] the exercise of a person whose activity is entirely or principally directed towards its territory of the freedom guaranteed by the Treaty for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.”); Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media*, 1993 E.C.R. I-487, ¶ 12 (citing the same passage from the *Van Binsbergen* case); Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, 1994 E.C.R. I-4795, ¶ 21 (holding that “a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State’s territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law.”); Case 229/83, *Leclerc v. Au ble vert*, 1985 E.C.R. I, ¶ 27 (holding that a Member State could restrict freedom of movement

that this rationale also applies in cases where a pseudo-foreign corporation is formed in order to circumvent the national legislation of the Member State where the corporation's real seat is located. However, the decisive question is whether the doctrine can legitimately be directed against the pseudo-foreign corporation itself as opposed to its incorporators or shareholders. Article 48 of the EC Treaty explicitly extends the freedom of establishment to corporations<sup>153</sup> and thereby recognizes the corporation as a separate legal entity. This implies that a corporation cannot be accused of circumventing national law, simply because its shareholders and/or incorporators have done so.

At first glance, this solution may seem artificial. However, to deny the corporation the freedom of establishment on the grounds that its founders or shareholders have circumvented their national legislation would amount to a case of reverse veil piercing. In the field of corporate law, such reverse veil piercing is generally and sensibly considered to be permissible only in rare and exceptional cases.<sup>154</sup> Allowing such veil piercing in the field of European Community law would render the guarantee contained in Article 48 of the EC Treaty superfluous. If the freedom of establishment of corporations had been intended to depend on that of the

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of goods where the goods were "exported for the sole purpose of re-importation in order to circumvent legislation of the type at issue.").

153. EC Treaty, *supra* note 16, art. 48.

154. See *Stoebner v. Lingenfelter*, 115 F.3d 576, 580 n.4 (8th Cir. 1997) (applying Minnesota law which recognizes reverse pierce of the corporate veil when "no shareholder or creditor would be adversely affected."); *Flight Serv. Group, Inc. v. Patten Corp.*, 963 F. Supp. 158, 160 (D. Conn. 1997) (holding that "the corporate veil can be pierced . . . to impose liability on the owner of an offending corporation" and rejecting argument by defendant for reverse pierce of the corporate veil where defendant sought "imposition of liability on a corporation based on its shareholder's liability."). *But see* Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 696-704 (1989) (adopting a "flexible definition of the corporate entity" and proposing "unitary interest test" as a more generous approach towards reverse veil piercing). For examples in German law, see HOLGER ALTMIPPEN & GÜNTHER ROTH, GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG (GMBH) [LIMITED LIABILITY COMPANY (GMBH) ACT] 146-47, § 13 ¶¶ 28-32 (3d ed. 1997), referring to individual cases decided by the German judiciary.

corporations' incorporators or shareholders, one could have omitted Article 48 of the EC Treaty and instead derived the protection of corporations from the freedom of establishment of their incorporators or shareholders.

Moreover, it should be kept in mind that in other cases a corporation's freedom of establishment is not limited either by the extent to which its shareholders and incorporators enjoy that Freedom. For example, if U.S. citizens form a corporation under German law, the corporation is protected by Article 43 of the EC Treaty, even though its founders (and first shareholders) are not.<sup>155</sup> Why then, should one deny the protection of Article 43 of the EC Treaty to a corporation, simply because the corporation's shareholders or incorporators have sought to avoid their Member State's legislation and therefore cannot claim to be violated in their freedom of establishment?

Admittedly, the suggested approach is not completely in line with the case law of the Court. In the already cited *TV10 SA* decision, the Court applied the circumvention doctrine to a Luxembourg corporation that had been formed by Dutch nationals in order to circumvent their national legislation.<sup>156</sup> However, the case could have been decided the same way without recourse to the circumvention doctrine. The Court could simply have pointed out that cultural pluralism is an imperative requirement that justifies restricting the fundamental freedoms.<sup>157</sup> Moreover, in *TV10 SA* the

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155. See, e.g., ULRICH EVERLING, *DAS NIEDERLASSUNGSRECHT IM GEMEINSAMEN MARKT* [THE FREEDOM OF ESTABLISHMENT IN THE COMMON MARKET] 40 (1990); SCHNICHEL, *supra* note 31, at 59–60; TROBERG, *supra* note 87, ¶¶ 5, 32. But see Albert Bleckmann, *Zur Dogmatik der Niederlassungsfreiheit im EWG-Vertrag* [The Dogmatics of the Freedom of Establishment], *WIRTSCHAFT UND VERWALTUNG* [WUV] 119, 120 (1987) (arguing that the freedom of establishment should only apply to those corporations that have at least one shareholder who is protected by Article 43 of the EC Treaty).

156. See Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, 1994 E.C.R. I-4795, ¶¶ 2, 20–22.

157. Cf., e.g., *Joined Cases 60 and 61/84, Cinéthèque SA v. Fédération nationale des cinémas français*, 1985 E.C.R. 2605, ¶¶ 15, 23 (holding that protection of the cinema as a means of cultural expression is necessary and that a national system which seeks to “encourage the creation of cinematographic works irrespective of their origin” by giving such works priority in distribution through the cinema is justified).

Court may simply have overlooked the issue. The case was referred to the Court by a Dutch Court according to Article 234 of the EC Treaty.<sup>158</sup> Under Article 234 of the EC Treaty, the national courts are competent both to find the facts and to apply the law.<sup>159</sup> The Court only has to decide on the correct *interpretation* of European Community law.<sup>160</sup> In *TVIO SA*, the Dutch Court, referring the case to the Court for a preliminary ruling, had found that the relevant corporation had “established itself in Luxembourg.”<sup>161</sup> Obviously, a corporation cannot form itself, and consequently it cannot “establish itself” unless it has already been formed. However, the terminology used by the Dutch Court is nicely suited to avoid having to address the problem of reverse veil piercing. The Court may simply have copied that terminology and hence the referring court’s flawed reasoning without giving the issue any thought.

In sum, the application of the German codetermination statutes to pseudo-foreign corporations cannot be justified on the grounds that the corporations’ incorporators intended to avoid German corporate law.

#### B. Article 46(1) of the EC

According to Article 46(1) of the EC Treaty, the freedom of establishment does “not prejudice the applicability of provisions

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158. See *TVIO SA*, 1994 E.C.R. I-4795, ¶ 1.

159. See, e.g., Joined Cases C-332/92, C-333/92 and C-335/92, *Eurico Italia Srl v. Ente Nazionale Risi*, 1994 E.C.R. I-711, ¶ 17, [1994] 31 C.M.L.R. 580 (1994) (“[I]t is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court.”); see also WYATT, *supra* note 84, at 269 (discussing “application of law to the facts or the compatibility of national with the requirements of Community law . . . are matters within exclusive jurisdiction of the national court in proceedings under Article 234.”).

160. Article 234 of the Consolidated EC Treaty provides that “[t]he Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty. . . .” Cf. WYATT, *supra* note 84, at 273 (stating the Court has jurisdiction to rule on the interpretation of the treaty).

161. See *TVIO SA*, 1994 E.C.R. I-4795, ¶ 9.

laid down by law, regulation or administrative action providing for special treatment of foreign nationals on grounds of public policy, public security or public health.”<sup>162</sup> These concepts are specified to some extent in Directive 64/221,<sup>163</sup> without, however, being given an exhaustive definition.<sup>164</sup>

With regard to codetermination, both public security and public health must obviously be discarded as possible grounds of justification. In particular, any positive effects that codetermination may have on the health of employees are far too indirect and speculative to support the application of the public health exception.

This leaves the public policy exception. According to the Court, the reliance by a public authority upon the concept of public policy presupposes the existence of a “genuine and sufficiently serious threat affecting one of the fundamental interests of society.”<sup>165</sup> This leads to the question of what the goals of the codetermination statutes are. In this context, it is helpful to consider the legislative history of the Codetermination Act. The relevant legislative materials refer to the public debate on codetermination, and without actually endorsing the relevant arguments, list four considerations that are used to justify codetermination.<sup>166</sup> These considerations include the protection of

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162. EC Treaty, *supra* note 16, art. 46.

163. 1963–1964 O.J. SPEC, ED, 117. The directive is based on Article 46(1) of the Consolidated EC Treaty.

164. See, e.g., LACKHOFF, *supra* note 106, at 451; TROBERT, *supra* note 87, at 1392 ¶ 9; WYATT, *supra* note 84, at 417–21 (discussing the lack of practicality in compiling “a list of diseases and disabilities which might endanger public health, public policy or public security, and that it is sufficient to classify such diseases and disabilities in groups.”).

165. Case 30/77, R v. Bouchereau, 1977 E.C.R. 1999, [1977] C.M.L.R. 800 (1977). *Bouchereau* concerned the free movement of workers, but it is generally assumed that the same standard has to apply with regard to the other fundamental freedoms. See, e.g., LAWRENCE GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE ECC 129 (1985) (discussing the idea of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests in society as developed in the context of persons is helpful in classifying restrictions or prohibitions on trade in goods).

166. Regarding the legislative history of the Codetermination Act from 1976, the official statement of reasons accompanying the government’s bill is

human dignity,<sup>167</sup> the necessity to grant equal rights to the providers of capital and labor,<sup>168</sup> the realization of the principle of democracy,<sup>169</sup> and the necessity to limit corporate power in general.<sup>170</sup> All of these considerations might somehow be categorized as concerning fundamental interests of society. However, in order for Article 46 of the EC Treaty to apply, there must also be a “genuine and sufficiently serious threat” to one or more of the interests in question.<sup>171</sup> In the case at hand, this requirement is not met.<sup>172</sup> The Court has pointed out that while European Community (“Community”) law does not impose upon the Member States a uniform scale of values, a particular state of affairs cannot be considered a serious threat if the relevant Member State tolerates the same state of affairs in other contexts.<sup>173</sup> A variety of legal entities that can own and operate an enterprise, e.g. partnerships, do not fall under the various

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comparatively silent on the question of the goals of codetermination. It only states that the statute aims at bringing about a situation in which shareholders and employees participate with equal rights and equal influence in the decision-making process in enterprises. *See* Drucksache des Bundestages (BT-Drs.) 7/2172, 16, 17. However, the statute had been prepared by a committee of experts appointed by the government, namely the so-called “Sachverständigenkommission zur Auswertung der bisherigen Erfahrungen bei der Mitbestimmung” (“Committee of Experts for the Evaluation of Past Experiences with Codetermination”). The resulting committee report summarizes the discussion on codetermination and, in particular, names the factors that are suggested as being the goals of codetermination. *See* Drucksache des Bundestages [BT-Drs.] VI/334, 18-20. *Cf. also* ZIMMER, *supra* note 23, at 135.

167. *See* Drucksache des Bundestages [BT-Drs.] VI/334, 18.

168. *See id.* at 18-19.

169. *See id.* at 19-20.

170. *See id.* at 20-21.

171. *See* sources cited *supra* note 85.

172. *See* Case C-23/93, TV10 SA v. Commissariaat voor de Media, 1994 E.C.R. I-4795.

