European Company Law: Comments and Meta-comments on *Centros*

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Given the abundant literature already existing on the *Centros* judgment (1), covering this topic once again requires special justification. My pretext is the writing of a review of Harald Halbhuber's recently published book on Art. 48 EC (ex Art. 58 EC-Treaty). (2) Besides being quite an amusing read, Halbhuber's book is an analysis of certain decisions of the European Court of Justice (ECJ) and of their reception in German legal literature. The book gives a very clear overview of the legal debate in European company law that was triggered by the *Centros* judgment, and this review aims to provide readers who are less familiar with the recent developments in European company law with a summary of what is topical and what is not in this field.

[1] Halbhuber's project started out as a treatise on the policies of European company law (3), but eventually became an analysis of the German academic discussion of European company law. Halbhuber puts the case that German lawyers, entangled in the structures of their national private law doctrine, widely misinterpreted the judgments of the ECJ in *Segers* (4), *Daily Mail* (5) and *Centros*, thus dissuading agents from using foreign (e.g. English or Irish) private limited companies for their business activities in Germany.

[2] The book is composed of nine quite self-contained chapters. Each chapter focuses on one of the arguments that govern the debate on *Centros*.

[3] In the *first* chapter Halbhuber brings the example of an Austrian businessman based in Vienna deciding how best to incorporate his enterprise and seeking advice on the most appropriate corporate form. The German "Gesellschaft mit beschränkter Haftung - GmbH" ("Limited Liability Company") cannot be used by the Austrian businessman, as German corporate law requires the GmbH to have its seat of administration in Germany. Therefore, the German corporate form cannot be exported to entrepreneurs based in other countries. The English "private limited company – Ltd.", however, need not have its seat of administration in England. This means that the Viennese entrepreneur for the incorporation of his undertaking could use the English corporate form. The export is possible, however, only in so far as the legal system of the country of incorporation – England – is concerned, there is an important barrier to the import of a foreign corporate structure in Austrian law: the national conflict of law rules. The Austrian conflict of law rules require that the recognition of an undertaking as a legal entity be determined according to the rules of the country where the undertaking has its real seat of administration. In Halbhuber's example this would be Austrian law, because the businessman wants to conduct his commercial activities from his Viennese office. According to Austrian conflict of law rules the undertaking based in Vienna has to be incorporated under Austrian law, incorporation under English law will not be recognised. This conflict of law rule is called the "real seat theory" and is also the prevailing theory in Germany. (6)
Having touched upon the problem by way of this example, Halbhuber moves on to the core of his topic: European community law and its impacts on the "real seat theory". He sets out Art. 43 and 48 EC (ex Art. 52 and 58 EC-Treaty), which grant the freedom of establishment and the freedom to provide services to companies "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community".
After an explanation and defence of his structure and method, which appear refreshingly unconventional, Halbhuber quotes excerpts from some standard German treatises (in their editions before the *Centros* decision) on Art. 48 EC (ex Art. 58 EC-Treaty), summarising that they give no satisfying answer to the question whether the "real seat theory" is compatible with the freedom of establishment of companies as laid down in the EC-Treaty or not.

[4] The *second* chapter is dedicated to the analysis of the decision of the ECJ ruling in *Daily Mail*. Halbhuber first quotes the reactions of German commentators to this decision, showing that *Daily Mail* was mainly understood in Germany as a confirmation of the "real seat theory" by defenders and opponents alike. Halbhuber returns to the original text of the decision in an attempt to examine once again its contents. The result of his interpretation is very different to theirs and should be outlined here, as it is one of the key factors for Halbhuber's understanding of the later *Centros* judgment. In *Daily Mail*, the English company Daily Mail plc. wanted to transfer its headquarters from London to Amsterdam in order to avoid English capital gains tax. To prevent tax evasion, such transfers were subject to the approval of the British government. The ECJ had to decide whether it was a violation of the freedom of establishment conferred upon Daily Mail plc. by Art. 43 and 48 EC (ex Art. 52 and 58 EC-Treaty) that the British tax authorities refused to grant their consent to a transfer of the company's headquarters to another Member State. The ECJ ruled that Art. 43 and 48 EC (ex Art. 52 and 58 EC-Treaty) conferred no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State. In its reasoning the ECJ said that companies existed only by virtue of the varying national legislations which determined their incorporation and functioning. Certain states required that not merely the registered office but also the real head office, that is to say the central administration of the company should be

