

Freedom of Establishment for Companies: the European Court of Justice confirms and refines its *Daily Mail* Decision in the Cartesio Case C-210/06

by

VERONIKA KOROM* and PETER METZINGER**

On 16 December 2008 the European Court of Justice delivered its judgment in the case C-210/06 Cartesio Bt. It is the latest case in the line of company law cases on freedom of establishment. While closing a chapter opened with Daily Mail some 20 years ago, the Court raises many new questions. Following Daily Mail, Centros, Überseering and Inspire Art, the referring Hungarian court wanted to know whether national company law provisions which prohibit a company, constituted in Hungary under Hungarian company law and entered in the Hungarian Companies Register, to request the transfer of its seat to another Member State of the European Union while remaining governed by Hungarian law, are compatible with Community law. Advocate General Maduro took the view that Articles 43 and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State. However, against all expectations and the AG Opinion, the European Court of Justice confirmed that in the absence of uniform Community legislation national law decides whether a national company can rely on the freedom of establishment enshrined in Art. 43 EC. The pro-freedom of establishment attitude of the Court witnessed in recent years seems to have yielded to a more conservative approach, upholding the distinctions between outbound v inbound and primary v secondary freedom of establishment.

* dr. iur. (Budapest), Lic. droit (Aix-Marseille), MJur (Oxford), LLB, PhD candidate, Centre de Droit Economique, Université Aix-Marseille III, France; START-Projekt 2, Institute for Business Law, Vienna University of Economics and Business Administration, Austria.

** dr. iur. (Pécs), LL.M. (Université René Descartes Paris V), PhD candidate, University of Pécs, ügyvéd (attorney at law), Budapest, Legal counsel to Cartesio before the ECJ. We are very grateful to Thomas Bachner and Mathias Siems for valuable comments. Opinions expressed in this paper are exclusively the authors' and do not in any way reflect those of Cartesio. Other usual disclaimers apply.

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I. Introduction

The *Cartesio* case¹ is the sixth reference for a preliminary ruling from a Hungarian court.² The referring Hungarian court, the Szegedi Ítéltábla (Court of Appeal of Szeged), addressed four questions to the European Court of Justice concerning the compatibility with EC law of various provisions of Hungarian law raised in the proceeding before it. The first three questions concerned rules of Hungarian civil procedure.³ The fourth question asked whether Hungarian company law provisions which prohibit a company, constituted in Hungary under Hungarian company law and entered in the Hungarian Companies Register, to request the transfer of its seat to another Member State of the European Union while remaining governed by Hungarian law, are compatible with EC law.

1 ECJ, Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.*

2 See the homepage of the Hungarian Ministry of Justice, Pending and closed Hungarian cases before the European Court of Justice, <http://irm.gov.hu/?katid=129&id=162&lang=hu>.

3 In particular, the compatibility with EC law of the Hungarian civil procedure rule which allows to bring a separate appeal against the order of the court making a reference for a preliminary ruling. The Advocate General took the view that Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for a preliminary ruling. The ECJ confirmed the AG's view.

The problem raised by *Cartesio*, the cross-border transfer of the company seat, is anything but new on the European scene. It is a legal problem which has repeatedly preoccupied both the European legislator and the European Court. Art. 293 EC provides the legal basis for Member States to enter into negotiations with each other with a view to securing, inter alia, the retention of the legal personality of companies in the event of the transfer of their seat from one Member State to another. Yet, with the recent abandonment of the draft proposal for the 14th Company Law Directive on the cross-border transfer of the registered office, this article has remained dead letter to the present day.⁴ First, the Commission decided in 2007 in consideration of, amongst other factors, the pending *Cartesio* case that it should not “rush forward” with legislation; later it abandoned the draft Directive all together.⁵ Faced with the

4 Art. 293 EC further provides for the regulation of the mutual recognition of companies which has been settled by ECJ case law in C-212/97 Centros, C-208/00 Überseering and C-167/01 Inspire Art after several legislative attempts had failed: Brussels Convention on the Mutual Recognition of Companies and Legal Persons (29 February 1968); see also Hague Convention concerning the recognition of the legal personality of foreign companies, associations and institutions (1 June 1956) and draft Convention on conflict of laws rules applicable to companies, International Law Association, Hamburg 1960 (in: Yvon Loussouarn/Pierre Bourel/Pascal de Vareilles-Sommières, *Droit international privé*, 8^e édition, Dalloz Paris 2004, 925). The possibility of mergers between companies or firms governed by the laws of different countries equally provided for by Art. 293 EC was settled by the C-411/03 SEVIC Systems case and the EC Directive on Cross-border Mergers (Directive 2005/56/EC).

5 Whereas the Commission had declared a proposal for a directive on the transfer of seat as a medium term priority in the Company Law and Corporate Governance Action Plan of May 2003, in June 2007 Charlie McCreevy, Commissioner for the Internal Market and Service, announced that the Commission would not “rush forward with legislation” as the Court of Justice could provide new insights and clarity on the current situation of cross-border transfer of a company’s seat in Europe in a case that is pending before it (SPEECH/07/441). The case referred to was undoubtedly the *Cartesio* case, see e.g. Vossestein, “Transfer of the registered office. The European Commission’s decision not to submit a proposal for a Directive”, *Utrecht Law Review*, Volume 4, Issue 1, 53 ff.; Ingo Saeger, “Wegzug von Personengesellschaften”, in: *Transaktionen, Vermögen, Pro Bono, Festschrift zum zehnjährigen Bestehen von P+P Pöllath + Partners*, 2008, 310. Finally, the directive was abandoned altogether in October 2007 because the economic analysis of the possible added value of a directive was found to be inconclusive, and because it was held that companies already have legal means to effectuate cross-border transfers (SPEECH/07/592). However, whereas the intended 14th Company Law Directive was meant to provide an answer to the identity-preserving transfer of the company’s registered office across borders whilst changing the applicable law (its scope has been narrowed after acknowledging that the de facto transfer of the head office has already been resolved by the case-law, Public Consultation document, 2004), the *Cartesio* case was concerned with the transfer of the company’s seat (head office and statutory seat) outside Hungary whilst retaining the Hungarian legal status under the old

legislator's failure, it seemed that the issue would be resolved by the ECJ. After a long line of antecedent history – with examples of failed national attempts to transfer the company seat across borders⁶ and requiring the ECJ to assess the seat transfer in the light of the Treaty freedoms⁷ – the Court at last had the opportunity to deliver the much-awaited clarifications to its case law in *Daily Mail*⁸, *Centros*,⁹ *Überseering*,¹⁰ *Inspire Art*¹¹ and *SEVIC*¹² and to pronounce itself on this important chapter concerning the scope of the freedom of establishment for companies in the EU.

law of 1997 (see later). This distinction is confirmed by the ECJ in para. 111 ff. of the *Cartesio* judgment.

- 6 For a recent example see OLG München 31. Zivilsenat, 31 Wx 36/07 (04. 10. 2007) where a German GmbH wished to transfer its seat to Portugal ("seat" in German law means the statutory seat and the real seat of the company, see Section III. Fn. 38). The German court held that the question whether a company constituted according to the laws of a Member State may transfer its seat across borders whilst preserving its legal identity does indeed fall within the scope of the EC freedom of establishment. However, in the light of the *Daily Mail* decision of the European Court the Treaty freedom – in the absence of a Community legislative measure or national measure so permitting – does not give a company a direct right to undertake such a transfer. According to the German court the European Court upheld this view in its later case law therefore there was no reason to request a preliminary ruling from the ECJ. The case has been reported DB 2007, 2530–2531, NZG 2007, 915–916, ZIP 2007, 2124–2125. The reasoning of the German court in 31 Wx 36/07 is very similar to the reasoning of the ECJ in *Cartesio*, but in the German case the company did not wish to preserve its German legal identity whereas *Cartesio* did want to remain to be governed by Hungarian law. For an Italian example see Federico M. Mucciarelli, "The Transfer of the Registered Office and Forum Shopping in International Insolvency Cases: an Important Decision from Italy – Case Note on the Decision 'B & C' of the Italian Corte di Cassazione", ECFR 2005, 512–533.
- 7 ECJ, Case C-86/00, *HSB-Wohnbau GmbH*: The questions referred by the Amtsgericht Heidelberg were very similar to those in *Cartesio*: 'A. Does the transfer to Spain, with the company's identity being retained, of the statutory seat of a GmbH validly constituted under German law and registered in the German register, whose sole shareholder is a Spanish company, fall within the rights set out in Articles 43 EC and 48 EC? B. Do Articles 43 EC and 48 EC preclude a rule prohibiting the transfer to Spain, with the company's identity being retained, of the statutory seat of a GmbH validly constituted under German law and registered in the German register, whose sole shareholder is a Spanish company?' However, the ECJ had no jurisdiction to answer the questions, because the Amtsgericht was performing a non-judicial function.
- 8 ECJ, Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue*, ex parte *Daily Mail and General Trust plc*. [1988].
- 9 ECJ, Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999].
- 10 ECJ, Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002].
- 11 ECJ, Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art* [2003].
- 12 ECJ, Case C-411/03 *SEVIC System AG* [2005].

In this article we first address the factual background of the case and give an overview of the submissions made by the intervening states and the Commission before the Court (Section II.). Next, we discuss the role and function of the “company seat” in the company laws and private international laws of the Member States (Section III.) and set out the relevant rules of Hungarian law (Section IV.). Then, we give a summary of Advocate General Maduro’s carefully considered¹³ Opinion (Section V.) and comment on the judgment of the Court (Section VI.). We conclude the paper by presenting the response of the Hungarian legislator to the *Cartesio* case as well as a similar reform adopted recently in Germany (Section VII.).

II. Factual background

As both the Opinion of Advocate General Maduro and the ECJ decision were relatively restrained in their discussion of the background of the company seat transfer, we propose to reproduce here the essence of the arguments presented by the parties before the Court.¹⁴

1. Facts and the proceedings before the national courts

The *Cartesio Oktató és Szolgáltató Bt.* is a limited partnership formed under Hungarian law.¹⁵ *Cartesio* sought to transfer its seat from Hungary to Italy. At the same time, *Cartesio* wished to remain governed by Hungarian law.