173. *See, e.g.,* Joined Cases 115 & 116/81, Adoui v. Belgian State and City of Liège and Cornuaille v. Belgian State, 1982 E.C.R. 1665, [1982] 19 C.M.L.R. 631 (1982) (arguing that the conduct of a foreign citizen may not be considered as being of sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State if the Member State in question does not adopt genuine and effective measures to combat such conduct with respect to the same conduct on the part of its own nationals).



codetermination statutes.<sup>174</sup> Given that Germany tolerates the absence of codetermination in such companies, it is implausible to argue that the lack of codetermination in pseudo-foreign companies is a sufficiently serious threat to the interests mentioned above. Article 46(1) of the EC, therefore, cannot serve as a basis for justifying the application of the German codetermination statutes to pseudo-foreign corporations.

### C. The Imperative Requirements Doctrine

Under the case law of the Court, national measures restricting the freedom of establishment can also be justified under the so-called “imperative” or “mandatory” requirements doctrine.<sup>175</sup> In order for this doctrine to apply, the national measure in question must meet five requirements: it must be applied in a non-discriminatory manner; it must be justified by imperative requirements in the general interest; it must be suitable for securing the attainment of the objective that it pursues; and it must not go beyond what is necessary in order to attain it.<sup>176</sup> Finally, the burden imposed by the measure in question must not be disproportionate when compared to the benefits that the measure

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174. See *supra* notes 55–72 and accompanying text.

175. See sources cited *supra* note 114.

176. See, e.g., Case C-55/94, Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶¶ 36–37 (participating in a specific activity of a national of a Member State in another Member State is subject to conditions of the host Member State, those conditions must fulfill these requirements where they are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty). In *Centros*, the Court did not consider these conditions to be fulfilled, providing two reasons in support of this conclusion. See Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459. First, imposing the minimum capital requirement on “pseudo-foreign companies such as Centros is not such as to attain the objective of protecting creditors” because no such requirement is imposed on companies having their real seat in the United Kingdom and conducting business in Denmark. *Id.* Second, the minimum capital requirement goes beyond what is necessary: the corporation’s creditors are on notice that the corporation is formed under the law of another Member State. *Id.* Moreover, Denmark could have protected creditors in a manner that restricts the freedom of establishment less by, for example, making it possible in law for public creditors to obtain the necessary guarantees. *Id.*

produces.<sup>177</sup>

*1. The Existence of an Imperative Requirement in the Case of  
Codetermination*

The first task in applying the above-described doctrine to the context at hand is to determine whether the German system of codetermination serves any imperative requirements.

In this context, several issues need to be considered. For the purpose of simplicity, it is helpful to first address a view in the legal literature according to which codetermination cannot possibly serve any imperative requirements, because codetermination lacks a “community dimension.”<sup>178</sup> As shown below, this view is unconvincing.<sup>179</sup>

This leads back to the main problem, namely how to define the imperative requirements that Germany will be able to invoke in defending its system of codetermination. This task comprises two aspects. One is the need to identify the legislative goals that the Court is likely to recognize as imperative requirements.<sup>180</sup> The other is predicting the amount of discretion that the Court will grant the Member States, in this case Germany, in specifying these requirements.<sup>181</sup>

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177. See, e.g., Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH, 1995 E.C.R. I-1923, ¶ 15 (noting it is settled law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions may be justified as being necessary in order to satisfy overriding requirements relating, inter alia, to consumer protection and fair trading but, such provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-Community trade). Case C-19/92, Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-1663, ¶ 42 (interpreting Articles 48 and 52 of the Treaty to mean that the benefits of an authorization procedure for a national who holds a postgraduate academic title awarded in another Member State to use the title on its territory are not disproportionate for the penalties proscribed for non-compliance with the procedure).

178. See Hammen, *supra* note 23, at 2494–95.

179. See discussion *infra* Part III.A.1.

180. See discussion *infra* Part III.A.2.

181. See discussion *infra* Part III.A.3.

*i. The Need for a "Community Dimension"*

According to a view recently expressed by Hammen, there can be no imperative requirement justifying codetermination law, because codetermination lacks what he calls a "community dimension."<sup>182</sup> Hammen's reasoning can be summed up as follows: fundamental freedoms are supposed to restrain the Member States. Therefore, it cannot be left to the Member States to freely define the imperative requirements that justify restricting those freedoms.<sup>183</sup> It follows that an objective can only be classified as an imperative requirement, if it has a "community dimension."<sup>184</sup> Codetermination lacks such a community dimension.<sup>185</sup> Article 137(3)(3) of the EC Treaty explicitly allows the European Community to pass legislation regarding codetermination,<sup>186</sup> but the European nations have not made use of this provision.<sup>187</sup> Moreover, neither the European Social Charter nor the Community Charter of the Fundamental Social Rights of Workers postulate any right to codetermination.<sup>188</sup>

It should be noted, first, that Hammen's reasoning has been rendered obsolete by recent legislative developments. In 2001, the European Community adopted a directive governing worker participation in the so-called European Company.<sup>189</sup> Thus, it seems reasonable to argue that codetermination now has a community dimension. Even aside from this, however, Hammen's line of

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182. See Hammen, *supra* note 23, at 2494-495.

183. See *id.* at 2494.

184. See *id.*

185. See *id.*

186. EC Treaty, *supra* note 16, art. 137(3)(3).

187. See Hammen, *supra* note 23, at 2495.

188. See *id.* In my view, it is not clear why Hammen refers to the European Social Charter ("Europäische Sozialcharta") at all. The European Social Charter is not part of European Community or European Union law. Rather, the European Social Charter was adopted by the Council of Europe, an international organization that is independent of the European Union. It is possible, however, that Hammen really means the Community Social Charter that was adopted in 1989.

189. See Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees, 2001 O.J. (L 294) 22.

reasoning is unconvincing. To begin with, black letter law does not support the thesis that imperative requirements must have a “community dimension” in the sense described by Hammen. The Court does not even mention such a “community dimension” in the context of the imperative requirements doctrine.<sup>190</sup> Moreover, even though Hammen is right in arguing that the Member States cannot be completely free in defining imperative requirements, it does not necessarily follow that the Court should only recognize those requirements as imperative that are already endorsed by the Treaty or by secondary Community law. Even without taking recourse to European Community law, the Court can undertake a balancing test to determine whether the goals invoked by the Member States are sufficiently important to be classified as imperative requirements.

Moreover, Hammen’s view, if applied consistently, violates the principle of subsidiarity expressed in Article 5(2) of the EC Treaty.<sup>191</sup> According to Article 5(2) of the EC Treaty, the Community cannot, except in areas where its competence is exclusive, take action if a certain problem can be dealt with adequately at the level of the Member States.<sup>192</sup> Following Hammen’s line of reasoning, the Member States cannot pass legislation restricting the fundamental freedoms, unless the relevant legislative objective has already been made the object of Community law.<sup>193</sup> Therefore, if the Member States wish to protect

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190. For examples of cases that do not mention a “community dimension” as part of the imperative requirements doctrine, see Case 8/74, *Procureur Roi v. Dassonville*, 1974 E.C.R. 837, ¶ 14; Case 58/80, *Dansk Supermarked A/S v. a/S Imerco*, 1981 E.C.R. 181, ¶ 11; Case 6/81, *BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV*, 1982 E.C.R. 707, ¶ 7; Case 182/84, *Miro BV*, 1985 E.C.R. 3731, ¶ 16; Case 179/85, *Commission v. Germany*, 1986 E.C.R. 3879, ¶ 11; Case C-196/89, *Nespoli*, 1990 E.C.R. I-3647, ¶ 14; Case C-293/93, *Straffesag v. Houtwipper Neeltje*, 1994 E.C.R. I-4249, ¶ 11.

191. EC Treaty, *supra* note 16, art. 5(2).

192. EC Treaty, *supra* note 16, art. 5(2) provides that:

[i]n areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

193. See Hammen, *supra* note 23, at 2494.

values that are not listed in the EC Treaty itself, they have to make these values the object of secondary Community law, even if these issues can be dealt with more efficiently at the level of the Member States.<sup>194</sup>

Even if Hammen were right in claiming that imperative requirements must have a “Community dimension,” his reasoning regarding codetermination would still be unconvincing. In asserting that codetermination lacks a “Community dimension,” Hammen fails to distinguish between the imperative requirements that function as legislative meta-goals and the means by which these meta-goals are pursued. Codetermination may not be an imperative requirement itself, but it can still constitute a means by which Member States pursue other goals such as the protection of workers. Therefore, instead of asking whether codetermination has a “Community dimension,” Hammen should have examined whether the purposes that are served by codetermination have such a dimension. This distinction is particularly important, because the Court has pointed out that the Member States enjoy a certain freedom of choice in selecting the most appropriate means to pursue a given imperative requirement.<sup>195</sup> Correspondingly, the Court has made it clear that a law does not need to exist in more than one Member State in order to serve an imperative requirement.<sup>196</sup>

In summary, the suggestion that codetermination cannot be justified by imperative requirements for lack of a Community dimension does not hold.

### ii. Identifying Imperative Requirements

The Court has never provided a definition of the term

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194. *See id.* at 2495.

195. *See, e.g.,* Case C-293/93, *Straffesag v. Houtwipper Neeltje*, 1994 E.C.R. I-4249, ¶ 22 (noting that Member States have great discretion in choosing appropriate measures to deal with trade among Member States).

196. *See, e.g.,* Case C-124/97, *Markku Juhani Läärä et al. v. Sweden*, 1999 E.C.R. I-1227, ¶ 36 (stating “the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end.”).

“imperative requirement.”<sup>197</sup> Rather, the Court has decided on a case-by-case basis on which legislative meta-goals are to be classified as imperative.<sup>198</sup> In doing so, the Court has been rather generous, not hesitating to stretch the common meaning of the expression “imperative requirement.”<sup>199</sup> For example, the prevention of unfair commercial practices,<sup>200</sup> the effectiveness of

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197. See, e.g., *KAPTEYN & VAN THEMAAT*, *supra* note 112, at 676 (noting that the Court will only accept measures justified by non-economic interests, yet it is still unclear what measures the Court will allow a Member State to implement).

198. See *infra* notes 200–09 and accompanying text.

199. See *infra* notes 200–09 and accompanying text.

200. See, e.g., *Case 8/74, Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, ¶ 6 (discussing that measures to prevent unfair practices should be reasonable and should not act as a hindrance to trade between Member States); *Case 58/80, Dansk Supermarked A/S v. Imerco*, 1981 E.C.R. 181, ¶ 17 (stating that “an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice.”); *Case 6/81, BV Industrie Diensten Groep v. J. A. Beele Handelsmaatschappij BV*, 1982 E.C.R. 707, ¶ 7 (stating that “in the absence of common rules relating to the production and marketing of products, obstacles to movement within the Community resulting from disparities between national legislation must be accepted in so far as such legislation, applying without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy mandatory requirements relating in particular to . . . fairness in commercial transactions.”); see *id.* ¶ 13 (noting that “a body of case-law prohibiting imitation of someone else’s product may not be regarded as exceeding the scope of the mandatory requirements which . . . the fairness of commercial transactions constitute.”); *Case 182/84, Miro BV*, 1985 E.C.R. 3731, ¶ 24 (noting that the Court has held that “interests such as fair trading must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.”); *Case 179/85, Commission v. Germany*, 1986 E.C.R. 3879, ¶ 15 (recognizing that the requirements arise “from the need to have regard on all sides for the fair and traditional practices observed in the various Member States.”); *Case C-196/89, Nespoli*, 1990 E.C.R. I-3647, ¶ 14 (stating that “such rules are therefore permissible under the Treaty only if . . . they . . . are intended to satisfy mandatory requirements relating, in particular, . . . to fair trading.”); *Case C-238/89, Pall Corp. v. P.J. Dahlhausen & Co.*, 1990 E.C.R. I-4827, ¶ 12 (noting that the Court has “consistently held that obstacles to intra-Community trade resulting from disparities between the provisions of national law must be accepted in so far as such provisions . . . may be justified as necessary in order to satisfy imperative requirements relating . . . to fair trading.”); *Case C-293/93, Straffesag v. Houtwipper Neeltje*, 1994 E.C.R. I-

fiscal supervision,<sup>201</sup> the protection of consumers<sup>202</sup> and the plurality of the media<sup>203</sup> have all been accepted by the Court as imperative

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4249, ¶ 20 (rejecting the argument that “a Member State may not prohibit the marketing in its territory of articles of precious metal hallmarked by the producers themselves in the Member State of exportation, where compliance with the law and . . . the safeguarding of fair trading are assured by a ranges of measures.”).

