

## *Cartesio: Analysis of the Case*

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### I. Introduction

The judgment of the European Court of Justice in the *Cartesio*<sup>1</sup> case delivered another interpretation of Articles 43 and 48 EC Treaty.<sup>2</sup> In the latest judgment on companies' mobility, the ECJ examined the case of the Hungarian partnership *Cartesio* that wished to transfer its registered seat abroad without changing the applicable law. Since the Hungarian law followed the rule whereby a change of company's registered seat to a foreign country required liquidation procedure in order to re-incorporate in another member state, it was not possible that after the seat transfer *Cartesio* could be still governed by the law of its incorporation. Therefore, the national court sought the ECJ's interpretation on Articles 43 EC and 48 EC in reference to the national provisions concerning the rules which prevented a Hungarian company from transferring its seat to another member state by requiring its prior winding-up. The European Court of Justice ruled that Articles 43 EC and 48 EC do not preclude national legislation that prevents a company from transferring its seat to another member state while remaining under governance of the law of the member state of incorporation.

The judgment in *Cartesio* touched upon several issues fundamental to European company law. The Court referred to the idea of companies as "creatures of national laws" and analysed the role of the national laws in shaping the rules on companies' mobility. The judgment established rules concerning the change of the law applicable to the company that transfers its seat. Further, the Court emphasised the distinction between case law on 'emigration' and 'immigration' of the companies. In that respect the judgment clarified and systematised the previous case law on Articles 43 EC and 48 EC. However, the *Cartesio* case is not only about the interpretation of Treaty provisions. It should be also looked at from the regulatory perspective. The question that still remains unresolved after the judgment is whether there is a need for harmonisation and secondary law on companies' cross-border seat

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<sup>1</sup> E.C.J., Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, 2008, not yet reported (henceforth, '*Cartesio*').

<sup>2</sup> This paper will only analyse the issues relating to Articles 43 EC and 48 EC, without reference to the issues relating to Article 234 EC.

transfer. Therefore, it is important to situate the judgment in *Cartesio* in the on-going process of shaping the rules on companies' mobility under the principle of freedom of establishment both in reference to the previous case law and prospective Community legislation.

## **II. *Cartesio* and the company law perspective**

### **A. Companies as 'creatures of law' and the role of national laws**

#### **1. Company versus natural person in respect of the freedom of establishment**

The judgment in *Cartesio* referred to the fundamentals of the company law concerning the legal status of companies.<sup>3</sup> Precisely, in respect of the referring courts' explanation on the Hungarian company law based on the real-seat theory, the ECJ referred to the core rule of company law that companies exist by the virtue of law. The ECJ evoked the statement from the judgment in *Daily Mail and General Trust* that "companies are creatures of national law".<sup>4</sup> This finding of the Court reflects upon the distinction of legal persons from natural persons and the notion that companies cannot be treated as natural persons.<sup>5</sup> Contrary to natural persons, companies have legal personality that inevitably binds their existence to the rules of law. This feature has further significant consequences in regard to the freedom of establishment. Although Articles 43 EC and 48 EC literally provide that companies should be treated in the same way as natural persons, companies as 'creatures of law' are limited by the frameworks of national laws. In order to enjoy freedom of establishment Treaty provisions require from a natural person nationality of a member state.<sup>6</sup> However, an analogous requirement -i.e., 'corporate nationality'- could not be applied to companies. While a natural person's nationality is not influenced by migration, the nationality of a company, according to national laws, might be influenced by both companies' emigration and immigration.<sup>7</sup> The

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<sup>3</sup> *Cartesio*, § 104.

<sup>4</sup> **E.C.J.**, Case 81/87, *The Queen v HM. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, 1998 ECR 5483 (henceforth, '*Daily Mail and General Trust*'), § 19.

<sup>5</sup> The Court in *Daily Mail and General Trust* in § 16 referred to Article 58 [now, Article 48 EC] and stated that natural persons and companies should enjoy freedom of establishment in the same way. However, due to the fact that companies are creations of law, they additionally need to respect the national laws and cannot be treated identically. See also: **E.C.J.**, Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, 2003 ECR I-09919 (henceforth, '*Überseering*'), § 81.

<sup>6</sup> In case of primary establishment even domicile within the EU is not required. See: **S. GRUNDMANN**, *European Company Law: Organization, Finance and Capital Markets*, Intersentia, 2007, p. 123.

<sup>7</sup> Depending on the national laws of home and host member states.

