# The ECJ Ruling in Cartesio and Its Consequences on the Right of Establishment and Corporate Mobility in the European Union

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**Abstract**

*Before Cartesio, the case law of the European Court of Justice on freedom of establishment mainly considered company immigration situations, i.e. legal entities moving into another Member State. Cartesio is the first major ruling on company emigration since the 1988 decision in Daily Mail. Consequently, much was expected from Cartesio, notably that it would confirm a company's right to directly invoke its freedom of establishment in emigration scenarios. However, this was not the case. Although Cartesio introduced some new concepts into the freedom of establishment case law like the concept of company conversion, the freedom of establishment actually took a step backward. This effectively resulted in almost complete disregard of the freedom of establishment in emigration situations - unlike in immigration situations. This partial denial of freedom of establishment, one of the fundamental freedoms of Community law, would seem urge the continuation of work on the new 14th Company Law Directive. In light of the current ECJ case law, only a legislative approach would seem suitable to guarantee non-discrimination in the ongoing regulatory competition between Member States which apply the registered seat theory and those which apply the administrative (real) seat theory.*

**Keywords:** Cartesio, right of establishment, