The cross-border mobility of companies within the European Community after the *Cartesio* ruling of the ECJ

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Introduction

On 16 December 2008, the ECJ, in delivering its ruling in the *Cartesio* case[1], concerning a limited partnership incorporated in Hungary and seeking to transfer its seat to Italy while maintaining its legal status under Hungarian law, uphold – contrary to the Advocate General (AG) recommendation - a position expressed twenty years earlier in the *Daily Mail* case[2]. Notably, in *Daily Mail* the ECJ had stated that, at the current state of EC law, Article 48 of the Treaty could not be interpreted as conferring companies incorporated in a Member State the right to move their head office or registered office to another Member State (so called right of primary establishment) while retaining the legal status conferred by the law of the State of incorporation.

After *Daily Mail*, the ECJ had been delivering other landmark company law rulings concerning companies' freedom of establishment within the European Community – in particular, the *Centros*[3], the *Uberseering*[4], the *Inspire Art*[5], the *SEVIC*[6] and the *Cadbury Schweppers*[7] cases - and this case-law has been triggering, in the academic community both within and outside the European Community, a very wide amount of contributions discussing the contents of the freedom of establishment granted to companies by Articles 43 and 48 of the EC Treaty and its implications[8].

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[1] Case C 210/06

[2] Case 81/87, *Daily Mail* ECR [1988] 5483

[3] Case C 212/97, *Centros* ECR [1999] 1459

[4] Case C 208/00, *Uberseering* ECR [2002] 9919

[5] Case C 167/01, Inspire Art ECR [2003] 10155

[6] Case C 411/03, SEVIC Systems ECR [2005] 10805

[7] Case C 196/04, *Cadbury Schweppes* ECR [2006] 7995

[8] Amongst the extremely wide literature since the *Daily Mail* case, inter alia: Loussouarn, Y, "Le droit d'etablissement des societes", Revue trimestrelle de droit europeen, 1990, 227-239; Tridimas, T. "The case-law of the Court of Justice on corporate entities", Yearbook of European Law, 1994, (13), 336- 360; Roussos, A. Realising the free movement of companies: European Business Law Review, 1(12) 2001, pp. 7-25; Andenas, M., "Free Movement of Companies", Law Quarterly Review, 2003, pp. 119-226; Ballarino, T. "Sulla mobilita' delle societa' nella Comunita' Europea. Da Daily Mail a Uberseering: norme imperative, norme di conflitto e liberta' comunitarie", Rivista delle societa', 2003, pp. 723-764; Cerioni, L. "The Uberseering ruling: the Eve of a Revolution for the Possibilities of Companies' Migration throughout the European Community? The Columbia Journal of European Law 2003, Vol. 10, pp. 117-137; Roth, W.-H.. "From Centros to Ueberseering: Free Movement of Companies, Private International Law and Community Law", International and Comparative Law Quarterly, 2003, Vol. 52, pp.177-208; Wooldridge, F., "Freedom of Establishment of Companies Affirmed" , European Business Law Review 2003, Vol. 14, pp. 227-235; Gildea A.J. "Uberseering: A European Company Passport", Brooklin International Law Journal, Vol. 30.1., 2004, p. 257-292; Kieninger, E.M., "Internationales Gesellschaftsrecht nach Centros, Überseering und Inspire Art: Antworten, Zweifel und offene Fragen", Zeitschrift für Europäisches Privatrecht (ZEuP) 2004, pp. 685-705; Vaccaro, E. "Transfer of Seat and Freedom of Establishment in European Company Law", European Business Law Review. 2005, Vol. 16 p. 1348-1365.

In the rulings issued after *Daily Mail*, the ECJ had been taking a "liberal" stance in defining the contents of the freedom of establishment. In fact, it had clarified that: companies incorporated in any Member State may open a branch in another Member State and carry on even their entire business activity via this branch[9]; the use of a more favourable company law legislation or tax legislation can be amongst the reasons driving the exercise of the right of establishment[10]; a Member State where a company registered in another has moved its central administration cannot refuse to recognise this company's legal personality[11]. Against this background, the *Cartesio* ruling – due to the fact that it has denied companies the right under Art. 48 to move its central headquarter out of its Member State of incorporation while remaining subject to the law of this State – is meeting strong criticism[12]. Nonetheless, as the ECJ's has distinguished the situation in Cartesio from a situation in which a company wishes to transfer its registered and real seat with the change of applicable national law, the ruling is bound to have, in this author's view, far-reaching effects, which this paper aims at highlighting.

For this purpose, the first part delineates the background and the situation in *Cartesio*, and illustrates the A.G.'s reasoning, whereas the second part analysis the ECJ's arguments. In light of this analysis, the third part stresses the possible implications for the future developments of EC company law.

1. The background and the AG reasoning

Within the European Community, Member States adopt different criteria for identifying the connection between a legal person and the legal system which is deemed to govern the creation and the functioning of the legal person itself. A group of Member States[13] has traditionally been following the "real seat" criteria, according to which a company is governed by the law of the Member State where its head office (real seat) is located. This criteria generally requires the head office to be maintained in the same State as the registered office, so that the transfer of the head office to another State either results in the winding up of the company in the State of origin or is subject to certain conditions. Another group of Member States[14] has been adopting the "incorporation system", according to which the company is governed by the law of the country where it is registered; Member States adopting the incorporation system allow companies formed under their jurisdiction to move their head office abroad while still keeping the legal status as companies formed under national law.

In the case at stake Cartesio, a limited partnership formed in accordance with Hungarian law and thus registered in Hungary submitted an application to its local

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[9] Case C 212/97, *Centros*, cit.

[10] Case C 212/97, *Centros*, cit., as regards the company law legislation; Case C 196/04, *Cadbury Schweppes* , cit. as regards the tax law legislation.

[11] Case C 208/00, *Uberseering*, cit.

[12] Gerner Beuerle G., Schilling M., The Mysteries of Freedom of Establishment after Cartesio (February 11, 2009), working paper available at SSRN: http://ssrn.com/abstract=1340964; Hamburg. J.B., Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies? European Law Reporter, n. 3, 2009.

[13] E.g., Austria, Belgium, France, Germany, Luxembourg, Spain.

[14] E.g., the UK, Ireland, the Netherland, Demark, Finland.

commercial court to amend its registration in the local commercial register so as to record, as its new commercial headquarter, an address in Italy, while remaining registered in Hungary. The commercial court rejected the application, on the ground that Hungarian law did not offer companies the possibility of transferring their operational headquarters to another Member State while retaining their legal status as a company governed by Hungarian law. In consequence, to move its operational headquarter to Italy, Cartesio would first have to be dissolved in Hungary and then reconstituted in Italy.

When submitting its application for recording its new commercial headquarter in Italy to the Hungarian commercial court, Cartesio could certainly not foresee that the applicable Hungarian law, which at that time used to require the coincidence between the legal seat and the place of central management (i.e., the head office), would subsequently be amended and that no problem would have arisen had the new provision applied. In fact, new provisions introduced by the Hungarian legislature, which entered into force on 1 September 2007, allow a business to transfer its head office to another Member State while remaining registered (and keeping its registered office) in Hungary[15].

The competent Hungarian Court of Appeal, before which *Cartesio* brought an appeal against the decision of the commercial court, asked the ECJ, essentially, whether the transfer of seat of a company constituted under Hungarian law to another Member State is within the scope of EC law or whether, in the absence of harmonisation, national law is exclusively applicable, and whether Arts. 43 and 48 must be interpreted as meaning that national rules which prevent a Hungarian company from transferring its seat to another Member State of the EC are incompatible with EC law[16].

It has been noted that, unfortunately, the case right from the beginning was "enveloped in the mist of confusion with regard to legal terminology"[17]. Whereas the Hungarian reference simply used the term "*szekhely*" (seat), thus apparently asking whether a simultaneous transfer of the statutory seat and of the head office was covered by the freedom of establishment provisions of the Treaty, the A.G. developed its reasoning by assuming that *Cartesio* wanted to transfer its "operational headquarter" (i.e., the head office) alone. Although the question dealt with by the AG was thus different from the one really at stake, the subsequent ECJ ruling – as it will be indicated[18] – indirectly offered the response to the issue actually raised by the Hungarian court too.

