OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 16 July 1998 *

I — Object of the question referred by the national court, facts and relevant national provisions

1. The Højesterets Anke-og Kæremålsudvalg (Appeals and Objections Committee of the Danish Supreme Court), hereinafter 'the Højesteret' (Supreme Court), has asked the Court, within the meaning and for the purposes of Article 177 of the EC Treaty (hereinafter 'the Treaty'), to interpret the Community provisions on the right of establishment with regard to a case of alleged circumvention of the domestic provisions of a Member State requiring a minimum capital for certain types of company. The question referred by the national court is as follows:

'Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 58 and 56 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of £100 (approximately DKK 1 000) and established under the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying in company capital of not less than DKK 200 000 (at present DKK 125 000)?'

2. I propose to begin with a brief account of the facts that gave rise to the main proceedings. In the summer of 1992, Mrs Bryde, a member and the sole director of Centros Ltd which had been registered as a private limited company in England and Wales in May of that year, approached the Erhvervs-og Selskabsstyrelsen (hereinafter referred to as the 'Companies Board') seeking recognition of the company's memorandum of association with a view to registering a branch. It is apparent from the order for reference that, according to its memorandum of association, the company's object is to carry on business within an extensive range of commercial areas, including the provision of loans. However, the partners intended it only to be a wine import and export business. Since its formation the company has never done any business. The only other member is Mrs Bryde's husband. Mr and Mrs Bryde, both Danish

* Original language: Italian.

citizens resident in Denmark, acquired the company shortly after it was formed and hold the only two shares that have been issued. The company's share capital, amounting to the legal minimum of £100, has not actually been paid in and is kept in a cash-box at Mr Bryde's home. The company address is that of a friend of the Brydes in the United Kingdom.

3. The registration of branches of foreign limited companies in Denmark is governed by the rules on limited companies, which, at the time of the events at issue in this case, were embodied in Articles 117-122 of Lovbekendtgørelse (Consolidating Regulation) No 660 of 25 September 1991. It follows from the provisions of that regulation that a limited company established in a Member State may do business in Denmark through a branch established in Danish territory, managed by one or more directors authorised to act on its behalf. The branch must be registered by the Companies Board in order to do business and it may not do business if registration is refused. The branch is subject to Danish law and decisions of the Danish courts in respect of its business dealings in Denmark. It should also be noted for the purposes of this Opinion that — as expressly mentioned in the question referred by the national court — at the time of the events at issue in this case, companies established in Denmark were required to have paid-up capital of not less than DKK 200 000. [1] The commentary on the draft law, subsequently adopted as Law No 886 on 21 December 1991, states that the reason for the increase in the minimum capital required to establish companies of the type in question (and also establish public limited companies), [2] compared with the amount previously stipulated, was to strengthen the financial soundness of the companies, to protect the State and other public creditors which, unlike private creditors, cannot demand security or sureties to cover outstanding debts. The new provisions were also intended to prevent the risk of abusive bankruptcy proceedings arising from the insolvency of companies with insufficient paid-up capital. Danish law does not impose any requirement as to minimum capital for companies from other Community countries seeking to establish a branch in Danish territory. However, the practice followed by the Companies Board in such cases seems to be to ascertain whether the establishment of the existing company abroad is designed to circumvent the Danish rules on minimum capital. In the present case, having failed to obtain from Mrs Bryde the information it had requested about Centros's activities in England and Wales, the Board rejected the application for registration. That decision was upheld by the Østre Landsret (Eastern Regional Court) in a judgment delivered on

1 — This was subsequently reduced to DKK 125 000 by Law No 378 of 22 May 1996. At the same time, however, other rules designed to secure company capital were tightened, in particular, (i) the prohibition on acquiring own shares or shares in the parent company; (ii) the conditions governing the acquisition of the company by shareholders within two years of registration if the consideration paid amounts to at least DKK 50 000 and corresponds to at least 10% of the capital; and (iii) the obligations incumbent on the directors, in the event of losses equal to at least 40% of the share capital.

2 — Law No 886 of 21 December 1991 set the requirement as to paid-up capital for public limited liability companies at DKK 500 000 (that is to say, much more than the minimum amount of ECU 25 000 laid down in the Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) (hereinafter 'the Second Directive') (OJ 1977 L 26, p. 1), as subsequently amended).

8 September 1995, in which it found that the Treaty provisions on freedom of establishment did not allow companies of any Member State, whose activity is directed entirely towards the territory of any other Member State, to circumvent binding rules of that other State. Appearing as a witness in the proceedings before that court, Mr Bryde said he did not know if the purchase of Centros and the subsequent establishment of a branch in Denmark could be called a circumvention of Danish law but admitted that 'it is certainly easier to find £100 than DKK 200 000' (free translation). An appeal against the decision of the court of first instance is now pending before the Højesteret, which in view of the circumstances has approached the Court with a request for interpretation in the terms cited above.

II — Submissions of the parties, the intervening Governments and the Commission

4. Centros submits that all the conditions prescribed under Danish company law for registration of a branch are satisfied in the present case. The refusal to register the company is therefore, in its view, contrary to the freedom of establishment in the territory of a Member State other than the Member State in which the principal establishment is situated, to which Centros is entitled under Articles 52 and 58 of the Treaty. According to the appellant, it follows from the Court's judgment in *Segers* [3] that a company's right to set up a secondary establishment within Community territory is subject only to the conditions laid down in Article 58 of the Treaty and not to the additional requirement that the company must actually do business in the State in which it is registered. The appellant also submits that the fact that the company carries on its business — through an agency, branch or subsidiary — solely in one or more Member States other than the Member State in which the principal establishment is situated, is entirely immaterial.

5. Similar observations are made by the United Kingdom Government, which considers that the refusal to register the branch is tantamount to denying Centros a right which is at the very core of freedom of establishment and that it is contrary to the principle of mutual recognition of companies. The legitimate interest of protecting the creditors of limited companies can be adequately protected by means that are less restrictive than the measure at issue in this case and that are moreover already provided by Community law. The United Kingdom authorities cite, for

3 — Case 79/85 *Segers* v *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

example the coordinated disclosure requirements covering numerous documents and particulars relating to branches opened in a Member State by companies governed by the law of another Member State introduced by the Eleventh Council Directive on companies (hereinafter 'the Eleventh Directive'). [4] Under that system, third parties entering into contractual relations with the parent company through its branch are informed that the parent company has been incorporated in another Member State in accordance with the requirements imposed in that State, including the requirements in respect of paid-up capital, and that the relevant particulars may be found in the State register in which the branch is entered. The United Kingdom Government recognises that, according to the case-law of the Court, a distinction must be drawn between the legitimate exercise of the right of establishment and merely perfunctory recourse to conduct regulated by Community law. It considers, however, that the establishment of a company by nationals of one Member State in accordance with the laws of another Member State can never be so described. In any event, the restriction on the right of establishment resulting from the Companies Board's decision cannot be justified on purely economic grounds, which are not covered by Article 56 of the Treaty.

6. The Companies Board contends that the Brydes may not, on the basis of a 'pro forma' company incorporated in the United Kingdom, rely on Articles 52 and 58 of the Treaty to avoid payment of the minimum capital laid down by law. In the circumstances described, the branch which Centros, in the person of Mrs Bryde, sought to register in Denmark was in reality the parent company. As to the Community concept of 'branch', the defendant proposes, in the absence of any acceptable definition in the relevant legislation, to employ the concept used by the Court in its rulings interpreting the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968 (hereinafter 'the Convention'). [5] It claims that it follows from that case-law, [6] in particular, that if there is no parent body with effective powers of direction and control over the activities of the branch, the branch will constitute the company's principal place of business. It must then, according to the Companies Board, consistently meet the requirements for constituting the principal, not the secondary, establishment. The fact that it is essential to the exercise of the right to set up a secondary establishment that the parent body actually pursue a business activity may, in its view, also be deduced *mutatis mutandis* from the case-law on the free movement of workers. [7] The defendant argues that it is perfectly legitimate for a Member State to impose this obligation, since, at the present stage of development of Community law, the establishment and running of companies are still governed

4 — Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC) (OJ 1989 L 395, p.36).