Treaty took the difference between legal and natural persons into consideration.<sup>8</sup> Therefore, the prerequisites for companies' freedom of establishment are more complex. Firstly, in order to benefit from the freedom of establishment a company has to be formed in accordance with the law of a member state.<sup>9</sup> The second prerequisite requires that the locus of company's registered office, central administration or principal place of business is located within the Community.<sup>10</sup> In that respect the Treaty provisions rely on the laws of member states. National laws regulating companies' 'birth' serve the *function* of nationality of natural persons.<sup>11</sup>

## 2. Determining 'corporate nationality' and its consequences

The law determining 'corporate nationality' can be divided in two sets: the rules concerning company's 'birth'; *i.e.*, creating a connection -connecting factor- between the company and national and the rules on maintaining the connection. Corporate nationality is not a unified concept. Each set of rules governing corporate nationality can be regulated differently in member states. However, there are two dominant concepts; *i.e.*, the incorporation theory and the real-seat theory.<sup>12</sup> A company's nationality results from creating the *connection* between a company and a national law. While under incorporation theory, the connection is created solely by incorporation,<sup>13</sup> under the real-seat theory the connection between a national law and a company is determined by the place of the centre of administration.<sup>14</sup> Thus, in the latter case the nationality of the company is preserved only on the territory of the real seat, not abroad.<sup>15</sup> As a consequence, incorporation theory and real

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<sup>8</sup> *Cartesio*, § 106; *Daily Mail and General Trust*, § 21.

<sup>9</sup> J. RENAULD, *Droit européen des sociétés*, Vander, 1969, p. 228.

<sup>10</sup> Article 48 EC. However, it should be noted that the Treaty does not name that the location of company's registered office, central administration or principal place of business must be in placed one member state.

<sup>11</sup> See: *Überseering*, § 57; E.C.J., Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*; 2003 ECR I-10155 (henceforth, '*Inspire Art*'); § 97; E.C.J., Case 79/85, *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*, 1986 ECR I-02375, § 13; E.C.J., Case 270/83, *Commission of the European Communities v French Republic*, 1986 ECR I-00273, § 18. However, national regulations on maintaining 'corporate nationality' modify such function and distinguish companies from natural persons.

<sup>12</sup> E. WYMEERSCH, *The Transfer of the Company's Seat in European Company Law*, European Corporate Governance Institute, Working Paper, No 8/2003, 2003, pp. 8-10.

<sup>13</sup> See: V. EDWARDS, *EC Company Law*, Oxford, Clarendon, 1999, p. 335. Consequently, nationality of a company is preserved both on the territory of incorporation and abroad. However, it should be noted that national law can impose additional requirements on cross-border transfer which would also impede emigration despite legal framework generally allowing that; *i.e.*, tax law in case of *Daily Mail and General Trust*.

<sup>14</sup> S. GRUNDMANN, *European Company Law*, *o. c.*, p. 116.

<sup>15</sup> Company may not move its centre of administration abroad as it will break the connecting factor and will no longer be governed by the national law.

seat theory have different implications when it comes to emigration and immigration of a company. A company's emigration, according to the incorporation theory regime, results in maintaining its nationality.<sup>16</sup> On the other hand, a company's emigration, according to the real seat theory regime, results in loss of nationality.<sup>17</sup> A company's immigration, seen from the incorporation theory regime, should have no company law implications, as no connecting factor is created. Such a rule was confirmed in the *Inspire Art* case.<sup>18</sup> On the other hand, immigration to the country following the real-seat theory regime might be perceived as creating the connecting factor by setting up the centre of administration. Such an approach was however abolished by the judgment of the ECJ in *Überseering*.<sup>19</sup>

### **B. Cartesio on the scope of the national company laws**

The judgment in *Cartesio* not only discussed the concept of companies as “creatures of law”, but also the scope of national laws determining the existence of companies. As the freedom of establishment principle influences the scope of national substantive company laws and conflict of laws rules, these two areas in respect of Treaty principles can be treated together as a whole<sup>20</sup> or separately.<sup>21</sup> As the judgment in *Cartesio* shows strong emphasis on the role of national laws and refers first to the substantive law and subsequently to the conflict of laws,<sup>22</sup> these aspects will be discussed separately. Firstly, it has to be noted that the Court interpreted Treaty provisions only in respect of the powers of the home member state; *i.e.*, member state of incorporation.<sup>23</sup> The Court stated that the role of national *applicable* law<sup>24</sup> is

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<sup>16</sup> E.C.J., Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, 1999 ECR I-01459 (henceforth, ‘*Centros*’), § 36; *Überseering*, § 70.

<sup>17</sup> It was a factual background of the *Cartesio* case.

<sup>18</sup> In the *Inspire Art* case a company wanted to establish a branch under the law of Netherlands which adheres to the incorporation theory. The host member state required the company to meet additional conditions set for formally foreign companies. Such additional requirements were abolished by the ECJ's judgment.

<sup>19</sup> In the *Überseering* case, the national court stated that to the company incorporated under Netherlands law, that was operating in Germany -*i.e.*, according to German law it had transferred its actual centre of administration-German law was applicable and the company was required to be reincorporate in Germany.

<sup>20</sup> C. GERNER-BEUERLE and M. SCHILLING, “The Mysteries of Freedom of Establishment After *Cartesio*”, at <http://ssrn.com/abstract=1340964>, p. 9.