The A.G. started its reasoning by assuming that Hungarian law was based on the so-called "real seat criteria"[19] and by submitting that the outbound transfer of seat does not fall outside the scope of the Treaty. He pointed out that national rules allowing a company to transfer its operational headquarter only within the national territory treat cross-border situations less favourably than purely domestic situations – just like the national rules regarded by the ECJ as incompatible with the freedom of establishment in

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[15] Deak, D., Outbound establishment revisited in Cartesio, EC Tax Review, n. 6, 2008, pp 250-258, 251.

[16] Although *Cartesio* was a limited partnership rather than, strictly speaking, a "company", this paper will refer to "company" for consistency with the terminology used by the ECJ. On the other hand, the distinction between partnership and companies does not appear to be relevant for the case at stake, because both companies and partnerships, as profit-making entities, fall within Art. 48 of the Treaty.

[17] Hamburg. J.B., Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies ?, cit.

[18] See infra, par. 2

[19] Opinion, point 23. Hereinafter, the terms "real seat", "head office", "commercial headquarter" or "commercial headquarter" are used interchangeably.

the rulings *X and Y*[20], *Lasteryrie du Saillant*[21], *SEVIC Systems*[22] and *Oy*[23] - and that amount to discrimination against the exercise of the freedom of movement[24]. On the ground that Cartesio – by seeking to transfer its operational headquarter to Italy – proposed the “actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period” according to the definition of genuine exercise of the freedom of establishment given by the ECJ in *Cadbury Schweppers*[25], the AG argued that Treaty rules on the right of establishment clearly applied to the case[26].

With this starting point for his reasoning, the A.G. submitted that the distinction made by the ECJ itself between the “moving out” situation in *Daily Mail* on the one hand, and the “moving in” situation in *Centros*, *Uberseering* and *Inspire Art* on the other hand, never fitted the ECJ’s analytical framework for Articles 43 and 48, which framework, particularly in the SEVIC ruling, had been summarised by the ECJ itself as meaning that restrictions “on entering” or “on leaving” national territory are prohibited[27]. In the A.G. view, this distinction drawn by the ECJ between inbound establishment (allowed by Centros, Uberseering, Inspire Art and SEVIC) and outbound establishment (not allowed by Daily Mail) departed from the ECJ’s reasoning in Daily Mail itself: in making this argument, the A.G. referred to the ECJ’s statement in Daily Mail, identical to the one formulated in *Baars*[28] and *in Lasteyrie du Saillant*, whereby the provisions on freedom of establishment “also prohibit the Member State of origin from hindering the establishment in another Member State or of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58”[29].

Consistently with these premises, the A.G. expressed the opinion, first, that the ECJ’s statement in Daily Mail, according to which the Treaty does not confer companies a right to transfer the head office to another Member State while retaining their status as companies incorporated under the legislation of the first Member State”[30], does not represent the case-law and its underlying logic accurately[31]. This would be the case, according to the AG, both with regard to the possibility for companies of using the freedom of establishment – where he found that the *Cadbury Schweppes* ruling represents a significant qualification of the liberal rulings in *Centros* and *Inspire Arts*, due to the ECJ’s statement, in *Cadbury Schweppes*, that the right of establishment does not prevent Member States from being wary of “letter box”or “front companies” – and with regards to the effects that any segment of national rules or practices may have on the freedom of establishment.. On the realisation that the effective exercise of the freedom of establishment requires at least some degree of mutual recognition and coordination of the various systems of rules, the AG draw the conclusion that the case-law, while respecting

[20] Case C-200/98 *X and Y* ECR [1999] 8261
[21] Case C-09/02 *Lasteryrie du Saillant* ECR [2004] 2409
[22] Case C-411/03, SEVIC System ECR [2005] 10805
[23] Case C-231/05 Oy ECR [2007] 6373
[24] Opinion, point 25
[25] Case C-196/04 Cadbury Schweppes ECR [2006] 7995
[26] Opinion, point 25.
[27] Case C-411/03, SEVIC, cit., para. 22 and 23; Opinion, point 28
[28] Case C-251/98, Baars ECR [2000] 2787
[29] Case 81/87, Daily Mail, cit., para. 16, Opinion, point 28. Art. 58 icle currently, Article 48
[30] Case 81/97, Daily Mail, cit. para. 24
[31] Opinion, point 29

national rules regardless of whether they are based on the real seat or on the incorporation theory, implies that neither theory can be applied to the fullest logical extension[32]. In the AG view, Uberseering is perhaps the best example of the fact that neither theory can be applied to the fullest logical extension[33]. In effect, in that case, involving a company incorporated in the Netherland which had been regarded as having transferred its central administration to Germany, the ECJ had ruled that the denial in Germany of the capacity of a company incorporated in the Netherlands to be a part of legal proceeding, unless the company were reconstituted under German law (which would have been the result of a full application of the real seat theory) was tantamount to an outright negation of the freedom of establishment, and could not be justified on grounds of general interest[34].

Consequently, in the AG's view, on the basis of the current state of EC law Member States do not enjoy an absolute freedom to determine "life and death" of companies constituted under their domestic law regardless of the effects on the freedom of establishment, on the ground that Member States would otherwise have total discretion to impose the winding up of a company just because the company had decided to exercise the freedom of establishment[35]. Having noted that Hungarian provisions applicable at the relevant time did not merely set out conditions for the transfer, but instead required that the company be dissolved, and that the Hungarian Government did not put forward any grounds for justification, the AG considered therefore the Hungarian provisions at issue as an outright negation of the freedom of establishment without justifications on public interests reasons. He thus recommended the ECJ to rule that Articles 43 and 48 preclude national rules which make it impossible for a company formed under national law to transfer its operational headquarters to another Member State[36].

Because the AG, in his reasoning, had accepted that grounds of general public interests such as the protection of the interests of creditors, minority shareholders, employees or the tax authorities may make it acceptable for a Member State to set certain conditions before a company formed under its national law could transfer its operational headquarter to another Member State, the AG conclusion could well have been different had the Hungarian provisions simply set specific requirements to be met before the transfer – rather than imposing the dissolution of the company – and had the Hungarian Government justified these requirements.

2. The ECJ's arguments

The reason underlying the distinction, in the case of legal entities, between outbound seat transfer (the Daily Mail and Cartesio situation) and inbound seat transfer (the situation in Centros, Uberseering and Inspire Art), which was found unconvincing by the AG, was implicitly explained by the ECJ through his statement, in *Daily Mail*, that "unlike natural persons, companies are creatures of law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying

[32] Opinion, point 29
[33] Ibid
[34] Case C-208/00, Uberseering, cit. para. 93.
[35] Opinion, point 31
[36] Opinion, points 34 and 35

national legislation which determines their incorporation and functioning"[37].

The realisation that companies are "creatures of national law", as a reason for leaving national law the assessment whether a company still meets the conditions for its existence, seemingly faces the objection, in the AG opinion, that at the current state of Community law it is impossible for Member States to enjoy an absolute freedom to determine the "life and death" of companies. However, if the ECJ statement under consideration (companies are "creatures of national law") is taken together with another statement, in Daily Mail itself, whereby the freedom of establishment "also prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58" (currently, Article 48)[38], the two statements could have been reconciled if interpreted in light of each other.

In fact, it could be inferred that, in the ECJ's view, *as long as companies continue to satisfy the conditions set by national legislation for their existence*, the Member State of origin cannot prohibit companies from establishing operations in other Member States. From this viewpoint, no contradiction could be found between the conception of companies as creatures of national law and the Daily Mail conclusion on the one hand, and the ECJ's statements whereby Member States of origin cannot hinder the establishment in other Member States, referred to by the AG, on the other hand. The contradiction could not be found because two different issues are at stake: what the existence of a company requires (the creation in accordance with national law); what rights the company enjoys under EC law once it exists under national law. A parallel could be drawn between the incorporation of companies (with the national law applicable to them) and the nationality of individuals: for natural persons too, the issue concerning the conditions under which an individual can be a national of a Member State (conditions which are established by each State) is conceptually different from the issue concerning which rights nationals of Member States enjoy under EC law.