5 — OJ 1972 L 299, p. 32. The consolidated version of the Convention, as amended by previous accession Conventions (the most recent being the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention), was published in OJ 1998 C 27, p. 1.

6 — Case 14/76 *de Bloos* v *Bouyer* [1976] ECR 1497, paragraph 20, Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, paragraph 12, Case 139/80 *Blanckaert & Willems* v *Trost* [1981] ECR 819, paragraph 12.

7 — See judgment in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 21, according to which the advantages which Community law confers in the name of freedom of movement for workers may be relied upon only by persons who *actually* pursue or *seriously* wish to pursue activities as employed persons in a Member State other than their State of origin.

by the national rules on the subject. Furthermore, as the Court has stated, the host State has the right to require that nationals of other Member States abide by the rules applicable to its own nationals or companies in exercising their activities, provided this does not prevent the nationals of other Member States from exercising properly their right of establishment. [8] The Companies Board contends that Centros's application is an abusive exercise of the right of establishment and suggests that the conclusion reached in *Van Binsbergen* [9] with regard to the interpretation of Article 59 of the Treaty should apply by analogy in the present case. According to the principles established by the Court in that case, a Member State has the right to take measures to prevent the exercise by a person providing services, who is a national of another Member State and whose activity is entirely or principally directed towards the territory of the first State, of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. In short, the Companies Board contends that, even if Centros was entitled to exercise the right to freedom of establishment within Community territory, the fact remains that the requirement in respect of the minimum capital for limited companies, imposed by Danish law to protect the interests of companies and their employees and creditors, is a perfectly legitimate measure despite the absence of harmonisation on the subject at Community level. It is, in the Board's view, essential in the general interest to strengthen the financial basis of companies of the type in question. That need cannot be met by less restrictive means than refusing registration and may, indeed, require more drastic measures such as extending company liability to include personal assets or requiring sureties to be provided when a company is established, to cover future obligations vis-à-vis the tax or social security authorities, or other public creditors. Citing a consistent line of the Court's judgments on the subject of the abusive exercise of rights deriving from Community rules, the Companies Board observes in particular that in *Segers*, also quoted by Centros, the Court established that in principle Article 56 of the Treaty allows within certain limits special treatment for companies formed in accordance with the law of another Member State provided that that treatment is justified by the need to combat fraud. It is true that the Netherlands action at issue in that case was in fact held not to be justified within the meaning of that provision, as the refusal to accord a sickness benefit to a director of a company formed in accordance with the law of another Member State cannot constitute an appropriate measure in that respect. However, in the Board's view the decision taken in that specific case in no way detracts from the validity of the general principle established by the Court. Above all, the protection of the financial interests of creditors is not, in its opinion, an economic objective — and consequently not within the scope of Article 56 — but is intended to preserve a legal system based on fair dealing in contractual relations.

8 — Judgment in Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, paragraphs 18 and 20.

9 — Case 33/74 *Van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metallnijverheid* [1974] ECR 1299, paragraph 13.

7. The views of the Companies Board are shared by the Danish Government and by

the French and Swedish authorities. The Danish Government claims, first, that the situation at issue is of purely domestic concern to Denmark and that the Community rules cited by Centros do not apply in this case. In its view, the appellant is attempting to circumvent the national rules by establishing a parent body in the guise of a branch. However, in the absence of any effective and continuous link between Centros and the economic life of the United Kingdom or between the company and the Danish branch, the requirement imposed by the Court in *Levin* and *Gebhard* [10] is not met in this case. In any event, the Danish Government considers that the Court's judgment in *Segers* cannot apply to the main proceedings in the present case, in which there is no element of discrimination on grounds of nationality.

8. The French Government, for its part, maintains that the principle that for the purposes of the right of establishment it is immaterial that the foreign company does not conduct business in the country in which it is incorporated — a principle established by the Court in *Segers* and relied upon in the present case by Centros (see point 4 above) — applies only if there appear to be legitimate reasons for setting up a secondary establishment and there is no abusive or devious intent. This is not so where, as in the present case, the sole purpose of the operation is to circumvent rules of company law in the State where the secondary establishment is being set up. That State may then refuse to register the branch on the assumption that the conduct in question is abusive or devious. For this reason, the competent authorities in France may be obliged to investigate whether there has been an abusive exercise of the right of establishment on the part of the foreign company if the activities of its branch are 'regulated', that is to say if they are subject to supervision, authorisation or certification.

9. The Netherlands Government, for its part, concedes that the Companies Board's decision is contrary to Article 52 of the Treaty but maintains that that provision is of limited application in the present case. In particular, while admitting the need for a consistent interpretation of all the Community rules on the fundamental freedoms, it draws attention to the principle — established by the Court in its judgment in *Rutili* [11] on the free movement of workers — that restrictive national

10 — Case 53/81, cited in note 7 above, and Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraphs 25 and 26, according to which freedom of establishment — unlike the freedom to provide services, characterized by the temporary nature of the activities pursued in another Member State — is designed to allow Community nationals to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

11 — Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraph 28, on the interpretation of Articles 7 (now 6) and 48 of the Treaty.

measures based on the personal conduct of the individual concerned may be justified by a genuine and sufficiently serious threat to public policy. The Netherlands Government considers that the Court's statement in *Segers*, to the effect that the need to combat fraud may justify a difference of treatment for companies formed in accordance with the law of another Member State, should be interpreted in the light of these considerations, a contention that is in fact also based on the concept of public order referred to in Article 56 of the Treaty.

10. Finally, the Commission proposes a different and more complex view of the case at issue. On the one hand, it maintains that Centros was simply exercising the right of establishment in the Member State that offered it the most favourable conditions in respect of the paid-up capital requirement, a procedure which — it follows from the judgment in *Segers* — is exactly one of the objectives freedom of establishment is designed to achieve. The ability to take advantage of the opportunities offered by different types of company in other countries and differences in the regulations of Member States does not in itself constitute unlawful circumvention of national rules. The Commission therefore maintains that, in the circumstances at issue in the main proceedings, the administrative procedure followed by the Companies Board in its investigations as described (see point 3 above) and the subsequent refusal to register a branch of a company that meets the requirements laid down in Article 58 of the Treaty amount to discrimination on grounds of nationality, which is prohibited under Article 52. A State in which it is sought to set up a secondary establishment may not make registration of the branch subject to the condition that the parent company must satisfy all the requirements for the establishment of companies imposed by its national law. On the other hand, when — as in the case which concerns us here — there is no coordination at Community level, the Commission considers that the Member State in which it is sought to set up a secondary establishment may impose conditions for the registration of the branch based on its domestic rules and designed to secure for persons in its own territory who enter into relations with the foreign company a greater measure of protection than is afforded by that company's memorandum of association. In the present case it appears at least probable, if not certain, that the Danish rules on paying up capital achieve the declared objective of protecting public creditors. With respect to that objective, the Commission considers however that it is disproportionate to refuse permission for the secondary establishment purely and simply on a presumption of intent to circumvent laws currently in force. Such refusal cannot be justified on any of the grounds mentioned in Article 56 of the Treaty, which do not apply to economic objectives and would in any event presuppose actual proof that the foreign company intended to defraud creditors in Denmark. According to the Commission, in view of the facts and the legal background in the main proceedings, an appropriate and less restrictive means of protecting creditors in this case would be to make registration of the branch subject to the condition that the foreign parent company have paid-up capital corresponding to that required under the relevant national provisions for the establishment of companies of that type in Denmark.