201. *See, e.g.*, Case 120/78, *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, ¶ 8 (noting that “obstacles to movement within the Community” must be accepted if they are created by national provisions that are “necessary in order to satisfy mandatory requirements relating . . . to the effectiveness of fiscal supervision, the protection of public health, fairness of commercial transactions and the defence of the consumer.”); Case 823/79, *Carciati*, 1980 E.C.R. 2773, ¶ 10 (noting that a prohibition “imposed by a Member State on persons resident in its territory on the use of vehicles imported temporarily tax-free” is “an effective way of preventing tax frauds and ensuring that taxes are paid in the country of destination of the goods.”); Case 90/82, *Commission v. France*, 1983 E.C.R. 2011, ¶ 29 (explaining that conformity with the provisions of Directive No. 72/464, which is designed to establish general principles for the harmonization of the system of taxation of tobacco, guarantees the integrity of the fiscal receipts).

202. *See, e.g.*, *Dassonville*, 1974 E.C.R. 837, ¶ 6 (noting that reasonable measures must be taken to guarantee for consumers the authenticity of a product’s designation of origin); *Dansk Supermarked*, 1981 E.C.R. 181, ¶ 13 (noting that the Danish law at issue is not only comparable to laws of other Member States against unfair competition, but it also has a particular objective in protecting consumers); *REWE-Zentral*, 1979 E.C.R. 649, ¶¶ 8–9 (noting the necessity of a Member State’s regulation of alcohol production and marketing for “the protection of public health . . . and the defence of the consumer.”); Case 130/80, *Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV*, 1981 E.C.R. 527, ¶ 6 (stating that “obstacles to intra-community trade resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be . . . necessary in order to satisfy imperative requirements relating to . . . consumer protection.”); Case 193/80, *Commission v. Italy*, 1981 E.C.R. 3019, ¶ 21 (noting that the requirements are still necessary to satisfy mandatory requirements such as consumer protection); Case 6/81, *BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV*, 1982 E.C.R. 707, ¶ 13 (noting that the protection of consumers constitutes the scope of the mandatory requirements); Case C-196/89, *Nespoli*, 1990 E.C.R. I-3647, ¶ 14 (stating that “such rules are therefore permissible under the Treaty only if . . . they . . . are intended to satisfy mandatory requirements relating, in particular, to consumer protection.”).

203. *See, e.g.*, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. I-3689, ¶¶ 25, 27 (noting

requirements. At the same time, the Court has pointed out that none of its listings of such requirements is meant to be exhaustive.<sup>204</sup>

Hence, in order to identify the imperative requirements that may justify a restriction on the freedom of establishment, three steps need to be taken. The first one is to identify the goals actually pursued by the relevant national measure. The second is to examine whether these goals fit into any of the categories already recognized by the Court. If any legislative goals are not covered by any of the imperative requirements, one must consider the recognition of a “new” imperative requirement.

*a. The Goals of Codetermination Laws*

In order to decide whether or not a national law serves imperative requirements, one needs to identify the goal that is actually pursued by the law in question. As mentioned before,<sup>205</sup> the legislative history of the Codetermination Act of 1976 names several considerations that are used to justify codetermination: the protection of human dignity, the necessity to grant equal rights to the providers of labor and capital, the democratization of corporate decision-making and the necessity to limit entrepreneurial power in general.<sup>206</sup>

*1. The Exact Meaning of the Goals of Codetermination*

It is helpful to analyze each of the above-mentioned considerations in more detail. First, the underlying idea behind the protection of human dignity through codetermination, is that

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that maintaining press diversity is a legitimate objective and suggesting that it may be attained by less restrictive measures by the Member State).

204. *REWE-Zentral*, 1979 E.C.R. 649, ¶ 13 (noting that the argument that fixing of minimum alcoholic contents may lead to standardization of products and their designation “cannot be taken so far as to regard the mandatory fixing . . . as an essential guarantee of the fairness of commercial transactions.”); *see also* KAPTEYN & VAN THEMAAT, *supra* note 112, at 676 (stating that “the interest or values covered by the rule of reason do not constitute a closed class.”).

205. *See supra* note 166 and accompanying text.

206. *See* Drucksache des Bundestages [BT-Drs.] VI/334, 18–20.



human dignity requires self-determination.<sup>207</sup> Against this background, it was seen as incompatible with the concept of human dignity to treat the individual worker as a mere “cog in the wheel.”<sup>208</sup>

The argument that the providers of capital and labor should be granted equal rights is more problematic. The legislative materials strongly suggest that this consideration was not so much seen as a legislative goal in itself. Rather, equal treatment of the providers of capital and labor was considered to be necessary in order to protect the interests of workers against adverse decisions by their employers, i.e., corporations. Thus, in explaining the concept of equal treatment of capital and labor, the relevant committee report points to the argument that workers, too, bear the risk inherent in business judgments.<sup>209</sup> It is also mentioned that the loss of employment may be even more burdensome than the loss of the capital invested in a corporation.<sup>210</sup> In sum, the legislative goal in question can be defined as the protection of the workers against adverse decisions by the corporation.

With respect to the principle of democracy, it was suggested that this principle should not be confined to politics.<sup>211</sup> Corporate power, too, was seen to be in need of democratic legitimacy.<sup>212</sup>

The legislative materials also mention the argument that codetermination is necessary to limit entrepreneurial power in general.<sup>213</sup> The relevant committee report makes it clear that this concept was understood broadly.<sup>214</sup> It is pointed out that entrepreneurs, if unchecked, may abuse their power not only vis-à-vis workers and consumers,<sup>215</sup> but also in the political sector.<sup>216</sup>

In sum, the legislative history indicates that the legislation considered, if not necessarily endorsed, the following goals: the

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207. *See id.* at 18.

208. *See id.*

209. *See id.*

210. *See id.* at 19.

211. *See id.*

212. *See id.*

213. *See id.* at 20.

214. *See id.*

215. *See id.*

216. *See id.*

protection of human dignity, the protection of workers against adverse decisions by corporations, the democratization of corporate decision-making and the limitation of entrepreneurial power in general.

*2. The Relevance of Legislative Intent*

One may argue that the four above-mentioned legislative goals need not be the only imperative requirements that may justify the German system of codetermination. In fact, the Court has never held that a statute must be motivated by a particular imperative requirement in order to be justified by an imperative requirement.<sup>217</sup> It follows that the above-mentioned goals may not include all the possible justifications for the German system of codetermination. Rather, codetermination may have other benefits that were not considered by the legislature in 1976, but are

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217. For examples of the European Court not holding that an imperative requirement for a statute must have actually motivated the legislature, but holding that certain national statutes may be justified as being necessary for consumer protection and fair trading, even if they may cause obstacles to intra-Community trade, see Case 120/78, *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, ¶ 8; Case 58/80, *Dansk Supermarked A/S v. A/S Imerco*, 1981 E.C.R. 181, ¶ 13; Case 6/81, *BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV*, 1982 E.C.R. 707, ¶ 7; Case 182/84, *Miro BV*, 1985 E.C.R. 3731, ¶ 14; Case 179/85, *Commission v. Germany*, 1986 E.C.R. 3879, ¶ 10; Case C-238/89, *Pall Corp. v. P.J. Dahlhausen & Co.*, 1990 E.C.R. I-4827, ¶ 12; Case C-293/93, *Houtwipper*, 1994 E.C.R. I-4249, ¶ 20 (noting that the German legislation provides a range of measures that have the equivalent effect of assuring fair trading). *But see* the opinion of Advocate General Jacobs in Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2099, ¶ 209. There, one of the questions was whether a law privileging German suppliers of renewable energy could be justified on the basis of Article 36 of the EC Treaty, given that the Court had previously recognized the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as capable of constituting an objective covered by the concept of public security. The Advocate General dismissed this argument on the grounds that the positive consequences of the relevant statute on the security of energy supply were a mere positive side-effect, the objectives of the statute being essentially environmental. This reasoning seems to imply that positive effects of a national statute that were not intended by the national legislature cannot serve as a justification for restricting the fundamental freedoms.

nevertheless capable of providing a justification. While such reasoning would be correct, there is not much reason to believe that the German system of codetermination could be justified by considerations that are not included among the objectives listed above. In particular, there is little reason to believe that codetermination produces net efficiency gains.<sup>218</sup> It must be remembered in this context that, at least in principle, the Member States bear the burden of proof that their national measures are indeed suited to attaining the objective that they pursue.<sup>219</sup> Even if the Court recognized the creation of an efficient corporate law regime as an imperative requirement, Germany would almost certainly be unable to show that its system of codetermination actually contributes to that goal. Hence, with regard to further analysis, it seems reasonable to exclude efficiency considerations as a possible justification for codetermination.

### b. Defining Imperative Requirements

Among the imperative requirements that the European Court

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218. Most studies have either been inconclusive or have come to the conclusion that codetermination is inefficient. See, e.g., DIETER SADOWSKI, MITBESTIMMUNG – GEWINNE UND INVESTITIONEN [CODETERMINATION – PROFITS AND INVESTMENT] 82–83 (1997); Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 IOWA J. CORP. L. 657, 678 (1996) (finding no conclusive evidence that using employee involvement to improve the attitudes and motivation of workers leads to long-term economic benefits); Felix R. FitzRoy & Kornelius Kraft, *Economic Effects of Codetermination*, 95 SCANDINAVIAN J. ECON. 365, 366 (1993) (finding “no significant effects of codetermination on productivity.”).

219. See, e.g., Case C-128/89, *Commission v. Italy*, 1990 E.C.R. I-3239, ¶ 27 (finding the Italian government’s measures were ill-suited for the purported objectives); Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227, ¶ 14 (holding the Federal Republic of Germany’s regulation failed to fulfill its claimed purpose to safeguard public health); Case 51/83, *Commission v. Italy*, 1984 E.C.R. 2793, ¶ 1 (stating that Italy, by restricting the importation of certain confectionary products failed to fulfill its obligations to justify the restriction). Cf. also Case C-17/93, *Openbaar Ministerie v. Van der Veldt*, 1994 E.C.R. I-3537, ¶¶ 15–20 (finding that Belgian legislation prohibiting the marketing of bread and other bakery products could not be adequately justified on the grounds of protecting health).

has recognized so far are the protection of workers,<sup>220</sup> and – more specifically – the improvement of working conditions.<sup>221</sup> This said, it is nevertheless worth asking whether the Court might recognize additional imperative requirements in the context at hand.