The actual ECJ reasoning in *Cartesio* developed two key issues: whether companies created under the law of a Member State could move its real seat to another State while remaining governed by the law of the country of incorporation; the distinction between this situation and the situation of companies wishing to move to another Member State both the registered and the head office with a change of the applicable national law.

As regards the question whether companies created under the law of a Member State could move its real seat to another State while remaining governed by the law of the country of incorporation, the ECJ – in departing from the AG opinion – followed and developed exactly the line of the above arguments. In detail, the ECJ first highlighted its previous statements in *Daily Mail* and in *Uberseering*, to the effect that: a) the Treaty places on the same footing the different connecting factors required by Member States for the creation of companies governed by their own legislations in order to grant companies formed under the national law of any Member States the right of establishment[39]; b) the question whether a company formed in accordance with the law of one Member State can transfer its registered office or its real seat to another Member State without losing its

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[37] Daily Mail, para. 19
[38] Para. 16 of Daily Mail
[39] Para 105-106 of the *Cartesio* ruling. Hereinafter, the various paragraphs of the ECJ's reasoning in Cartesio will be referred to simply as "Para….of the ruling".

legal personality under the law of the Member State of incorporation, and the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated[40]. Based on these premises, and after stressing its statement in *Daily Mail* that the Treaty regards the differences in the legislations of Member States concerning the connecting factors for companies as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or convention, the ECJ draw a consistent conclusion.

The ECJ conclusion is that, in the absence of a uniform Community law definition of companies which may enjoy the right of establishment on the basis of a single connecting factor, it is for the applicable national law to solve the question whether Art. 43 applies to a company which seeks to rely on the right of establishment. This on the ground that a company is entitled to freedom of establishment so long as it maintains the connecting factor required for its existence under the national law of the Member State of incorporation[41]. The power of a Member State – concludes the ECJ – "includes therefore the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation"[42]

Contrary to the AG opinion, the ECJ thus found that a Member State can still determine "life and death" of a company *if* the company wishes to retain its legal status under the law of that State whilst no longer complying with the conditions required to maintain the connecting factor. In essence, this part of the ECJ's ruling echoes the *Daily Mail* conclusion. Before the *Centros, Uberseering, Inspire Art* and *SEVIC* rulings were issued, the conclusion in *Daily Mail* had been regarded, by a part of the literature, as a refusal by the ECJ to recognise under EC law the right of primary establishment – in the absence of EC harmonisation measures or of a convention between Member States - due to a possible concern to prevent Arts. 43 and 48 of the Treaty from granting different rights to companies according to whether they were formed in Member States adopting the real seat criteria or the incorporation criteria[43]. Although in the *Daily Mail* case both the Member State of origin (the UK) and the intended Member State of destination (the Netherlands) adopted the incorporation system, it had been argued that, had the ECJ recognised *Daily Mail* the right under Art. 48 to move its head office to the Netherlands while still remaining governed by UK law on the ground that the company enjoyed this right under its national law, it would have been forced to deny under Art. 48 the same right to companies formed in Member States adopting the real seat criteria, on the ground that these other companies did not enjoy the same right under their national laws[44]. It had thus been submitted that the ECJ conclusion in *Daily Mail*, despite its contrast with the ECJ's readiness to give full effect to Art. 43 in other areas of the right of establishment (such as the right of establishment of individuals) even in the absence of harmonisation

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[40] Para. 107 of the ruling

[41] para. 109-110 of the ruling

[42] para. 110 of the ruling.

[43] Loussouarn, Y, "Le droit d'etablissement des societes", cit; Cerioni, L. "The barriers to the International Mobility of Companies within the European Community: A re-reading of the case-law", Journal of Business Law, 1999, pp. 59-79.

[44] Cerioni, L. "The barriers to the International Mobility of Companies within the European Community: A re-reading of the case-law", cit.,pp. 75- 76.

measures, had avoided *recognising under EC law* the disparities created by different national company laws[45].

These arguments – in light of the first ECJ conclusion in *Cartesio* - could be "updated" by submitting that, although the ECJ still avoids granting expressly under Art. 48 different rights to companies according to the rights granted by their national legislators, *de facto* the first conclusion in *Cartesio* would (continue to) produce exactly this (undesirable) result, as it would imply different consequences for companies according to the national law of the Member State where they have been set up.

Companies created in countries adhering to the real seat theory would be bound to keep their central headquarter in the Member State of origin (i.e. in the same Member State of location of the registered office) as a condition for existence while being free to exercise the outbound freedom of establishment by setting up agencies, branches or subsidiaries in other Member States. By contrast, companies created in countries adopting the incorporation theory would be free, while keeping the registered office in the State of incorporation, to transfer the central headquarter to other Member States (as allowed by their national law of incorporation), in addition to setting up agencies, branches or subsidiaries in the host State.

The first conclusion in *Cartesio*, if taken on its own, would mark the "end of the history" for the academic debates which, after the ECJ's rulings in *Centros*, *Uberseering*, *Inspire Art* and *Lasteyrie du Saillant,* had been focusing on the issue whether the ECJ's *Daily Mail* ruling could be considered as still applicable and whether the real seat criteria had to be regarded as not allowed by EC law. In particular, the *Lasteyrie du Saillant* ruling concerning natural persons, in which the ECJ had struck down exit taxes imposed on "taxpayers" (thus, seemingly, on both individuals and companies) wishing to move their residence to another Member State, was regarded – by virtue of the fact that Art. 48 of the Treaty equates companies with natural persons – as applying to companies formed in any Member State too[46]. As a result, it was considered as implying the need to give up the real seat theory by Member States of origin adopting it until the time of the ruling[47].

The *Cartesio* ruling, in its first conclusion, clarifies that this is not the case: a Member State applying the real seat theory is still free to consider the outbound movement of the head office to another Member State as a situation not satisfying the requirement for the existence of the company in its jurisdiction, although an intended Member of destination, by virtue of the *Uberseering* ruling, is not free to refuse the inbound movement. Because the justification of the real seat criteria, in the Member States adopting it, lies in the protection of the interests of the various stakeholders involved (creditors, employees, minority shareholders, tax authorities)[48], the first conclusion of the *Cartesio* ruling would

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[45] Loussouarn, Y, "Le droit d'etablissement des societes", cit, p. 235: "C'est manifestement pour eviter de consacrer des semblables disparites que la Court a pose comme regle generale la soumission de la liberte de transfer a l'edification d'un droit derive…et le Daily Mail en a fait les frais", Cerioni, L. "The barriers to the International Mobility of Companies within the European Community: A re-reading of the case-law", cit, p. 76.

[46] Deininger, R. "Case Comment: Impact of the Inspire Art decision", The European Legal Forum, 2004, 1 (4), 17-19

[47] Ibid

[48] As it was pointed out by the German Government in *Uberseering*: Case C-208/00, Uberseering, cit., para. 87 to 90

reveal, if read together with *Uberseering*, that the state of origin and the state of destination are in an opposite position. Specifically, the protection of these interests, which can be invoked by a State of destination in *certain* (exceptional) *circumstances* to restrict the freedom of incoming companies to move the head office into its jurisdiction[49], can *normally* be invoked by a State of origin (by virtue of the first *Cartesio* conclusion), if this State so wishes, for preventing the outbound movement of the head office.

The first part of the ruling seems thus, ex post, to confirm the argument, which was put forward after the *Centros* case by a part of the literature, according to which in that case the ECJ did not really intend to assess the consistency of the real seat criteria with EC law[50]: the first ECJ's conclusion in *Cartesio* implies that, at the current stage of development of EC law, the real seat criteria, as a criteria concerning the connecting factor which a national legal system is free to adopt, cannot be regarded as inconsistent with Art. 48 if applied by the Member State of origin. The asymmetrical position, in which States of origin and State of destination find themselves, raises the question whether this situation can find any other rationale in addition to the fact that companies are creatures of national law.

The issue seems to arise because, despite the fact that companies are creatures of national law, part of the academic literature, before the *Cartesio* ruling, found (just like the A.G. in *Cartesio*) a lack of rationale for any distinction between "moving in" and "moving out" cases[51]. This literature argued that, if the State of origin is allowed to liquidate companies that transfer their head office or registered office to another Member State, the company does not exist any more and those who incorporate a new company in the Member State of destination are the former shareholders who would exercise their freedom of establishment as *individuals*, which, in this view, would cause the freedom of establishment of *companies*, granted by Art. 48 of the Treaty, to loose its meaning.