situated on their territory, and the removal of the central administration from that territory thus presupposed the winding-up of the company with all the consequences, such as loss of legal personality.
Halbhuber concludes that the ECJ only focused on the state of incorporation, leaving it up to each Member State to define the factors that determine the existence and the dissolution of companies that incorporate there. In other words, the ECJ held that the freedom of establishment rules of the EC Treaty did not provide an answer to the question:

(i) whether a company could transfer its seat of administration to another Member State while retaining its status as a company incorporated under the laws of the first Member State; and
(ii) whether in such a case the state of incorporation could provide for a dissolution of the company.

Halbhuber establishes that the ECJ had not dealt with the question whether a Member State was obliged to recognise a company incorporated in another Member State. In reading *Daily Mail* as a judgment exclusively concerned with a restriction imposed by the tax law of the Member State of origin, Halbhuber's interpretation differs from the vast majority of the German commentators, who interpreted the judgment in a broader sense, namely as a recognition of the differences in national law regarding:

(i) not only the establishment and the winding-up of companies incorporated under its own law; but also
(ii) the recognition of companies incorporated under foreign law. (7)

Halbhuber seeks to find the reasons for such a "misreading" by exposing some commentators' arguments to the glaring light of strict verbal logic: The language of each commentator is carefully compared with the wording used by the Court. Halbhuber shows - very convincingly it is submitted - that the reading of *Daily Mail* as a confirmation of the "real seat theory" cannot be upheld. The reasons for such widely spread misreading then become Halbhuber's main interest. According to him, such misreading is due to several factors:

(i) a misleading German translation of the *Daily Mail* judgment;
(ii) the reconceptualisation of the judgment in terms taken from German private law doctrine; and
(iii) the lack of a look across the borders to legal comments in other Member States.

All of these factors led to the development of what Halbhuber calls the "*Daily Mail* legend".

[5] In chapter *three*Halbhuber analyses the *Centros* judgment, by now one of the most widely known judgments of the Court. The facts of the case were quite simple: Ms and Mr Bryde, two Danish residents, wanted to conduct business in Denmark through a company. As Danish law required a substantial capital input on formation of a limited company (about 28.000 Euro (8)), the Brydes decided to set up a limited company under UK law – Centros Ltd. – with a minimum capital of GBP 100 without starting any business activity in the UK. Then they applied for the registration of a branch of Centros Ltd. in Denmark. Their application was turned down by the Danish administration on the grounds that, as Centros Ltd. was not conducting any business in the UK, it was in fact seeking to establish not a branch, but a principal establishment in Denmark and thereby circumvent Danish company law, more specifically the Danish rules on minimum capital. Upon appeal, the question was eventually referred to the ECJ on whether the refusal of the Danish authorities was compatible with the freedom of establishment. The ECJ ruled that it was contrary to Art. 43 and 48 EC (ex Art. 52 and 58 EC-Treaty) to refuse to register a branch of a company formed in accordance with the law of another Member State in which it had its registered office but in which it conducted no business, when the purpose of the branch was to enable the company concerned to carry on its entire business in the state where the branch was to be created, thus avoiding compliance with the incorporation rules in that state.
After presenting this case Halbhuber looks at the consequences of the decision for countries applying the "real seat theory". Very soon after the *Centros* ruling, the Austrian Supreme Court (OGH) handed down three decisions (9) in cases comparable to *Centros*. The OGH ruled that the registration of Austrian branches of companies incorporated elsewhere could not be denied on the basis that the companies conducted no business in the state of their incorporation. The OGH thus drew the correct conclusion that the legal existence of companies incorporated in another Member State had to be recognised and that the "real seat theory" was, to this extent, inapplicable. Some authors (10) said, however, that giving up the "real seat theory" had been an over-obedient act of the OGH. They argued that in *Centros* questions of private international law had not been an issue because the English company had been recognised as a company with limited liability in Denmark, whereas in Austria the English company would not have been recognised as a valid legal person.
Halbhuber disarms the criticism that the OGH faced for its decisions. He argues that the qualification of a national rule potentially in conflict with a freedom granted by the EC Treaty as a "conflict of law" rule (as opposed to a rule of "substantive law") was not a relevant justification (11), nor could the non-recognition of a company be defended by saying that "no infringement could be conceived of a non-existing entity". Halbhuber also doubts the concept and the success of the "real seat theory" for establishing a higher level of creditor protection (as opposed to the allegedly less stringent concept of Danish law). He quotes Danish legal scholars explaining that the distinction between the "real