### 1. The Protection of Human Dignity

There can be little doubt that the Court will recognize the protection of human dignity, as an imperative requirement because the Court has already stated that the inviolability of a person's human dignity is one of the fundamental rights recognized and protected by European Community law.<sup>222</sup>

### 2. The Democratization of the Workplace as a Goal Per Se

By contrast, it seems unlikely that the Court will categorize the democratization of the workplace as an imperative requirement. As stated above, the Court has never provided a definition of the term “imperative requirement.” Nevertheless, it is striking that the imperative requirements recognized by the Court are always worded in such a way as to ensure that most or even all Member States, if asked, would agree that the relevant goals deserve to be pursued. For example, the Member States of the Community will easily be able to agree that “the cohesion of the national tax systems” needs to be protected, even though they are unlikely to agree on how these systems should look like. Similarly, the protection of consumers, the protection of the environment, or the prevention of unfair commercial practices are concepts that are unlikely to spark opposition in principle. By contrast, the democratization of the workplace is considered desirable in only

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220. See Case C-279/00, *Commission v. Italian Republic*, 2002 E.C.R. I-01425, ¶ 19.

221. See, e.g., Case 150/80, *Oebel*, 1981 E.C.R. 1993, ¶ 12.

222. See Case 26/29, *Stauder v. City of Ulm-Sozialamt*, 1969 E.C.R. 1419, ¶ 7. Cf. also RUDOLF GEIGER, *EG-VERTRAG [TREATY ESTABLISHING THE EUROPEAN UNION]* 563–64, art. 164, ¶ 40 (listing the inviolability of a person's human dignity as one of many fundamental human rights).

some of the Member States.<sup>223</sup> Hence, the Court will avoid stating that this value constitutes an imperative requirement.

### 3. The Limitation of Entrepreneurial Power

Similarly, it is unlikely that the Court will recognize the limitation of entrepreneurial power as an imperative requirement per se. To do so would directly contradict the very concept of the freedom of establishment. After all, the freedom of establishment precisely amounts to the right to exercise a self-employed activity without being confined by unjust limitations.

This does not mean, of course, that the prevention of certain abuses of entrepreneurial power cannot be recognized as an imperative requirement. As regards the abuse of entrepreneurial power in the labor or product markets, there can be little doubt that the prevention of such an abuse constitutes an imperative requirement. The EC Treaty's rules on competition law, particularly Articles 81 and 82, demonstrate the necessity to prevent the abuse of market power.<sup>224</sup> Moreover, even though the Court has not explicitly categorized the prevention of the abuse of market power as an imperative requirement, the Court has stated that the Member States can continue to apply their national antitrust law even if Articles 81 and 82 of the EC Treaty are also applicable.<sup>225</sup> Given that antitrust rules can render the exercise of the freedom of establishment less attractive, holding that the national antitrust rules remain applicable presupposes that they are covered by an imperative requirement.

As regards the abuse of entrepreneurial power in the political sector, the Court is equally likely to recognize this goal as an imperative requirement. After all, the Member States must be free

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223. Germany is not the only Member State prescribing the participation of workers in the management of public corporations. See Hammen, *supra* note 23, at 1491.

224. See Stephen McShea, *The "Dominant Position" Doctrine and the European Union's Response to the British Airways/American Airlines Alliance*, 23 B.C. Int'l & Comp. L. Rev. 71, 75 (1999) (stating that Articles 81 and 82 of the EC Treaty outline the primary framework for the regulation of competition in the EU).

225. See, e.g., Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1.

to define their political system.<sup>226</sup> Correspondingly, national measures aimed at preserving the integrity of the political system, such as rules limiting the contributions to political parties, never seem to have come under scrutiny by the Court.

*c. Summary*

In sum, it is likely that the Court will consider five imperative requirements in the context of codetermination: the protection of human dignity, the protection of workers against their employers, the improvement of working conditions, the prevention of the abuse of market power, and the protection of the integrity of the political system.

*iii. The Specification of Imperative Requirements*

This leads to the question of whether the Member States, in this case Germany, will be allowed any discretion in specifying the above-mentioned imperative requirements.<sup>227</sup> There can be little doubt that the imperative requirements recognized by the Court are often in need of specification, i.e., given a more concrete definition, in order to be applied. Ideally, of course, the imperative requirements themselves serve as focal points for evaluating national measures: According to the imperative requirement doctrine, national measures restricting the fundamental freedoms are only justified if they are both suitable and necessary with respect to the relevant requirement.<sup>228</sup> However, the imperative requirements recognized by the Court are usually formulated too vaguely to directly allow the evaluation of national measures. For example, the Court has recognized the prevention of unfair commercial practices as an imperative requirement.<sup>229</sup> The conclusion that a national measure is suitable and necessary to prevent unfair commercial practices presupposes a definition of what constitutes an unfair practice. The question, therefore, is

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226. See *supra* Part Four (III)(A)(3)(e).

227. See *supra* Part Four (III).

228. See sources cited *supra* note 176.

229. See cases cited *supra* note 200.

whether the Member States will be allowed discretion in defining the relevant requirements. For example, will Germany be allowed to argue that the German understanding of good working conditions includes a “democratic workplace”?

In legal literature, this problem is largely neglected. Commentators generally state that both the content and the scope of imperative requirements are defined at the European level.<sup>230</sup> This statement is technically correct, but does not really address the issue at hand. The Court can easily define the scope and content of an imperative requirement and still allow the Member States discretion, namely, by choosing a definition of the relevant imperative requirement that refers directly or indirectly to decisions made by the Member States. The prevention of unfair commercial practices may serve as an example. Regarding the content of this requirement, the Court held in *Dansk Supermarked v. Imerco* that “the marketing of imported goods may be prohibited if the conditions on which they are sold constitute an infringement on the marketing usages considered proper and fair in the state of importation . . . .”<sup>231</sup>

While the Court has never addressed the problem on a general level, the positions it has taken vary widely from case to case. As *Dansk Supermarked* shows, the Court sometimes defines imperative requirements in such a way as to leave broad discretion to the Member States.<sup>232</sup> This generous approach can also be illustrated by the fact that the Court has recognized the cohesion of the national tax system as an imperative requirement.<sup>233</sup> Given that it is up to the Member States to choose their tax system in the first place, the right to protect their national system leaves them considerable room for maneuvering. In other cases, the Court has taken a much more restrictive position. For example, the Court has not left the Member States much discretion in specifying the

230. See, e.g., PETER-CHRISTIAN MÜLLER-GRAIF, *Artikel 30*, in GROEBEN ET AL., KOMMENTAR ZUM EU-/EG-VERTRAG [TREATISE ON THE EU/EC TREATY] 631, 704 ¶ 206 (5TH ed. 1997).

231. Case 58/80, *Dansk Supermarked A/S v. Imerco*, 1981 E.C.R. 181, ¶ 15.

232. See *id.* ¶ 2.

233. See, e.g., Case C-204/90, *Bachmann v. Belgium*, 1992 E.C.R. I-249; 30 C.M.L.R. 785 (1993) (noting that there is a “need to preserve the cohesion” of national tax systems).

goal of protecting consumers.<sup>234</sup> Rather, it has developed what scholars have called the concept of the “well-informed consumer.”<sup>235</sup> In dealing with national rules pursuing the protection of consumers, the Court regularly argues that consumers can be expected to inform themselves by means of product labels,<sup>236</sup> and can also be expected to be reasonably well informed, observant and circumspect.<sup>237</sup> Thus, by defining the

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234. Cf., e.g., MÜLLER-GRAFF, *supra* note 230, at 711 ¶ 218; S. WEATHERILL, *The Evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer*, in RECHTSEINHEIT ODER RECHTSVIELFALT IN EUROPA [UNIFORM LAW OR LEGAL DIVERSITY IN EUROPE] 424, 424–40 (H. Micklitz ed., 1996).

235. Cf. CHALMERS & SZYSZCZAK, *supra* note 84, at 324–25 (stating that even though a product might not comply with the specific labeling laws of a member state, they are acceptable so long as the labeling is clearly understandable); MÜLLER-GRAFF, *supra* note 230, at 711 ¶ 218; WEATHERILL, *supra* note 234, at 424–30.

236. See, e.g., Case C-293/93, *Straffesag v. Houtwipper Neeltje*, 1994 E.C.R. I-4249, ¶ 20 (stating that a hallmark informing consumers about the fitness of a precious metal affixed in accordance with legislature of exporting Member State is enough to satisfy consumer protection statutes of importing Member States); Case 27/80, *Fietje*, 1980 E.C.R. 3839, ¶ 12 (holding that if a label contains the same information as prescribed by rules of importing state and can be understood by consumers of that state, no alterations to the label are necessary); Case 788/79, *Gilli and Andres*, 1980 E.C.R. 2071, ¶¶ 7–8 (holding that a product clearly labeled as apple vinegar cannot be prohibited for sale on grounds that consumers might confuse it with wine vinegar); Case 261/81, *Rau v. De Smedt*, 1982 E.C.R. 3961, [1983] 20 C.M.L.R. 496 (stating that labeling of a product as margarine is as effective of a way to inform the consumer about the product and hinders the free movement of goods less than requiring all margarine to be sold in cubic packages only).

237. See, e.g., Case 220/98, *Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*, 2000 E.C.R. I-117, ¶ 32 (holding that a legislature of a Member state may prohibit importation of a cosmetic product containing word ‘lifting’ if a reasonably informed, observant consumer will be misled by such labeling); Case C-210/96, *Gut Springenheide and Tusky*, 1998 E.C.R. I-4657, ¶¶ 31–32 (stating that in assessing whether the label is misleading, national courts should take into consideration expectations of an average consumer who is reasonably informed, observant and circumspect); Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars GmbH*, 1995 E.C.R. I-1923, ¶ 24 (finding that a “+10%” marking on a wrapping where a marking occupies more than 10% of the total surface wrapping should not mislead a reasonably circumspect consumer into thinking that there is a link between surface area



standards that consumers must meet, the Court has given its own interpretation to the imperative requirement of protecting consumers.

In my view, these seeming inconsistencies can be explained as follows. Giving the Member States discretion in specifying the imperative requirements will necessarily reduce the level of judicial scrutiny. Hence, the Court will naturally be reluctant to grant such discretion. However, in some cases, the Member States of the European Community may be able to agree that a certain legislative goal is sufficiently important enough to restrict the fundamental freedoms, but the Member States have different preferences in detail, and therefore, cannot agree on the exact content or definition of the relevant imperative requirement. In this case, the Court could simply impose one of the different concepts of the relevant imperative requirement. However, the more the different national preferences diverge, the more inefficient such a solution would be. Hence, it seems more reasonable in such cases to simply grant the Member States a certain amount of discretion, while at the same time ensuring that they do not abuse this discretion for protectionist purposes. This would explain, for example, why the Court has not granted the Member States much discretion in specifying the concept of consumer protection: Many of the relevant national rules deal with the packaging and labeling of products as well as with quality standards that products have to meet.<sup>238</sup> Such rules, however, tend to make it much more difficult for producers from other Member States to enter the national market, given that such producers may have to comply with both the rules of their own state and the rules of the state of destination. Hence, the Court will naturally tend to disregard diverging national preferences in order to prevent protectionism.