Nonetheless, if the distinction between "moving in" and "moving out" cases were intended not in the sense of EC law allowing only the "moving in" and leaving the "moving out" entirely to national legislators[52], but in the sense of *allowing both the "moving in" and the "moving out" while attaching certain conditions to the "moving out" only*, two observations could be formulated. First, if intended in this second meaning, *the distinction* between outbound movement and inbound movement *can find a rational justification* if the stakeholders involved by the company's business activity (creditors, employees, minority shareholders...) are mainly or only concentrated in the Member State of departure. Second, *this distinction could still avoid rendering Art. 48 meaningless* (from the viewpoint of the freedom of primary establishment) *if*, despite the different treatment of moving out cases and moving in cases, the dissolution of the company could still be avoided in cases of moving out.

More specifically, in the author's view, if the interests of stakeholders involved were taken into account and a distinction between inbound movement and outbound movement was drawn in the sense of establishing certain conditions for the moving out only, there

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[49] Case C-208/00, Uberseering, cit., para. 92

[50] Xanthaki, H., "Centros: is this really the end for the theory of the siege reel?", Company Lawyer 2001, Vol. 22, n.1, pp. 2-8

[51] Mucciarelli, F.M. "Company Establishment' and EC Freedom of Establishment: Daily Mail Revisited" European Business Organisation Law Review, 2008, 267-303, at 296-298

[52] Which, as previously stressed, would be the practical outcome of the first ECJ conclusion in Cartesio *if taken on its own*, and is the legal outcome criticized by the literature.

would be a *de facto* inconsistency not between moving in and moving out cases, but between the different treatment of two different modalities of moving out: on the one hand, the intended transfer of the head office (which could lead to liquidation if the Member State involved adopts the real seat criteria); on the other hand, the concentration of all business activity in a branch located in another Member State (which would be allowed) by an already existing company which, until the time of shifting all activity to the branch, had operated only in the Member State of origin. This is so because if a company, despite formally keeping the central headquarter in the Member States of origin, sets up a branch in another Member State and carries on all its activity through this branch (a branch on which the host Member State cannot impose requirements of compliance with its own national law, but only the requirements laid down by the Eleventh Company Law Directive[53]), the company could in practice achieve the same outcome as if it transferred to the host Member State the central headquarter. In fact, in this case the branch would be *de facto* the primary centre of affairs, i.e. it could as a matter of fact be the head office (despite being not formally registered as such) due to the concentration of the activity there, despite the ECJ has adopted, in *Centros* and in *Inspire Art*, a formal classification of a registered branch as secondary establishment[54]. Whereas, for this reason, the inconsistency which – after *Daily Mail* and *Cartesio* - arises between the different treatment of two alternative modalities of outbound transfer, in case of a Member State adopting the real seat criteria and requiring liquidation of a company moving out the formal head office, would be a *de facto* inconsistency, no *lega*l inconsistency could be found if following the ECJ reasoning. By taking the ECJ line of reasoning, it could in fact be noted that the connecting factor with the law of the Member State of origin would be broken in case of outbound transfer of the formal head office but not in case of creation of a branch in another Member State.

As regards the distinction between moving in and moving out cases, the key concern about moving out cases should be – in order not to deprive Art. 48 of its scope from the perspective of the freedom of primary establishment - how to avoid the dissolution of the company and its reincorporation (while indicating the conditions making the "moving out" possible).

Exactly this concern is addressed by the ECJ's reasoning on the second issue – i.e., the situation of companies wishing to move to another Member State with an attendant change of the applicable national law - which reasoning makes available to all companies the possibility of outbound seat movement by changing, without dissolution, the connecting factor with a Member State. In the ECJ's wording, in a case in which a company governed by the law of one Member State moves to another with an attendant change as regards the national law applicable, the company is converted into a form of company which is governed by the law of the Member State to which it has moved. In this case, *the power of the Member State of origin* to define the connecting factor required of a company incorporated in its jurisdiction and wishing to maintain its status, "….far from implying 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

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[53] Case C- 167/01, *Inspire Art*, cit.

[54] In the Inspire Art proceedings, the Netherlands Government and other Governments had actually questioned whether the establishment formally registered as branch was actually to be regarded as the head office.

establishment, *cannot*, in particular, *justify the Member State of incorporation*, by requiring the winding up or liquidation of the company*, in preventing 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*" [55].

As it was noted[56], the AG dealt with an issue – the transfer of the head office alone – which, due to confusion in the legal terminology, was different from the question actually raised by the company, which used to refer to the transfer of the "seat". Cartesio was thus, apparently, interested in transferring both the registered office and the head office while maintaining its status as an entity governed by Hungarian law. Nonetheless, the ECJ's statement cited just above clarifies that at the current stage EC law does not confer companies a right to transfer the registered office and the head office while remaining governed by the law of the State of incorporation, but confers companies the right to transfer the registered and the head office (without dissolution) only with a change of the applicable national law. *Cartesio* indicates therefore that the *Daily Mail* conclusion – while still applicable if the company wishes to maintain the connecting factor with the Member State of incorporation while no longer complying with the underlying conditions – no longer applies in case of a seat transfer complying with the condition of converting the legal form (without dissolution).

The last part ("to the extent that it is permitted under that law to do so") turns out being the decisive one. Taken on its own, it indicates that the possibility of cross-border seat transfer without winding up of the company ultimately depends on the law of the State of destination. If the legal system of the State of destination allows the inbound movement of both the registered office and the real seat of a company formed in another EC jurisdiction without requiring a new process of incorporation but merely the conversion into the new legal form, the State of origin cannot prevent the transfer[57]. In fact, in the case under consideration, the transfer amounts not to an infringement of the conditions required by the law of the State of incorporation by a company wishing to maintaining its connecting factor with this State, but to a choice *of the company* – as an entity distinct from its shareholders - to change its connecting factor, i.e. to establish a new connecting factor with another Member State. By stating that the prevention of the actual conversion into a company governed by the law of the Member State of destination constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Art. 43[58], the ECJ's reasoning clarifies that exactly the choice of a company to change its connecting factor with a Member State is protected by the Treaty's provisions on the right of establishment and that, at the current state of EC law, companies enjoy a right of primary establishment under this form of seat transfer.

The second ECJ's conclusion can thus be seen as specifying that a Member State's *power to determine "life and death"* of a company incorporated under its legislation *no longer exists* where this company aims at changing the applicable national law.

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[55] Para. 112 of the ruling.
[56] Retro, paragraph 1
[57] See next paragraph as regards the issue whether the law of the Member State of destination can prevent this transfer (without reincorporation of the company and with) conversion of the legal form.
[58] Para 113 of the ruling

In addition, the ECJ strengthened its overall conclusions about the difference between the case of a company wishing to move its head office while retaining its status under the law of the State of incorporation and the case of a company wishing to move the registered office with a change of the applicable national law by dealing with Commission's argument and by drawing a distinction with the SEVIC ruling.

The Commission had maintained that the absence of EC legislation aimed at harmonising the connecting factors required by national legislations was remedied by the rules on the forms of business organisation introduced by the European Community. These forms, i.e. the European Economic Interest Grouping (EEIG)[59], the European company (*Societas Europaea*, SE)[60] and the European Cooperative Society[61], are to a good extent governed by uniform EC law as regards their core features, but these EC provisions leave several aspects to the national law of the Member State of registration. Specific provisions of the respective Regulations allow such entities to transfer both the registered office and the head office with a change of this applicable national law, and the Commission argued that such rules should be applied to the cross-border transfer of real seat of a company incorporated under the law of a Member State. Arguably, the Commission's view that such rules are applicable *mutatis mutandis* to the transfer of registered office and real seat of companies governed by national law is consistent with its assessment that a Directive on the transfer of the registered office of companies from one Member State to another is unnecessary at the current time.