III — Legal analysis of the question referred to the Court

11. The order for reference has defined the reason for referring the question clearly in the following terms. It is not disputed in the main proceedings that properly incorporated *private companies limited by shares* with registered offices in England or Wales have a right to establishment in Danish territory through branches, despite the fact that the minimum paid-up capital required under United Kingdom law for that type of company is considerably less than is required under Danish law for companies of the same type established in Denmark. Moreover, according to the Danish Government representative's statements at the hearing, limited companies of Community Member States, particularly the United Kingdom, in fact make wide use of the right of establishment in Denmark without the Companies Board taking measures of the kind at issue in this case to prevent them from doing so. The point at issue is a different one, namely, is a company lawfully exercising the right to set up a secondary establishment when it intends to carry on its own business *exclusively* in the country in which the branch is registered and when it is clear that the original decision to incorporate the company in a Member State other than the State in which it is intended to do business was motivated *solely* by a desire to avoid the stricter legal requirements in respect of minimum company capital imposed by the law of the Member State in which the secondary establishment was to be set up? According to the Danish Government, in view of the circumstances in the case at issue, the answer should be that it is not (and the measure mentioned in the question referred to the Court should consequently be declared to be compatible with the rules of the Treaty). To be more precise, the facts in the case at issue are being used by the Danish authorities to advance a two-pronged line of argument, namely that the refusal to register the branch of Centros does not represent a restriction on freedom of establishment contrary to Article 52 of the Treaty and, in the alternative, if there is any restriction it is in any event covered by the provisions for special treatment for foreign companies which Member States are allowed to adopt under Article 56 of the Treaty on grounds of public policy *inter alia*. I propose to examine both these arguments in due course. Before doing so, however, I should like if I may to give a brief survey of the Court's case-law on the subject and to consider what function a secondary establishment in another country performs in the organisational structure of a company.

12. The rule contained in Article 52 of the Treaty, which has been directly applicable since the end of the transitional period, is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State. The right of establishment includes the

right to set up and manage undertakings under the conditions laid down for its own nationals by the law of the host country and the setting up of agencies, branches or subsidiaries by Community nationals having their principal establishment in the territory of another Member State. And under Article 58 of the Treaty, the right of establishment also includes the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration *or* principal place of business within the Community to do business in another Member State through a secondary establishment. Three further rights are a logical corollary of this fundamental freedom: first, company business may be conducted in a Member State through a company incorporated in that State or in another Member State; second, companies have the right to decide whether a secondary establishment is to be a subsidiary or a branch; and lastly, foreign companies have the same rights in the State in which the secondary establishment is set up as the companies of that State. [12]

As the liberal provision of Article 58 could be interpreted as meaning that the freedom to set up a secondary establishment is also extended to legal persons having their registered office but not their 'real' head office, that is to say their central administration or principal place of business, within the Community, it very soon became clear that the conditions governing that freedom in the case of companies *whose principal establishment was outside the Community* would have to be defined. [13] For that purpose, as explained in the General programme for the removal of restrictions on freedom of establishment adopted by the Council on 18 December 1961, [14] it is necessary to satisfy the further criterion of an economic connection, an 'effective and continuous' link with the economy of a Member State. [15] However, I need scarcely add, that criterion applies only to non-Community companies.

13. As to the scope of the right to set up a secondary establishment, it is apparent from the case-law of the Court that it is the seat of the company in question in the sense of the three possibilities mentioned above (see

12 — See E. Werlauff, *EC Company Law*, Copenhagen, 1993, pp. 17-22.

13 — See S. Poillot-Peruzetto-M. Luby, *Le droit communautaire appliqué à l'entreprise*, Paris, 1998, p. 141. Y. Loussouarn observed, with regard to the origin of the criterion of connection examined later in this Opinion, that the Community authorities and the delegates of the Member States had proceeded on the assumption that Article 52 governed the right with respect to a secondary establishment of natural persons having their (primary) establishment in the territory of a Member State, hence the requirement of Community residence as well as Community nationality. However, simply to transpose that requirement to companies by insisting on a real head office as well as a registered office would be in open and irremediable breach of Article 58 (see 'Le rattachement des sociétés et la Communauté économique européenne', in *Etudes de droit des Communautés européennes. Mélanges offerts à Pierre Teitgen*, Paris, 1984, p. 239, in particular pp. 245 and 246, and 'Le droit d'établissement des sociétés', in *Rev. trim. dr. europ.*, 1990, p. 229, in particular p. 236).

14 — (JO 1962 No 2, p. 36.) OJ, English Special Edition IX, Resolutions of the Council and of the Representatives of the Member States, p. 7.

15 — Such a link may consist precisely of a non-Community company having a branch in the territory of a Member State, provided that the activities of the territorial extension are permanent, effective and relevant (not just, for example, branch offices or showrooms that are not active in the market or employ only a very small number of people). On the other hand, the nationality of the partners or members of the company's managerial and governing bodies is immaterial in this connection.

point 12) which 'serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its seat is situated in another Member State would thus deprive that provision [Article 52 of the Treaty] of all meaning'. [16] When the two requirements for *Community nationality* laid down in Article 58 are satisfied, i. e. when a company is lawfully constituted and belongs to a Member State, it is entitled to receive the same treatment as companies of a Member State other than the State in which its principal establishment is situated, even if it carries on its business *solely* in that other State through an agency, branch or subsidiary. [17] Thus, it follows from the case-law of the Court that 'the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'. [18] Similarly, the Court has ruled that national measures are incompatible with the Treaty where those measures, even though they are applicable *without* discrimination, are liable to hamper or to render less attractive the exercise by Community nationals (or companies) of fundamental freedoms guaranteed by Community law. [19]

14. Under Article 56 of the Treaty, Member States may moreover derogate from the prohibition on measures restricting establishment in their territory and apply provisions providing for special treatment for foreign nationals (natural and legal persons) with recognised rights under Community law on grounds of public policy, public security or public health. Inasmuch as it represents a derogation from a fundamental principle of the Treaty, Article 56 must be interpreted strictly. For it to apply, there must therefore be a genuine and sufficiently serious threat affecting one of the fundamental interests of society, including need to combat possible abuse and to ensure the proper implementation of the national social security legislation. [20] It follows that it cannot be invoked in support of economic aims; [21] furthermore, the measures taken to protect the interests which it seeks to safeguard must be limited to what is strictly necessary and must obey the principle of proportionality. [22]

16 — See *ex multis* Case 270/83 *Commission* v *France* [1986] ECR 273, paragraphs 13, 14 and 18, in particular paragraph 18. See also Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraphs 25 and 26, and Case C-264/96 *ICI* v *Colmer (HMIT)* [1998] ECR I-4695, paragraph 20.

17 — Case 79/85, cited in note 3 above, paragraphs 14 and 16. In that judgment, the Court held that it was incompatible with Articles 52 and 58 of the Treaty for a director of a company to be refused sickness benefit under the national sickness insurance scheme by the competent authorities of the Member State in which a secondary establishment (subsidiary) of the company is situated solely by reason of the fact that the parent company was formed in accordance with the laws of another Member State and has its registered office in the territory of that State, although it does not conduct any business in that State but operates exclusively in the Member State in which the secondary establishment is situated.

18 — Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 14, and Case C-1/93 *Halliburton Services* v *Staatssecretaris van Financiën* [1994] ECR I-1137, paragraph 15.

19 — See *ex multis* Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32.

20 — See *ex multis* Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraph 35, and Case 79/85, cited in note 3 above, paragraph 17.

21 — See *ex multis* Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* v *Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11.

22 — See *ex multis* Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgian State* [1982] ECR 1665, paragraph 9, and Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1982] ECR 2085, paragraph 36.