13 At the hearing held on 10 July 2007 before the ECJ in Luxembourg the Advocate General announced that he would render his Opinion latest by 7 November 2007. This deadline was later extended to 13 March 2008 and then further extended to 22 May 2008, when the Opinion was indeed eventually delivered.

14 See Report for the Hearing, Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.*, reporting judge C.W.A. Timmermans, and the oral pleadings before the Court on 10 July 2007.

15 “Bt.” stands for “*betéti társaság*”, which is a Hungarian company form, and consists of at least one member with limited liability and at least one other with unlimited liability for the debts and obligations of the company (in this regard it is similar e.g. to the *société en commandite simple* or the *società in accomandita semplice*). However, although the Bt. is not formally a legal person, it has separate legal personality. The Bt. is subject to the same company law legislation as are legal persons and its profits are subject to corporation tax (see §2(2)(a) of Act LXXXI of 1996 on Corporation Tax). Art. 48 EC extends to “companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making” and therefore covers *Cartesio*. See also AG Maduro Opinion, Fn. 2. Furthermore, we note that the Hungarian translation of Art. 48 EC uses the term “*társaság*” (“companies or firms” in the English version) and under the

However, the Company Court, in the exercise of its task of maintaining the Companies Register, refused to enter the new Italian seat in the Hungarian Register on the ground that the transfer was not permitted under Hungarian law. It held that a legal entity that wishes to transfer its seat to another Member State must first be wound up in Hungary and then reconstituted under the law of that Member State (see Section IV.).

Cartesio appealed against the decision of the Company Court to the Court of Appeal of Szeged. The Court of Appeal, by request lodged on 5 May 2006, referred the case to the European Court of Justice.

2.Proceedings before the European Court of Justice

The European Court received written submissions from Cartesio, the Hungarian Government, the Commission and the Governments of Poland, the Czech Republic, the Netherlands, Ireland and Slovenia. The United Kingdom made oral submissions at the hearing before the Grand Chamber of the Court in Luxembourg held on 10 July 2007. The Court had explicitly requested the parties and the intervening governments to address the post-*Daily Mail* case law in their oral submissions.

Cartesio contended that the internal market needs an efficient solution to the necessity of relocating the seat of companies. Art. 43 and 48 EC confer the right on a company formed in accordance with the laws of a Member State to move its seat to another Member State and demand the registration of the transfer in the national Companies Register. Cartesio argued that the refusal by the Hungarian Company Court to register the transfer of its seat to Italy constituted an unlawful discrimination between companies from different EU Member States based on the location of their seat. Hungarian substantive law allows companies to move their seat within Hungary but denies them registration if they wish to move their seat outside Hungary. According to Cartesio, to prevent a company formed under Hungarian law from transferring its seat to another Member State of the EU constitutes a violation of EC law.

According to the Hungarian Government¹⁶ the rules laid down by the Court in *Daily Mail* regarding primary establishment have not in any way been altered or superseded by the subsequent case-law, which related only to the

Act CXLIV of 1997 on Business Companies and Act IV of 2006 on Business Companies the Bt. is clearly a “társaság”.

16 Magyar Köztársaság Kormánya, Írásbeli Észrevételek, C-210/06. számú Cartesio Oktató és Szolgáltató Betéti Társaság, received by the Court on 8 August 2006 [Written submissions, Government of the Republic of Hungary].

secondary right of establishment. Hence, *Daily Mail* is still good law. Articles 43 and 48 EC are not to be interpreted as granting a right to a company incorporated in accordance with the laws of one Member State to transfer its seat into another Member State whilst preserving the legal identity and applicable law of the state of incorporation.

Furthermore, the Hungarian Government pointed out that a distinction must be drawn between the home state (state of departure) and the host state (state of arrival) of the company proposing to transfer its seat. The EC freedom of establishment does not prohibit the state of departure, here Hungary, from imposing or maintaining restrictions on the cross-border transfer of the company seat. Hungarian company law applies to companies having their seat within Hungary. If the seat is moved out of the country, the relationship between the company and Hungary ceases to exist and Hungarian law no longer applies. It is therefore not contrary to Art. 43 and 48 EC to deny a company from keeping its Hungarian legal personality and registration in the Hungarian Companies Register if its seat is moved abroad. In the absence of Art. 293 EC measures or EC directives adopted to coordinate the matter in question, and in the presence of a legislative proposal for the cross-border transfer of the registered office, it is clear that Art. 43 EC does not itself contain the right to the identity-preserving transfer of the seat.

The Hungarian Government further argued that if a seat transfer, as requested by *Cartesio*, were declared possible under EC law, it would make it impossible for national authorities to exercise any supervision over companies. Furthermore, the protection of creditors and minority shareholders as well as legal certainty require that the seat of a company be situated in the country under the laws of which the company has acquired and enjoys legal existence.

The European Commission¹⁷ reported at the hearing before the Court that more and more companies complain that the seat transfer – as it is currently possible – is too lengthy, cumbersome and expensive and that they wish for simpler and cheaper ways to transfer their seat. The Commission therefore believes that the current situation is unacceptable and needs to be addressed. It is true that under EC law there are means available to companies that wish to transfer their seat abroad allowing for an identity-preserving transfer of the seat. These demonstrate that the possibility exists under EC law for a company to transfer its seat without having to be wound-up and be out of business often for months before being reincorporated in a new state. These

17 See also Commission of the European Communities, Written Submissions in the Case C-210/06 *Cartesio Oktató és Szolgáltató Betéti Társaság* reference for preliminary ruling, received by the Court on 14 September 2006.

possibilities however do not offer a satisfactory solution to the problem raised by *Cartesio*.

The Commission concedes that in 1988 the Court was right to acknowledge the supremacy of national law over EC law for the regulation of the transfer of the company seat. But, as it pointed out, that case law is 20 years old, reflects a certain time and stage in the development of EC law and has to be put into perspective. EC law has since moved on.

The Commission reiterated the fundamental nature and the direct applicability of Art. 43 EC with respect both to natural and legal persons. It binds not only the Member State of arrival, but equally the Member State of departure. Art. 43 guarantees the right for a company validly formed under the laws of one Member State to freely transfer its seat across borders. It is true that until *Cartesio* the Court only had to assess restrictions imposed by host Member States in respect of migrating companies, but the Commission emphasised that the findings of the case-law equally apply to home Member States.

The Commission acknowledged the principle of European law according to which a matter that is not yet the subject of any harmonisation measures can be freely regulated by the Member States. However, it stressed that the existence of harmonisation measures cannot be a prerequisite for the application of primary EC law.¹⁸ The Court has repeatedly confirmed that harmonisation of the laws of the Member States cannot constitute a condition precedent to the application of Article 43 and 48 of the Treaty.¹⁹

The Commission concluded that national laws or practice, such as the Hungarian laws in question, which prevent a company from transferring its seat across borders without having to be wound-up and reincorporated in the new state of the seat, are contrary to Art. 43 and 48 EC. However, the registration of the seat transfer can be made subject to conditions by both Member States concerned by the transfer if these conditions pursue objectives that are compatible with the EC Treaty and are necessary and proportionate to achieve the objectives or are justified by mandatory requirements.

The only intervening Member State which shared the Commission's liberal attitude, were the Netherlands. The Dutch Government argued that the right

18 Compare the change in the Commission's position in *Cartesio* with its position in *Daily Mail* where the Commission observed that the right of emigration of a company depends on the national law of the country of incorporation. See *Servaas van Thiel*, "Daily Mail Case – Tax planning and the European right of establishment. A setback", *European Taxation*, 1988, 362.

19 C-204/90 *Bachman v Belgian State*, para. 11; C-208/00 *Überseering*, para. 55; C-411/03 *SEVIC*, para. 26.

to transfer the seat follows directly from Art. 43 and 48 EC. Only conditions of public order, which are proportionate and necessary, can be imposed on such a transfer by the home state of the company.

The other Governments were opposed to *Cartesio*'s request. The Polish and Czech Governments argued that the legal form "betéti társaság" is a partnership, whereas the EC Treaty and the freedoms contained therein apply to corporations only. Therefore, EC law does not apply to *Cartesio* as it doesn't satisfy the requirements of Art. 48 EC.²⁰

The same doubts were raised by the Government of Ireland.²¹ However, should the Court find that *Cartesio* satisfies the requirements of Art. 48 EC, Ireland submitted that *Daily Mail* is still good law and that Member States are entitled to impose conditions on the seat transfer aimed at the protection of minority shareholders, creditors and others. The post-*Daily Mail* case law only concerns the secondary right of establishment and in fact confirms the relevance of *Daily Mail*. Ireland further stressed that there are already means available to companies to transfer their seat abroad and that it is not for the Court but for the Commission and the Member States to decide on the transfer of the company seat by adopting appropriate legislation.

The Slovenian Government found that Hungarian substantive law, which discriminates between lawfully formed companies based on the location of their head office and refuses to allow the cross-border transfer of the head office, is compatible with EC law.

According to the UK Government *Daily Mail* clearly laid out that the freedom of establishment does not contain the right to transfer the company seat. In the opinion of the UK Government there are no good reasons why *Daily Mail* should be overruled but there are good reasons why it should not. In the absence of a provision of Hungarian law allowing companies to transfer their seat outside the country, *Cartesio* could not rely on Art. 43 EC for doing so. The fact that the registered office of the company must be situated in Hungary is an essential prerequisite for a company to be formed under Hungarian law and is in no way prohibiting the company from carrying on

²⁰ See Fn 15.

²¹ Relying on the – erroneous – English translation of the request for preliminary ruling, Ireland understood the contended seat transfer to mean only the transfer of the registered office and focused its pleadings before the Court accordingly. Following the publication of the AG Opinion, which assessed in the light of EC law the cross-border transfer of the company headquarters, Ireland requested the Court to order that the oral procedure be re-opened on the basis that the factual premisses of the Advocate General's analysis were incorrect (Case C-210/06 *Cartesio*, para. 41 ff.). See Section III below.

business in Italy. Therefore, the Hungarian rule in question is not in violation of EC law.