In response, the ECJ simply highlighted that, even if the application of the rules on the seat transfer of the EEIG and of the SE concerning the seat transfer with a change of applicable law *were to govern* the cross-border seat transfer of a company incorporated under national law, the fact that Cartesio merely wished to transfer its seat without changing the national law implies that these rules on seat transfer contained in the EEIG regulation and in the SE could not lead to the predicted result (of allowing the transfer) in the circumstances at stake in the Cartesio case[62]. The specification even if these rules "were to govern" impliedly indicates that, in the ECJ's view, the rules on the seat transfer of the EEIG and of the SE are *actually* intended to govern *only* these EC law vehicles (whose regulation is in some respects left to national laws) rather than companies governed by national laws. The rules applying to these vehicles currently require the registered office and the head office to be in the same State[63]. Because they would not seem, on the basis of the ECJ's wording in *Cartesio*, to apply to companies governed by national law, and since this wording emphasizes the conversion of the company into a form governed by the law of the State of destination, which requires the registered office to move to this State, the ruling would seem to leave the doubt as to whether – in addition to the transfer of both the registered office and the head office – the transfer of the registered office alone would be allowed and, if so, in what cases[64].

In the second respect – i.e., the distinction between the facts at stake in *Daily Mail* and in *Cartesio*, and the implications of the *SEVIC* ruling – the ECJ explained that SEVIC

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[59] Regulation n. 2137/85

[60] Regulation n. 2157/2001

[61] Regulation n. 1435/2003

[62] Para 120 of the ruling.

[63] E.g., Regulation n. 2157/2001, Art. 7

[64] A response will be proposed in paragraph 3, 3.2.

does not relate to the same problem. The difference in the underlying issue would be that, whereas in *Daily Mail* and *Cartesio* the issue at stake is the *existence* itself of the company under the national law of the State of origin and thus its *entitlement* to the right of establishment, in the situations in *Centros*, *Uberseering*, *Inspire Art* and *SEVIC* the issue was a possible restriction, in the Member State of destination, of the right of establishment of companies whose existence under the national law of incorporation is not called into question[65].

All these ECJ arguments in *Cartesio* give rise to new issues for the potential developments of EC company law.

3. Assessment of potential effects: key issues

As noted above, the ECJ, by specifying that the Member State of origin cannot prevent a company formed under its national law from transferring its seat to another Member State (without dissolution and) with a change of the applicable national law, to the extent that the law of the intended State of destination allows the inbound movement, seems to have left decisive choices to the State of destination.

In the author's view, this ECJ position and the fact that, seemingly, the rules on the seat transfer laid down for the SE and the EEIG do not apply to companies governed by national laws[66], raise important issues: *a)* whether a Directive on the cross-border seat transfer would be necessary and, if so, for which purpose; *b)* in what case restrictions by a State of origin could be justified by overriding requirements in the public interest; *c)* whether a Convention between Member States would be necessary; *d)* any potential impact of *Cartesio* on the supranational company law forms.

3.1. The need for a Directive on the cross-border seat transfer

The Commission, in its impact assessment on a Directive on the cross-border transfer of registered office[67], carried out an assessment of the need for protection, and of the safeguards either to be considered as existing or to be introduced, for each of the different categories of stakeholders. This Commission's assessment – which focused on the transfer of the registered office *with a change of applicable law* - identified the potential risks for stakeholders and stressed that, whereas in some areas the safeguards would be ensured by the EC legislation already enacted, in other areas further safeguards would be needed., but it concluded that it was not clear that adopting a Directive would represent the least onerous way of achieving the objectives set[68], and that therefore a Directive on the cross-border transfer was not needed at the current time[69]. The Commission was induced to draw this conclusion, inter alia, by the belief that the issue of the transfer of the registered office might be clarified by the ECJ in the *Cartesio* ruling still pending at

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[65] Para. 122-123 of the ruling.

[66] See retro, paragraph 2.

[67] Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007)1707, 12 December 2007

[68] Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007)1707, 12 December 2007, p. 6.

[69] Ibid.

the time[70].

Having the Commission reached such conclusion before the ECJ's ruling in *Cartesio,* the question arises whether the ECJ's conclusion makes the Directive necessary to avoid a situation in which, within the internal market, companies could move their seat only to some States and not to others. The European Parliament, on 10 March 2009, adopted a resolution[71] recommending the Commission to put forward a Directive on the cross-border transfer of the registered office of a company, but this resolution does not mention the *Cartesio* ruling. Interestingly, the resolution invites the Commission to propose a Directive in order to *facilitate* the cross-border transfer of the registered office, but notes that "undertakings can currently transfer their set *only either* by dissolution and establishment of a new legal entity in the Member State of destination, *or* by establishing a new legal entity in the Member State of destination and then merging both undertakings; further notes that this procedure involves administrative obstacles, costs and social consequences and offers no legal certainty"[72] . The European Parliament therefore considers the dissolution and the reincorporation ex novo in the State of destination, and the cross-border merger with a newly established company, as the two existing modalities of seat transfer: in this sense, the *facilitation* of the cross-border transfer of the registered office that would be brought about by the Directive consists of the *addition*, as a new modality of seat transfer, of the outright transfer of registered office without dissolution and without need for a merger. In other words, the European Parliament uses the verb "facilitate" *not in the sense of making it easier* a form of transfer that is already possible, but in the sense of *making it legally possible* a form of transfer which is not yet possible. On a first reading, the ECJ's conclusion in *Cartesio*, by specifying that the outright seat transfer with a change of the applicable national law is possible to the extent that it is "*permitted*" by the law of the State of destination, would seem to imply that a Directive is necessary to ensure that any Member State permits the inbound transfer. If this were the case, a Directive would thus serve to *make it legally possible* – as intended by the European Parliament – the direct seat transfer (without dissolution and without the need for a merger) as a modality of exercise of the freedom of establishment throughout the Community.

This purpose of the intended Directive would, however, be inconsistent with the clarification by the ECJ, in SEVIC, that the freedom of establishment is *unconditional* and that EC harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment[73] . Although SEVIC has been regarded by the ECJ, in *Cartesio*, to be a case of inbound movement, the circumstance that the Cartesio ruling has specified that, subject to the change of applicable national law, the outbound movement is possible too, makes the ECJ's reasoning in SEVIC also applicable to the outbound seat transfer. To put it differently, despite in Cartesio issues concerning a possible Directive on the seat transfer were not raised, the ECJ's reasoning in SEVIC as regards the cross-border merger directive seems to be applicable *mutatis mutandis*. In particular, in SEVIC,

[70] Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007)1707, 12 December 2007, p. 25.

[71] 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)).

[72] Ibid, paragraph 1 and 2 of the resolution.

[73] Case C-411/03, SEVIC, cit, para. 24 to 31

where it had classified cross-border mergers as one of the possible forms of exercise of the freedom of establishment, the ECJ had made it evident that a Directive on cross-border merger could serve *to facilitate* this form of exercise of the right of establishment, which, irrespective of the existence of a specific Directive, has to be seen as allowed due to the *unconditional nature* of the rights conferred by Arts. 43 and 48. Moreover, the ECJ had found that Arts. 43 and 48 cover all measures that permit or even merely facilitate access to another Member State by participating in the economic life of the country effectively and under the same conditions as national operators[74]. Undoubtedly, the cross-border seat transfer, at least when consisting of a transfer of the registered office together the head office-principal place of business, can be as effective as the cross-border merger in permitting or facilitating the access to another Member State, i.e. in allowing the participation in the economic life of the country of destination.

Accordingly, it would be inconsistent to consider one form of exercise of the right of establishment, such as cross-border merger, as allowed *irrespective of* the specific Directive (i.e., as unconditional) and another form of exercise of the right of establishment, i.e. the cross-border seat transfer (without dissolution and) with a change of applicable national law as allowed *provided that* a specific Directive is issued (i.e. as conditional on the existence of a specific Directive). The freedom of establishment being unconditional irrespective of its modality of exercise, the *logical argument* would be that a Directive on the transfer of the registered and head office with a change of applicable national law should only serve to facilitate this direct seat transfer in the sense of making it easier, to the same extent as the Directive on cross-border mergers[75], in light of the SEVIC ruling, only serves to make cross-border mergers easier.