A mixed picture results if this reasoning is applied to the imperative requirements that are relevant in the context of codetermination.

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marking and actual increase in size and quantity).

238. *Gilli and Andres*, 1980 E.C.R. 2071 (labeling of vinegar); *Rau*, 1982 E.C.R. 3961 (packaging of margarine).

*a. The Protection of Human Dignity*

Regarding the protection of human dignity, several factors suggest that the Court will not allow the Member States discretion in defining this requirement. The inviolability of human dignity is often considered to be rooted in natural rather than merely positive law.<sup>239</sup> This implies that the content of this concept cannot depend on national preferences. Another factor to be considered in this context is that the Court has already recognized the inviolability of human dignity as a fundamental right binding the European Community's own authorities.<sup>240</sup> Therefore, the Court will sooner or later be forced to define this concept on the European level anyway, namely in cases where citizens invoke the inviolability of human dignity against acts of the European Community. It is unlikely that the Court will find it plausible to define human dignity in a certain way, while at the same time allowing the Member States to give a different meaning to the same concept.

*b. The Improvement of Working Conditions*

As regards the improvement of working conditions, the Court will likely grant the Member States broad discretion. While some preferences regarding this issue may be identical in all the Member States, e.g., limits on working hours, many of the relevant issues will strongly depend on national preferences. A rule prohibiting smoking at work is one obvious example, and codetermination is another. It depends on the preferences of the workers whether they derive any non-monetary benefits from being able to

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239. This does not mean, of course, that positive law cannot guarantee the inviolability of human dignity. For example, such a guarantee is contained in Article 1 (1) of the German Constitution. GRUNDGESETZ [GG] [CONSTITUTION] art. 1(1) (F.R.G.).

240. See, e.g., KAPTEYN & VAN THEMAAT, *supra* note 112, at 282 ("Written Community law contains no specific provision dealing with respect for fundamental rights in the Community authorities' dealings with Community citizens."). However, in 1969, the European Court of Justice held that fundamental human rights are enshrined in the general principles of Community law and that the inviolability of human dignity is among these fundamental rights. See Case 29/69, Stauder v. City of Ulm-Sozialamt, 1969 E.C.R. 419, ¶ 7.

influence the firm's decision-making. At the same time, the protectionist effects of the German system of codetermination are limited in that corporations can easily avoid being subject to diverging national rules. Corporations employing fewer than 500 employees in Germany do not fall under the German statutes on codetermination.<sup>241</sup> Corporations employing more than 500 workers in Germany can avoid the application of diverging national rules by forming a subsidiary company for their operations in Germany.<sup>242</sup>

*c. The Protection of Workers Against their Employers*

Similarly, the Court is likely to grant the Member States a certain amount of discretion in defining the concept of protecting workers against their employers. In order to decide which rules protect workers, one has to determine the preferences of workers. These will vary from state to state. For example, a rule restricting working hours at the price of lower wages may be seen to protect workers in some states but not in others. Consequently, if the German system of codetermination were to reduce the number of layoffs while at the same time leading to lower average wages, the Court would probably accept the claim that this result is in line with the German conception of protecting workers.

*d. The Prevention of the Abuse of Market Power*

As regards the prevention of the abuse of market power, the Court is also likely to grant the Member States a certain level of discretion. After all, the determination of the most suitable antitrust rules is closely related to the individual structure of a country's economy. In any case, the question of discretion is unlikely to be of importance with respect to this particular imperative requirement, given that the German law of codetermination does not seem to presuppose an understanding of

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241. Hartmut Dietrich, *Co-Determination of Employees In the Governance of the Enterprise*, in BUSINESS TRANSACTIONS IN GERMANY (FRG) § 31.03(3)(a)(i) (Dennis Campbell ed.) (1985).

242. *Id.* § 31.03(2)(a)(ii).

market power and its abuse that differs from the understanding of those concepts underlying antitrust legislation in general.

*e. The Integrity of the Political System*

Concerning the integrity of a Member State's political system, too, the Court is likely to grant the Member States a certain amount of discretion. The very concept of integrity presupposes value judgments that depend on national preferences. At the same time, there is no obvious risk that the Member States could abuse their discretion for protectionist purposes.

*2. Suitability*

In order for a restriction on the fundamental freedom to be justified under the imperative requirement doctrine, the relevant national measure must be well suited to attaining the objective that it pursues.<sup>243</sup> In applying this criterion, the Court focuses on two aspects: the measure's suitability to further the legislative goal and the consistency of national legislation vis-à-vis the objective in question.<sup>244</sup>

*i. Furthering the Legislative Goal*

It is generally accepted that in order to pass the suitability test, the Member State has to make a plausible showing that the measure contributes in more than an insubstantial way to the realization of the imperative requirement.<sup>245</sup> If there are different possible measures to choose from, the Court gives the Member States broad discretion in choosing the measure they consider most

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243. See, e.g., Case C-19/92, Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-1663, ¶ 32; Case C-55/94, Gebhard v. Consiglio dell'ordine degli avvocati e procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37.

244. See Opinion of Advocate General, Case C-17/00, De Coster v. College des bourgmestre et echevins de Watermael-Boitsfort, 2001 E.C.R. I-9445, ¶ 124; Opinion of Advocate General, Case C-255/97, Pfeiffer GroBhandel GmbH v. Lowa Warenhandel GmbH, 1999 E.C.R. I-2835, ¶ 43.

245. See, e.g., MÜLLER-GRAFF, *supra* note 230, at 830 ¶ 130.

appropriate.<sup>246</sup> If this test is applied to the different aims of codetermination, the outcome is likely to differ with regard to the different imperative requirements that are relevant in this context.

*a. The Improvement of Working Conditions*

Given that a democratic workplace constitutes an improved working condition per se, Germany will have no trouble showing that the German system of codetermination improves working conditions.

*b. The Protection of Workers Against their Employers*

With regard to the protection of workers against the power of their employers, Germany will be expected to show that codetermined companies are comparatively less likely to make decisions that affect the interests of workers in an adverse manner. In fact, both intuition and existing research suggest that the representatives of workers will have at least some success at preventing corporate decisions that are perceived as harmful to the interests of workers.<sup>247</sup> This is true, in particular, with regard to restructuring measures leading to layoffs.<sup>248</sup> Of course, this does

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246. See, e.g., Case 293/93, *Straffesag v. Houtwipper Neeltje*, 1994 E.C.R. I-4249, ¶ 22 (discussing Member States' wide discretion in choosing appropriate measures for requirements of hallmarking articles of precious metals).

247. See, e.g., GARY GORTON & FRANK SCHMID, *CLASS STRUGGLE INSIDE THE FIRM: A STUDY OF GERMAN CODETERMINATION* 5–6 (Nat'l Bureau of Econ. Research, Working Paper Series, Working Paper No. 7945, 2000) at <http://www.nber.org/papers/w7945> (showing empirically that employees have some success at preventing restructuring efforts). Theoretical models reach the same conclusion. See Chun Chang, *Capital Structure as an Optimal Contract Between Employees and Investors*, 47 J. FIN. 1141, 1141–58 (1992) (creating a theoretical model achieving optimal contract by a debt-equity combination and a compensation schedule); Hajime Miyazaki, *Internal Bargaining, Labor Contracts, and a Marshallian Theory of the Firm*, 74 AM. ECON. REV. 381, 381–93 (1984) (creating a theoretical model investigating the effect of varying degrees of labor's bargaining power on firm policies and predicting employee resistance to restructuring, layoffs, and wage reductions).

248. See, e.g., GORTON & SCHMID, *supra* note 247, at 5–6 (noting specifically employee resistance to restructuring, lay-offs and wage reductions).

not prove conclusively that the interests of workers are effectively served. It may be that codetermination promotes the interests of workers in the short run, but runs contrary to the workers' interests in the long run, namely, by preventing the most efficient allocation of capital. Moreover, codetermination may protect workers at the expense of the unemployed by preventing firms from being restructured in a more efficient manner. However, it has already been mentioned above that the Member States enjoy a certain amount of discretion in specifying the requirement of protecting workers.<sup>249</sup> Hence, it must be left to the Member States to determine whether they wish to promote the short-term interests of workers at expense of their long-term interests. Similarly, only the Member States can balance the interests of the employed and the unemployed.

*c. The Protection of Human Dignity*

It seems unlikely that the Court will consider the German system of codetermination adequate in protecting human dignity. In order to do so, the Court would have to accept the idea that human dignity requires a democratic workplace. Not all Member States adhere to a system of codetermination,<sup>250</sup> and even in Germany most workers work in firms that are not subject to the law of codetermination. Hence, in considering human dignity to require a democratic workplace, the Court would have to make an assumption that the law of some Member States violates human dignity.

*d. The Prevention of the Abuse of Market Power*

By contrast, it seems highly probable that the Court will consider the German rules on codetermination sufficient to prevent the abuse of market power. Workers have an interest in preventing the enterprise from exploiting potential market power

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249. See *supra* note 238 and accompanying text.

250. See, e.g., Beth L. Roberts, *The Impact of the Maastricht Summit on European Community Social Policy: A Breakthrough for Codetermination or the Creation of a Two-Speed Europe?*, 28 *TEX. INT'L L.J.* 357, 372 (1993).

vis-à-vis its employees. Hence, the workers' representatives will attempt to prevent such exploitation. Similarly, it is plausible to argue that the workers' representatives will be less inclined than the shareholders' representatives to support the use of market power in the product market. Any abuse of market power aims at raising prices to a supracompetitive level.<sup>251</sup> This means, however, that the level of production will be suboptimal.<sup>252</sup> Such a scenario may be attractive to shareholders who are interested in profits rather than in the level of production. However, it is far less appealing to workers. They do not, as a rule, share the increased profits resulting from the supracompetitive prices.<sup>253</sup> At the same time, the suboptimal level of production runs counter to their interests. In particular, under German labor law the individual worker's risk of being laid off decreases when additional workers are hired.<sup>254</sup> That is because, *ceteris paribus*, firms that wish to reduce the size of their work force generally have to lay off the more recently employed workers first.<sup>255</sup> Moreover, intuition suggests that an increase in the size of the workforce will tend to result in greater chances for the individual worker of being promoted.

*e. The Integrity of the Political Process*

As mentioned above, the Court will likely grant the Member

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251. See, e.g., ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS* 66 (4th ed. 1994) (contrasting monopolies with perfectly competitive industries); WALTER NICHOLSON, *MICROECONOMIC THEORY* 548, 573-74 (7th ed. 1998) (setting forth a mathematical model).

252. See, e.g., GELLHORN & KOVACIC, *supra* note 251, at 66.

253. See *id.*

254. According to section 1(1) of the Kündigungsschutzgesetz [Protection Against Unlawful Dismissal Act] of August 25, 1969, Bundesgesetzblatt I 1317, the dismissal of a worker who has been employed for more than six months is only valid if the dismissal is socially justified. Kündigungsschutzgesetz, v.25.8.1969 (BGBl.I S.1317). According to section 1(3) of the same statute, the dismissal of a worker for business reasons rather than for reasons that lie in the person of the worker is socially unjustified if the employer does not sufficiently take into account social considerations in determining which workers are to be dismissed. *Id.* (BGBl.I S).

255. See *id.*

States discretion in defining the integrity of the political process.<sup>256</sup> Hence, the Court will probably accept the argument that the integrity of the political process requires that corporations be prevented from exercising their power in the political arena. In the context at hand, therefore, the question is whether the German system of codetermination actually furthers this aim. While no empirical research seems to exist on this issue, one can plausibly argue on a theoretical level that this question has to be answered in the affirmative. In the German political system, entrepreneurs and workers tend to pursue different and often incompatible aims. Hence, both the representatives of workers and the representatives of shareholders will generally attempt to make sure that the other side does not use the power of the corporation to further its political aims.

*f. Summary*

In sum, Germany will likely be able to show that codetermination contributes to the goals of protecting workers against their employers, improving working conditions, preventing the abuse of market power, and protecting the integrity of the political process. By contrast, there is no reason to believe that Germany will be able to prove that codetermination protects human dignity.

*ii. Inconsistency as an Obstacle to Suitability*

The question remains whether the German system is unsuited to attaining its objectives, because it does not apply across the board to all companies, let alone all legal entities. It should be recalled, in this context, that the scope of application of the German system of codetermination is limited in a variety of ways. For example, it only applies to certain organizational forms,<sup>257</sup> and even if it were extended to cover pseudo-foreign corporations, it

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256. See *supra* note 254 and accompanying text.

257. See Coal and Steel Codetermination Act, *supra* note 55, §1; Codetermination Act, *supra* note 62, §1; Industrial Constitution Act of 1952, *supra* note 73, §§ 76, 77.



still would not be applicable to corporations having their real seat abroad.<sup>258</sup> The question is whether the above-described limits to the scope of application of the law of codetermination call into question its suitability to attain its various objectives.

*a. The Court's Approach to Inconsistent Legislation*

According to the Court, a national measure may be considered unsuitable if it pursues its objectives in an incomplete, half-hearted manner.<sup>259</sup> The exact scope of this criterion, however, is not always clear.

In *Centros*, the Court seems to apply a particularly harsh standard. There, the Danish government had advanced the argument that the minimum capital requirement imposed by Danish law was necessary to protect creditors.<sup>260</sup> The Court, however, argued that the Danish minimum requirement was "not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk."<sup>261</sup> At first glance, this reasoning seems to suggest that whenever national legislation has loopholes or does not completely eliminate an unwanted risk, it is considered unsuitable. Regarding codetermination, it could be argued that the German system of codetermination will not attain its goals, because corporations can avoid this system by establishing their

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258. See *id.*

259. See, e.g., Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780. Cf. also PETER VON WILMOWSKY, *EUROPÄISCHES KREDITSICHERUNGSRECHT* [EUROPEAN LAW OF SECURED TRANSACTIONS] 13–14 (1996) (stating that the European Court of Justice demands that any national measure restricting fundamental rights must be proportionate to its goals); WULF-HENNING ROTH, *Das Allgemeininteresse im europäischen Internationalen Vertragsrecht* [The Public Interest in the Context of Rules Governing Conflicts of Laws in the Field of Insurance Law], *VERSICHERUNGSRECHT* [VERSUR] 129, 137 (1993).

260. See Opinion of the Advocate General Pergola, Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶¶ 6-7.

261. *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 35.

real seat in another Member State.<sup>262</sup>

However, *Centros* has to be examined in the context of prior case law. Traditionally, the Court has only used the “incompleteness” of national legislation to question a measure’s legality where the national legislation seemed inconsistent, i.e., where no reason existed for the merely partial pursuit of a certain legislative goal.<sup>263</sup> The Court’s case law on national legislation banning the use of additives in the production of food may serve to illustrate this point. In *Commission v. Germany* (1987), the Court faced a German statute banning the use of all but a few additives in the production of beer.<sup>264</sup> The Court stressed the fact that the Member States were free to ban additives if there were reasonable grounds to believe that these additives might be harmful to the health of consumers.<sup>265</sup> However, as the Court pointed out, German law was inconsistent in that some of the additives that could not legally be used to produce beer could be legally used in the production of virtually all other beverages.<sup>266</sup> Given that there were no reasons for this inconsistency,<sup>267</sup> the Court held the German law in question to violate Community law.<sup>268</sup>

In my view, the Court’s reasoning in *Centros*, too, can be explained as an example of this inconsistency principle. The Danish authorities did not provide any reasons why it should be necessary to subject pseudo-foreign companies to harsher requirements than other companies formed under U.K. law and doing business in Denmark.<sup>269</sup> This does not necessarily mean that no such reasons existed. Companies located in the U.K. are

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262. See *supra* note 27 and accompanying text.

263. See WILMOWSKY, *supra* note 259, at 13–14.

264. See *Commission v. Germany*, 1987 E.C.R. 1227.

265. See *id.* ¶ 42.

266. See *id.* ¶ 49.

267. See *id.*

268. See *id.* ¶ 53.

269. See Opinion of the Advocate General Pergola, Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 6 (summarizing the reasoning of the Danish Companies Board which argued that the requirement in respect of minimum capital for limited companies, imposed by Danish law to protect the interests of companies and their employees and creditors, was a perfectly legitimate measure despite the absence of harmonization on the subject at Community level).

subject to certain administrative controls that aim at preventing the formation of corporations for fraudulent purposes.<sup>270</sup> Doing business only in Denmark, Centros Ltd. was not subject to these controls.<sup>271</sup> Hence, there was an objective reason for subjecting Centros Ltd. to stricter standards than companies having their real seat in the U.K. However, the Court may not have been aware of this fact. At least, neither the opinion of the Advocate General nor the Court's judgment mentions this point.<sup>272</sup>

*b. Are the German Statutes on Codetermination Inconsistent?*

It follows from the above that the limited scope of application of the German system of codetermination is only likely to call into question the suitability of the German laws on codetermination if it cannot be justified in a plausible way. Before this question is examined in detail, a caveat seems appropriate. Even if the limited scope of the German system of codetermination were found to violate Article 43 of the EC Treaty, this would hardly seal the fate of codetermination. After all, the German legislature has to modify the German codetermination statutes anyway if they are to be applied to pseudo-foreign companies, and hence, any inconsistencies could be straightened out as well. Notwithstanding this possibility, the present article focuses on whether the German system of codetermination in its present form could be extended to cover pseudo-foreign corporations. Hence, it is appropriate to ask whether additional modifications are necessary in order for the German codetermination statutes to pass the scrutiny of the Court.

Obviously, this task first necessitates an inquiry into potential inconsistencies regarding the scope of application of the statutes on codetermination. In this context, several issues are of importance. To begin with, the different statutes only apply to certain organizational forms,<sup>273</sup> and, in case of the Coal and Steel

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270. See, e.g., L. C. B. GOWER, PRINCIPLES OF MODERN COMPANY LAW 684 (1999); ZIMMER, *supra* note 23, at 1364; Ulmer, *supra* note 23, at 664.

271. See *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 3.

272. See *id.*; Opinion of the Advocate General Pergola, *Centros Ltd.*, 1999 E.C.R. I-1459, ¶¶ 11–22 (making no mention of the fact that Centros Ltd., doing business only in Denmark, was not subject to U.K. control).

273. See Codetermination Act, *supra* note 62 and accompanying text;

Codetermination Act, to certain industries.<sup>274</sup> Moreover, the different codetermination laws each presuppose a certain number of employees.<sup>275</sup> Also, even if the codetermination laws were extended to cover pseudo-foreign corporations, corporations having their seat in another country would still be beyond the reach of the German system of codetermination.<sup>276</sup>

Finally, the German system of codetermination has two main loopholes that are frequently used for the purpose of circumventing the relevant statutes. The first loophole concerns the law of corporate groups.<sup>277</sup> German law allows for so-called controlling agreements between two corporations.<sup>278</sup> A controlling agreement allows the controlling corporation to impose its decisions on the managing board of the controlled corporation.<sup>279</sup> Thereby, the supervisory board of the controlled corporation is basically cut off from the decision-making process.<sup>280</sup> This may not matter in cases where the controlling corporation is subject to codetermination. However, if the real seat of the controlling corporation is situated in another country, the German statutes on codetermination are not applicable.<sup>281</sup>

The second loophole concerns limited partnerships. Limited partnerships do not fall under the law of codetermination.<sup>282</sup>

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Industrial Constitution Act of 1952, *supra* note 73 and accompanying text.

274. *See* Coal and Steel Codetermination Act, *supra* note 55 and accompanying text.

275. *See id.* § 1(2) (specifying 1000 employees); Codetermination Act, *supra* note 62, § 1(1)(1) (specifying 200 employees); Industrial Constitution Act of 1952, *supra* note 73, §§ 76(6), 77 (specifying 500 employees).

276. *See supra* note 83.

277. *See, e.g.,* ZIMMER, *supra* note 23, at 157–59.

278. *See* German Stock Corporations Act, *supra* note 50, § 291.

279. *See* German Stock Corporations Act, *supra* note 50, § 308. *Cf. also* KARSTEN SCHMIDT, *supra* note 4, at 954–58, § 31.

280. *Cf.* German Stock Corporations Act, *supra* note 50, § 308 (making it clear that the managing board has to obey the instructions it receives from the controlling corporation, even if these instructions harm the interests of the controlled corporation).

281. ZIMMER, *supra* note 23, at 157–59.

282. *See* Coal and Steel Codetermination Act, *supra* note 55, § 1(2) (1000 employees); Codetermination Act, *supra* note 62, § 1(1)(1) (specifying 2000 employees); Industrial Constitution Act of 1952, *supra* note 73, §§ 76(6), 77

However, from the point of view of entrepreneurs, the limited partnership has the disadvantage that at least one partner faces unlimited liability.<sup>283</sup> German law allows for this partner to be a corporation.<sup>284</sup> If the shares of this corporation are held by the limited partners, the employees of the partnership are considered employees of the corporation,<sup>285</sup> and thereby the corporation itself is subject to the law of codetermination.<sup>286</sup> In sum, partnerships generally do not permit the avoidance of codetermination without incurring unlimited liability. Nevertheless, a legal loophole exists. According to the prevailing view, the general partner can be a corporation that has its seat in another country, and therefore, does not fall under the German statutes on codetermination.<sup>287</sup>

Of the issues listed above, the limitation to firms of a certain size is least problematic. One can plausibly argue that the organizational and financial burdens imposed by the codetermination rules are easier to bear for larger companies. Similarly, the exemption of non-corporate entities from the statutes on codetermination can be justified without particular problems.<sup>288</sup> The exempted organizations generally fall into at least one of two categories.<sup>289</sup> The first category includes those

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(specifying 500 employees).

282. See, e.g., ZIMMER, *supra* note 23, at 157–59.

283. See § 162 HGB.

284. The German Commercial Code does not explicitly mention this organizational form. However, German courts have long recognized the possibility that limited liability companies function as general partners in a limited partnership.

285. See Codetermination Act, *supra* note 62, § 4(1).

286. See Coal and Steel Codetermination Act, *supra* note 55, § 1(2).

287. See, e.g., Bayerisches Oberstes Landesgericht [Bavarian Supreme Court], WERTPAPIER-MITTEILUNGEN 968, 970 (1986); OLG Saarbruecken [Court of Appeals of Saarbrücken], Recht der Internationalen Wirtschaft [RIW] 38 (1993), 848 (850) (Saarbrücken lacked jurisdiction over the Defendant because he was not domiciled in the enforcing state).

288. See *supra* note 273 and accompanying text.

289. Another exemption is the so-called registered commercial association formed under § 22 BGB (members of such associations avoid both unlimited liability and codetermination). However, the formation of a registered commercial association presupposes a special concession. And there exists a general agreement that this concession is only to be granted if the persons concerned cannot reasonably be expected to choose another organizational form.

organizations in which at least one of the firms' owners faces unlimited personal liability.<sup>290</sup> With regard to these organizations, the exemption from the codetermination statutes can be defended on the grounds that incompetent decision-making on the part of workers' representatives can have particularly harsh consequences. The second category consists of firms that serve non-profit purposes.<sup>291</sup> In this case, the exemption seems justified by the need to encourage the creation of such firms.

The fact that the application of the Coal and Steel Codetermination Act is limited to specific industries poses more difficult problems. The scope of application of this particular statute has historical reasons. After World War II, the relevant firms accepted codetermination, because they saw it as a way to avoid decartelization.<sup>292</sup> The Coal and Steel Codetermination Act

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*See, e.g.,* BVerwG 58, 26 (1978). For this reason, the registered commercial association is of very limited practical importance. *See* SCHMIDT, *supra* note 3, at 683-84, § 24.

290. This is true with regard to partnerships. *See* § 128 HGB; §§ 128, 161(2) HGB (holding this true regarding limited partnerships); §735 BGB (holding this true regarding civil-law partnerships).

291. This is particularly true with regard to the so-called unincorporated association. *See* § 54 BGB; § 21 BGB (regarding the so-called incorporated association and stating that an association not intended for commercial purposes attains legal status by its entry onto Register of Associations).

292. *See, e.g.,* Benjamin A. Streeter III, *Codetermination in West-Germany: Through the Best (and Worst) of Times*, 58 CHI-KENT. L. REV. 981, 983 (1982) (stating that the 1951 Act did not only benefit trade unions but it meant all workers would be represented). Given its role in the Third Reich, the Allies viewed the coal and steel industries with suspicion. Plans existed to decartelize the industry, i.e., to break up existing trusts. *See* Hans-Jürgen Teuteberg, *Ursprünge und Entwicklungen der Mitbestimmung in Deutschland [Origin and Development of Codetermination in Germany]*, in *CODETERMINATION - ORIGINS AND DEVELOPMENT* 7, 51 (Hans Pohl ed., 1981). The concerned corporations hoped to gain the support of the workers in opposing these decartelization efforts. *See* Streeter, *supra* note 292, at 986. Against this background, the British military government finally introduced a system of codetermination in the coal and steel industries that was to become the model for the Coal and Steel Codetermination Act. *See* Hans G. Nutzinger, *Institutions and Experiences*, in *CODETERMINATION: AN APPROACH FROM A DIFFERENT DIRECTION* 163, 166 (J. Backhaus & H.G. Nutzinger eds., 1989). Why the British opted for codetermination, is not entirely clear. One consideration may have been to prevent social instability. *See* H.J. SPIRO, *THE POLITICS OF GERMAN*

that was later adopted by the German legislature mainly aimed at preserving this status quo.<sup>293</sup> Hence, the Court will hardly agree with the assertion that a harsher form of codetermination in the coal and steel industries is justified. Consequently, it is unlikely that the German legislature can extend the scope of application of the Coal and Steel Codetermination Act to pseudo-foreign companies without violating their freedom of establishment.

As regards the exemption of companies having their seat abroad, the Court's reasoning in *Centros* on the one hand seems to suggest that the Court will not tolerate this exemption.<sup>294</sup> After all, in *Centros*, the Court pointed out that a minimum capital requirement cannot protect creditors if the same requirement does not apply to corporations having their real seat in the U.K.<sup>295</sup> This seems to imply that the German system of codetermination cannot protect workers or improve working conditions if it is only applicable to corporations having their real seat in Germany.

On the other hand, the Court has frequently pointed out that as a general principle, Member States cannot restrict the fundamental freedoms in order to protect the interests of other Member States.<sup>296</sup> Consequently, Germany cannot impose its

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CODETERMINATION 32-34 (1958).

293. See, e.g., Streeter, *supra* note 292, at 983.

294. See Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 35.

295. See *id.*

296. See, e.g., Case C-169/89, *Gourmetterie Van den Burg*, 1990 E.C.R. I-2143, ¶ 17 (holding that member states may not introduce stricter measures for protecting a given species of bird which is neither migratory nor endangered than that of the member state on whose territory the bird in question occurs); Case C-5/94, *Ex parte Hedley Lomas Ltd.*, 1996 E.C.R. I-2553, ¶ 20 (holding that a state cannot under any circumstances unilaterally adopt corrective measures to prevent the failure of another Member State to comply with a treaty); see also Opinion of Advocate General Trabuchi, Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, ¶ 6; [1974] 11 C.M.L.R. 436, ¶ 6 (stating that if a Member State takes measures to prevent unfair practices those measures must be both reasonable in their means and should not act as a hindrance to trade between other Member States); ANDREAS ZIEGLER, *THE COMMON MARKET AND THE ENVIRONMENT: STRIKING A BALANCE* 103-04 (1995); Ulrich Everling, *Die Wiederaufbereitung abgebrannter Brennelemente in anderen Mitgliedstaaten der Europäischen Gemeinschaft [The reprocessing of used fuel elements in other Member States of the European Community]*, RECHT DER INTERNATIONALEN

system of codetermination on foreign companies in such a way that workers in other Member States are given the right to be represented on the supervisory board of foreign corporations. This leads to the following problem: If German law ensures that workers employed by foreign corporations in Germany are represented on the board of their corporations while failing to ensure such representation with regard to workers employed by foreign corporations in other countries, then corporate decision-making will be biased in favor of workers employed in Germany as opposed to workers employed elsewhere.

For foreign firms that are headquartered in another Member State, this would make codetermination much more burdensome, because the interests of the workers employed in Germany may be even less in line with the interests of shareholders than the interests of workers in general. The reason is that the workers employed in Germany will often form a small minority and will therefore tend to exploit their influence in the supervisory board at the expense of the corporation as a whole. If, on the other hand, the number of workers' representatives is reduced in such a way as to correspond to the percentage of workers employed in Germany, codetermination may become largely ineffective. Against this background, a rule limiting the scope of application of codetermination statutes to companies having their real seat in Germany cannot be deemed inconsistent.

The question remains whether the two legal loopholes existing in the law of codetermination would pass the scrutiny of the Court.<sup>297</sup> This seems doubtful because they do not serve any particular purpose. The German legislature could simply prohibit the constructions described above to the extent that they are used to circumvent the law of codetermination.<sup>298</sup>

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WIRTSCHAFT [RIW], Beilage 2, 1, 10 (1993) (stating that a member state may not force its policies on other member states through autonomous restrictions of fundamental freedoms).

297. See *supra* notes 277, 282 and accompanying text.

298. Admittedly, this would restrict the Freedom of Establishment. See *supra* note 296. However, given that the law of codetermination serves at least one imperative requirement, namely the improvement of working conditions, this restriction would be justified.



### iii. Summary

By and large, the limits on the scope of application of the German codetermination statutes are unlikely to lead to a violation of European law. However, an exception must be made for the Coal and Steel Codetermination Act, which arbitrarily imposes a harsher regime on firms in a certain industry.<sup>299</sup> Likewise, the two loopholes in the German system of codetermination described above are unlikely to pass scrutiny by the Court.<sup>300</sup>

### 3. Necessity

The imperative requirement doctrine dictates that a national measure may not go beyond what is necessary.<sup>301</sup> In other words, there must be no equally effective, but less burdensome restriction.

This criterion does not pose a problem with regard to the protection of workers against their employers. Admittedly, it is at least possible that the benefits of codetermination could be achieved in some other way, e.g., by restricting the right of employers to dismiss employees. But it should be rather hard to show that such restrictions would prove less burdensome to employers.

Similarly, the improvement of working conditions cannot be achieved in a less burdensome way. At least, this is true if one subscribes to the view suggested above, namely that the Member States are at liberty to define a “democratic workplace” as an improvement per se.

With regard to the prevention of the abuse of market power, the case is more problematic. One could argue that the problem of market power is already addressed by antitrust rules, both on the

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299. See *supra* note 289.

300. See *supra* notes 277, 282.

301. See, e.g., Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 41 (stating that while national authorities are entitled to prescribe penalties, they should not be out of proportion to the offense committed); Case C-55/94, *Gebhard v. Consiglio dell'ordine degli avvocati e procuratori di Milano* 1995 E.C.R. I-4165, ¶ 37 (stating that national measures liable to hinder the exercise of fundamental freedoms must be justified and must not go beyond what is necessary to obtain their objective).

national and on the Community level. Moreover, most companies have no, or only very limited, market power. Hence, it might be less burdensome, but equally effective, to limit codetermination to those companies that are actually found to exert market power. However, neither argument is completely convincing. Given the general principle that Member States can choose the level of protection with regard to recognized imperative requirements,<sup>302</sup> a Member State cannot be prevented from choosing to combine antitrust rules with other means of preventing the abuse of market power. Moreover, it is hardly practical to limit the scope of application of codetermination statutes to firms enjoying market power. It would require an immense bureaucratic effort to monitor the emergence, continued existence, and disappearance of such power.

Finally, there does not seem to be any less burdensome, but equally effective way of guaranteeing the integrity of the political process. Admittedly, one can curtail or even ban financial contributions to political parties or candidates. However, a corporation can exert political pressure in other ways, e.g., by threatening to move its facilities to other states, and it is hard to see how such tactics could be prevented effectively in a way that is less burdensome to corporations than the existing system of codetermination.

In sum, the criterion of necessity is unlikely to constitute an obstacle to the justification of the German system of codetermination.

#### 4. No Disproportionate Burden

The burden imposed by national measures must not be out of proportion when compared to the likely benefits.<sup>303</sup> Although the

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302. See, e.g., Case 120/78, REWE-Zentrale-AG v. Bundesmonopolverwaltung für Brantwein, 1979 E.C.R. 649.

303. See, e.g., Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars GmbH, 1995 E.C.R. I-1923, ¶ 15 (stating that provisions which place a burden on intra-Community trade are permissible if they are proportionate to the objective pursued); REWE-Zentrale-AG, 1979 E.C.R. 649, ¶¶ 8, 13 (stating that national laws related to alcohol marketing must only be accepted insofar as necessary to achieve the social objectives desired).

Court sometimes fails to mention this requirement,<sup>304</sup> there is general agreement that this balancing test is part of the imperative requirements doctrine.<sup>305</sup>

Concerning the protection of workers and the improvement of working conditions, it will be hard for the Court to argue that the burden imposed on corporations is disproportionate. The same is true with regard to the protection of the integrity of the political process: Given the ongoing criticism regarding the democratic legitimacy of the European Community,<sup>306</sup> the Court has a powerful motivation not to give the impression that it does not take the integrity of the political process seriously.

As concerns the prevention of the abuse of market power, the situation is more difficult. In my view, one could argue that the marginal benefits of imposing codetermination in addition to existing antitrust rules is sufficiently small and uncertain for the corresponding burden to be considered disproportionate. However, it is hard to predict how the Court would view this issue. In any case, given that the German system of codetermination does not impose a disproportionate burden with regard to the other three objectives described above, this question is unlikely to be decisive.

##### 5. The Absence of Discrimination

Finally, a national measure restricting the fundamental freedoms can only be justified under the imperative requirements

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304. See, e.g., Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, ¶ 34 (stating that the following four conditions for national measures must be considered: “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 it”).

305. See, e.g., WILMOWSKY, *supra* note 259, at 15; MÜLLER-GRAFF, *supra* note 230, at 715 ¶ 231.

306. Cf., e.g., PAUL CRAIG, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in *THE EVOLUTION OF EU LAW* 1, 23–30 (Paul Craig & Gráinne de Búrca eds., 1998); JOSEPH WEILER, *European Models: Polity, People and System*, in *LAWMAKING IN THE EUROPEAN UNION* 1, 1–20 (Paul Craig & C. Harlow eds., 1998).

doctrine if it applies in a non-discriminatory manner.<sup>307</sup>

As explained in Part II of this article, the German system of codetermination does not discriminate overtly against pseudo-foreign corporations. However, if the corporate law under which the corporation is formed does not allow the corporation to comply with the German system of codetermination, the application of the German codetermination law necessarily leads to a “hidden” or “indirect” discrimination.<sup>308</sup> The question, therefore, is whether such indirect discrimination also prevents a national measure from being justified on the grounds of the imperative requirements doctrine.

The Court tends to be rather inconsistent in its rulings.<sup>309</sup> On several occasions, the Court has considered national measures to be justified, even though they clearly amounted to indirect discrimination.<sup>310</sup> This case law has led Advocate General Tesauro

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307. See, e.g., *Centros Ltd.*, 1999 E.C.R. I-1459, ¶ 34 (stating that national measures that restrict fundamental freedoms must be applied in a non-discriminatory manner); *Case C-19/92, Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 28 (stating that “Community law sets limits to the exercise of those powers by the Member States in so far as provisions of national law adopted in that connection must not constitute an obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the [EC] Treaty.”); *Case C-55/94, Gebhard v. Consiglio dell’ordine degli avvocati e procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37 (stating that national measures that restrict fundamental freedoms must be applied in a non-discriminatory manner).

308. See *supra* Part II.A.

309. See the (somewhat polemical) criticism by the Advocate General Tesauro in his joined opinion regarding case, *Decker v. Caisse de maladie des employes prives*. Joined Opinion of the Advocate General Tesauro, *Decker v. Caisse de maladie des employes prives*, 1998 E.C.R. I-1831, ¶¶ 49, 50 (stating that the Court should adopt a singular approach to national measures, with a preference toward keeping some measures applicable, regardless of indirect discrimination, as his is “more in keeping with the case-law in this area considered as a whole.”).

310. See, e.g., *Case C-204/90, Bachmann v. Belgium*, 1992 ECR I-249; [1993] 30 C.M.L.R. 785 (holding that the deductibility of insurance contributions is contrary to the EC Treaty, but may be justified by the need to maintain the national tax system). In some cases, such as *Aher-Waggon v. Germany*, the Court simply considered a national measure justified by imperative requirements without addressing the problem that the measure was indirectly discriminatory.

to suggest that national measures discriminating indirectly against the nationals of foreign Member States can still be “applicable without distinction” and can therefore be justified under the imperative requirements doctrine.<sup>311</sup> However, in other decisions, the Court has stated explicitly that national measures discriminating indirectly against foreign nationals cannot be justified under the imperative requirements doctrine.<sup>312</sup> Given the

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*See* Case 389/96, *Aher-Waggon v. Germany*, 1998 E.C.R. I-4473. In other cases, the Court has basically argued that indirect discrimination can only exist where the foreign and domestic products are comparable in that a sufficient reason for distinguishing between the two is lacking. *See, e.g.*, Case 113/80, *Commission v. Ireland*, 1981 E.C.R. 1625 (discussing whether souvenirs produced abroad are to be treated in the same manner as souvenirs produced in the country where the souvenir is sold). Thus the Court has defined the notion of discrimination in such a way as to include the absence of a justification for different treatment. *See supra* note 309. This line of reasoning allows the Court to avoid stating that an indirectly discriminatory measure can be justified under the imperative requirements doctrine, but it is a purely formal question whether a reasonable consideration is considered to prevent the existence of discrimination or whether the same consideration is classified as a justification for the same difference in treatment. *See* Opinion of Advocate General, Case 203/96, *Chemische Afvalstoffen Dusseldorp BV v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeer*, 1998 E.C.R. I-4075, ¶ 90 (expressing criticism and accusing the Court of resorting to “rather tortuous reasoning”). *Cf. also Dusseldorp*, 1998 E.C.R. I-4075, ¶¶ 44, 49 (where the Court left open whether a discriminatory restriction on exports could be justified on environmental grounds).

311. *See* Joined Opinion of the Advocate General Tesauro, Case C-120/95, *Nicolas Decker v. Caisse de Maladie des Employes Privés*, 1998 E.C.R. I-1831, ¶ 50. In the context of measures aiming at the protection of the environment, a similar suggestion has been made by Advocate General Jacobs. *See* Opinion of Advocate General Jacobs, Case C-379/98, *PreussenElektra AG v. Schlesweg AG*, 2001 E.C.R. I, ¶ 233 (arguing where such measures necessarily have a discriminatory impact, the possibility that they may be justified should not be excluded); *see also* Opinion of Advocate General La Pergola, Case C-302/97, *Klaus Konle v. Republik Österreich*, 1999 E.C.R. I-3099, ¶ 15 (stating that “the rules in the present case make no reference to the nationality of those to whom they are addressed and may be regarded in that respect as applicable without distinction”).

312. Case C-224/97, *Erich Ciola v. Land Vorarlberg*, 1999 E.C.R. I-2517, ¶¶ 14–16 (holding that quota systems which restrict the number of moorings that may be allocated to non-national boat owners are not justified under the imperative requirements doctrine); Case 231/83, *Cullet v. Leclerc* 1985 E.C.R.

above-mentioned inconsistencies, it cannot surprise that legal scholars, too, disagree as to whether indirectly discriminating national measures can be justified under the imperative requirements doctrine.<sup>313</sup>

In my view, it is very likely that the Court will, at least in the long run, allow the justification of national measures that discriminate indirectly.<sup>314</sup> Otherwise, the Court would have to accept highly inefficient outcomes.<sup>315</sup> If indirectly discriminating measures could not be justified under the imperative requirements doctrine, they could only be justified under the provisions of the EC Treaty that explicitly allow for the justification of discriminating national measures.<sup>316</sup> However, these provisions,

305, ¶¶ 30, 31h (stating that the imperative requirements doctrine does not justify minimum price requirements on imported fuel); Case 229/83, *Cullet v. Leclerc*, 1985 E.C.R. 1, ¶ 29 (rejecting the French government's argument that "safeguarding of consumers' interests" and "protection of creativity and cultural diversity" justify fixing prices on imported books under the imperative requirements doctrine).

313. Some scholars state explicitly that indirectly discriminatory measures cannot be justified under the imperative requirements doctrine. *See, e.g.*, FRANK EMMERT, *EUROPARECHT* 48 (1996); Hans D. Jarass, *Die Niederlassungsfreiheit in der Europäischen Gemeinschaft [The Freedom of Establishment in the European Community]*, 38 *RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW]* 1, 6 (1993) (stating that legal scholars are not all in agreement as to how much indirect discrimination of foreigners is acceptable). Others come to the opposite conclusion. *See, e.g.*, LACKHOFF, *supra* note 106, at 458; PETER VON WILMOWSKY, *ABFALLWIRTSCHAFT IM BINNENMARKT [THE WASTE DISPOSAL INDUSTRY IN THE COMMON MARKET]* 157–60 (1990) (stating that members of Court of Justice and other legal scholars have competing views as to whether national measures are justified in indirectly discriminate against foreigners under the imperative requirements doctrine).

314. *Cf. also* Opinion of Advocate General Jacobs, Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2099, ¶ 227 (arguing that the Court may be reconsidering its earlier case law and may now be tending to the view that even discriminatory measures can sometimes be justified by imperative requirements).

315. *Cf.* VON WILMOWSKY, *supra* note 266, at 160 (criticizing the lack of a balancing test).

316. *Cf.* Case C-224/97, *Erich Ciola*, 1999 E.C.R. I-2517, ¶ 16 (pointing out that "[n]ational rules which are not applicable to services without distinction . . . are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 56 of the EC Treaty.")

such as Article 46(1) of the EC Treaty in the context of the freedom of establishment, only allow very limited grounds for justifying national measures, such as the protection of public health, public security, or public policy.<sup>317</sup> By contrast, national measures serving other legislative goals of fundamental importance would be held invalid, simply because they affect citizens from other Member States more severely than they affect the Member State's own nationals.<sup>318</sup>

In the field of corporate law, the consequences would be particularly far-reaching. Given that the law of a Member State becomes discriminatory as soon as it is incompatible with the law of the state of incorporation,<sup>319</sup> the state of incorporation could artificially create a discriminatory effect in order to enable its corporations to avoid the legislation of their host state. It is unlikely that the Court will accept this rather inequitable consequence.

#### CONCLUSION

In sum, the German legislature could probably extend the scope of application of the German law of codetermination to cover pseudo-foreign companies without violating the freedom of establishment.

The German system of codetermination restricts the freedom of establishment of foreign corporations, but this restriction is for the most part justified under the so-called imperative requirements doctrine. Admittedly, the Court is unlikely to accept the claim that the democratization of corporate decision-making constitutes an imperative requirement per se or that codetermination is necessary in order to protect human dignity. However, Germany will be able

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(citing Case 352/85, *Bond van Adverteerders and Others v. Neth. State*, 1988 ECR 2085).

317. Cf. Opinion of Advocate General Colomer, Case C-17/00, *Francois De Coster v. College des bourgmestre et echevins de Watermael-Boitsfort*, 2001 E.C.R. I-9445, ¶ 130 (arguing that discriminatory measures are compatible with Community law, if authorized by an express provision contained in the Treaty).

318. See *id.* ¶ 133 (holding tax ownership of satellite dishes has nothing to do with public policy or public safety and is therefore discriminatory).

319. See *supra* note 316 and accompanying text.

to argue that the protection of workers from their employers, the improvement of working conditions, the prevention of the abuse of market power, and the protection of the integrity of the political process constitute imperative requirements, and that codetermination is an effective, necessary and proportionate means of pursuing these requirements.

In some respects, the German law of codetermination will have to be modified. In particular, the German legislature will not be able to extend the Coal and Steel Codetermination Act to pseudo-foreign companies. Moreover, existing loopholes in the law of codetermination will have to be eliminated. All in all, however, the speculations that the German system of codetermination will not survive *Centros* are misplaced. It follows that Germany corporate law is unlikely to follow the U.S. example by focusing almost exclusively on the maximization of shareholder wealth. Rather, German corporate law will continue to focus on the interests of workers as well as on those of shareholders.