The UK Government also pointed out that EC law provides for a range of different means in which *Cartesio* could exercise the right of establishment. The fact that the Commission is working on a draft directive for the cross-border transfer of the company seat is to be read as signalling that Art. 43 EC does not alone allow for the transfer of seat. At the same time it is noteworthy that even the proposed EC directive doesn't go as far as *Cartesio* claims to have the right to under Art. 43 EC. Under the proposed directive, *Cartesio* would become subject to Italian law and could not maintain its Hungarian legal form and personality.

III. The company seat

The 'company seat' is the key concept of the *Cartesio* case and of the present paper. Therefore, we propose to set out the terminology problems surrounding the company seat and to give a brief analysis of the seat from the perspective of national company law and national private international law. This, we hope, will serve as a useful base for further discussion of the problems raised by the cross-border transfer of the company seat.

1. Terminology issues

It may have caught the eye of the careful reader that whilst the English translation of the reference²² for a preliminary ruling lodged by the Court of Appeal of Szeged asked the Court to assess the Hungarian laws concerned with the cross-border transfer of the "registered office" in the light of EC law, the English version of the Opinion delivered by AG Poiares Maduro on 22 May 2008 discussed the transfer of *Cartesio*'s "operational headquarters" to Italy. At the same time, both the original Hungarian reference from the Court of Appeal and the Hungarian translation of the AG Opinion used the Hungarian company law term "*székhely*" (company seat).

The imprecise English translation of "*székhely*" lead to a great deal of confusion in the *Cartesio* case. Both Ireland and the UK seem to have relied on the English translation of the request for preliminary ruling and focus their submissions on the problem of the cross-border transfer of solely the registered office. This might explain why before the Court both Governments argued against *Cartesio*, although a priori both Irish and English company law allow the transfer of the company headquarters abroad without the loss of

22 OJ C 165, of 15.07.2006, p. 17.

legal personality. The misunderstanding came to light following the publication of the Advocate General's Opinion. Ireland then requested that the oral procedure be re-opened. The Court considered that it was apparent from the order for reference as well as from the request made by the Court to the intervening Governments as regards the focus of their submission that the case was concerned with the transfer of the real seat. Therefore, the Court decided that it had all the evidence necessary to enable it to reply to the questions referred and turned Ireland's request down.²³

However, what really was at stake in *Cartesio* was neither the transfer of the registered office alone nor that of the real seat in itself, but the transfer of the "székhely", i. e. the simultaneous transfer of the real seat and the statutory seat. Prior to 1 September 2007 the statutory seat and the real seat of a company had to coincide under Hungarian law. The law required the company to mention as the statutory seat the place where the centre of administration was located. Thus the term "székhely" designated both these aspects and functions of the company seat.

The above is indicative of the underlying terminology problem that surrounds not only the *Cartesio* case but in general the European debate about the cross-border transfer of the "company seat".²⁴ The fact that we use English as the language to communicate our ideas further adds to the complexity of the problem. Inherent in this lies the danger that we use incorrect translations or use an English term that does not fully reflect the different non-English national legal concept that we have in mind.²⁵ We must be wary of confusing

23 See Case C-210/06 *Cartesio*, para. 41–53.

24 For a similar conclusion see Federico M. Mucciarelli, "Seat's transfer and the State of Origin-imposed limits to companies' mobility", SSRN Working Paper Series, 26 April 2007, 3; Eddy Wymeersch, "Is a Directive on Corporate Mobility Needed?", *European Business Organisation Law Review*, 2007, 166; Ingo Saenger, "Wegzug von Personengesellschaften", in: *Transaktionen, Vermögen, Pro Bono, Festschrift zum zehnjährigen Bestehen von P+P Pöllath + Partners*, 2008, 299; Maggy Pariente, "Les obstacles à la libre mobilité des entreprises européennes à l'intérieur de l'Union", *Bull. Joly Sociétés* 2002, 23.

25 We presume that the difference between the seat concepts of Irish law and English law on the one hand, and, on the other, most continental European legal systems may have added to the misunderstanding in *Cartesio*. While in many continental company laws the "registered office" (statutory seat) may simultaneously designate the "head office" of the company, in English and Irish company laws it does not. Therefore, while the Court may rightly presume that for continental Member States it must have been "apparent" from the wording "registered office" that *Cartesio* was in fact asking to also transfer its real seat, for Ireland and the UK it was not (see below).

the concepts of English company law²⁶ with national legal concepts of other legal systems, as it happened in the *Cartesio* case.

So what is meant by the “seat” of a company?

2. *The company seat in national company law*

The company seat is first and foremost a concept of national company law. Every company must have a seat, which is a constitutive feature of the company. The seat allows to locate the company geographically and to identify it for the purposes of legal relations. The seat may serve two vital functions: it may be the “contact address” at which third parties can get in contact with the company (formalistic function).²⁷ It may also designate the place where the “reality” of the business is concentrated, i.e. where the management and the administration of the company are carried out, where the shareholders’ meetings are held, etc. (substantive function). The substantive seat can easily accomplish the function of the formalistic seat, thus the formalistic seat and the substantive seat may coincide, and in practice they often do. Moreover, in some legal systems they must.

National company laws determine what is legally meant by seat. We argue that a broad distinction can be drawn between the company laws of the Member States based on whether they use the formalistic seat concept or the substantive seat concept or both. The typical facts that are required to constitute or imply the existence of the company seat will vary depending on which seat concept the national company law has chosen to embrace. To illustrate what we mean by the different seat concepts we propose to investigate English and French law.

In English company law the “seat” is not a term of art. English law uses the “registered office” of a company, which must be located permanently in the UK.²⁸ In reality, the registered office is a mere address, which must be mentioned in every company document. The only requirements in connection with the registered office are that it must be possible for third parties to contact

26 We use the colloquial term “English company law”, but note that the correct term would be UK company law; see s. 1299 Companies Act 2006: Except as otherwise provided (or the context otherwise requires), the provisions of this Act extend to the whole of the United Kingdom. According to s 5 and Sch 1 Interpretation Act 1978 the “United Kingdom” means Great Britain and Northern Ireland. For more on this see Thomas Bachner, “Exkursion auf die britischen Inseln – Praxisfragen und Hintergrundinformationen zur Herkunft von ‘Limiteds’”, GeS 2007, 320.

27 The location of the contact address may also serve procedural functions.

28 Ss 86–87 Companies Act 2006.

the company and to serve notices on the company at the given address and that the company must keep available for inspection at the registered office any register, index or other document so required by law. This is what we will call the formalistic seat concept. There are no further requirements imposed, English company law is not concerned with the economic and business reality of the company. The concepts of “real seat”, “head office” or “administrative seat” are unknown to English company law.²⁹

On the contrary, the French company seat, the “*siège social*”, prima facie unites and serves both the formalistic and the substantive seat functions. Article L210–2 of the French *Code de Commerce*³⁰ says that the company seat (*siège social*) shall be determined in the company statutes including the exact postal address of the *siège*.³¹ The *siège* must be mentioned on the stationery, invoices and all communication issued by the company.³² Most of the time the

29 However, tax law uses the “place of the central control and management” of the company to determine whether a company is resident in the UK for tax purposes. Under common law rules a company is resident in the UK for tax purposes if it is centrally managed and controlled in the UK, its real business is carried on in the UK. See *De Beers Consolidated Mines v Howe* [1906] AC 455; *Wood v Holden* (HMIT) [2006] EWCA Civ 26.

30 The text of the *Code de Commerce* can be consulted both in French and in English on the page of the *Service public de la diffusion de la loi* www.legifrance.gouv.fr. The English translation of Art. L210–2 and Art. L210–3 *Code de commerce* gives another nice example of the difficulty to talk about national company seat concepts in a foreign language. The translation of Art. L210–2 says that the registered office (*siège social*) shall be determined by the statutes, while Art. L210–3 reads that companies whose registered office (*siège social*) is located in French territory shall be subject to French law. The translation is imprecise and misleading because, on the one hand, it suggests to the reader that the statutes of the company only determine a seat in the sense of the formalistic registered office known from English company law and nothing more, which it is not the case (see Fn. 33 and 34). And on the other, it gives the impression that French law follows the incorporation theory, which it does not. See Jacques Mestre/Marie-Eva Pancrazi, *Droit Commercial – Droit interne et aspects de Droit international*, 26e édition, L.G.D.J. Paris 2003; M. Cozian/A. Viandier/F. Deboissy, *Droit des Sociétés*, 19e édition, Litec Paris 2006. For the new school of thought which argues that French law follows the incorporation theory, see Pierre Mayer/Vincent Heu, *Droit international privé*, 8e édition, Montchrestien Paris 2004; Michel Menjucq, “Mondialisation et rattachement juridique des sociétés”, in *Aspects actuels du droit des affaires*, Mélanges en l’honneur de Yves Guyon, Dalloz Paris 2003; for a discussion of these opposing views see Jean-Bernard Blaise, “Une cohabitation difficile: nationalité des sociétés et libre établissement dans la CE”, in *Souveraineté étatique et marchés internationaux à la fin du 20^{ème} siècle*, Mélanges en l’honneur de Philippe Kahn, Litec 2000.

31 Paul Didier, *Droit commercial* -2, 3ème ed., Presses Universitaires de France, Paris 1999, 86.

32 Art. R123–237 C.com.

siège statutaire, i.e. the *siège* mentioned in the company statutes, will be presumed to be the *siège social*. However, the choice of the founders as to the *siège statutaire* cannot be arbitrary. The *siège* mentioned in the statutes must reflect business reality, it must correspond to the place of the effective management of the company as the *Cour de Cassation*³³ and the *Cour d'Appel* of Paris³⁴ have confirmed (*siège réel*). It follows from the above that under French law there is a presumption that the real seat and the statutory seat coincide.³⁵ In fact, if the statutory seat as indicated in the company statutes does not correspond to the place of the central management, French law speaks of a “*siège social fictif*”, which has the consequence that third parties may avail themselves of either the *siège statutaire* or the *siège réel* as against the company.³⁶ The company cannot do the same.³⁷ This establishes the supremacy of the real seat over the statutory seat. Therefore we argue that French company law uses the substantive seat concept (which serves the formalistic functions, too).³⁸

We conclude that while the formalistic seat concept is a clear matter of law, the substantive seat concept is a matter of fact. In fact, we argue that the latter is actually primarily a sociological rather than a legal concept because it uses the place of the main business activity of the company, i.e. the place where the

33 Cass.civ., 15 juin 1957 ; Cass.com., 16 déc. 1958 ; Cass. Com., 6 janv. 1998.

34 CA Paris, 30 janv. 1970; CA Paris, 17 oct. 1980; CA Paris, 16 mai 1984; CA Paris, 28 oct. 1992; CA Paris, 22 mars 2001.