Consequently, if as a result of the ECJ's literal wording in *Cartesio* ("..to the extent that it is *permitted*..") a Directive was regarded as necessary to make the cross-border seat transfer legally possible as a modality of exercise of the freedom of establishment, it would become problematic to reconcile this wording with the above ECJ's general statements in SEVIC.

Nonetheless, an interpretation capable of translating the logical argument into a legal one is possible if the ECJ's specification that the outbound transfer falls under the freedom of establishment "to the extent that it is permitted under the law" of the State of destination is read again together with the ECJ's conclusion in the *Uberseering* ruling. In *Uberseering*, the ECJ had stated that a State A, in whose territory a company formed under the law of a State B has moved the head office while remaining governed by the law of State B, cannot refuse to recognise the company's legal capacity, as such a refusal would amount to an outright negation of the freedom of establishment[76].

In reaching this conclusion, the ECJ had however admitted that measures restricting the freedom of establishment could be taken by a Member State for overriding reasons of public interest, such as the protection of the interests of creditors, of employees, of tax authorities[77]. On the other hand, it had clarified that the refusal to recognise the legal capacity – which amounts to a refusal to allow the incoming seat transfer without

[74] Case C-411/03, SEVIC, cit, para. 18
[75] EC Directive 2005/56 of 26 October 2005.
[76] Case C-208/00, Uberseering, cit., para. 94
[77] Case C-208/00, Uberseering, cit., para. 92

reconstitution of the company – goes beyond what was necessary to achieve the protection of those interests as it would be an outright negation of the freedom of establishment[78] and would thus be in breach of Arts. 43 and 48.

By taking this reasoning together with the *Cartesio* findings, it can be inferred that, if a State of destination cannot refuse to allow the inbound seat transfer in the event that the company *wishes to remain governed by the law of the State of origin*[79], to an even greater extent the State of destination cannot refuse the inbound seat transfer if the company intends to change the applicable national law and to become subject to the national legislation of this State. The ultimate outcome would otherwise be again the outright negation of the freedom of establishment, with the absolute freedom of the State of origin to prevent the transfer whenever the intended State of destination does not allow the inbound seat transfer into its jurisdiction. Moreover, from the viewpoint of the State of destination, the risks for third parties' interests are certainly lower when the incoming company wishes to become subject to its national law.

Accordingly, it can be argued – by reading together *Cartesio* and *Uberseering* - that the State of destination must accept the incoming seat movement, but can have discretion only as regards the steps to be taken by the incoming company for changing the applicable law. The ECJ's statement in Cartesio ("to the extent that it is permitted by the law of this latter State") can thus be read as meaning that the Member State of origin cannot prevent the outbound seat transfer of a company with a change of the applicable national law, *to the extent that the company takes all the steps required, for this purpose, by the law of the State of destination.*

If accepting this reading, the conclusion would be that, following the *Cartesio* ruling, a Directive on the cross-border transfer of seat would be needed only to *facilitate* the transfer (just like the Directive on cross-border merger could only be intended, following the SEVIC ruling, to facilitate cross-border mergers). The Directive would do so by harmonising the steps required for this purpose by the different Member States to incoming companies.

This raises the question whether the draft proposal for the 14th Company Law Directive, in the last version which was put forward before the Commission's conclusion that this Directive was not needed and thus before the *Cartesio* ruling, and the recommendations of the European Parliament which set out the same procedure, would be adequate for this purpose. This procedure for the transfer - preparation and publication of a transfer proposal, approval of the transfer proposal by shareholders and creditors, etc.. - is similar to the procedure set out in Regulation 2157/2001 (the European Company Statute) for the seat transfer of a SE and to the procedures indicated by the Directives dealing with mergers[80]. The procedure mainly seeks to harmonise the steps to be taken in the State of departure; therefore, it clearly reflects a concern for the protection of stakeholders in that State. As regards the steps to be taken in the State of destination, the recommended

[78] Case C-208/00, Uberseering, cit., para. 93

[79] As highlighted in the previous paragraph, this position of the State of destination is asymmetrical with the position of a State of origin from which the company wishes to move out while remaining governed by the law of this State.

[80] Art. 8 of EC Regulation 2157/2001; Directive 78/855 EEC of 9 October 1978, Articles 5 to 9; Directive 2005/56/EC of 26 October 2005, Articles 5 onwards.

procedure only indicates that: a certificate conclusively declaring that all acts and formalities required have been completed, issued by the Member State of origin, should be presented within an appropriate period of time to the body responsible for registration in the Member State of destination, together with a copy of the memorandum, of the article of association envisaged for the company in this latter Member State and of the transfer proposal; these documents should suffice to enable the company to register in the Member State of destination; the competent authority in this State must verify that the substantive and formal conditions for the transfer are met and give immediate notification of the registration to the authority of the Member State of origin[81].

These recommendations, if they were to result in a Directive, would be detailed and specific (leaving virtually no discretion) for the State of origin, but it would still leave wide discretion to the Member State of destination as regards the steps to be taken in that State. Specifically, the Member State of destination would seem free to decide: *a)* what is the "appropriate period of time" for the presentation of the documents to the its competent authority; *b)* whether the registration should take place *immediately* upon presentation of the documents above indicated *or* whether, *before* registration, the competent authority should verify if the clauses of the articles and memorandum of association comply with any requirement which might exist in relation to the new chosen legal form[82]; *c)* whether the incoming company should wait until the new legal form has been adopted (and entered into the commercial register) to identify itself with the tax authorities in the new State or whether should do so before registration[83].

Consequently, a Directive intended to prevent the persistence of considerable differences between the Member States in these important aspects should go further than the draft 14th Directive and the European Parliament recommendation, i.e. it should indicate in detail not only the procedural steps required in the Member State of origin, but *the conditions to be met in the Member State of destination too*. This would be necessary for creating a level playing field for cross-border mobility of companies within the European Community. Complying with the conditions that may be requested in the new Member State, and ensuring uniformity of all these conditions from one Member State to another, would in fact guarantee that the Member State of origin could not hinder the

[81] European Parliament resolution, cit., Recommendation 4 (administrative transfer procedure and verification). According to this recommendation, the competent authority of the Member State of origin *shall remove* the company from its register *after* having received the notification of registration in the Member State of destination. This seems to be consistent with the interpretation of the ECJ' s statement in Cartesio ("to the extent that it is permitted by the law of this latter State") as meaning that the Member State of origin cannot prevent the outbound seat transfer of a company with a change of the applicable national law if *the company takes all the steps required, for this purpose, by the law of the State of destination.*

[82] This choice would seem to be possible for the Member State if the Directive stated, just like the recommendation of the European Parliament (Recommendation 4, 2nd paragraph), that *"Those documents* shall be sufficient*"* to allow the registration, rather than *"the presentation of those documents* shall be sufficient.." (emphasis added).

[83] This alternative would seem to be possible for the State of destination because - although, according to the recommendation of the European Parliament (Recommendation 1), "the transfer shall take effect on the date of registration in the host Member State. From the date of registration in the host Member State, the company shall be governed by the legislation of that State" – the company would retain all its assets, liabilities and contractual relations (Recommendation 1), so that the business activity would normally continue during the transfer procedure.

transfer (whichever the Member State of destination will be), but could only ensure that the appropriate procedural steps for the protection of stakeholders in the Member State of origin[84] will be complied with.

3.2. Possibility of restrictions by a State of origin on grounds of overriding requirements in the public interest

In the ECJ's statement whereby the prevention of the actual conversion into a company governed by the law of the State of destination constitutes a restriction in breach of the Treaty's articles on the freedom of establishment, the specification "unless *it serves overriding requirements in the public interest"*[85], appears particularly significant. On the one hand, it indirectly confirms that the seat transfer with the actual conversion into a form governed by the law of the State of destination cannot be subject to the existence of a Directive, i.e. that a Directive could only be intended to facilitate it rather than to make it legally possible. On the other hand, it shows the importance of the overriding requirements concerning stakeholders' protection in the State of origin, and gives rise to the question whether, in case of introduction of a Directive setting out (as the proposed draft and the European Parliament recommendation do) procedural phases in this State, exactly for the purpose of *ensuring this protection*, the prevention of the seat transfer with conversion by the State of origin on grounds of overriding requirements of public interests is still possible. If this part of the *Cartesio* ruling is red together with the ECJ's statement in *Uberseering* and in *SEVIC* whereby the overriding requirements in the public interest relate to the protection of creditors, employees, minority shareholders or tax authorities[86], it could be inferred that the ECJ in *Cartesio* refers to the same categories: however, the provisions of the Directive at stake, in setting out the procedure for the transfer, would aim at ensuring exactly this protection.