Thus, when the restrictive measure at issue is not discriminatory — that is, for present purposes, when it is applicable without distinction to national companies and to companies of other Community countries — it may be justified by overriding reasons relating to the general interest, [23] provided that (i) those reasons are not already satisfied by the rules imposed on the foreign company in the State in which it is established and (ii) the measure is necessary and proportionate. [24]

15. That being said, I come now to the concepts of 'branch' and 'subsidiary' (*filiale* or to be more precise *affiliata*), [25] referred to in Article 52 which in turn refers to Article 58 of the Treaty (I leave aside the term 'agency', which has no bearing here). What is the criterion for distinguishing between these two forms of permanent territorial division that a company may set up, possibly in the territory of Member States other than the State of origin, generally with the intention that they should deal with third parties? The essential difference is that a branch has no independent legal personality but is defined as part of a *de facto* whole or simply as a limb of the company, allowing a measure of decentralisation. [26] A subsidiary, on the other hand, is legally independent of the parent company by which it is controlled. [27] As learned writers have observed, [28] the distinction between these two legal devices employed by companies to

23 — These include professional rules intended to protect recipients of a service, protection of intellectual property, protection of workers, consumer protection, conservation of the national historical and artistic heritage, turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country, and reasons of cultural policy (see *ex multis* Case C-288/89, cited in note 21 above, paragraphs 14 and 27); protection of the recipients of services for monitoring and renewing patents (Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 17); the need to preserve the cohesion of the tax system (Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249); the prevention of crime and the maintenance of order in society in view of the damaging consequences of excessive demand in the gambling sector (Case C-275/92 *H. M. Customs and Excise* v *Schindler* [1994] ECR I-1039, paragraphs 58 and 59); maintaining the good reputation of the national financial sector (Case C-384/93 *Alpine Investments* v *Minister van Financiën* [1995] ECR I-1141, paragraph 44); the effectiveness of fiscal supervision (Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions* [1997] ECR I-2471, paragraph 31); and fair trading (Joined Cases C-34/95, C-35/95 and C-36/95 *KO* v *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 53).

24 — See *ex multis* Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* v *Commissariaat voor de Media* [1991] ECR I-4007, cited in note 21 above, paragraphs 13 and 15.

25 — '"Società affiliate" rather than "filiali" used in Article 52 of the Treaty is the term which in Italian legal usage corresponds to the Dutch "dochterondernemingen", English "subsidiaries", French "filiales", German "Tochtergesellschaften"' (Opinion of Mr Advocate General Mancini in Case 270/83 *Commission* v *France* [1986] ECR 273, cited in note 16 above, point 2). See also G. M. Ruggiero — M. De Dominicis, Art. 52, in R. Quadri — R. Monaco — A. Trabucchi (ed.), *Trattato istitutivo della Comunità economica europea. Commentario*, Milan, 1965, vol. I, p. 399, in particular pp. 412 and 413. But see note 27 below.

26 — See M. Cabrillac, *Unité ou pluralité de la notion de succursale en droit privé*, in *Mélanges en l'honneur du Doyen Joseph Hamel*, Paris, 1981, p. 119, and Y. Loussouarn, *La succursale, technique juridique du commerce international*, in D. P. C. I., 1985, p. 359, in particular p. 362.

27 — But see A. Pietrobon, *L'interpretazione della nozione comunitaria di filiale*, Padua, 1990. According to the author, the use of legal form as a method for interpreting the concepts of agency, branch and subsidiary — i. e. the use of concepts and methods pertaining to national laws, as though those laws considered individually or in comparison with one another must necessarily provide the model for interpreting the Treaty, — seems inappropriate in that it does not admit certain types of branch which there is no reason to exclude. Moreover, a *functional* interpretation of the concept of 'secondary establishment' shows its essential characteristics (the fact that the branch is subject to the administrative choices of the parent company, which is responsible for all decisions concerning the existence, functions and basic *modus operandi* of the territorial division) to be such as to lead inevitably to the conclusion that an independent undertaking, with its own organization and business, cannot be the secondary establishment of another undertaking. The author adds that it consequently appears doubtful whether this is applicable to the concept of the *società affiliate* which, as she has pointed out, is not mentioned in the Italian version of Article 52. In her view, the establishment by an undertaking incorporated in one Member State, of a subsidiary (*società affiliata*) in another Member State is an operation that should more properly be regarded as a primary establishment (of the subsidiary). However, she considers that the question is of no practical importance, since both interpretations recognize the possibility of establishing subsidiaries (*società affiliate*). (Loc. cit. pp. 101-115, in particular pp. 103, 114 and 115; notes omitted).

28 — See Loussouarn, op. cit. in note 26 above, pp. 363-368.

set up establishments in other countries is important in various respects.

Above all, since *nationality* is an attribute of personality, a branch whose activity is the same as that of its parent company cannot have a different nationality from that company; and its legal status is governed by the legal order to which the parent company, of which it is merely a limb, is subject. The opposite applies to subsidiaries. Moreover, although a branch may enjoy a degree of managerial independence, the parent company alone is responsible for the *business activity* conducted on its behalf by the person appointed to run the branch. A subsidiary, on the other hand, can legitimately conclude contracts, though in some cases the parent company may intervene in the transaction as a contracting party. And lastly, on the principle of *unity of assets and liabilities*, any debts contracted (or, conversely, credits accumulated) by a branch in the course of its activities are chargeable to the company (so that it is incorrect to speak of *a branch's* debts) inasmuch as, for reasons of practical convenience, creditors are normally allowed in such cases to bring an action against the company before the court of the place where the branch is established (see point 18 below). A subsidiary, on the other hand, has its own funds to settle any debts it has contracted; the subsidiary with its own separate legal personality thus acts as a protective screen between parent company and creditors.

IV — The answer to the question referred by the national court

Compatibility of the refusal to register the Danish branch of Centros with the fundamental freedom of establishment

16. In my view, the measure taken by the Danish authorities is contrary to the Treaty provisions on freedom of establishment. As I shall explain more clearly, that measure does not merely limit the exercise of the right of companies of other Community countries to set up secondary establishments, it absolutely precludes it. In the present case, Mr and Mrs Bryde are effectively prevented from carrying on a business activity in Denmark through a company that is lawfully established and has its registered office in another Member State of the Community. The Companies Board appears to consider, in effect, that because the persons concerned intend to do business only in the Danish market they must therefore comply with the rules imposed under Danish law with respect to the type of company they have chosen. This, in my opinion, is contrary to Article 52 of the Treaty. The case must also be considered in the light of Article 58. In that regard, it is clear that Centros has been treated differently from companies established in accordance with Danish legislation, which have no such obstacles to overcome when they set up branches in Denmark. The measure at issue in this case also indirectly affects the appellant company's right to decide whether to open a branch or establish a subsidiary in Denmark. It seems to me obvious that the Danish authorities

would not have taken exception to Centros if the company established in the United Kingdom had preferred to set up its overseas establishment in the form of a subsidiary rather than a branch since a subsidiary, being separate from the parent company, must by definition satisfy the requirements imposed by the relevant national law, including the requirements as to minimum capital. But the second sentence of the first paragraph of Article 52 of the Treaty expressly leaves traders free to choose the most appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited, as it is in the present case, by discriminatory provisions. [29]

17. I shall now take a closer look at the arguments advanced by the Danish authorities against the points I have found it necessary to raise. They contend that Centros cannot legitimately claim the right to freedom of establishment within the meaning of the Treaty. As the company established by the Brydes in the United Kingdom does not conduct any business there, they maintain that it has no real and continuous link with the economic life of that country and that the situation is consequently of purely domestic concern and as such has nothing to do with Community law; in other words, according to the Danish authorities, this is patently a case of abusive and devious exercise of the right of establishment enshrined in the Treaty. [30] These arguments do not convince me for reasons I shall explain below and also because they take no account of the fact that the requirement that the parent company effectively carry on business is not only debatable as to substance but difficult to apply owing to its indeterminate nature. What kind of business must the parent company conduct, for how long and on what scale, for it to be at liberty to exercise the right to set up a secondary establishment?