35 *Droit des Affaires, Sociétés Commerciales* 2007, Mémento Pratique, Editions Francis Lefebvre, Levallois 2006, n° 1556.

36 Art. L210–3 C.com.

37 Jacques Mestre/Marie-Ève Pancrazi, *Droit Commercial*, 27^e édition, L.G.D.J., Paris 2006, 253–254.; Philippe Merle/Anne Fauchon, *Droit commercial*, 10^e édition, Dalloz, Paris 2005, 117.

38 For further examples of the substantive seat concept see e.g. § 4(1) Austrian GmbHG, which states that the seat of the company must be specified in the statutes (statutory seat, *Satzungssitz*). Further in § 5(2) it reads that the seat of the company is either the place where the company has a business establishment or where the management or the administration of the company are situated (real seat, *Verwaltungssitz*). Previously (repealed as of 1 January 2007) § 5(4) GmbHG also said that only a place in Austria can be named as the real seat of the company. The same is required for public limited liability companies (§5 Austrian AktG). This requirement ties the statutory seat (*Satzungssitz*) and the real seat (*Verwaltungssitz*) together. Equally in German law, prior to the reform introduced in November 2008 (MoMiG, see Section VII.), both in the case of a private limited liability company and in that of a public limited liability company the seat of the company specified in the statutes had to be the place where the company had a business establishment or where the management or the central administration were situated (§ 4a(2) German GmbHG, § 5(2) German AktG). (N.B. the *Satzungssitz* both in Austrian and German law is not a concrete address).

physical-intellectual centre of the business is located, to determine the seat.³⁹ National company laws differ in their use of the company seat. We therefore propose the consistent use of “statutory seat” and “real seat”. They are not terms of art under UK company law and therefore help to avoid any confusion with concepts of UK company law, while pertinently expressing the essential characteristics of formalistic and substantive seat concepts.

3. *The company seat in private international law*

At the same time, the company seat may also be a concept of private international law. Broadly speaking we distinguish between two kinds of private international law principles that are used to establish the ‘personal statute’ (*lex societatis*) of companies.⁴⁰ These two approaches differ in how they determine the link between a company and its governing system of law (connecting factor).

The real seat theory determines the *lex societatis* based on the location of the real seat of the company. Consequently, in a larger context, the real seat theory inextricably intertwines a company’s nationality and residence.⁴¹ The seat

39 A priori it is a different question whether this centre appears in the company documents and gains legal relevance at all.

40 For more on the connecting factors see Péter Metzinger, “A de facto külföldi székhelyű magyar társaságok székhelye és honossága a közösségi jog tükrében”, in Európai Jog, 3/2006, 17; Ratka Thomas, *Grenzüberschreitende Sitzverlegung von Gesellschaften*, Wien 2002, 53 ff; Michalski, “Grundzüge des internationalen Gesellschaftsrechts”, NZG 1998, 763 f; Ebke Werner F., “The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond”, EBLR 2005, 9.; Michel Menjucq, “L’articulation du droit d’établissement communautaire et des droits nationaux relatifs au rattachement juridique des sociétés”, JCPE 2003, n°448, 520; Wyatt Derrick, *Wyatt’s and Dashwood’s European Union Law*, 5th ed., London Sweet & Maxwell, 2006., Stephan Rammeloo, *Corporations in Private International Law: A European Perspective*, OUP 2001; Lajos Vékás, “Unió alapvető szabadságok és közösségi nemzetközi kollíziós jog”, Európai Jog, 1/2005, 3; Robert R. Drury, “Migrating Companies”, *European Law Review* 1999, 357; Federico M. Mucciarelli, “Company ‘Emigration’ and EC Freedom of Establishment: Daily Mail Revisited”, EBOR 9/2008, 282 ff.

41 AG Maduro Opinion, para. 23. Establishment under EC case law is defined as the actual pursuit of an economic activity through a fixed establishment in a Member State for an indefinite period (see ECJ, Case C-196/04 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, para 54.). This establishment concept in international taxation terms means precisely that the company established in a country will be resident, i.e. be a chargeable person in that country for tax purposes, see OECD Model Convention with Respect to Taxes on Income and Capital, Art. 7 (2). Establishment can be primary, in which case the real seat (place of central management and control) of the company is situated in the country of taxation.

used as connecting factor by the real seat theory is usually the same as the seat known from national company laws using the substantive seat concept. The real seat theory has traditionally been applied by the private international laws of Germany, Austria, France, Belgium, Spain, Portugal, Greece, and Luxembourg. According to the incorporation theory the applicable law to a company is the law of the state where the company was incorporated (or registered). The location of the company seat (whether understood as registered office or real seat) is of no relevance as connecting factor. In Europe, the incorporation theory is used e.g. in the UK, Denmark, Ireland, Hungary and the Netherlands.

The main point of difference between the incorporation and the real seat theory for the purposes of this paper concerns their effect on the cross-border transfer of the company seat. The differences are significant both from the perspective of the home state and that of the host state of the company. While the incorporation theory is indifferent as to the location of the company's real seat (in the sense that the law governing the existence and organisation of the company does not depend on the location of the real seat), the real seat theory attaches a different national legal order to the company each time the real seat is moved across borders (provided that there is no *renvoi*), which effectively means the non-recognition of the cross-border transfer of the real seat.

We conclude this section by noting that cross-border seat transfers will involve the combined application of the conflict and substantive rules of both the country of incorporation and the country of arrival.⁴² Having regard to the distinctions made above and the ECJ case law we propose to summarize the various assumptions of the seat transfer under European law in the table below:

But it can also be secondary, meaning that a company resident in another country for tax purposes maintains a branch in the given State, which – although not a separate legal person – enjoys separate tax personality. Therefore, freedom of establishment necessarily entails the question about the tax residence of the legal person. The Court held in *Commission v France* that Art. 43 EC was to be applied to the area of tax law and indeed in recent years we observe that the issue of the freedom of establishment has more frequently been raised in the context of tax law (See e.g. ECJ, Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002], ECJ, Case C-253/03 *CLT-UFA SA v Finanzamt Köln-West* [2006], ECJ, Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006], ECJ, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006], ECJ, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2006], ECJ, Case C-170/05 *Denkavit Internationaal BV, Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie* [2006]).

42 Federico M. Mucciarelli, "Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited", *EBOR* 9/2008, 292.

No	Transfer of the substantive (real) seat?	Transfer of the formalistic (statutory) seat? ⁴³	Modification of the national applicable law (international transformation)?	Example
# 1	YES	YES	YES	VALE ⁴⁴
# 2	YES	YES	NO	<i>Cartesio</i> ⁴⁵
# 3	YES	NO	YES/NO ⁴⁶	<i>Überseering</i>
# 4	YES	NO	NO	<i>Daily Mail</i>
# 5	NO	YES	YES	-
# 6	NO	YES	NO	-

IV. Hungarian law

The Community law issue under discussion here – i. e. whether a company formed in accordance with the laws of a Member State has the right to transfer its seat whilst retaining its original legal form and personality – arose because prior to 1 September 2007 the Hungarian Act on Company Registration (Ctv.)⁴⁷ and the Act on Business Companies (Gt.)⁴⁸ did not correspond to the Hungarian Statutory Rule on Private International Law (Nmjt.).⁴⁹ Hungarian

43 If the formalistic seat may be detached and moved independently from the substantive seat.

44 See Section VI.3.

45 In the *Cartesio* case the substantive seat and the formalistic seat had to coincide by law. See further details in Section IV.

46 In the *Überseering* case the German courts considered that *Überseering* BV had transferred its real seat from the Netherlands to Germany and that with this deemed transfer also the national law applicable to the company had changed. The European Court considered that the refusal by Germany to recognise the legal capacity of *Überseering*, formed in accordance with the law of the Netherlands in which it had its registered office, on the ground, in particular, that the company moved its actual centre of administration to Germany following the acquisition of all its shares by nationals of Germany residing in Germany, with the result that the company could not bring legal proceedings to defend rights under a contract unless it reincorporated under the law of Germany, constituted a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC (Case C-208/00 *Überseering*, para. 82). *Überseering* maintained its Dutch *lex societatis*.

47 Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings is applicable to the proceedings in *Cartesio*. The new Act V of 2006 on the Register of Companies, Public Company Information and Court Registration Proceedings came into force on 1 July 2006. It has been modified concerning our subject-matter as from 1 September 2007.

48 Act CXLIV of 1997 on Business Companies is applicable to the proceedings in *Cartesio*. The new Act, Act IV of 2006 on Business Companies, came into force on 1 July 2006, but the new Act fully coincides with the previous one on the issue.

49 Statutory Rule No. 13 of 1979 on Private International Law.

law was suffering from an inner discrepancy,⁵⁰ which, albeit fundamental for the submissions of *Cartesio* in the case, the European Court of Justice failed to acknowledge and address in its judgment.

A company acquires legal existence in Hungary as a result of its registration in the Hungarian Companies Register [§ 16 (2) Gt.]. This registration is undertaken by the Company Court. The registration can take place only if it is permitted or required by a statutory disposition [§ 2 (1) Ctv.]. Such a requirement with respect to companies formed under Hungarian law is formulated in § 16 Gt. Companies must be registered in the Hungarian Companies Register within 30 days after the adoption of their statutes.

The Gt. – according to its § 1 – regulates the creation, the inner structure and the operation of business companies having their seat (*székhely*) in Hungary. § 11 Gt. provides that the company seat (*székhely*) must be determined in the statutes (statutory seat). However, it does not give a definition of what constitutes a company seat for the purposes of the Act. The answer is given by § 16 (1) Ctv., which lays down that the *székhely* is the company's place of central administration (real seat). By reading § 11 Gt. and § 16 (1) Ctv. together, it follows that the place where the operational headquarters of the company are located is supposed to (and must) coincide with the statutory seat, i. e. the term *székhely* simultaneously designates both the real seat and the statutory seat of the company.