<sup>21</sup> S. GRUNDMANN, *European Company Law, o. c.*, p. 494.

<sup>22</sup> As mentioned above, the Court referred to the very core principles of company law by reflecting judgments in *Daily Mail and General Trust* and in *Überseering*; *i.e.*, the Court pointed out the role of national laws in determining the connecting factor and consequences of its modification [*Cartesio*, §§ 104-108].

<sup>23</sup> Such notion can be drawn from Court's distinction between cases on inbound and outbound establishment and dealing with *Cartesio* as an ‘emigration’ case. From the Court's analysis it seems that the Court referred to the powers of a member state from which company emigrates. Moreover, the Court indicated that it referred to “national law *applicable* to a company”. The law *applicable* is undoubtedly one under which company was formulated.

to resolve whether a company may rely on Article 43 EC. However, this power is not arbitrary, as a company's right to freedom of establishment should be "established, *in the light* of the conditions laid down in Article 48 EC".<sup>25</sup> Thus the Court concluded that a member state by virtue of national law has the power to determine: (1) the connecting factor between company and national law as well as (2) requirements for maintaining that connection. Based on these conditions, a member state by allowing for a company's creation under its law, 'qualifies' it for the entitlement to rely on the freedom of establishment. Such interpretation implies that once the connecting factor is established and as long as the connecting factor is maintained according to the national laws,<sup>26</sup> a company is entitled to rely on the freedom of establishment.

The judgment in *Cartesio* opposes national legislation against the freedom of establishment principle<sup>27</sup> and states that national laws concerning incorporation *and* winding up or liquidation of companies must respect Treaty rules. In particular, they cannot justify the country of incorporation *preventing a company from transferring* to another jurisdiction. Although the statement of the Court is not very clear, it is of great importance as it shows a new approach towards interpreting the scope of national law in respect of the freedom of establishment. *Cartesio* is the first case in which the Court analysed national laws against the Treaty rules in a situation when a company leaves the home member state. In previous judgments, the Court either did not regard national law that hindered a company's emigration as incompatible with Treaty rules<sup>28</sup> or did not touch upon this issue.<sup>29</sup> However, the Court is not precise on the scope of national laws. The uncertainty that follows from the Court's statement is twofold. Whereas it is clear that the rules on winding up cannot prevent a company from "converting itself into a company governed by the law of the other member state",<sup>30</sup> it is not clear in what way national rules on incorporation should respect Treaty provisions. One possible answer could be that the rules of incorporation cannot be formulated in a way that prevents a company from a *conversion* into another jurisdiction. However, the

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<sup>24</sup> Namely, substantive company law; contrary to conflict of laws rules which will be discussed in the subsequent part of the paper.

<sup>25</sup> *Cartesio*, § 109.

<sup>26</sup> It follows from subsequent Court's statement in § 110, concerning "breaking the connecting factor".

<sup>27</sup> See also: Opinion of Advocate General Maduro, § 31.

<sup>28</sup> *Daily Mail and General Trust* case.

<sup>29</sup> The Court did not refer to the scope of national laws of member state in terms of hindering company's emigration, as the companies in cases such as *Centros* or *Überseering* were already allowed for the transfer by home member states.

<sup>30</sup> *Cartesio*, § 112.

law on incorporation, as it is strictly understood as creating the connecting factor between the company and national law, does not directly influence companies' conversion into another jurisdiction. Rather, it would be reasonable to stick to the Court's statement that the function of the law on incorporation is to allow the company to rely on the freedom of establishment, whereas rules on winding up of companies cannot prevent a company from a transfer. Secondly, it should be noted that the transfer to another jurisdiction is allowed "to the extent that it is *permitted* under that law [law of the host member state or home member state] to do so".<sup>31</sup> The Court did not mention precisely whether conversion of the company to another jurisdiction should respect the 'permission' of the law of the home member state or the host member state. In the former situation, the extent of conversion would depend on national law. The effect of such an interpretation would be that a country of origin that adheres to the real seat theory would allow for such conversion to the full extent, as after the seat transfer, the company would stop being governed by that law. On the other hand, under the national law following incorporation theory such conversion would not be required at all as the company would remain governed by the law of incorporation also after the transfer. It seems that the judgment accepts both options. The second possible interpretation is that the extent of the company's conversion would depend on the host member state. Such a reading of the judgment has to be limited by the previous case law on inbound establishment; *i.e.*, under previous judgments the host member state was required to respect lawful incorporation of the company [*Centros*, *Überseering* and *Inspire Art*], its legal capacity [*Überseering*], governance of the home member state law [*Centros*] and was denied the possibility of imposing additional conditions on an immigrating company [*Inspire Art*].<sup>32</sup>

### **C. *Cartesio* on the scope of national conflict of laws rules**

#### **1. The requirement of changing applicable law after a transfer of the registered seat**

The Court in *Cartesio* examined the rules on conflict of law by making a distinction between transfer of the seat with and without a change of applicable law.<sup>33</sup> The ECJ's judgment formed a rule allowing national laws to prevent companies from transferring the

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<sup>31</sup> *Ibid.*

<sup>32</sup> However, the last two rules could not be strictly followed when the company would convert under the jurisdiction of another member state.