seat theory" and the "incorporation theory" was unfamiliar to Danish legal doctrine (12). An inquiry into the concept of the "real seat theory" reveals that this theory does not seem refined enough to efficiently protect creditors. (13) Halbhuber concludes that no materially distinguishing factors can be found to justify a different treatment of the cases put before the OGH.
Subsequently Halbhuber turns to the question why the ECJ did not deal with *Daily Mail* when rendering its judgment in *Centros*. Consistent with his interpretation of the two cases he concludes that different factual aspects were treated and that *Daily Mail* could not be seen as a relevant prior case for *Centros*. The connection made between *Daily Mail* and *Centros* by German commentators is then analysed from a rhetorical point of view, mainly by literally quoting the language employed by the commentators when deducting a recognition of the "real seat theory" from *Daily Mail*. The connection established seems a purely artificial one, based on twisted and blurred language instead of being supported by logical arguments. Halbhuber sees in the use of certain expressions hidden warning signals to the ECJ and to German courts not to touch the "real seat theory": identified by Halbhuber as an attempt to defend a dear and sacred tradition. The ECJ's ruling in *Segers* (14), on the other hand, is classified as a true precedent to *Centros*. Halbhuber argues that the German commentators did not recognise the implications of *Segers* for private international law, whereas in the Netherlands *Segers* had been interpreted as signalling the end of the "real seat theory" with regard to companies incorporated in the common market (15).

[6] In the*fourth*chapter Halbhuber examines certain arguments for a restricted understanding of Art. 43 and 48 EC (ex Art. 52 and 58 EC-Treaty): it had been argued that the freedom of establishment for companies could be interpreted only as giving the right to transfer the seat of a company, not the right to choose freely the first seat of a company. (16) The reason for this restriction not being mentioned in the text of the EC Treaty is that Art. 43 (ex Art. 52 EC-Treaty) is based on the freedom of establishment for natural persons, where the question of a "right to freely choose the primary establishment" cannot arise, as natural persons can only benefit from the freedom of primary establishment by moving to another Member State. Halbhuber does not further investigate the question of the proposed restricted interpretation of the freedom of primary establishment, because a company can, just like in *Centros*, rely on the freedom of secondary establishment. It is therefore not necessary to evoke the freedom of primary establishment. Here again some authors (17) criticised that the freedom of secondary establishment could only be claimed if a main seat existed already, in other words that the creation of a branch necessarily presumed the prior existence of a main establishment. To counter this argument, Halbhuber points out that Art. 43 (ex Art. 52 EC-Treaty) extends the freedom of establishment to branches and subsidiaries, it would therefore seem incoherent to deduct a restriction of the freedom of establishment from this Article. Halbhuber also argues that the possibility of regulatory competition is an implication of the concept of a single market known long before *Centros*. The legal system of a country cannot be regarded as detached from the place of business, but rather as part of the factors that determine the attractiveness of a certain state or region to commercial agents. In principle, benefiting from the regulatory differences in the Member States is a legitimate means of improving one's own competitiveness. Halbhuber analyses the Court's case law on the circumvention of national legislation by evoking the advantages of the provisions of community law. He finds that Member States are only allowed to restrict the freedoms granted by the EC Treaty by means of national legislation if such legislation has an aim that is found to be in conformity with community law, that is if the Member States have a competency to regulate this special field. Applying this concept to *Centros*, Halbhuber argues that Member States are allowed to regulate the commercial activities on their territories, e.g. by professional conduct rules etc., but they cannot prescribe a certain company form for the exercise of these activities, e.g., they cannot require that all business on their territory is exclusively conducted in the corporate forms that are available under national law. This area of regulation is not in the exclusive competency of the Member States, but is a matter of community law and thus national rules have to be checked as to their compliance with community law. Whether regulatory competition as a consequence of such an understanding of national and community law is to be feared or is to be welcomed remains open. Halbhuber declares not to join the very lively policy-discussion in this field. (18)