18. Further to the views expressed above, I should point out that the rules on freedom of establishment are inapplicable — as the Danish Government maintains they are in the present case — only where there is no connecting factor between the situation of those concerned, be they nationals or companies of a Member State, and the provisions of Community law, which consequently has no bearing on the case. [31] For my own part, I do

29 — Case 270/83, cited in note 16 above, paragraph 22.

30 — See C. Timmermans, *Methods and Tools for Integration. Report*, in R. M. Buxbaum — G. Hertig — A. Hirsch — K. J. Hopt (ed.), *European Business Law, Legal and Economic Analyses on Integration and Harmonization*, Berlin-New York, 1991, p. 129, in particular pp. 136 and 137.

31 — See *ex multis* Case C-60/91 *Batista Morais* [1992] ECR I-2085.

not think that this is true of the situation at issue in the main proceedings. Centros was formed in accordance with the law of England and Wales and has its registered office in the United Kingdom. Those circumstances alone are sufficient to bring the company's situation within the scope of Articles 52 and 58 of the Treaty. In my view, no further information is needed about the nationality of the members or directors or about the territorial scope of the company's activities. [32] Moreover, the Court has held that the reference in Article 52 to 'nationals of a Member State' who wish to establish themselves 'in the territory of another Member State' cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have taken advantage of the facilities existing in the matter of freedom of movement and establishment, are, with regard to their State of origin in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty. [33] The Danish authorities insist that the principal establishment must really pursue the activities stated to be the object of the company. However, that line of reasoning leads them to see in Article 58 of the Treaty *an additional condition* to which the right to set up a secondary establishment is subject. However, in my view, the formal requirements set out in Article 58, for the purpose of identifying companies that have that right, are definitive. The legal form of the company is decisive. This is the point: there is no need to inquire into the nature and content of the activities the company is pursuing or intends to pursue. [34] Moreover, on the subject of freedom of establishment for natural persons, the Court has already had occasion to rule on a Member State's claim that the exercise of that right should be subject to an additional condition (in that case, actual residence in the territory of the State in question) over and above the requirement that the person be a national of a Member State, which is *the only condition Article 52 imposes in respect of persons*. The Court held that claim to be contrary to Community law. [35] The comparison — suggested by the Companies Board — between the present case and the case that was the subject of the ruling in

32 — See Case 79/85, cited in note 3 above, paragraph 14; also note 17 above and notes 45 and 46 below, together with the relevant points in the text. See also the judgment in Case C-23/93 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795, paragraph 15, according to which the circumstance that a broadcasting body established itself in another Member State in order to avoid the legislation applicable in the receiving State to domestic broadcasters does not preclude its broadcasts being regarded as services within the meaning and for the purposes of Article 59 of the Treaty. The situation of Centros is consequently different, for example, from the situation — examined by the Court in *Esso Española* — which has to do purely with the extension within the territory of a Member State of the activities of a company having its head office in that State and pursuing its activities there (Case C-134/94 *Esso Española* v *Comunidad Autónoma de Canarias* [1995] ECR I-4223, paragraphs 12-17).

33 — Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraphs 20 and 24.

34 — See I. G. F. Cath, *Freedom of Establishment of Companies: a New Step Towards Completion of the Internal Market*, in F. G. Jacobs (ed.), *1986 Yearbook of European Law*, Oxford, 1987, p. 247, in particular pp. 259 and 261. See also *mutatis mutandis* Case C-441/93 *Pafitis and Others* v *Trapeza Kentrikis Ellados and Others* [1996] ECR I-1347, paragraphs 18 and 19, in which the Court held that 'it is clear from the title and Article 1 of the Second Directive that it applies to the companies referred to in the second paragraph of Article 58 of the EC Treaty constituted in the form of public limited liability companies. The criterion adopted by the Community legislature to define the scope of the Second Directive is therefore that of the legal form of the company, irrespective of its business'.

35 — According to the Court, 'it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State' (Case C-369/90 *Micheletti and Others* v *Delegación del Gobierno en Cantabria* [1992] ECR I-4239, paragraphs 10 and 11). See also Case 136/78 *Ministère Public* v *Auer* [1979] ECR 437, paragraph 28, in which the Court held that 'there is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the Member States and that, in addition, the other conditions for the application of the rule on which they rely are fulfilled'.

Levin [36] is therefore, in my opinion, impracticable in view of the difference in wording between Article 52, which guarantees in abstract terms the simple opportunity to engage in business activities (see point 19 below), and Article 48(3) of the Treaty, which sets out in detail the content of the activities covered by the right of movement guaranteed to employed persons. [37]

19. In support of the position they have taken in the present case, the Danish authorities also cite other decisions handed down by the Court in the context of the Convention (see point 6 above). Those decisions are however irrelevant for the purposes of this case. They are, as we have seen, interpretative decisions concerning the applicability in those particular cases of the provision on special jurisdiction contained in Article 5(5) of the Convention. [38] In those cases, the Court confined itself to considering the characteristics of the concept of secondary establishment that may from time to time be relevant for the purpose of answering questions referred to it by the national courts. It is required to ensure that the Convention is given full effect and it has thus had to rely on an *independent* interpretation of the concepts of subsidiary and branch. Those conventional concepts are restrictive inasmuch as they are primarily concerned with the need to avoid multiple jurisdiction, with its corollary of *forum shopping*, and with any 'protectionist' motives underlying the original provisions on special jurisdiction in the legal orders of the Contracting States that may be detrimental to foreign

36 — Case 53/81, cited in note 7 above.

37 — The Court observed that 'under Article 48(3) of the Treaty the right to move freely within the territory of the Member States is conferred upon workers for the "purpose" of accepting offers of employment actually made. By virtue of the same provision workers enjoy the right to stay in one of the Member States "for the purpose" of employment there. Moreover, it is stated in the preamble to Regulation (EEC) No 1612/68 that freedom of movement for workers entails the right of workers to move freely within the Community "in order to" pursue activities as employed persons, whilst Article 2 of Directive 68/360/EEC requires the Member States to grant workers the right to leave their territory "in order to" take up activities as employed persons or to pursue them in the territory of another Member State. However, these formulations merely give expression to the requirement, which is inherent in the very principle of freedom of movement for workers, that the advantages which Community law confers in the name of that freedom may be relied upon only by persons who actually pursue or seriously wish to pursue activities as employed persons' (loc. cit. paragraphs 20 and 21).

38 — In derogation from the general rule laid down in Article 2 of the Convention, Article 5(5) provides that a person domiciled in a Contracting State may, in another Contracting State, be sued, as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated. 'This concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there. Further it also comprises those relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body' (Case 33/78, cited in note 6 above, paragraph 13). It should also be noted that, in derogation from the provisions of Article 4 of the Convention, Article 8 provides that an insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State; the same rule applies, under Article 13 of the Convention, to a party who has entered into a contract with a consumer and who is not domiciled in a Contracting State.

defendants. [39] That case-law was developed for purposes that are entirely different from those at issue here and it certainly cannot be held to imply that an establishment is secondary, rather than primary, only if it concerns commercial activities undertaken as an extension of a principal establishment which is actively engaged in business and to whose direction and control the secondary establishment must be subject.