<sup>33</sup> *Cartesio*, § 111.

seat without a change of applicable law.<sup>34</sup> Although in the previous judgments the Court tended to opt for the incorporation theory,<sup>35</sup> it seems that in the *Cartesio* case, the Court opts for neither the incorporation nor the real seat theory as the judgment does not impose a general obligation so that the companies change the applicable law when they move their seats. Rather, it accepted such a possibility under the provisions on freedom of establishment. However, the judgment lacks any comment on another scenario; *i.e.*, when the national law does not prevent transferring the seat without a change of the applicable law.<sup>36</sup> As a result, the ruling can be interpreted as delivering a solution that can be applied to home member states that follow either the incorporation theory or the real seat theory. In both cases the effect will be that a company is able to move abroad. Such an approach might deliver different outcomes of companies' emigration in terms of the change of law, dependent on whether a company leaves the country following the real seat theory or the incorporation theory.

In the *first variant -i.e. in Cartesio-like scenarios-*, when a company moves its seat or head office<sup>37</sup> *according to a real seat regime*, to succeed with the transfer, it would have to change the applicable law. In the *second variant*, a company that moves out *according to an incorporation theory regime* would be able to transfer but not necessarily with a change of the applicable law. The company would be able to choose either to adhere to the incorporation theory principle and remain being governed by the law of the home country or to choose relying on *Cartesio* and change the applicable law; which cannot be forbidden by the home member state, according to the judgment in *Cartesio*.<sup>38</sup> The only exception to the free choice of the company could be if national law -probably other than company law, like tax law- would put a condition of winding up or liquidation of the company on its transfer abroad without a change of applicable law. Then, the company could rely on the *Cartesio* rule and would have to transfer itself to another jurisdiction by giving up the connection with the law of incorporation.

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<sup>34</sup> This rule will be later referred to as a '*Cartesio* rule'.

<sup>35</sup> See: *Centros; Überseering*; E. WYMEERSCH, "Centros: A Landmark Decision In European Company Law", p. 22.

<sup>36</sup> This scenario is possible in countries where company law is based on incorporation theory.

<sup>37</sup> This situation would concern both transfer of the registered seat and head office as under real seat theory these two places are inseparable and transfer of head office entails transfer of the registered seat; "real seat theory inextricably entwines a company's nationality and residence". See: EDWARDS, *EC Company Law, o.c.*, p. 336.

<sup>38</sup> Presented *Cartesio's* interpretation in reference to company's emigration from incorporation theory regime is supported by the judgments in *Überseering* or *Inspire Art*, whereby the result was that the companies could rely on laws of their incorporation.

The change of applicable law after the transfer will also influence host member states in different ways, dependent whether a company enters country following real seat theory or incorporation theory. The company's emigration to the country following real seat theory will be in line with principle of the national law of the host country, as the company will form the *connection* with the host member state by setting up its central administration there. On the other hand, the company's emigration and change of applicable law to the law of a member state following incorporation theory will result in setting up a new *connecting factor* with that member state on the ground of the seat transfer; whereas incorporation theory requires establishing a connecting factor by incorporation of the company under this law.

It follows from the above considerations that the *Cartesio* rule approximates freedom of establishment to companies, despite providing for different outcomes. The aim of the rule is to afford the company to undergo structural change while preserving its existence or legal personality. Such a right was awarded to *Cartesio* on a condition of changing the applicable law. In this sense it seems that *Cartesio* left behind *Daily Mail and General Trust*. In *Daily Mail and General Trust* a company could not transfer without losing its legal personality under the law of incorporation and was denied the right to transfer at all.<sup>39</sup> In *Cartesio* the company was denied the possibility to transfer while remaining under governance of home law but it was awarded a possibility to rely on the freedom of establishment, retain legal personality and transfer with a change of the applicable law.

Another concern is that the *aim* of preserving legal personality of the company contrasted with the *means* proposed by the Court and might be in contradiction. It seems that a company is supposed to jump into a new legal environment after "breaking the connecting factor" with the home member state. It is not clear what is meant by the conversion into a "form of a company governed by the law of the member state to which it has moved"<sup>40</sup> and how a company converts in terms of the procedure. Should such a company be recognised as a company incorporated in the home member state<sup>41</sup> or should it be recognised as a company under the law of the host member state and if so, what would be a starting point for the recognition? Moreover, another uncertainty is the scope of rules that the host member state should apply. Should it apply the same rules as apply to national companies from the moment

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<sup>39</sup> *Daily Mail and General Trust*, § 24.

<sup>40</sup> *Cartesio*, § 111.