[7] In chapter *five*Halbhuber adds a historical component to his analysis of Art. 48 EC (ex Art. 58 EC-Treaty). Again, the challenge of another argument leads his way. He questions the argument of some German scholars claiming that the "real seat theory" had to be compatible with the EC Treaty because all of the original Member States had adhered to the "real seat theory" at the signing of the Treaty of Rome in 1957. As a consequence, the literal reading of Art. 48 (ex Art. 58 EC-Treaty) would not have matched the intentions of the founders of the European Economic Community. Halbhuber, however, quotes 1950s legal writing that casts a doubt on the dominance of the "real seat theory" in each and every one of the six original Member States. Even German legal writers from the 1960s who were of the opinion that the EEC Treaty implied the mutual recognition of foreign companies are quoted. How come no legal earthquake similar to the one following *Centros* had been provoked then? Halbhuber offers an explanation: The original understanding of the freedoms of the EC Treaty had been that they were just a programme and not directly applicable. After the ECJ had declared that the freedom of establishment was directly applicable (19), German legal writers were reluctant to draw the consequences and not apply the "real seat theory" with respect to companies in other Member States. Instead, complicated arguments were used to avoid this consequence. Halbhuber presents the example of a legal writer gradually changing his position over time, from first regarding the "real seat theory" as

obsolete to the later defence of it as being in conformity with the EC Treaty.

[8] Chapter *six* deals with the harmonisation of company law in the European Community. Halbhuber quotes some German commentators who remark that after *Centros* it would be even more important to harmonise company law in the Community. Starting from this, Halbhuber asks if harmonisation could be an adequate means of solving the problems that emerge from the *Centros* decision. Halbhuber draws the picture of a failure of harmonisation. The areas that have been harmonised are mostly rules on the disclosure of company information for public registers, the core of company law remaining largely untouched. Most of the directives are aimed at publicly held companies, whereas private limited companies are not addressees of the harmonisation measures. Moreover, in areas of substantive company law the transposition into national law seems to have little effect on national company law in practice, as Halbhuber demonstrates by quoting English company lawyers on how to opt-out of the conduct prescribed by harmonised law. The reason for the failed harmonisation, according to Halbhuber, is also due to the lack of connection between the directives and national company law, the directives often dealing with issues than might be very important for some countries but less relevant for others. Halbhuber also conducts an empirical research on ECJ decisions dealing with the transposition of directives, finding that most litigation is concerned with domestic situations. Halbhuber concludes that harmonised company law is of little relevance in cross-border transactions. A survey of German legal writing, however, reveals rather positive and sometimes even enthusiastic comments on the progress of harmonisation. Halbhuber declares that the success of harmonisation is generally overstated in German literature. The real effect of harmonisation appears as a just symbolic reconciliation of different legal traditions.