In this respect, it can be noted that the European Parliament resolution recommending the Directive, in its preamble, expressly states that "the cross-border transfer of the registered office should not circumvent legal, social and fiscal conditions"[87] and that "the right of other stakeholders concerned by the transfer, such as minority shareholders, employees and creditors etc, should be safeguarded"[88].

In other words, if the compliance in the State of departure with all procedural steps set out by the possible Directive under consideration was regarded as *always* satisfying all requirements of stakeholders' protection, the ECJ's specification "unless it serves overriding requirements" (meaning that the freedom of outbound transfer can be restricted if there are overriding requirements of general interest) would no longer make sense after the introduction of the Directive. On the contrary, if the compliance with the procedural steps set out by the Directive were considered to be *necessary* for stakeholders' protection but *not always sufficient* for this purpose, the Member State of origin would be left some discretion in assessing when the outbound transfer could be

[84] Steps laid down by the Directive.
[85] Para. 113 of the ruling
[86] Case C-208/00, Uberseering, cit., para. 92; Case C-411/03, *SEVIC*, cit. para. 28

[87] European Parliament resolution, cit., statement D.
[88] European Parliament resolution, cit., statement E.

subject to further restriction due to overriding requirements.

In the author's view, both cases when the compliance with the procedural steps laid down by the possible Directive may be necessary and sufficient for stakeholders' protection and cases when this compliance might not be sufficient could occur. This realization would seem to derive on the one hand from the modalities of transfer of registered office that, on the basis of the European Parliament resolution, would be allowed by the Directive, and, on the other hand, from a co-ordinated reading of the *Cartesio* ruling with the *SEVIC* and *Cadbury Schweppes* rulings.

Specifically, the Directive, if based on the European Parliament recommendations, would clearly govern *both* the transfer of the registered office together with the head office *and* the transfer of the registered office alone (in both cases with the change of the applicable national law): the resolution states in fact that a rule requiring a company to maintain its head office and its registered office in the same Member State would run counter to ECJ's case-law[89]. The resolution refers to the case-law before the *Cartesio* ruling: because the ECJ's wording in *Cartesio* would seem to leave the doubt as to whether – in addition to the transfer of both the registered office and the head office – the transfer of the registered office alone would be allowed under Art. 43 and 48 and, if so, in what cases[90], in the author's view the solution to this issue and the identification of cases when a Directive might not be considered as sufficient for stakeholders' protection are interconnected, and depend on the interpretation of the statement "unless it serves overriding requirements in the public interest" in *Cartesio*. It is proposed here that this statement should be read together with the ECJ's findings, in *SEVIC* and *Cadbury Schweppes*, that the provisions on freedom of establishment protect the effective participation in the economic life of the host Member State, i.e. a genuine economic integration in the host Member State[91].

A transfer of the registered office together with the head office could arguably relate to a concentration of the business activity (mainly) in the Member State of destination and thus result in a genuine economic integration in that Member State. The application of the new legislation would thus not serve to circumvent the legislation of the Member State of origin. Because the situations in which stakeholders' protection risks being jeopardized are obviously those in which a company intends to circumvent a national legislation that is aimed at ensuring this protection, in a case of genuine economic integration in the State of destination, lacking the intention to circumvent the legislation of the Member State of origin, stakeholders' interests should reasonably be regarded – unless particular circumstances of the concrete case suggest otherwise - as protected by the arrangements that would be laid down by the Directive[92].

By contrast, a transfer of the registered office alone could give rise to some doubts about whether or not there would be genuine economic integration in the intended State of destination if all the business activity, together with the head office, remained concentrated in the Member State of origin. In such a case, this latter State should

[89] European Parliament resolution, cit., statement G.

[90] Retro, paragraph 2

[91] Case C-411/03, SEVIC, cit., para. 18; Case Case C 196/04, *Cadbury Schweppes*, cit. para. 53, 54 and 76.

[92] E.g., according to the European Parliament resolution, Recommendation 2, a company planning a transfer should publish, amongst other particulars, "an indication of the arrangements whereby creditors and minority shareholders of the company may exercise their rights and the address at which full information concerning those arrangements can be obtained free of charge".

arguably be left some discretion in assessing the outbound transfer. If the transfer was aimed (due to the change of applicable law) at circumventing national provisions protecting the stakeholders and if, to avoid this circumvention, the arrangements laid down by the Directive would not suffice**,** the prevention of the outbound transfer of the registered office alone for overriding requirements in the public interest would arguably be allowed by the *Cartesio* ruling, subject to the condition that no less restrictive means[93] exist to prevent the circumvention and to ensure stakeholders' protection**.** Such an interpretation seems to be capable of reconciling the *Cartesio* statement concerning the overriding requirement in the public interest with the purpose of the freedom of establishment provisions as specified by the ECJ in *SEVIC* and *Cadbury Schweppes*.

In cases where the intention in terms of economic integration in the host Member State seems to be doubtful, which may occur especially in the event of transfer of the registered office alone, the purpose of a Directive which would aim at facilitating the cross-border seat transfer with the change of applicable national law would in fact need to be balanced against the need for assessment as to whether the operation is consistent with the purpose of the freedom of establishment. To achieve this balance would be the challenge for any future ECJ ruling dealing with cross-border seat transfer after the introduction of the Directive.

3.3. A possible Convention between Member States

Thirdly, the question also arises whether Cartesio makes no longer necessary the negotiations between Member States under Art. 293 of the Treaty. Article 293 commits Member States to enter into negotiations, to the necessary extent, for securing the mutual recognition of companies and the retention of the legal personality in the event of seat transfer from one Member State to another. In the *Daily Mail* ruling, the ECJ had considered the differences as between the connecting factors as problems "which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation *or* conventions"[94], and in *Cartesio*, in elaborating its reasoning, it made reference to this part of the *Daily Mail* ruling. In consequence, it could be argued that, if after Daily Mail a multilateral Convention had been entered into between all Member States for the purpose of securing the mutual recognition of companies and the retention of legal personality in the event of seat transfer, the ECJ conclusion in *Cartesio* would have been different. Nonetheless, it must be noted that, before *Cartesio*, the ECJ'conclusion in *Uberseering* had already ensured the two objectives indicated by Art. 293 from the viewpoint of the Member State of destination, and that *Cartesio* specifies the condition under which the retention of the legal personality is ensured, under EC law, from the viewpoint of the State of departure too. Whereas the drafters of Art. 293 did not distinguish between retention of the legal personality and retention of the legal form, *Cartesio* ensures the retention of the legal personality (intended as continuing existence of the company) without the retention of the legal form chosen under the law of the Member State of origin, which legal form must be converted into the legal form offered by the Member State of destination. As a result, if one assumes that, by "legal

[93] In accordance with the proportionality test generally used by the ECJ to assess the legitimacy of restrictions of the freedom of establishment once a restriction has been found to exist.
[94] Case 81/87, Daily Mail, para. 21-23.

personality", the drafters of Art. 293 simply meant the separate legal existence of the company as a corporate entity, irrespective of the specific legal form (e.g., either private or public limited company), after *Cartesio* a Convention between Member States aimed at ensuring the retention of legal personality is no longer necessary. In the author's view, what could be necessary – especially if the Directive on cross-border seat transfer were not adopted – is a Convention aimed at agreeing the procedural steps that, both in the State of origin and in the State of destination, will need to be taken by the company (irrespective of the States from which and to which it wishes to move).

3.4. Potential impact on the European Company and the proposed European Private Company

If the transfer of the registered office without the transfer of the head office is to be regarded as allowed for companies governed by national laws, although subject to the assessment in light of the need for stakeholders' protection[95], the obligation imposed by the current version of the European Company Statute, on SEs, to transfer the registered office together with the head office[96] would need to be abolished during the forthcoming revision of the Regulation[97], in order not to place the SE at a disadvantage in comparison with companies governed by national law. By contrast, the current version of the proposal for a European Private Company (EPC)[98] - which would allow a company to have the registered office and the head office in two different Member States[99] – does not seem, in the author's view, to be affected by the *Cartesio* ruling.

This would hold true for two reasons (in addition to the fact that a EPC would have no obligation to keep registered office and head office in the same State). First, the EPC would be a "creature of EC law", governed by uniform EC law to a much wider extent than the SE[100], so that – to apply *mutatis mutandis* the ECJ's reasoning in *Daily Mail* (which was uphold in the first part of the *Cartesio* ruling) – it is for EC law to govern the condition for its existence and functioning.

Second, the procedure for the transfer of the registered office of both the SE and the proposed EPC, which specify various phases aimed at protecting stakeholders in the State of departure and – particularly in the case of the proposed EPC – indicates the obligations on the authorities of the State of destination[101], could remain unaffected again because of the fact that the legal form would not be altered by the transfer. The maintaining of the legal form would of course avoid leaving the authorities of the State of destination the same margins of discretion that they would have in case of companies governed by national law wishing to convert the legal form**.** In effect, the provision of the proposed EPC Regulation relating to the seat transfer clarify that the substantive and formal

[95] See retro, 3.2., about the overriding requirements of public interest.
[96] EC Regulation 2157/2001, Art. 7
[97] Revision which, as stated in Regulation 2157/2001, was due to take place after 5 years of application of the European Company Statute.
[98] Proposal which was presented by the Commission in June 2008: see Proposal for a Council Regulation on the Statute for a European private company, COM(2008)396/3.
[99] Proposal for a Council Regulation on the Statute for a European private company, cit., Art. 7
[100] See Proposal for a Council Regulation on the Statute for a European private company, cit., Preamble, recitals (2) and (6).
[101] See Art. 37 of the proposed Regulation for a European Private Company.

requirements laid down in the relevant Chapter[102] already indicate *all* conditions to be fulfilled[103]. Pending the revision of the European Company Statute, if the EPC were introduced according to the current proposal it would thus be, after the *Cartesio* ruling, the only legal form allowing businesses to transfer either the *registered office together with the head office* or the *head office alone* or *the registered office alone*.

4. Conclusion

Cartesio can certainly be seen as a landmark ruling for companies' migration throughout the European Community because, for the first time, the ECJ has expressly identified the content of the freedom of primary establishment, covered by Articles 43 and 48, which companies created in any Member State can enjoy.

After this ruling, the legal environment within the European Community indicates three possible situations as regard the cross-border seat transfer: a) transfer of the head office alone without the transfer of the registered office; b) transfer of the registered office alone without the transfer of the head office, and without a change of the applicable national law; c) transfer of the registered office, either alone or with the head office, with a change of the applicable national law.

Whereas in the situations in a) and b) the possibility for companies to implement such modalities of transfer would *entirely depend* on the national laws of their Member States of incorporation, the situation in c) would be the only one falling within Art. 48, and which would thus be possible for companies created in whatever Member State (but would be subject, *particularly* in case of transfer of the registered office alone, to the assessment of its compatibility with overriding requirement in the public interest).

This would be so because, irrespective of the Member State to which companies wishes to move the head office with a conversion of the legal form, the host Member State cannot refuse the incoming transfer and cannot require the reincorporation ex novo under its legislation, but can only indicate the fulfillments to be complied with for the conversion of the legal form.

Taking into consideration the A.G. opinion whereby the previous ECJ case-law indicated that neither the incorporation theory nor the real seat theory could be applied to *the fullest possible extent*, it could be argued that in the *Cartesio* ruling – without sharing the final recommendation of the A.G. – the ECJ has actually indicated that under EC law neither the incorporation system nor the real system apply as regards the cross-border mobility of companies. In fact, the possibility of transfer of the registered office without the head office and with a change of applicable national law would be a situation which, from the viewpoint of the Member State of "departure", would be allowed neither by Member States adopting the incorporation system nor by Member States adopting the real seat system[104]. In other words, the ECJ conclusion in *Cartesio* shows that, *until legislation at EC level will be introduced to approximate the connecting factors required by Member States for companies formed in their jurisdictions*, under Article 48 only what

[102] Chapter VII of the proposed Regulation for a European Private Company, Arts 35 to 38.
[103] As it is clear from Art. 37 of the proposed Regulation.
[104] See Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, cit., p. 9

could be defined as “conversion system” applies regarding the cross-border seat transfer of companies governed by national law. To draw the comparison with natural persons, the difference could be highlighted in these terms: whereas natural persons, once they have acquired the nationality of a Member State, get the right under EC law to emigrate to other Member States without changing the nationality, companies governed by national law, once created in accordance with the law of a Member State, acquire under EC law the right to “change the nationality” by means of a transfer with a change of the applicable national law. Because the “change of nationality” of the company, by means of the conversion of the legal form (from a form allowed by the law of the State of origin to a form allowed by the law of the destination State), actually needs to be carried out by the members of the company, one might take the perspective of the company’s founders[105] and question whether the freedom of establishment allowed by *Cartesio* is the freedom of establishment of natural persons who are members of the company rather than freedom of establishment of the company itself as a legal entity. Nonetheless, in this author’s view, the freedom of establishment available by means of the seat transfer with change of the legal form must still be considered as freedom of establishment of the company, for two reasons. First, the company as a separate legal entity is not dissolved; second, the freedom of primary establishment of individuals, under Art. 43, consists of the freedom to *set up and manage undertakings* in the host Member State after the migration there, whereas in the case of seat transfer with conversion of the legal form, the company has *already* been set up in the State of origin *before* the seat transfer.

Moreover, if a Directive on the cross-border seat transfer for companies governed by national laws were not issued before the introduction of the proposed EPC[106], the possibilities offered by this latter in terms of seat transfer would be likely to allow this form to successfully compete with legal forms governed by national laws in the choices of SMEs throughout the European Community. The same argument could obviously apply to the SE in the choice of larger enterprises, if the revision of the European Company Statute will manage to reduce the margins for national laws.

A conclusive reflection seems therefore to be necessary. After the opinion of the A.G. in *Cartesio*, and in the wait of the ECJ ruling, the Hungarian literature noted that the amendments of Hungarian law after the time of the *Cartesio* proceedings had all produced the result of making the national company regime more attractive: freedom of Hungarian-registered business organizations to transfer head office to other Member States, while remaining registered in Hungary, since 1 September 2007; reduction of the minimum capital required for registration, since that time; registration within a term of as much as one hour, since 1 July 2008[107]. This literature thus argued that the Hungarian company law (by making Hungary attractive for the registration of companies which are then be free to have their head offices in other Member States) would imply effects of regulatory competition that can be seen as harmful in other Member States[108], and that, because an interpretation of the freedom of establishment such as the one advocated by

[105] Schon, W. Niederlassungsfreiheit als Grundungsfreiheit, in Hommelhoff, Rawert, Schmidt (eds), Festschrift fur Hans-Joachim Priester zum 70.Geburtstag, 2007, pp. 737 et seq.

[106] The Commission would like to see the EPC in force by mid-2010.

[107] Deak D., Outbound establishment revised in Cartesio, cit., p. 258.

[108] Arguably, in the Member States where the head office of businesses governed by Hungarian law would be located.

the AG in Cartesio may contribute to the acceleration of this regulatory competition which would be not necessarily welcome in various Member States, the ECJ would be careful in considering whether to follow the A.G. opinion[109]. Taking these arguments into consideration, it can *ex post* be concluded that the ECJ, by not following the A.G. opinion, may have avoided accelerating a regulatory competition between legal forms governed by national company laws, but may have paved the way for a regulatory competition between national legal forms and legal forms mostly governed by European law. In the author's view, this latter competition should however be welcome, due to the fact that, if successful in this competition, the revised European Company statute and the proposed EPC would eventually manage or better manage to fulfill their own role as vehicles aimed at helping businesses of any Member State to benefit from all opportunities offered by the EC internal market.

[109] Deak D., Outbound establishment revised in Cartesio, cit., p. 258.