<sup>41</sup> On what grounds such a company should be recognised by home member state if it changed national law applicable and law of origin does not apply to it any more?

of incorporation<sup>42</sup> or should it apply national rules on assumption that the company was lawfully formed in the home member state although it has no more connection with that state? These concerns are discussed in the following part.

## **2. Breaking the connecting factor versus understanding of Article 48 EC**

The rule concerning conversion from a company governed by one member state to a company under governance of another member state by “breaking the connecting factor”<sup>43</sup> seems to be in conflict with the aim of setting up this rule; *i.e.*, allowing a company to transfer while retaining legal existence and changing only the law applicable. Such a notion results from analysis of the concept of “breaking the connecting factor” in reference to the Article 48 EC. As noted above, the Treaty provision applies to the companies that meet the requirements: (1) to be “formed in accordance with a law of a member state” and (2) to have “registered office, central administration or principal place of business within the Community”. When a company breaks the connecting factor with the national law, it loses the right of having its seat there<sup>44</sup> and as a result it does not meet the second requirement under Article 48 EC. However, the moment of breaking the connecting factor is not specified. The questions that may arise are: whether the moment of breaking the connecting factor is a physical transfer of the office, changing the statute, crossing out from the companies’ registry or just notifying the home member state of such change? The moment itself is significant as once the connection between a company and the country of incorporation is broken, a new connection with the host member state should be immediately established; *i.e.*, as the Court says the company ‘converts’ into another jurisdiction. Otherwise, the company with no connection to a member state cannot be regarded as a company governed by the national law and consequently by the EC Treaty. The judgment in *Cartesio* did not touch upon this issue. Furthermore, the Court did not specify in what way a company converts into an entity governed by another jurisdiction. The company does not lose its legal personality after the transfer and it is recognised by the law of a host member state. However, it is uncertain from which moment the national law of the host member states starts to be applicable to the

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<sup>42</sup> Among others, impose requirements concerning incorporation of the company. However, that would be contrary to the rule established in *Inspire Arts*.

<sup>43</sup> *Cartesio*, § 110.

<sup>44</sup> The Court states that company breaks the connecting factor by moving its seat to another territory; *i.e.*, by losing territorial connection with the home member state [*Cartesio*, § 110]. Such situation may occur if the company leaves real seat theory regime -above described ‘first variant’- or if it leaves incorporation theory regime and decides to change the applicable law.

company. Again, would that be from the moment of notification or registration or another action? Defining this moment is important for the continuity of the company's governance under national laws. Since the transfer of the company should result in retaining legal personality, there must be a certain moment from which the company stops being governed by the law of the home member state and starts being governed by the law of the host member state. If it does not happen simultaneously -i.e., there is no immediate conversion- and the company would stop being governed by the law, it would not be able to retain its legal personality.

It seems that the issue can be now, in the absence of secondary law, clarified only by the national laws. The member states could either cooperate between each other in that matter by mean of agreements or they could change the national laws in order to facilitate foreign companies to convert under their jurisdiction.<sup>45</sup>

#### **D. Emigration versus immigration of companies**

Another important 'lesson' from *Cartesio* is the Court's analysis of the distinction between inbound and outbound establishment. In that respect, the Court's conclusion was opposite to the Opinion of Advocate General.<sup>46</sup> The Court found the distinction essential because companies 'entering' and 'leaving' member states cause different legal problems. The Court referred to *Daily Mail and General Trust* as a case based on a "situation fundamentally different"<sup>47</sup> from *SEVIC Systems*<sup>48</sup> and cases covering similar scenarios, namely *Centros*, *Überseering* and *Inspire Art*. In *SEVIC Systems* the judgment concerned recognition "in the member state of incorporation of a company, of an establishment operation carried out by that company in another member state".<sup>49</sup> Whereas, according to the ECJ, the problem in cases such as *Centros*, *Überseering*, *Inspire Art* and *SEVIC Systems* focused on whether the company encountered a "restriction in the exercise of its right of establishment in another

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<sup>45</sup> This concept might lead to regulatory competition among the member states. However, this issue will not be discussed in this article.

<sup>46</sup> Advocate General Maduro in his Opinion on the *Cartesio* case scotended that there was no ground for distinguishing between *Daily Mail and General Trust* from *Centros*, *Überseering* and *Inspire Art*. He emphasised that the principle of freedom of establishment prohibits restrictions on both inbound and outbound establishment [§ 27].

<sup>47</sup> *Cartesio*, § 122.

<sup>48</sup> E.C.J., Case C-411/03, *Sevic SYSTEMS AG*, 2005 ECR I-10805 (henceforth, '*Sevic SYSTEMS*').