[9] In chapter *seven* Halbhuber takes another aspect of *Centros* under scrutiny: the minimum capital requirements as a means of creditor protection. The ECJ sees the information of creditors via the disclosure directives (and the national law implementing such directives) as the most significant means of creditor protection. Halbhuber observes that this is in line with the ECJ's perception of the market citizen as a "mature consumer". In addition, Member States may take measures to protect involuntary creditors, such as public and tort creditors. Halbhuber deducts from *Centros* that national legislators are entitled to adopt measures for the protection of creditors, but such measures must pass the proportionality test. Halbhuber then investigates the minimum capital requirements as the central institution of creditor protection in German and Austrian company law. An analysis of the existing legal framework leads Halbhuber to the conclusion that the minimum capital requirement is inadequate to assure a satisfaction of the claims of involuntary creditors in the company's insolvency: it cannot be conceived as a guarantee capital, because it is at the same time meant to be the working capital of the company, thus creating a contradiction. Other writers achieve similar results from an economic point of view. (20) Halbhuber poses the intriguing question of the nature of the specific danger that results from the limitation of the liability of commercial agents, presenting a thesis on risk distribution among the market participants. His thesis is inspired by theories on corporate finance. The shareholders receive all of the profits from their entrepreneurial activities, with having nothing to lose but their investment. Likewise, contract creditors (such a banks lending money to the company) receive a certain part of the profits, with nothing to lose but the lent sum. Their profit prospects cannot exceed a certain limit (the interest rate fixed in the loan agreement), but the risk they bear is lower than that of the shareholders because their claims are privileged in insolvency and often secured by collateral (as a result of the lending negotiations). The main risk is shifted to involuntary creditors, e.g. people suffering from the environmental damage caused by the production of the company. Halbhuber reflects on alternative means for the protection of creditors, more efficient as well as more likely to pass the proportionality test of the ECJ. Halbhuber mentions the setting up of certain guarantees in favour of public creditors, a concept that already exists in German and Austrian tax law. At this point Halbhuber mentions the new Danish tax legislation that was enacted as a reaction to *Centros* and which might be a viable solution. It should be added here, however, that the new Danish tax law has already been strongly criticised by Danish legal writers and regarded as not fit to pass the (indirect) discrimination and proportionality tests. (21) Halbhuber further mentions compulsory insurance for the benefit of involuntary creditors, the preferential treatment of involuntary creditors in insolvency proceedings and a piercing of the corporate veil for the benefit of involuntary creditors. Without seeking arguments for or against the contemplated measures, Halbhuber contents himself with recalling three principles which have to be born in mind when drafting creditor protection rules in the common market: the differentiation between voluntary and involuntary creditors, the taking into account of protection rules in the country of origin and the taking into account of the level of protection in the host country. Halbhuber obviously presupposes that the creditor protection rules of the country of origin should continue to be applied in the host country, thereby implicitly parting from the idea that the foreign company imports with it the company law of the country of its incorporation as a "package of rules". Declaring the German minimum capital rules a failure in the field of creditor protection, Halbhuber considers it highly unlikely that these rules can justify restrictions on the freedom of establishment. Halbhuber finishes the chapter with an analysis of German legal writing on the minimum capital requirement, conducted in the already familiar, fiercely independent style. He finds that the system of minimum capital has occasionally been criticised, but the critical voices never managed to make themselves heard. Halbhuber assumes that the reasons for that are both historical and cultural: a certain lack of trust of the paternalistic bureaucracy in liberal commercial activity as well as a need to justify the risks inherent in the admittance of limited companies, such admittance being part of the

development into a capitalist society. As Halbhuber adds at the very end of his book (22), law and legal rhetoric have an important cultural function. Law is called upon to settle the conflicts resulting from the diverging interests that exist in society. According to Halbhuber law performs this task not so much by delivering a truly fair solution, but by its symbolic importance that keeps society from breaking apart.

[10] Chapter *eight* is dedicated to comparative law, more precisely to an analysis of the interpretation of foreign law in German legal writing. The starting point is the fear expressed by certain commentators that *Centros* would lead to a "race for laxity" in European company law. In the first example Halbhuber discusses an essay by the German law professor Merkt on the "Delaware effect". (23) Halbhuber concludes that the essay, while claiming to be an objective treatise on the dangers of a "race to the bottom" of the company laws in Europe as a consequence of regulatory competition, is in fact a rhetorically well concealed political statement for the defence of the "real seat theory". The second example concerns English company law and its allegedly administrative nature. Some German commentators on *Centros* argued that the "real seat theory" was necessary in order to protect creditors from undertakings incorporated under English law. The English private limited company is seen as a very attractive candidate for replacing the German GmbH, as the founding conditions are much simpler and do not require substantial minimum capital. German legal writers then came up with the argument that the control powers of the English authorities would function as a substitute for the minimum capital requirements, thus ensuring protection of creditors from undercapitalised companies. The creditors of an English private limited company - so runs the argument of these German authors - were therefore protected not by means of private (company) law, but by the administrative supervision. An English private limited company doing business in Germany, however, would benefit from the liberal founding rules of English company law, while at the same time escaping the supervision of the English authorities. Halbhuber investigates the quoted English rules on the supervision of companies, concluding that although English company law does vest the Department of Trade and Industry ("DTI") with certain investigative powers, their scope is not the protection of creditors from undercapitalised companies, but rather the protection of consumers from fraudulent business practices. Halbhuber mentions that there might indeed be problems in applying English creditor protection rules, such as the rules on the disqualification of managers by the DTI after an insolvency, on English companies that operated abroad and where the insolvency proceedings are therefore conducted abroad, simply due to practical reasons, such as communication or co-operation problems between the DTI and a German receiver. This aspect, however, seems mostly to have escaped the attention of German commentators. Halbhuber especially criticises the fact that German authors often quote one another without checking original English legal sources.

[11] In the *ninth* and final chapter Halbhuber summarises the doctrinal findings of his thesis and concludes with some "meta-legal speculations".
These findings concern the interpretation of the *Centros* case and its implications on international private law in Germany and Austria. They can be summarised as follows: Art. 48 EC (ex Art. 58 EC-Treaty) is a rule of international private law as far as it determines that the existence of a company formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the European community is subject to the laws of the state of its incorporation. This reference to the laws of the state of incorporation does not only include the vesting of the undertaking with its own legal personality, but also rules pertaining to the functioning of the company. The applicable laws determined by Art. 48 EC (ex Art. 58 EC-Treaty) can be set aside by rules of the host country if this is, case by case, necessary in order to protect imperative requirements in the general interest. Halbhuber draws the reader's attention to the cases pending before the ECJ that will provide further statements on the implications of *Centros* for the "real seat theory". To provide the reader with an even more recent update on some possibly relevant case law:

(i) pending case C-208/00, the opinion of the Advocate General is due to be delivered on 4 December 2001;
(ii) case C-86/00 was decided by the ECJ on 10 July 2001, but unfortunately the ECJ declined its competence and the opportunity for further remarks on the "real seat theory" was lost;
(iii) pending case C-115/00, the Advocate General delivered his opinion on 27 November 2001;
(iv) pending case C-447/00, which is an Austrian query from the Landesgericht Salzburg explicitly asking whether the Austrian "real seat theory" is compatible with the freedom of establishment.

In the second part of the final chapter Halbhuber summarises his findings with respect to his analysis of German commentary literature: the judgments of the ECJ are often interpreted in a haphazard way; *Daily Mail* was understood as a confirmation of the German "real seat theory" although this judgment had not addressed the issue at all; *Segers* was mostly neglected although it was a strong indication against the compatibility of the "real seat theory" with community law; foreign law was incorrectly interpreted in German legal writing; Danish international private law was classified as adopting the real seat approach, although such a characterisation seems to be unfamiliar to Danish private law; the discussion of company law in the United States is transferred to Europe without carefully checking the different preconditions; an allegedly administrative character of English company law is construed; the history of community law is filtered and changed on its way to the present; harmonisation of company law in Europe is largely overstated in German literature.

[12] After summing up his theses, Halbhuber offers possible explanations for such mistakes. He puts the case that these mistakes have a tendency to support the admissibility of the "real seat theory". A possible explanation might be one inspired by the political-economic analysis of William J. Carney (24), who argued that in pre-communitarian Europe it had been possible for Member States to maintain a company law that caused higher costs to companies, because such disadvantage in competition for domestic companies was compensated by imposing tariff barriers on the products of foreign competitors. The creation of the common market entailed the removal of trade barriers: therefore a company law that imposed higher costs on companies became a relevant factor in competition. Carney interprets the harmonisation process in Europe as an effort to abolish competition between the national legislators in certain fields. This is in line with the interests of Member States that impose high costs on companies for the benefit of other market agents, because competing companies from other Member States will have to bear the same increased costs in observing the harmonised rules. Carney sees certain "interest groups", such as creditors, managers and employees, as the factors that shape company laws. Those "interest groups" try to shift costs from themselves to other actors. Halbhuber takes up the idea of "interest groups" seeking to protect existing legislative gains, and puts the "real seat theory" to this test. He suggests that the most relevant "interest groups" that could be concerned with the application of the "real seat theory" in the single market are German banks and German lawyers. German banks might be interested in keeping up a discussion that focuses on how the economic risks of limited liability are shifted from shareholders and management to creditors, because, as Halbhuber points out, this discussion ensures that there is in fact a much stronger shift of risks from the banks to other creditors, mainly involuntary creditors. Neglecting this aspect is especially interesting if the bank can have a major factual influence on the companies that it finances. (25) German lawyers are interested in companies operating in their "area" being construed in accordance with the law in which these lawyers were trained. German lawyers are also interested in further harmonisation of company law, because the community-wide adoption of German standards would further stabilise German company law and German lawyers specialising in the harmonising directives could broaden the services offered by them. Halbhuber even goes so far as to say that in an exaggerated way one could state that via the harmonisation directives lawyers have created the problems that they now offer to solve. This political-economic understanding is, as Halbhuber himself claims, (26) not a thorough analysis trying to explain certain phenomena, but rather hints at some aspects thereof which may have had an influence on the incorrect interpretation of European and foreign law in the *Centros* debate as exposed by Halbhuber. No hard evidence is given. This, however, should by no means devaluate Halbhuber's speculations on the issue, which offer an interesting and innovative perspective on the reception of community law in national legal cultures.

[13] Halbhuber mentions three further methodological weaknesses. First, the lack of consultation of relevant legal material in its original language. Given the linguistic diversity in the European Union, it may of course be difficult to completely avoid misunderstandings due to misleading translations, as the original version will not always be accessible to the commentator without the help of translators. Secondly, the use of national doctrinal structures for the interpretation of European and foreign laws. Some German commentators tried to fit the ECJ's decisions into the structures that they found in their national law, not being conscious of their own legal preconceptions. Looking through the glasses of national doctrine, they failed to "ask the right questions" and therefore could not produce a fresh view of the Court's decisions. Here Halbhuber is inspired by the German philosopher Hans-Georg Gadamer (27). Halbhuber also points to the special position of private law in the context of European integration. (28) The resistance of national private law against Europeanisation can be explained by the perception of private law as a non-political system. The underlying political decisions, however, are a substantial part of national identity. The dynamic of European integration does not stop at the removal of public law trade barriers. The ECJ does not hesitate to see provisions of private law as a potential hamper to the freedoms of the market and thus forces Member States to defend the very contents of their private law systems. This entails the exposure of the underlying political decisions. It is thus the fear of losing even more sovereignty to Brussels that explains such national resistance.