Hungarian company law does not explicitly allow for the transfer of the company seat. However, § 29 Ctv. contains rules concerning the notification of any amendments of the company statutes to the Company Court. Subsection 3 expressly details the procedural requirements for the notification and registration of a change in the company's *székhely* (statutory seat and real seat) within the national territory. Therefore companies can freely move their seat within the territory of Hungary and must register this change with the Company Court. Also, the inseparability of the statutory seat and the real seat is well demonstrated. The change in the location of the real seat must be reflected in the statutory seat by undertaking a corresponding amendment of the company statutes and lodging it with the Registrar. Yet whilst the domestic transfer of seat is a permitted possibility to companies formed under Hungarian law, there are no corresponding provisions regulating the international transfer of the company seat.

50 Similarly already Miklós Király, "A Daily Mailtől az Inspire Artig – az Európai Bíróság ítéleteinek hatása a társasági jog értékválasztásaira", *Magyar Jog*, 11/2004, 685; Miklós Király, "A cégbejegyzési elv jövője figyelemmel a közösségi jog változására", *Gazdaság és Jog* 2005, 46.

The Nmjt. sets out the rules for determining the applicable law to legal persons, including companies. According to § 18 Nmjt., the law applicable to a legal person is the law of the state where the legal person was incorporated.⁵¹ Hungarian private international law therefore follows the incorporation theory, i.e. it uses the place of incorporation as the connecting factor. The law of the state of incorporation will determine the existence and functioning – the legal personality, the business nature, personal rights, the relationship between the members – of the company. Therefore – from the perspective of the Nmjt. – a company formed under Hungarian law and registered in the Hungarian Companies Register is governed by Hungarian law, irrespective of the location of its seat. Since the applicable law is determined by the place of incorporation, the actual transfer of the *székhely* across borders should not – in theory at least – affect the legal personality. In other words, Hungarian substantive law should apply to companies incorporated and registered in Hungary, even if their *székhely* is situated outside Hungary. (And, vice-versa, a company incorporated and registered outside of Hungary should not be governed by Hungarian law, even if the seat of this company is located in Hungary.)

However, at the same time – and inconsistently – the grammatical analysis of § 1 Gt. reveals that the Gt. purports to regulate the formation, organization and operation of those business companies only, which have their *székhely* in Hungary (see above). This means that the Gt., on the one hand, does not apply to companies having their *székhely* outside Hungary and, on the other, at least in theory, that it does apply to companies incorporated and registered abroad if their real seat is to be found within the territory of Hungary.⁵²

51 Subsections 3 and 4 of § 18 Nmjt.: If, however, the legal person is incorporated under the laws of several states or the law of the seat named in the statutes does not require incorporation, then the law of the country where the statutory seat is located will be applied. If the legal person has no seat named in the statutes, or has several seats, and is not incorporated under the law of any state, the applicable law will be the law of the state in whose territory the legal person has its central administration. (Translations taken from: Ferenc Mádl/Lajos Vékás, *The Law of Conflicts and Foreign Trade*, Akadémiai Kiadó, Budapest 1987, 153).

52 We note that § 1 of the 1997 Act does not serve as a conflict of laws rule nor as a rule of ordre public. It doesn't prevail in practice. Hungarian law, i.e. the Act on Business Companies, will be applied to a company registered in Hungary independently of whether its real seat (location of the management and the decision-making) is incidentally situated abroad, which in fact is rather common in case of foreign-owned Hungarian companies. And, conversely, Hungarian law will never be applied to a company that was registered abroad despite the fact that its real seat is in fact located in Hungary (which, with the increasing popularity of off-shore companies registered on e.g. the Bermuda Islands or Cyprus, is not a rare phenomenon).

Thus, prior to 1 September 2007, if a company formed under Hungarian law and registered in the Hungarian Companies Register wished to transfer its *székhely* abroad, it had to request the registration of the seat transfer at the Company Court. Pursuant to § 18 (2) Nmjt. the transfer would not change the applicable law, the company remaining a company governed by Hungarian law. However, at the same time, it fell out of the scope of the Gt., which considers that it no longer applies to the company given the fact that the *székhely* has been moved out of the country.

In such a situation, the company's registration in the Hungarian Companies Register cannot be maintained as there is no Hungarian statutory rule that would permit or require such a registration. As a result, the Company Court must reject the request for the registration of the modification of the "*székhely*", i. e. reject the registration of the new, foreign seat.⁵³

However, the Hungarian Company Court in *Cartesio* did not decline the request for the registration of the seat transfer to Italy based on the above, but because – in our opinion, erroneously – it considered that Hungary adhered to the real seat theory.⁵⁴ *Cartesio* appealed against the rejecting order of the Company Court to the Court of Appeal of Szeged, which decided to stay its proceedings and request the Court of Justice to give a preliminary ruling under Article 234 EC on the matter.

V. The Opinion of Advocate General Poiares Maduro

The Advocate General delivered his Opinion in the *Cartesio* case on 22 May 2008.⁵⁵ With regard to the fourth question referred by the Hungarian Court the Advocate General suggested that the Court replies that Articles 43 and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State. The AG's conclusion was unanimously welcomed by legal commentators across Europe, some even wishing for a more overt break away from *Daily Mail*.⁵⁶ The Court however took a fundamentally different

53 Failure to register the transfer of the *székhely* constitutes a violation of the Ctv. and may result in the imposition of a fine on the company. Furthermore, the non-registration of the change constitutes a violation of the "principle of authenticity of the Companies Register" because the Register will no longer reflect business reality.

54 KH:9/2007. (www.lexmercatoria.hu).

55 Opinion of Advocate General Maduro, delivered in Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.*, 22 May 2008.

56 See Wolf-Georg Ringe, "Keine Beschränkung des Wegzugs von Gesellschaften innerhalb der EU ('Cartesio')", ZIP 23/2008, 1067; Andreas Weng, "Die Rechtssache Cartesio – Das Ende Daily Mails?", EWS 7/2008, 264; Rüdiger Wilhelmi, "Der Wegzug

position on the issue (see Section VI.) without making the effort to address the arguments presented by the Advocate General. Below we recall the main points of the AG Opinion.

The Advocate General started the substantive analysis of the relevant Community law by pinning down that *Cartesio* seeks to transfer its operational headquarters to Italy, i.e. that it proposes the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.⁵⁷ In these circumstances, the Treaty rules on the right of establishment clearly apply.⁵⁸

The Opinion pinned down that although Member States are free to choose whether they wish to embrace the real seat or the incorporation theory in their legal systems, the effective exercise of the right of establishment – as interpreted by the European Court in its case law – implies that neither the real seat theory nor the incorporation theory can be applied to its fullest logical extension.⁵⁹ Somewhat surprisingly,⁶⁰ albeit of no relevance for the conclusions, the Opinion seems to have misunderstood Hungarian private international law. Para. 23 of the Opinion reads “Hungarian company law, so it would appear, is grounded in the ‘real seat’ theory”. On the one hand, this observation is imprecise and confusing because company law – as substantive law – cannot in itself be grounded in either the real seat theory nor in the incorporation theory, because these theories are concepts of private international law and determine precisely the substantive company law of which state is to be applied in a specific case.⁶¹ On the other hand, and in any case,

von Gesellschaften im Lichte der Rechtsprechung des EuGH zur Niederlassungsfreiheit”, *Der Betrieb*, 30/2008, 1611; Dennis Weber, “Advocate General considers Hungarian company law restricting the transfer of operational headquarter to another Member State incompatible with EC law”, *European Tax Service*, June 2008, 25; Péter Metzinger, “A társaságok és a szabad letelepedés”, *Európai Jog* 4/2008, 21.

57 We note that the above English term “fixed establishment”, in French “*installation stable*”, appears in the official Hungarian translation as permanent “*telephely*” instead of the more precise permanent “*létesítmény*”, thereby giving rise to possible confusion with the right of secondary establishment.

58 AG Maduro Opinion, para. 25.

59 AG Maduro Opinion, para. 30.

60 The misunderstanding is surprising because the request for preliminary ruling lodged by the Szeged Court of Appeal explains in detail the relevant provisions of Hungarian private international law.

61 All one could say is that the company law of a state gives a formalistic or a substantial definition of the company seat. As will be shown later, since 1 September 2007 Hungarian law uses both seat concepts.

Hungarian private international law – as demonstrated above under Section IV. – follows the incorporation theory.⁶²

The Opinion held that the distinction generally drawn between primary and secondary establishment is wrong and has never been entirely convincing.⁶³ This observation in fact could be also inferred from the grammatical analysis of Articles 43 and 48 EC because Article 48 does not refer only to the second sentence of Article 43 – which contains the right of secondary establishment – but to the entire Treaty chapter on the freedom of establishment. The Opinion furthermore affirmed as a matter of principle that restrictions on both the inbound and outbound establishment are prohibited and that therefore the distinction drawn between home states and host states is also inappropriate. In particular, the distinction between situations in which a Member State prevents or dissuades companies that are constituted under its own company law from seeking establishment abroad, and situations in which the host Member State restricts the freedom of establishment, never fitted the Court's general analytical framework for Articles 43 and 48 EC.⁶⁴

Thus the AG Opinion concluded that it is impossible to argue that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. Were this to be the case, Member States would have *carte blanche* to impose a 'death sentence' on a company constituted under their laws just because it had decided to exercise the freedom of establishment.⁶⁵ According to the AG this cannot be right from the perspective of EC law and would also be inconsistent with the Court's more refined approach developed in its recent case law on the right of establishment of companies. The Court's new approach concentrates on the effects that national rules or practices may have on the freedom of establishment and assesses the conformity of those effects with the right of establishment as guaranteed by the Treaty. The argument in *Centros*, *Inspire Art* and *Überseering* that certain rules of national company law should fall outside the scope of the Treaty provisions on the right of establishment has been consistently rejected. Despite what the ruling in *Daily Mail* seems to suggest, according to the Advocate General, the Court does not, a priori, exclude particular segments of the laws of the Member States from the scope of the

62 Maduro's imprecise formulation has lead to misunderstandings, e.g. Andreas Weng, "Die Rechtssache Cartesio – Das Ende Daily Mails?", EWS 7/2008, 265 where Weng gives an analysis of the AG Opinion and states that Hungarian private international law follows the real seat theory.