<sup>49</sup> *Cartesio*, § 122.

member state”.<sup>50</sup> This problem should be distinguished from the other one that arose in *Cartesio*, being “whether the company [...] may be regarded as a company which possesses the nationality of the member state under whose legislation it was incorporated”.<sup>51</sup>

### **E. The need for another judgment on freedom of establishment in the light of distinction between inbound *versus* outbound establishments**

It could be argued that in deciding *Cartesio* the Court could rely on the rules already established in the case law on freedom of establishment. Precisely, the question is whether it would be possible to find the solution that the Hungarian court sought before the ECJ, in the previous case law on freedom of establishment or there was a need for another rule that refined previous judgments. The answer seems to lie in the general approach to the problem of companies’ mobility; *i.e.*, the distinction or absence of distinction between inbound and outbound establishment. In the light of the *Cartesio* case, the distinction became an important tool in shaping interpretation of Articles 43 EC and 48 EC. In short, on the assumption that there is a distinction between ‘emigration’ and ‘immigration’ of companies, there was a need for developing the ECJ’s stand on ‘emigration’ cases; whereas, on the assumption that there is no distinction, the previous case law seems to be sufficient ground for solving the *Cartesio* scenario.<sup>52</sup>

In the literature systematisation of inbound *versus* outbound establishment is well established, although criticised.<sup>53</sup> Also, the ECJ noted in the judgment that legal problems that arise in ‘emigration’ and ‘immigration’ of companies differ.<sup>54</sup> Such a notion suggests that these two situations require different solutions. Therefore, it could be assumed that the Court took this distinction into consideration and found a need for analysing the *Cartesio* case. In that respect, it should be noted that the case law on inbound establishment is well developed;<sup>55</sup>

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<sup>50</sup> *Ibid.*, § 123.

<sup>51</sup> *Ibid.*

<sup>52</sup> See, *e.g.*, Advocate General Tizzano in his Opinion in *SEVIC System*; who stated that “it is evident from this case law that Article 43 EC does not merely prohibit a member state from impeding or restricting the establishment of foreign operators in its territory, it also precludes it from hindering the establishment of national operators in another member state” [§ 45].

<sup>53</sup> To name a few: **D. DEAK**, “Outbound Establishment Revisited in *Cartesio*”, *EC Tax Review*, 2008, p. 250; **M. SZYDŁO**, “Emigration of Companies under EC Treaty: Some Thoughts on the Opinion of the Advocate General in the *Cartesio* Case”, *European Review of Private Law*, 2008, p. 980; **E. WYMEERSCH**, *The Transfer of the Company’s Seat in European Company Law*, *o.c.*, pp. 10 and 12.

<sup>54</sup> *Cartesio*, § 123.

<sup>55</sup> **M. SZYDŁO**, “Emigration of Companies under EC Treaty”, *o.c.*, p. 973.

whereas since *Daily Mail and General Trust*, there has been no ‘emigration’ case.<sup>56</sup> What is more, in *Daily Mail and General Trust* the part of the judgment concerning freedom of establishment was an *obiter dictum*. Therefore, strictly speaking, the ECJ had not ruled before on circumstances such as those in the *Cartesio* case. Consequently, the Court could consider *Cartesio* as an opportunity for clarification on Articles 43 EC and 48 EC in the scope of company’s ‘emigration’. Taking into consideration the above reasoning, the answer to question of necessity for the judgment on ‘emigration’ case is affirmative. In that respect, it should be noted that the Court’s decision in *Cartesio* was justified and consistent. The Court not only interpreted Articles 43 EC and 48 EC in the context of a company’s moving out but also established that under these provisions the dichotomy in rules on freedom of establishment is needed. The importance of the latter issue had not been touched upon in previous ECJ judgments.<sup>57</sup>

On the other hand, one may argue that the distinction between ‘moving out’ and ‘moving in’ cases is unfounded.<sup>58</sup> There are several arguments against distinction between ‘immigration’ and ‘emigration’. Such a distinction, on the additional assumption that “freedom of establishment relates only to immigration, but leaves the states free to deal with emigration” might result in national regulators imposing restrictions on freedom of establishment resulting in hindering the freedom of movement of legal persons.<sup>59</sup> Moreover, it is argued that a distinction between ‘moving out’ and ‘moving in’ cases is not consistent with EC freedom of establishment. Taking into consideration differences between natural persons and legal persons it may lead to negation of freedom of establishment of companies.<sup>60</sup> Another argument is that there is no ground for differentiation between ‘immigration’ and ‘emigration’ as recognition of these processes is only dependent on the point of view of either the home member state or the host member state.<sup>61</sup> Furthermore, the “Treaty articles are directly applicable to both immigration and emigration” and when it comes to obstacles on free movement of companies, there cannot be differentiation between outbound and inbound

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<sup>56</sup> However, some authors find that in *Überseering* the ‘emigration’ element was raised See: **M. SZYDŁO**, “Emigration of Companies under EC Treaty”, *o.c.*, p. 984.

<sup>57</sup> Neither was it clear for the Hungarian court, that referred to both *Daily Mail and General Trust* and *SEVIC Systems*, as well as to the **E.C.J.** Case C-442/02 *CaixaBank France*, 2004 ECR I-8961. However, the referring court noted that the principle laid down in *Daily Mail and General Trust* “may have been further refined in the later case law of the Court” [*Cartesio*, § 35].

<sup>58</sup> **F.M. MUCCIARELLI**, “Company ‘Emigration’ and EC Freedom of Establishment: Daily Mail Revisited”, *European Business Organization Law Review*, 2008, pp. 267-303, at p. 296.

<sup>59</sup> **E. WYMEERSCH**, *The Transfer of the Company’s Seat in European Company Law*, *o.c.*, p. 17.

<sup>60</sup> **F.M. MUCCIARELLI**, “Company ‘Emigration’ and EC Freedom of Establishment”, *o.c.*, p. 298.

<sup>61</sup> **M. SZYDŁO**, “Emigration of Companies under EC Treaty”, *o.c.*, p. 975.

establishment; *i.e.*, national rules should be removed for both types of establishments.<sup>62</sup> The argument that a distinction between ‘emigration’ and ‘immigration’ of companies is unfounded was supported by Advocate General Maduro in his Opinion in *Cartesio*. The case law presented by the Advocate General seems to be convincing. Although the facts of the previous cases on freedom of establishment concerned either restriction on leaving the home member state<sup>63</sup> or on entering the host member state,<sup>64</sup> differentiation between rights of companies according to these scenarios would put the entities on unequal footing. Therefore, it can be assumed that the previous case law dealt with *migration* of companies and set rules for both companies moving out and moving in<sup>65</sup> rather than with ‘emigration’ and ‘immigration’ of companies as two different processes. On the assumption that there is no distinction between ‘emigration’ and ‘immigration’ of companies, it seems that previous case law on the freedom of establishment constitutes a sufficient basis for dealing with the circumstances of *Cartesio*. On the basis of cases such as *Centros*, *Inspire Arts*, *Überseering*, and *SEVIC Systems*, the *Cartesio* scenario could be resolved. Already in the *Überseering* case, the Court has established a rule that required the host member state to respect a legal entity incorporated in another country.<sup>66</sup> At the same time, it prevented application of national law of the host member state to the company that immigrated from abroad. After this judgment it could be assumed that companies could move between member states and such changes did not have to entail a change of applicable law. Furthermore, in the *SEVIC Systems* case the Court also required the home member state to recognise a company incorporated abroad. In this case the company was not required to convert into a company governed by the host member state in order to undergo merger procedures in the host country.<sup>67</sup> Under the judgments in *Überseering* and *SEVIC Systems*, the companies had to be recognised by the host member states and the host member states had to respect the national law applicable to these companies instead of applying its national rules. The companies at issue were not required to undergo a conversion in order to change the applicable law to the one of the host member state. One may ask further questions about the possible outcome of *Cartesio* based on the previous case law. The possible solution based on the previous case law could be that the provisions of the Hungarian company law that prevent a *Cartesio* from moving abroad while being governed by the Hungarian law were incompatible with principle of freedom of

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<sup>62</sup> *Ibid.*, p. 993.

<sup>63</sup> *Daily Mail and General Trust*.

<sup>64</sup> *Centros* and *Überseering*.

<sup>65</sup> Opinion of Advocate General Tizzano in *SEVIC System*, § 45.

<sup>66</sup> *Überseering*, §§ 81-82; M. SZYDŁO, “Emigration of Companies under EC Treaty”, *o.c.*, p. 986.

<sup>67</sup> The judgment in *SEVIC Systems*.

establishment understood as a right of a company to be respected in the host member state, and the right to preserve its legal status abroad.<sup>68</sup> However, the judgment in *Cartesio* did not rely on this rule, which can be seen as overruling of previously established rules. On the other hand, it can be also seen as merely systemising previous case law in order to clarify which rules should apply and how. In this regard, the judgment did not overrule previous case law but gave guidelines on how to read case law on the freedom of establishment.

### III. *Cartesio* and the regulatory perspective

The last question to be answered in the light of the *Cartesio* case is whether there is a need and space for secondary legislation on cross-border transfer of the companies' seat and by what means clarification on the issue should be achieved. Analysis of the present secondary law shows that there is a lacuna not filled so far with a comprehensive and clear set of rules. Existing Community law provides only for a narrow range of instruments for cross-border transfer.<sup>69</sup> Furthermore, the Community legislation, as mentioned in the *Cartesio* judgment,<sup>70</sup> does not serve in practice as an instrument for cross-border transfer of the seat; *i.e.*, despite the stand of the European Commission concerning its *mutatis mutandis* application to the *Cartesio* scenario, it was left without any doubt by the ECJ that secondary legislation cannot be applied to the seat transfer without a change of the applicable law.<sup>71</sup>

If the secondary law has so far failed in regulating European company law on cross-border transfer of the seat, the question is whether it should be left solely to the ECJ judgements or another attempt should be made by the European legislator. In the internal market the choice of jurisdiction should be given freely,<sup>72</sup> as it gives companies an opportunity to choose the most favourable economic conditions, which also allows them to

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<sup>68</sup> *Centros* and *Überseering*.