[14] As a whole, the book is a highly original and entertaining work, which offers a very well researched insight into the struggle of European integration in the field of company law. An article by Harald Halbhuber based on his book will appear in the December 2001 issue of the Common Market Law Review in the English language. Reading recommended.

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(1) Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, [1999] ECR I-1459; available in full text on the Homepage of the ECJ at http://www.curia.eu.int
(2) *Halbhuber, Harald*, Limited Company statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand – Ein Beitrag zur Auslegung von Art. 48 EG und zum Europäischen Gesellschaftsrecht (Baden-Baden: Nomos Verlagsgesellschaft 2001)
(3) *Halbhuber*, *ibid.*, 7
(4) Case 79/85, *Segers*, [1986] ECR 2375

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(5) Case 81/87, The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc., [1988] ECR 5483
(6) MünchKommBGB – *Kindler*, IntGesR, RdNr. 264 (p. 88 f.) with further references
(7) Among others, Halbhuber quotes Ebenroth/Eyles, DB 1989, 363 f. and 413 f.; Groβfeld/Luttermann, JZ 1989, 384 f.; *Knobbe-Keuk*, ZHR 154 (1990), 325 f.; *Sandrock/Austmann*, RIW 1989, 249 f.
(8) *Wymeersch*, Centros: A landmark decision in European Company Law, Festschrift für Otto Sandrock zum 70. Geburtstag (2000)
(9) *Halbhuber*, supra note 2, 61 comments on the following two decisions: OGH decisions of 15 July 1999, cases 6 Ob 123/99b and 6 Ob 124/99z. Another decision was rendered on 11 November 1999, case 6 Ob 122/99f. These decisions are available in full text at http://www.ris.bka.gv.at/jus.
(10) For references see *Halbhuber, supra* note 2, 61 and 62
(11)For references to the Court's case law regarding the Court's blindness towards national doctrine classifications *see Halbhuber*, ibid., 63 and 64
(12)*Halbhuber*, ibid, 69 f.
(13)*Halbhuber*, ibid, 65 f.
(14)*Segers* is quoted by the ECJ in *Centros* as a relevant prior decision.
(15)For references to Dutch literature *see Halbhuber, supra* note 2, 84
(16)*Kieninger*, ZGR 1999, 724 f.
(17)Among others, Halbhuber quotes *Kieninger*, ZGR 1999, 724 f.; *Bachner/Winner*, GesRZ 2000, 73 f.; *Freitag*, EuZW 1999, 267 f.; *Korn/Thaler*, WBl 1999, 247 f.
(18)For an excellent survey on this *see Deakin*, Regulatory Competition versus Harmonisation in European Company Law, ESRC Centre for Business Research, University of Cambridge Working Paper No. 163 (March 2000)
(19)Case 2/74, Reyners v. Belgium, [1974] ECR 631
(20)*Armour*, Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law?, ESRC Centre for Business Research, University of Cambridge Working Paper No. 148 (December 1999)
(21)*Hansen*, From C 212 to L 212 – *Centros* Revisited, EBOR 2 (2001) 141 f.; Werlauff, The Main Seat Criterion in a New Disguise – An Acceptable Version of the Classic Main Seat Criterion?, EBLR 2001, 2 f.
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(23)*Merkt*, Das Europäische Gesellschaftsrecht und die Idee des „Wettbewerbs der Gesetzgeber", RabelsZ 59 (1995), 545
(24)*Carney*, The Political Economy of Competition for Corporate Charters, 26 Journal of Legal Studies (1997), 303
(25)*Halbhuber, supra* note 2, 179 and 219. On p. 179 Halbhuber states that the influence of creditor banks on the management of German industrial undertakings is generally recognized.
(26) Ibid, 216
(27)*Gadamer*, Gesammelte Werke, Band 1: Hermeneutik I: Wahrheit und Methode, 6. Auflage (Tübingen 1990, 1999)
(28)*Halbhuber, supra* note 2, 227 quoting *Caruso*, The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration, (1997) 3 European Law Journal 3