63 AG Maduro Opinion, para. 28.

64 AG Maduro Opinion, para. 28.

65 AG Maduro Opinion, para. 31.

right of establishment. Therefore the idea cannot be maintained that the incorporation and functioning of companies is determined exclusively by the varying national legislation of the Member States.⁶⁶ National rules that allow a company to transfer its operational headquarters only within the national territory clearly treat cross-border situations less favourably than purely national situations and therefore amount to an unacceptable discrimination against the exercise of freedom of movement.⁶⁷

VI. Comments on the Court's judgment

While the Court followed AG Maduro's Opinion regarding the first, second and third question referred by the Court of Appeal of Szeged, it did not do so with respect to the fourth question relative to the freedom of establishment. The Court – contrary to AG Maduro (see above, Section V.) – held that Articles 43 and 48 EC did not preclude national legislation, under which a company, incorporated under the law of that Member State, may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.⁶⁸ The Court arrived at this conclusion by confirming *Daily Mail* and – in part – *Überseering* (1),⁶⁹ and distinguishing *Cartesio*, on the one hand, from the situations in *Centros*, *Inspire Art*, *Überseering* and *SEVIC Systems* (2), and on the other hand, from the situation where the transfer of the company seat triggers a change in the national law applicable to the company (3).⁷⁰

1. Confirming *Daily Mail* and *Überseering*

As a starting point, the Court confirmed the *obiter dictum* declared in *Daily Mail*, according to which companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning.⁷¹ The Court restated the premise that the legislation of the Member States varies both with regard to the factor providing a connection to

66 AG Maduro Opinion, para. 27.

67 AG Maduro Opinion, para. 25.

68 The first case note published on *Cartesio* judgment considers that the Court's reasoning is disputable and inconsistent with its earlier case law on the freedom of establishment, see Béla Knof/Sebastian Mock, "Die Vereinbarkeit von Wegzugsbeschränkungen mit der Niederlassungsfreiheit ("Cartesio")", ZIP 1/2009, 31.

69 Case C-210/06 *Cartesio*, para. 104–110.

70 Case C-210/06 *Cartesio*, para. 111–120.

71 Case 81/87 *Daily Mail*, para. 19, Case C-210/06 *Cartesio*, para. 104.

the national territory required for the incorporation of a company under national law and with regard to whether this connecting factor may subsequently be modified.⁷² Some states require for incorporation that the registered office of the company be situated within their territory while others require that both the real head office and the registered office be situated in the state of incorporation.⁷³ The differences between the Member States in this regard also manifest themselves in the legal consequences attached to the removal of the head office from national territory.⁷⁴

It seems that in the understanding of the Court the theory – deriving from Saleilles – according to which a legal person (a company) is to be understood as a “*réalité juridique*” (i. e. a company exists only by virtue of the applicable law) prevails in European law.⁷⁵ Accordingly, already in *Überseering* the Court held that the question whether a company formed in accordance with the law of a given Member State can transfer its seat to another Member State without losing its genuine legal personality is determined by the national law of the State of incorporation.⁷⁶ In other words, the very existence of a company is inseparable from its status as a company incorporated under the law of a Member State.⁷⁷ Consequently, we must conclude that the Member State of incorporation has a privileged (exclusive) position – even within the framework of the European law – with regard to companies formed under its own laws.

This line of reasoning reminds one of an argument that appeared in the post-*Centros* German doctrinal writing. Anxious to confirm the compatibility of the real seat theory with the EC freedom of establishment in the light of the new ECJ case law, some commentators argued that although a company validly formed under the law of a Member State will be entitled to exercise the freedom of establishment enshrined in Articles 43 and 48 EC, the question whether a company has been validly formed and is thus a priori capable of

72 Case C-210/06 *Cartesio*, para. 105

73 See Section III and Section IV: While English company law requires that the registered office of the company be situated in England and Wales or Scotland, French and the old German and Hungarian company laws require that both the real seat and the statutory seat of the company be situated on their territory.

74 For example the French *Code de commerce* expressly provides for the cross-border transfer of the *siège social* entailing a change in the *lex societatis* of French companies (see Fn. 99), while under the old German and Hungarian company laws such a transfer was not possible.

75 For Saleilles's theory see e. g. László Kecskés, *Magyar Polgári Jog Általános Rész II. A személyek joga*, Dialóg Campus, Budapest-Pécs, 1999, 135–136.

76 Compare Case C-210/06 *Cartesio*, para. 107, confirming Case 208/00 *Überseering*, para. 70.

77 Case C-208/00 *Überseering*, para. 81.

enjoying the Treaty rights will not fall under EC law but will depend solely on the national company law of the state of incorporation. It is the prerogative of the Member States to determine the typology of national legal forms and the requirements which have to be fulfilled in order to gain access to these forms. The national legal order according to which the validity of the formation will have to be assessed is equally for the national law to determine. This latter issue is dealt with by the private international law of the Member State the court of which is called upon to render judgment in the matter. The private international laws of the Member States vary however in their use of connecting factor identifying the *lex societatis*. EC law recognises and accepts these differences. National company law takes priority over EC law in this regard, it is national law and not EC law which determines the nationality of the company.⁷⁸

In addition to the above doctrinal reasoning the Court was eager to show that the same conclusion could be arrived at on the basis of the wording of Article 48 EC: In defining the companies which enjoy the right of establishment, the Treaty considered the differences in the legislation of the Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether the seat (registered office or the head office) of a company may be transferred from one Member State to another as problems which are not resolved by the actual rules concerning the right of establishment, but which must be dealt with by future legislation or conventions.⁷⁹

At this point it is necessary to cite Article 48: “*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*” We argue that the conclusion reached by the Court in para. 108 of the *Cartesio* judgment is not implied by the wording of Article 48 EC. In fact, while Article 48 EC does indeed take account of the various possible seat concepts (see above, Section III.), it does not refer to them as “connecting factors to the legislation of a given Member State”. Rather, the ‘registered office’, ‘central administration’ and ‘principal place of business’ are understood as different types of seats which connect companies not to a single Member State, but to the Community as a whole. Article 48 EC uses them as a condition for the exercise of the right of

78 Peter Kindler, “Niederlassungsfreiheit für Scheinauslandsgesellschaften? – Die *Centros*-Entscheidung des EuGH und das internationale Privatrecht”, NJW 28/1999, 1196 ff.; see also Wolfgang Schön, “The Mobility of Companies in Europe and the Organizational Freedom of Company Founders”, ECFR 2006, 133 ff.

79 Case C-210/06 *Cartesio*, para. 108.

establishment. Furthermore, it must be underlined that Article 48 EC does not require that the seat of the company (i.e. the registered office or the central administration or the principal place of business, depending on the applicable national law) be located in the Member State where the company was formed, nor does it preclude the national law of the Member State of incorporation from requiring it.

Furthermore, contrary to what was held by the Court in paragraphs 108 and 109 of *Cartesio*, Article 48 EC does determine the two conditions a company must fulfil in order to enjoy the right of establishment: (i) the company must be formed in accordance with the law of a given Member State, and (ii) its registered office, or central administration or principal place of business (i.e. its seat) must be within the territory of the Community. Taking the example of *Cartesio*, we find that the company was formed according to the law of a Member State (*Cartesio* had been duly incorporated under Hungarian law), and its seat (in the terminology of Article 48 EC “central administration”) has always been within the Community (first in Hungary, then in Italy).

Therefore, it is difficult to accept the Court’s position stated at paragraph 109 of the *Cartesio* judgment, according to which Article 48 EC would not give a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single national connecting factor determining the national law applicable to a company. First, as it directly results from paragraph 109 of the judgment, Article 48 EC is neutral as to the concrete connecting factor determining the national law applicable to a company. However, this circumstance is independent from the question whether a company may or may not exercise the right of establishment: as the Court stated at paragraph 110 of the *Cartesio* judgment, a company has the right to the freedom of establishment only if it exists according to the law of the Member State of incorporation.⁸⁰ Second, as it was demonstrated above, Article 48 EC well defines the two conditions imposed by European law which a company must fulfil in order to be entitled to enjoy the freedom of establishment, regardless of eventual further (or, properly speaking, prior, i.e. ontological) conditions under the applicable national law.

However, if we follow the above train of thought deriving from Saleilles and recurring in the German doctrinal writings, we may concede the fundamental conclusion of the Court, laid down in the same paragraph 109 of the *Cartesio* judgment, according to which the question whether Article 43 EC applies to a company is a preliminary matter which – as Community law now stands – can

80 In that respect ‘incorporation’ is a synonym of ‘formation’, i.e. it is not applied as a private international law term referring to the applicable law, but as an ontological legal fact, bestowing legal existence on a non-natural person.

only be resolved by the applicable national law, similarly to the question whether a natural person is a national of a Member State. Yet in order for this conclusion to be convincing, Article 48 EC, and more precisely the first condition set forth within, must be construed as follows: only those companies may rely on the freedom of establishment which have been formed *and exist* (!) in accordance with the law of a Member State (and, of course, have their seat within the Community). In fact, as the company is a legal reality, it is not enough for it to have been formed in accordance with the law of a given Member State, but it must constantly exist in accordance with that law. In the same way, a natural person may exercise the right of establishment if he not only acquired the citizenship of a Member State prior to the exercise of the right, but if he is also holding it when establishing himself in another Member State.

As a consequence of the condition that a company seeking to rely on the freedom of establishment must exist and operate in conformity with the law of the Member State of its incorporation, it is evident that if that law requires of the company to keep its seat (registered office, central administration or principal place of business as defined by the applicable national law) within the territory of that Member State, the company falls under Article 48 EC only if it maintains its seat in that Member State. The legal existence of a company is – obviously – not a consequence of the freedom of establishment, but the precondition of it.⁸¹

As a consequence of *Daily Mail* and *Überseering* – as confirmed in *Cartesio* – the Member State has the power to define the conditions required of a company if it is to be regarded as incorporated under the law of that Member State (and operating in accordance with its legal order – we may add) and, as such, capable of enjoying the right of establishment.⁸² Therefore, national law

81 Cfr. Kindler, cited by Tito Ballarino, “Les règles de conflit sur les sociétés commerciales à l’épreuve du droit communautaire d’établissement. Remarques sur deux arrêts récents de la Cour de justice des Communautés européennes”, *Revue critique de droit international privé*, juillet-septembre 2003, 395.