20. I must also consider another argument advanced by the Companies Board and by the Danish Government, namely that Mr and Mrs Bryde's wish to carry on business through a limited company in Denmark is not eligible for protection under Articles 52 et seq. of the Treaty inasmuch as they deliberately chose to establish the company in Great Britain with abusive intent. Their aim was allegedly to avoid the rules on minimum capital in force in the State in which it was proposed to set up the secondary establishment, rules which on this view should have been applicable to what was in effect a 'primary establishment'. It is true that the Court has consistently upheld in its case-law the principle that 'rights conferred under Community law may not be relied on for fraudulent or abusive ends' [40] which is among the general principles of Community law. It is however by no means easy to define the precise scope of that principle. According to the recent judgment in *Kefalas*, a person abuses the right conferred on him if he exercises it unreasonably to derive, to the detriment of others, 'an improper advantage, manifestly contrary to the objective' pursued

39 — See Pietrobon, cited in note 27 above, pp. 162-164. Thus, in those cases the Court's statement that 'one of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body' led inevitably to the conclusion that when the grantee of an exclusive sales concession is subject neither to the control nor to the direction of the grantor, he cannot be regarded as being at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5(5) of the Convention (Case 14/76, cited in note 6 above, paragraphs 20-23) and that an *independent* commercial agent, who merely negotiates business ... and transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch, agency or other establishment within the meaning of Article 5(5) of the Convention (Case 139/80, cited in note 6 above, paragraphs 12 and 13). And again, it was solely in order to enable the German court to decide whether it had jurisdiction to try an action brought by a German undertaking against a French undertaking, the registered office of which was in French territory but which had an office or place of contact in the Federal Republic of Germany described on its notepaper as 'Representation for Germany', that the Court established in *Somafer* the condition that a branch, agency or other establishment must be easily recognizable by third parties as an extension of the parent body, implying 'a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension' (Case 33/78, cited in note 6 above, paragraph 12). The clearest evidence that the normative content of the concept of 'agency, branch or other establishment' in the context of the Convention is different from that of the concept of 'agency, branch or subsidiary' in the context of the Treaty, with contradictory implications in some cases (see Pietrobon, op. cit., p. 94), is provided by the guidance given by the Court on the situation in which a company acts, essentially, *as though it were* a branch or subsidiary of a different 'parent' company, although it is in fact legally independent and may even hold all the company capital, as was the case in *Rothschild*. In that case too, in order to protect the confidence of third parties, the special jurisdiction provided under Article 5(5) of the Convention must apply because the situation apparently created by 'the way in which these two undertakings behave in their business relations and present themselves *vis-à-vis* third parties in their commercial dealings' is such as to determine a close connection between the dispute and the court called upon to hear it. It should be noted that, according to the judgment in *Rothschild*, that provision applies 'to a case in which a legal entity established in a Contracting State maintains no dependent branch, agency or other establishment in another Contracting State but nevertheless pursues its activities there through an independent company with the same name and identical management which negotiates and conducts business in its name and which it uses as an extension of itself' (Case 218/86 *SAR Schotte* v *Parfums Rothschild* [1987] ECR 4905, paragraph 17).

40 — Case C-367/96 *Kefalas and Others* v *Hellenic State and Others* [1998] ECR I-2843, paragraph 20, and the other cases cited earlier in this Opinion. The Court has consequently held that 'Community law does not preclude a Member State from adopting, in the absence of harmonisation, measures designed to prevent the opportunities created under the Treaty from being abused in a manner contrary to the legitimate interests of the State' (Case C-19/92, cited in note 19 above, paragraph 34).

by the legislator in conferring that particular right on the individual. [41] On this aspect of the abuse of rights, there appears to be a certain affinity between the general principle regarding such abuse and the principle of proportionality as a criterion for limiting the exercise of power. [42] Furthermore, as learned authors have pointed out, the famous statement of the French authority on civil law, Planiol, that 'law ceases where abuse begins' *(le droit cesse là où l'abus commence)* still holds good and shows very clearly that the problem of abuse is resolved in the last analysis by defining the material content of the particular situation and thus the scope of the right conferred on the individual concerned. In other words, it is claimed that to determine whether or not a right is actually being exercised in an abusive manner is simply to define the material scope of the right in question. [43] If that is the case, I should like if I may to revisit the ideas on freedom of establishment developed earlier (see points 13 and 16 above). That freedom certainly includes, for the purposes of the present case, the right to establish companies in accordance with the legislation of a Member State to carry on business in that State or, *equally, in any other Member State*. In other words, the newly formed company may set up its principal — and indeed its secondary — establishment *wherever it wishes* within the Community.

The right of establishment is essential to the achievement of the objectives set in the Treaty, the purpose of which is to guarantee to all Community citizens alike the freedom to engage in business activities through the instruments provided by national law, thus giving them the *chance* to enter the market, irrespective of the motives that may actually have prompted the person concerned. In other words, it is the *opportunity* to exercise business activities that is protected, and with it the *contractual freedom* to make use of the instruments provided for that purpose in the legal systems of the Member States. In the present case, the right of establishment was exercised by setting up the company in accordance with the requirements of the law of the host country. So long as that right is exercised in accordance with the Treaty, the motives, calculations and particular personal interests underlying the choice do not come into consideration and are consequently not open to judgment [44]. What is relevant, however, is whether the activities pursued (if such there

41 — See Case C-367/96, cited in note 40 above, paragraph 28, with reference to an action brought by certain shareholders for a declaration that the increase in capital of a public limited liability company in financial trouble was invalid. I should point out that the formulation of the principle of abuse of rights adopted by the Court is based essentially on the common law of Member States with a civil law system [see L. N. Brown, 'Is there a General Principle of Abuse of Rights in European Community Law?', in *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, Dordrecht, 1994, vol. II (ed. D. Curtin — T. Heukels), p. 511, in particular p. 515].

42 — See Brown, op. cit. in note 41 above, pp. 521 and 522, and W. Van Gerven, 'Principe de proportionalité, abus de droit et droits fondamentaux', in *Journ. Trib.*, 1992, p. 305, in particular pp. 307 and 308.

43 — See C. Nizzo, 'L'abuso dei "diritti comunitari"; un quesito non risolto', in *Dir. comm. internaz.*, 1997, p.766, in particular p. 770.

44 — See *mutatis mutandis* Case 53/81, cited in note 7 above, paragraphs 20-22, in which the Court held that, provided that a worker actually pursues or wishes to pursue an activity as an employed person in another Member State and as such is among those enjoying the rights conferred under Article 48(3) of the Treaty and the relevant secondary legislation (see point 18 above), the motives which may have prompted the worker to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State and must not be taken into consideration.

be) are compatible with the domestic rules of public law in the State in which the establishment (primary or secondary) is situated, which may justify measures restricting the exercise of the right in question. The right of establishment is recognised in those terms precisely with a view to the completion of the single market. This is clear from the fact that different treatment is accorded under the Treaty to legal persons outside the Community who, to enter the circle of the Community, must satisfy the criterion of an effective and continuous link with the economy of a Member State (see point 12 above).

In support of what I have just said, I should like if I may to draw attention to the frequently cited case of *Segers*, in which a Netherlands national had incorporated his one-man business, which had its registered office in the Netherlands, into a private limited liability company formed in accordance with English law, which he had acquired at the same time and which did not conduct any business itself but operated solely through the secondary establishment. In fact, it appeared from the documents in the case that the reason for this arrangement was simply that he wanted to use the designation 'Ltd' which he considered more attractive than its Netherlands equivalent, 'BV', and to avoid the statutory time-limit presented by Netherlands law for such a change. [45] This did not prevent the Court from ruling that the situation of the company and of its director, Mr Segers, was covered by the provisions on freedom of establishment and that the applicant was therefore entitled to receive the treatment accorded to Netherlands nationals. [46] It is consequently not easy to see why the opposite conclusion should be reached in a situation where — as in the present case — a company is incorporated in the United Kingdom because the founders wish to avail themselves of the opportunity to operate with paid-up capital commensurate with the resources at their disposal and less than is required under Danish law. That situation, whether one likes it or not, is the logical consequence of the rights guaranteed under the Treaty. Moreover, it is consistent with the objective behind the inclusion of the freedom of establishment in the Treaty, namely the need to promote the free movement of

45 — See point 1 of Mr Advocate General Darmon's Opinion in Case 79/85, cited in note 3 above.