<sup>69</sup> Regulation on the Statute of European Company provides companies with are available only to the *Societas Europaea*, which (in fact) seriously limits application the Regulation. The Cross-border Mergers Directive provides a framework for the companies to merge across the borders. Again, although cross-border merger can be used for the purpose of cross-border moving of the seat, it may be unattractive because it always involves at least two companies of which always at least one will be dissolved as a result of the procedure; **P. PELLE**, "Companies Crossing Borders within Europe", *Utrecht Law Review*, 2008, p. 9.

<sup>70</sup> Regulation No 2137/85 on the EEIG; Regulation No 2157/2001 on the SE; Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [OJ 2003 L 207, p. 1]; *Cartesio*, § 115.

<sup>71</sup> *Cartesio*, §§ 115-120.

<sup>72</sup> **P. PELLE**, "Companies Crossing Borders within Europe", *o.c.*, p. 11.

respond to economic changes.<sup>73</sup> However, it should not be the role of the Court to act as a legislator in the area of companies' seat transfer. Although the Court might set the rules that would enable companies to move across the borders, these rules will not be precise enough as to afford companies with clear and certain indications. Therefore, the case law would not offer the companies legal certainty in this area. It could be assumed that the need for secondary law remains irrespective of the judgments of the European Court of Justice.<sup>74</sup>

*Cartesio* was an anticipated case from the very beginning as it was expected to deliver "new insights" into the interpretation on the freedom of establishment of the companies. It is said that works on the 14th Directive (henceforth, 'the Directive') were suspended because of the expected verdict of the European Court of Justice.<sup>75</sup> However, after the judgment was delivered leaving several doubts, it seems that the scale has been turned back to the European legislator. Also, the recent developments in legislature give hope that the Commission would continue works on the Directive. The European Parliament's recommendations of 10 March 2008 (henceforth, 'the Resolution') requested the Commission's submission of the proposal for the Directive on the cross-border transfer of the registered office of a company.<sup>76</sup> Interestingly the Resolution did not name *Cartesio* as one of the cases it regarded relevant for the recommendations, despite proposing solutions similar to ones in *Cartesio*; *i.e.*, transfer of the seat without loss of legal personality or winding up of the company and change of the applicable law after the seat transfer to the one of the host member state.<sup>77</sup> Moreover, the Resolution fills the spaces that the judgment in *Cartesio* left behind; *i.e.*, procedural aspects of the seat transfer both in the home member state and in the host member state.<sup>78</sup>

#### **IV. Conclusions**

It should be noted that *Cartesio* brings a change in interpretation of the Treaty provisions on freedom of establishment. A rule concerning change of applicable law has not been touched upon before in a way it was dealt with in *Cartesio*. The impact and significance

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<sup>73</sup> S. GRUNDMANN, *European Company Law, o.c.*, p. 530.

<sup>74</sup> G. VOSSESTEIN, "Transfer of the Registered Office: The European Commission's Decision not to Submit a Proposal for a Directive", *Utrecht Law Review*, 2008, p. 64; F.M. MUCCIARELLI, "Company 'Emigration' and EC Freedom of Establishment", *o.c.*, p. 277.

<sup>75</sup> *Ibid.*, p. 62.

<sup>76</sup> European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

<sup>77</sup> Annex to the Resolution, Recommendation 1.

<sup>78</sup> Annex to the Resolution, Recommendation 4.

of the judgment in *Cartesio* can be summarised in the following way. First, the judgment established that national law may require emigrating companies to change applicable law. Secondly, the judgment established that there is a clear distinction between ‘emigration’ and ‘immigration’ of companies. Such a distinction is useful and clarifies the previous case law. However, the distinction between ‘emigration’ and ‘immigration’ combined with the change of applicable law has important consequences. The rule in *Cartesio* may lead to different treatment of companies moving out and moving in and also companies emigrating from countries with the real seat theory and the incorporation theory. Finally, the change of applicable law meaning a conversion of a company governed by one member state to company governed by another member state, in the absence of specific procedures governing such conversion, is not clearly compatible with the rule under Article 48 EC on applicability of the Treaty to the companies.

A further conclusion is that existing legislation in that area of companies’ mobility is insufficient and cost-inefficient. Moreover, the awaited judgment in the *Cartesio* case which was expected milestone in jurisdiction on cross-border transfer of the seat did not bring the expected result of stating clear rules on cross-border transfer of the seat. The gap for further legislation or jurisprudence in this field still seems to remain unfilled. What can be now expected is that either the European legislator will provide companies with certain guidelines on the seat transfer across the borders, which would be an essential supplement of the *Cartesio* ruling or the member states will take initiative on the national level -or by international agreements-<sup>79</sup> or the private international law on companies will be still shaped by the subsequent judgments of the European Court of Justice.

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<sup>79</sup> Pursuant to Article 293 EC.