82 We believe that the wording of the *Cartesio* judgment is not quite precise enough. Paragraph 110 states that the Member State has the power to define the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State. However, in that respect the location of the company seat is a material condition of the legal existence of the company, and not a connecting factor used to determine the national law applicable to the company (nationality). In fact, as paragraph 20 of the judgment shows, under Hungarian private international law the principal connecting factor used to determine the nationality of a company is the place of the registration of the company and not the place of the seat. Prior to 1 September 2007 it was Hungarian substantive law which imposed the condition that a Hungarian company must have its seat in Hungary.

may impose on companies incorporated under that national law the requirement to have and maintain their seat within the national territory⁸³ and not permit a company governed by its law to retain that status if the company intends to move its seat to the territory of another Member State.⁸⁴ At the same time, Member States may not require nothing of companies not formed under their own law as regards the applicable law or the location of the seat.

With respect to the freedom of establishment it has been long held by the Court itself that albeit Article 48 EC is primarily aimed at ensuring that foreign companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of a company incorporated under its legislation which comes within the definition contained in Article 48 EC.⁸⁵ Articles 43 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State.⁸⁶ Following *Cartesio* it is difficult to imagine how the above statements are to be interpreted and what kind of outbound restrictions deriving from national law – contrary to the hitherto prevailing approach which examined what kinds of restrictions are allowed despite the rules of EC law – would not be allowed. The Court's position in *Cartesio* is "tougher" and more conservative than that in *Daily Mail*. In fact, the English law examined in *Daily Mail* was much less restrictive of the seat transfer than the Hungarian law in *Cartesio*. English law did not exclude the seat transfer per se, it merely made it subject to certain (acceptable) conditions. Hungarian law however prohibited the seat transfer altogether. Albeit this difference between the national laws in question was an important point in the argumentation of both *Cartesio* and AG Maduro,⁸⁷ the Court did not address the issue in its judgment.

83 Considering that companies' tax residence depends on the location of their real seat [see f.i. the OECD Articles of the Model Convention with respect to Taxes on Income and Capital, 2005, Art. 4 (3)], *Daily Mail* and *Cartesio* – albeit in *Cartesio* the Court did not expressly deal with this issue – imply that a company is not entitled to change its tax residence (i. e. its tax status) without changing its private law status (i. e. its nationality) if the law of the Member State of its incorporation does not allow for it.

84 Case C-210/06 *Cartesio*, para. 110.

85 Case 81/87 *Daily Mail*, para. 16; Case C-446/03 *Marks & Spencer plc*, para. 31; Case C-264/96 *Imperial Chemical Industries plc (ICI)*, para. 21.

86 Case 81/87 *Daily Mail*, para. 16.

87 AG Maduro Opinion, para. 43.

2. Distinguishing *Cartesio* from the previous case law

Relying on the judgments in *Centros*, *Inspire Art*, *Überseering* and *SEVIC Systems*, *Cartesio* claimed that Hungarian law could not prescribe that Hungarian companies must choose to locate their seat within Hungary.⁸⁸ In that respect the Court pointed out that while *Centros*, *Inspire Art* and *Überseering* dealt with the question of whether or not a company, which is a company governed by the law of a Member State, is faced with a restriction in the exercise of its rights of establishment in another Member State, *Cartesio* is concerned with the anticipatory issue of whether a company may be regarded as a company possessing the nationality of the Member State under whose legislation it was incorporated and as a consequence claim the right to the freedom of establishment.⁸⁹ Therefore no conclusions can be drawn from that case law for *Cartesio*. The Court also held that *SEVIC Systems* could not be said to have qualified the scope of *Daily Mail* or *Überseering*. The case in *SEVIC Systems* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross-border merger. Therefore it fundamentally differs from the circumstances of *Daily Mail* and *Cartesio*.⁹⁰ Thus the Court rejected *Cartesio*'s reasoning.

The Commission argued that the Community rules governing the cross-border transfer of the company seat, laid down in EC instruments such as the Regulation No 2137/85 on the EEIG, Regulation No 2157/2001 on the SE and Council Regulation (EC) No 1435/2003 on the SCE, may and should have been applied, *mutatis mutandis*, to the situation in *Cartesio*.⁹¹ In this regard the Court exposed that the rules referred to by the Commission concerned the transfer of the seat followed by the modification of the national law applicable to the entity making such transfer.⁹² *Cartesio* however merely wished to transfer its *székhely* (transfer of real seat incidentally leading to simultaneous transfer of statutory seat) from Hungary to Italy without any change in the applicable national law.⁹³

88 Case C-210/06 *Cartesio*, para. 26.

89 Case C-210/06 *Cartesio*, para. 123.

90 Case C-210/06 *Cartesio*, para. 121–122.

91 Case C-210/06 *Cartesio*, para. 115–116.

92 Case C-210/06 *Cartesio*, para. 117.

93 Case C-210/06 *Cartesio*, para. 119.

3. Distinguishing *Cartesio* from the international transformation: opening new horizons for corporate mobility?

The Court's judgment put an abrupt end to the debate relative to the cross-border transfer of the real seat in Europe.⁹⁴ At the same time however, it opened new perspectives for the cross-border seat transfer by introducing a fundamental distinction between on the one hand, the cross-border seat transfer of a company with no change as regards the law which governs that company, and, on the other, the transfer with an attendant change as regards the national law applicable.⁹⁵ In the latter situation the company is converted into a company form governed by the law of the Member State to which the seat is being moved (international transformation).⁹⁶ However, the Court did not confine itself to merely pointing out this distinction, but developed the assumption of the "seat transfer resulting in international transformation". In fact, at para. 112 the Court essentially set forth that the Member State of incorporation cannot, by requiring the winding-up or liquidation of the company upon the cross-border seat transfer, prevent that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so. Therefore, if *Cartesio* had proposed to convert itself into e.g. an S.a.s. (*società in accomandita semplice*), accompanied by a change in the applicable law from Hungarian to Italian, then Hungarian law could not have prevented the transfer of the seat.

The ECJ's hypothesis of the international transformation comes as a surprise. As German legal writers have already pointed out, the *obiter dictum* contradicts the *ratio decidendi* of the *Cartesio* judgment.⁹⁷ In fact, in para. 108–110. the Court declares that national legislators are in the exclusive position to define when and subject to what conditions a company formed under national law can exercise the right of freedom of establishment by moving its seat across borders. Only a few paragraphs further down the Court in one sweep negates the same national prerogative with respect to the international transformation. Admittedly however, the position of the Member State in the two scenarios must be distinguished. The prerogatives of the Member State of incorporation confirmed by *Cartesio* are attached to the national company form and applicable national law. As long as a company wishes to retain that form and be governed by the corresponding legal order, naturally, it must comply with the conditions formulated by the Member State

94 While maintaining the legal status of incorporation.

95 Case C-210/06 *Cartesio*, para. 111–113.

96 Case C-210/06 *Cartesio*, para. 111.

97 Béla Knof/Sebastian Mock, „Die Vereinbarkeit von Wegzugsbeschränkungen mit der Niederlassungsfreiheit („*Cartesio*“)“, ZIP 1/2009, 32.

the laws of which are at issue. As soon as the company however exits the authority and control of the law of incorporation and submits itself to the rules of a different national legal order, the Member State of incorporation must acknowledge that the company may do so, i.e. may not hinder the company in doing so. The prerogative of a Member State to define conditions for a company to maintain legal existence under its national laws does not mean that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment.⁹⁸

The Court's *obiter dictum* essentially restates the idea formulated in the abandoned 14th Company Law Directive, but says that the right of the companies to the international transformation derives – if the laws of the host state so permit – directly from the Treaty articles. The Court seems to suggest that the international transformation is a legal possibility even without the intervention of the European legislator. This raises questions both with respect of the position of the Member State of incorporation and with that of the Member State of destination upon an international transformation.

First, as regards the state of incorporation, the Court says that on the condition that the Member State of destination permits the transformation, the state of incorporation must not prevent the company from converting itself into a company form of the other state.⁹⁹ This implies that the courts of the Member State of incorporation will have to verify whether the law of the Member State of destination allows for a cross-border transformation. If it does, the company may not be hindered in migrating by requiring its winding-up or liquidation by law. Although the Court did not discuss the precise modalities of the transformation, it can be assumed that the Member State of incorporation would be entitled to impose certain conditions on the national company wishing to undergo a transformation. Such conditions (e.g. aiming at the protection of minority shareholders, creditors, employees) would have to fall either under Article 46 EC or fulfil the *Gebhard*-test.¹⁰⁰ The transformation may also raise a tax issue because as a result of the transfer

98 Case C-210/06 *Cartesio*, para. 112.

99 E.g. French and Italian company law expressly allow for the seat transfer accompanied by a change of the applicable law. The Code de commerce contains specific provisions in this regard for the different types of companies, see Art. L225–97 C.com for the SA, Art. L223–30 C.com. for the SARL and Art. L222–9 C.com. for the SCS. With respect to Italian law see Federico M. Mucciarelli, “The Transfer of the Registered Office and Forum Shopping in International Insolvency Cases: an Important Decision from Italy – Case Note on the Decision ‘B & C’ of the Italian Corte di Cassazione”, ECFR 2005, 519 ff. Other national company laws, such as e.g. German, Austrian or Hungarian law prohibit such a transfer by not providing for it.

100 Case C-212/97 *Centros*, para. 34.

of the real seat the tax residence of the company will change.¹⁰¹ The tax treatment of companies undergoing an international transformation will also have to be addressed and adequately regulated, ideally at European level.¹⁰²

Second, with respect to the Member State of destination of the transformation the Court leaves more room for state sovereignty. The *obiter dictum* was not concerned with the position of the destination state, but the formulation “to the extent that it is permitted under that law to do so”¹⁰³ seems to suggest that the Member State of destination may have a certain freedom to decide whether or not it will accept companies formed under the law of another Member State to convert into a company form under its national law. In fact, the company’s entitlement to the exercise of the European freedom of establishment in the form of the international transformation depends precisely on the choices made autonomously by the national legislators. A quick survey reveals that currently the national company laws generally lack any regulation permitting international transformations. This is for example the case under German and Austrian law,¹⁰⁴ while under French law the position is unclear.¹⁰⁵ It is again Hungarian law and case law that provides a nice illustration of the problem. In

101 Therefore, the home state can set conditions for the seat transfer insofar as their objective is to prevent a company from transferring its already realised profits to the host state without paying the taxes due on the profits in the home state. The Court consistently recognises that the balanced allocation of the power to impose taxes between the Member States should not be undermined by the exercise of the freedom of establishment. See C-231/05 *Oy AA*, para. 55.