46 — See note 17 above and the relevant part of the text. Similarly, the Court appears to have recognised (albeit implicitly) that the registration in the register of British fishing vessels of vessels originally registered in Spain and flying the Spanish flag and the acquisition of British vessels flying the British flag by companies incorporated under the laws of the United Kingdom owning or operating such vessels, most of whose directors and shareholders were Spanish nationals, did not constitute an 'abuse of the right of establishment', despite the fact that the wholesale recourse to such registrations in the British shipping register had resulted in the practice known as 'quota hopping', that is to say 'plundering' the fishing quotas allocated to the United Kingdom under the Common Fisheries Policy, and had led in effect to 'circumvention' of the system of national fishing quotas designed to conserve fish stocks and guarantee a reasonable standard of living for the communities dependent on fishing [see Case C-221/89 *The Queen* v *Secretary of State for Transport, ex parte Factortame and Others* [1991] ECR I-3905, in which the Court held that legislation on the registration of a fishing vessel in the register of a Member State containing restrictive conditions relating to the nationality, residence and domicile of the owners, charterers and operators (and of the shareholders and directors in the case of a company), such as the legislation enacted in 1988 by the United Kingdom to put a stop to *quota hopping* by vessels flying the British flag but lacking any genuine link with that country, was contrary to Article 52 of the Treaty (loc. cit., paragraph 4). The Court added that freedom of establishment in another Member State may legitimately be made subject to a requirement for the registration of a vessel to the effect that it must be managed and its operations directed and controlled from within the Member State in which it is to be registered, a requirement which, in the Court's view, essentially coincides with the actual concept of establishment within the meaning of Article 52 *et seq.* of the Treaty (loc. cit., paragraph 34). See also Brown, op. cit. in note 41 above, pp. 523-525].

persons (and capital) and, by the same token, the achievement of a common market. 'In that respect, the fact that a national of a Member State may take advantage of the flexibility of United Kingdom company law ... must be viewed in that context [that is, in the context of the Community system]'. [47] In short, in the absence of harmonisation, competition among rules must be allowed free play in corporate matters. [48] In the present case, as in *Segers*, the above-mentioned freedoms are part of the material content of the right in question and it cannot be held that Mr and Mrs Bryde took 'an improper advantage, manifestly contrary to the objective' pursued by Articles 52 et seq. of the Treaty in abusively avoiding the application of binding rules of the State where the secondary establishment was to be set up. Far from contradicting the conclusion I have reached, the case-law cited by the Danish Government seems to me ultimately to support it. In fact, it follows from the judgments in those cases that the question of abusing the law can arise only if the rule that is apparently being avoided undoubtedly applies to the legal situation at issue. [49] If the apparent avoidance concerns a provision of national law, it is therefore essential to ascertain first that the national provision it is hoped to apply in the case at issue can be relied on by the court as being consistent with Community law. And it is on precisely this point that the Companies Board's arguments appear, if I may say so, to beg the question: by insisting that the national provisions must apply with respect to the minimum capital limited companies are required to have when they are formed, the Danish authorities exclude the possibility that the opposite result may be brought about — as it has been in the present case — through the exercise of the freedom of choice, guaranteed to individuals under the Treaty, as to the company instrument best suited to their purposes of all the instruments available under the various national systems of the Member States. The contested measure of the Companies Board is contrary to Community law precisely because it was adopted on the implicit but clear assumption that business activities conducted by Danish nationals and directed essentially at the Danish market must inevitably be carried on through their principal establishment in Danish territory. This view cannot however be sustained at the present stage of European integration, which is characterised by the almost full completion of a single market thanks to the abolition of national obstacles to freedom of movement

47 — See point 6 of Mr Advocate General Darmon's opinion in Case 79/85, cited in note 45 above.

48 — See C. D. Ehlermann, *Compétition entre systèmes réglementaires*, in *Rev. Marché commun Union europ.*, 1995, p. 220, according to which there is no possibility of 'free competition' between the company laws of the Member States degenerating into a kind of 'Delaware effect' — that is a process whereby newly formed companies are attracted to the systems which afford a lower level of protection to investors and creditors, as happened in the United States in the case of company laws in New Jersey and, more recently, in Delaware —, since Member States can have recourse to the mechanism for the harmonisation of company laws within the meaning of Article 54(3)(g) of the Treaty (loc. cit., p. 223). According to D. Charny, harmonising the provisions of company law of the Member States seems, from the perspective of American corporate theory, to be 'a process in search of a justification', since such harmonisation of national systems may result indirectly from competition between them (see *Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the 'Race to the Bottom' in the European Communities*, in *Harv. Int'l. L. Journ.*, 1991, p. 423, in particular pp. 424 and 425).

49 — This is true both in the case of national legislation governing a person's access to or exercise of a profession in the territory of the country concerned (in particular rules relating to organisation, qualifications, professional ethics, supervision and liability), as in *Van Binsbergen*, or his trade qualifications, as in *Knoors*, cited respectively in notes 9 and 33 above and the relevant parts of the text; and also in the case of national legislation imposing obligations with respect to conduct in relation to the organisation of a specific commercial sector, such as the fixing of retail book prices by publishes or importers (Case 229/83 *Leclerc and Others* v *'Au blé vert' and Others* [1985] ECR 1, paragraph 27), or obligations with respect to the pluralist and non-commercial content of programmes broadcast in national territory (Case C-23/93, cited in note 32 above, paragraph 21).

for persons and capital [see Article 3(c) of the Treaty]. The interpreter must draw the necessary conclusions from the developments that have already taken place in the Community system; it is for the Court to ensure that the spirit of the Treaty prevails by applying the '*Cassis de Dijon*' doctrine on mutual recognition in a consistent manner, to corporate mobility *inter alia*. [50] This does not, in my view, mean that a foreign company which does no business in the country in which it was formed is not subject, in respect of the *exercise of activities* by a branch opened in another Member State, to binding rules of that State applicable to national companies of the same type. The secondary establishment is, in fact, such as to create an appropriate link between the foreign company and the economic system of the country in which it is set up. But the fact that binding local rules may apply must never mean that the Community company is *prevented* from exercising its right of establishment. It follows, in my view, that in the present case the Companies Board's claim that the secondary establishment should be accorded the treatment provided under national law for primary establishments, particularly in respect of minimum capital, can be upheld only if there are suitable reasons to justify it.

Possible justifications for the contested measure

21. This is the last aspect of the question that remains to be considered. Could the restrictive measure at issue in this case be justified within the meaning of Community law as being genuinely based on grounds of public policy and proportionate with respect to the aims it seeks to achieve? The Companies Board cites the need to combat fraud and, more precisely, the need to protect future creditors of Centros in relation to the activities of the Danish branch: in view of the 'undercapitalisation' of the company, at least by Danish standards, and the limited liability of the partners, the Board considers that registration of the branch in Denmark would expose Danish traders and public creditors to the risk of incurring financial losses should Centros subsequently fail. That is undeniably a risk inherent in all limited liability companies but it seems to me to be very far from constituting 'a genuine and sufficiently serious threat affecting one of the fundamental interests of society', as required by Article 56 of the Treaty, a derogating provision that in my view is better suited to cases where the actual

50 — See T. Mortimer, *The Removal of Barriers to Corporate Mobility: An Analysis of Cases Pertinent to Articles 52 and 58*, in A. Caiger — D. A. Floudas (ed.), *1996 Onwards: Lowering the Barriers Further*, Chichester, 1996, p. 135, in particular pp. 150 and 154. According to the judgment in '*Cassis de Dijon*' (Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraphs 14 and 15), in the absence of a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, any Member State is required to permit goods to be introduced into its territory provided that have they been lawfully produced and marketed in another Member State, even if they were produced in accordance with technical or quality requirements other than those in force in the importing State.

object or activities of the foreign company threaten public policy.