102 Manfred P. Straube, “Was bleibt von der ‘14. Gesellschaftsrechtlichen Richtlinie’?”, in: FS Peter Dorat, Manz, Wien 2004, 647. The international transformation should not be accompanied by unsurmountable fiscal barriers rendering the transformation de facto impossible, see e.g. the French reform of Art. 221 Code general des impôts undertaken by Art 34 of the Loi n°2004–1484 du 30 décembre 2004 de finances pour 2005.

103 Case C-210/06 *Cartesio*, para. 112.

104 Georg Eckert/Nikolaus Adensamer, „Umzug von Gesellschaften in Europa, insbesondere Wegzug österreichischer Gesellschaften ins Ausland“, GeS 2/2004, 58.

105 For the view, based on two ministerial answers, that French law disallows the transformation of a foreign company into a French company form see Boucobza X., “Les techniques de réglementation favorisant la mobilité des sociétés”, *Cahiers de Droit de l’Entreprise*, 2, mars-avril 2006, 26; Reinhard Dammann, “Mobilité des sociétés et localisation des actifs”, *Cahiers de Droit de l’Entreprise*, 2, mars-avril 2006, 42. For the view that transformation is possible on the condition that the company brings its statutes in line with French law and register in France see Reinhard Dammann, “Mobilité des sociétés et localisation des actifs”, *Cahiers de Droit de l’Entreprise*, 2, mars-avril 2006, 43; Berthold Goldman/ Antoine Lyon-Caen / Louis Vogel, *Droit commercial européen*, 5^e édition, Dalloz Paris 1994, 93 ; Maggy Pariente, “Les obstacles à la libre mobilité des entreprises européennes à l’intérieur de l’Union”, *Bull. Joly Sociétés* 2002, 28.

the recent VALE case¹⁰⁶ an Italian company (VALE S.r.l.) proposed to transfer its seat from Rome to Budapest. The *Camera di Commercio di Roma* registered the transfer in the Italian register and VALE S.r.l. was cancelled from the register because of the new Hungarian seat.¹⁰⁷ The shareholders then adopted a new company statute in accordance with Hungarian company law. VALE was thus converted from an Italian S.r.l. into a Hungarian Kft.,¹⁰⁸ i.e. the national law applicable to VALE had changed. The newly formed/converted Hungarian company then requested its registration in the Hungarian Companies Register. The Hungarian Company Court refused to register VALE Kft. on the grounds that the cross-border transfer of the company seat is not possible under Hungarian law. The mention of the Italian predecessor, VALE S.r.l., in the statutes of the VALE Kft. had caught the Company Court's attention and prompted the Court to refuse registration. The company appealed against this decision arguing that VALE is not in fact intending a seat transfer in the classical sense but that it has undergone an international transformation (from S.r.l. to Kft.). The mention of the Italian predecessor in the Hungarian company documents serves the sole purpose of notifying third parties (creditors and authorities) of the transformation. The Court of Appeal of Budapest, acting as the second instance court in the case, decided to suspend the proceedings until the ECJ gives its judgment in *Cartesio*. It remains to be seen what conclusion the Court of Appeal of Budapest will draw from *Cartesio* and whether it will lodge another request for preliminary ruling the ECJ. However, in the light of *Cartesio*, it is not clear whether Hungary could be obliged to allow for such a transformation.

VII. The impact of *Cartesio*

As a result of previous ECJ case law the “veiled”, de facto cross-border seat transfer is already a legal reality within the EU. It can be – albeit in a cumbersome way – achieved either through a cross-border merger under *SEVIC Systems* and the Cross-Border Merger Directive (resulting in the change of the *lex societatis*), or through the setting up a foreign branch and

106 KH:18/2007 (see www.lexmercatoria.hu).

107 For seat transfer under Italian law see Federico M. Mucciarelli, “The Transfer of the Registered Office and Forum Shopping in International Insolvency Cases: an Important Decision from Italy – Case Note on the Decision ‘B & C’ of the Italian Corte di Cassazione”, ECFR 2005, 519 ff.

108 The Hungarian company form Kft. (*korlátolt felelősségű társaság*) corresponds to the Italian S.r.l. (*società a responsabilità limitata*).

moving the head office into the branch, as seen in *Centros* or *Inspire Art* (while maintaining the incorporation *lex societatis*).¹⁰⁹

Especially in the light of AG Maduro's Opinion it seemed that as a next step the problem of the overt cross-border seat transfer would finally be resolved by the ECJ too. Now it is evident that this issue will require the intervention of the legislator (the European or the national ones).

The problem of the cross-border transfer of the real seat has been resolved for Hungarian incorporated companies. As a consequence of the case brought by *Cartesio*, the Hungarian legislator intervened to abolish the restrictions on the seat transfer for Hungarian companies with effect of 1 September 2007, i.e. even before the European Court of Justice delivered its judgment in the *Cartesio* case.¹¹⁰ The amendment was enacted as part of a comprehensive reform aimed at simplifying and modernising Hungarian company law and enhancing the attractiveness of the Hungarian business environment. A new § 7(1) Ctv. 2006 replaces now the previous *székhely* definition contained in § 17 Ctv. 2006 and says that the *székhely* of the company is no longer to be understood as its centre of administration, but as the registered office. The legislator thereby dissociates the formalistic and the substantive seat functions and reinterprets the term *székhely* so as to mean only the formalistic seat and introduces the substantive seat aspect, "*központi ügyvezetés helye*" (centre of administration), hitherto called the company *székhely*, as a new term of art

109 The latter case law has created an active incorporation market in the EU. Especially in Member States with high legal capital requirements entrepreneurs are aware that they can freely choose among all the limited liability vehicles in the EU to run a business in their home state. As a direct result, the number of UK Limited incorporations by continental entrepreneurs has exploded over the past years. See Marco Becht/Colin Mayer/Hannes F. Wagner, 'Where do firms incorporate?', ECGI Law Working Paper N°70/2006, September 2006, www.ecgi.org/wp; Marco Becht/Luca Enriques/Veronika Korom, 'Centros and the cost of branching', in: Michel Tison/Hans de Wulf/Christoph van der Elst/Reinhard Steennot (eds.), *Perspectives in Company Law and Financial Regulation*, CUP 2009, 91.

110 Amendment inserted by §3 Act LXI of 2007. See Explanatory Notes to Act LXI of 2007: "Under the new law '*székhely*' will be understood to mean not the real seat but the statutory seat, i.e. the registered office of the company in the sense of English company law. The new '*székhely*' (statutory seat) may but need not coincide with the real seat of the company. Thus a Hungarian company in future will have the possibility to move its business activity and the central place of its management to any EC state while preserving the statutory seat in Hungary. The objective of the Hungarian legislator is to provide Hungarian businesses with more options for structuring their activities and to thereby strengthen Hungary's position in the regulatory competition in the field of company law." The legal problem raised in *Cartesio* would therefore no longer arise under Hungarian law today if *Cartesio* maintained a registered office in Hungary.

into Hungarian company law. The company statutes can provide that the *székhely* is at the same time the place of the centre of administration (*központi ügyvezetés helye*) of the company, but no longer need to do so.¹¹¹ The centre of administration can be located either in Hungary or abroad. The new § 7/B expressly provides for the dissociation of the registered office (*székhely*) and the centre of administration, allowing the company to move the latter to any Member State of the European Union while maintaining the registered office in Hungary. The transfer of the head office requires a simple notification to the Registry and will be entered in the Register. By reinterpreting the *székhely* to mean registered office, §1Gt. and the Nmjt. no longer contradict each other, the inner discrepancy of Hungarian law has been removed.

Germany introduced even more recently a similar reform through the adoption of the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG).¹¹² The MoMiG abolishes the requirement both with regard to the GmbH and the AktG according to which the real seat and the statutory seat of the company have to coincide and be located in Germany.¹¹³ Under the new regime German incorporated GmbHs and AktGs can dissociate their registered office from their head office and locate the latter even outside Germany if they so wish while retaining their original legal personality under German law.¹¹⁴ It is hoped that by allowing German businesses more structural flexibility the position of Germany in the regulatory competition in the EU will be strengthened. Yet, in light of *Cartesio* some already hypothesize that the German legislator may try to back out of the MoMiG. One particular reason for this may be that under the new law it has become possible for German-incorporated companies to participate in the European insolvency forum-shopping by transferring their head office (COMI) across borders to the detriment of creditors and employees.¹¹⁵

Finally, by reviving the idea of the international transformation the European Court of Justice has opened Pandora's box. The 14th Company Law Directive

111 If the *székhely* of the company does not coincide with the place of the centre of administration, the place of the centre of administration must be separately mentioned in the company statutes and in the Companies Register.

112 In force as of 1 November 2008, see www.bmj.de

113 See the new §4a GmbHG and §5 AktG.

114 See e.g. Nicola Preuß, "Die Wahl des Sitzungssitzes im geltenden Gesellschaftsrecht und nach dem MoMiG-Entwurf", *GmbHR* 2/2007, 57; Jörn Fingerhuth/Joachim Rumpf, "MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?", *IPRax* 2/2008, 90.

115 Béla Knof/Sebastian Mock, "Die Vereinbarkeit von Wegzugsbeschränkungen mit der Niederlassungsfreiheit ("Cartesio")", *ZIP* 1/2009, 33.

has been abandoned, yet the re-negotiation and adoption of a measure ensuring the international seat transfer is more topical than ever.¹¹⁶

116 Federico M. Mucciarelli, "Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited", *EBOR* 9/2008, 302 ff.; Eddy Wymeersch, "Is a Directive on Corporate Mobility Needed?", *European Business Organisation Law Review*, 2007, 169.

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