Apart from that, while fair trading is an overriding reason relating to the general interest that could, in theory, justify national measures (applicable without distinction) restricting the right of establishment, I do not think that that has any bearing on the present case. Various considerations support this view. First of all, it is doubtful whether, in the case of limited liability companies, the criterion of presumed adequacy of minimum capital alone may be relied upon to protect or (in the words of the fourth recital in the preamble to the Second Directive, in relation to public limited liability companies) 'ensure' the protection of creditors. It is worth noting that that criterion is not employed in United Kingdom legislation, as the United Kingdom authorities have pointed out. [51] As the required minimum capital can easily be dissipated, creditors would in practice be wiser to rely on the more recent information disclosed by the company's annual accounts and, if necessary, seek appropriate security from the directors. But without wishing to overturn the sacred idol of nominal capital, [52] in a case such as this the contested measure is certainly not essential to protect the private creditors of Centros with regard to the operations of a hypothetical Danish branch. In fact, that requirement can be met without any need to adopt measures such as the one at issue in this case, thanks to the results achieved by the Community process of coordinating the company law of the Member States. As the United Kingdom Government has rightly observed, Mr and Mrs Bryde hold themselves out as they are, *not* a Danish company but the Danish branch of a company incorporated under English law; the limitations on the liability of such a company, that anyone in Denmark having dealings with the company's branch is fully entitled to know, are the limitations resulting from the Danish minimum capital requirement. The protection of persons who have dealings with a company of another Member State through a branch of that company is secured under the system of the Treaty through the coordinated disclosure requirements of the Member State in which the branch is

51 — The United Kingdom Government considers that minimum capital requirements imposed on private limited companies can act as a disincentive to enterprise and innovation and that they are contrary to the policy of encouraging small and medium-sized undertakings.

52 — See *ex multis* G. La Villa, *Introduzione al diritto europeo delle società*, Turin, 1996, p. 55, according to which the approach based on regulations designed to protect the integrity of companies' nominal capital has long been criticised and is apparently in the process of being superseded in more advanced economic systems, which tend to revise regulations based on the concepts of nominal capital and nominal value in favour of criteria that are closer to the market and to the real state of a company's assets and liabilities at a given time (note omitted), and G. B. Portale — C. Costa, *Capitale sociale e società per azioni sottocapitalizzate: le nuove tendenze nei paesi europei*, in P. Abadessa — A. Rojo (ed.), *Il diritto delle società per azioni: problemi, esperienze, progetti*, Milan, 1993, p. 133, in particular pp. 144 and 145, according to which fixing 'minimum' company capital actually performs a function entirely different from the function of fixing capital that is 'not manifestly inappropriate' to the company's object: it creates an instrument for choosing between various types of company ..., and it guarantees a 'reliability threshold' for certain collective business undertakings (notes omitted).

situated; [53] in this way, third parties are afforded the opportunity to obtain adequate protection for their interests by demanding appropriate guarantees (usually in the form of demanding security from the members) or through pre-emptive proceedings.

22. Then there is the imperative need to protect *non-contractual* public creditors, such as the social security and tax authorities. In this case, the creditor is not free to choose whether or not to enter into a contract with the branch of a foreign company, nor — as the Højesteret's order for reference explains — can it demand guarantees or security from the company's directors. Nevertheless, I consider that the refusal to register the branch, essentially on the ground that there was not an effective principal establishment, is unrelated to the imperative need to protect public creditors: that is to say, the supposed causal connection between that need and the contested measure appears to be too tenuous and indirect to be regarded as relevant for the purposes of Community law. This conclusion is based on the fact that, as the Danish authorities admitted in the course of the oral procedure, Centros would have encountered no obstacle to opening branches in Denmark if it had actually been engaged in business activities in the United Kingdom, though in that event its initial paid-up capital would still have been £100. It therefore remains to be seen how the effective possibilities of protecting the Danish social security and tax authorities' rights as creditors might have been affected, had Centros actually been engaged in business activities in its country of origin.

Quite apart from any other considerations, it should be possible for the requirement mentioned by the Danish authorities to be satisfied by measures that are less restrictive than the one at issue in this case, which effectively denies the right to set up a secondary establishment. This seems to me to be sufficiently clear not to require lengthy explanations but some clarification is nevertheless called for. In my opinion, the measure suggested by the Commission (see point 10 above) of making registration of the branch in Denmark subject to the condition that the foreign parent company have capital amounting to no less than the capital required under the relevant national provisions for the establishment of companies of the same type in Denmark is *not* among the measures that could be regarded as

53 — Under Articles 1-6 of the Eleventh Directive, cited in note 4 above and the relevant part of the text, a branch is required to disclose pursuant to the law of the Member State in which it is situated the information necessary to protect the public, including: (i) the name, address and activities of the branch, (ii) the name of the company of which it forms part, (iii) the names and addresses of the persons who are authorised as permanent representatives of the *company* for the activities of the branch, or who may represent the company in dealings with third parties and in legal proceedings, (iv) the annual accounts and annual reports relating to the company or group of companies to which it belongs, drawn up in accordance with the Fourth and Seventh Company Directives (if necessary translated into the language of the State in which the branch is registered), (v) the closure of the branch, (vi) the winding-up of the company or insolvency proceedings to which it is subject, (vii) particulars of the register in which the company file is kept, together with the registration number in that register, and (viii) the existence of any other branches in the same Member State. Also, the Member State in which the branch has been opened *may* require it to disclose further information about the company of which it is a branch, in particular concerning: (i) the instruments of constitution and the memorandum and articles of association (if necessary translated into the language of the State in question), (ii) an attestation from the register in which the company file is kept relating to the existence of the company, and (iii) an indication of the validity of the securities on the company's property situated in the Member State in question. Lastly, the registers in which the branch and the company are entered, together with their registration numbers in those registers, the registered office and legal form of the branch (and if necessary the relevant subscribed and paid-up capital) must also be stated in letters and order forms used by the branch.

acceptable — in the sense of being justified by the imperative need mentioned above and consistent with the criteria of necessity and proportionality. Like the measure at issue in this case, that condition would essentially be tantamount to indirectly applying the treatment prescribed under national law for a primary establishment to an act exercising the right to set up a secondary establishment. It would therefore still have the result of precluding Mr and Mrs Bryde from availing themselves of 'the flexibility of United Kingdom company law' to operate freely in any part of Community territory with an initial capital that is consistent with the requirements of the provisions on the constitution of companies even if it is less than that required under the laws of other Member States (notably the Member State in which it is intended to open a secondary establishment). In my view, therefore, not even the objective of protecting public creditors is sufficient reason not to number the absolute refusal to register the branch among the measures that are incompatible with the Community rules on freedom of establishment. I therefore conclude that — on the assumption that, once the administrative obstacle to its registration is removed, the Danish branch of Centros will be governed by the national provisions on the exercise of business activities to which companies of the same type established in Denmark are subject — the answer to the question referred by the national court should be in the negative, in the absence of any valid justification for the measure at issue.

Conclusion

23. In the light of the foregoing considerations, I propose that the Court give the following answer to the question submitted by the Højesterets Anke-og Kæremål-sudvalg:

Article 52 et seq. of the EC Treaty prohibit the competent authorities of a Member State from refusing to register a branch of a limited liability company formed in accordance with the law of another Member State and having its registered office in the territory of that State, if the reasons for refusing are that: (i) the company itself is not engaged in any business activities, (ii) the intention in establishing the branch is to carry on all the company's activities in the State in which the branch is to be set up, and (iii) that way of organising the operation allows the members to avoid the requirement to have a higher minimum capital than would have been the case had the company been established in the Member State in which it is intended to open the branch.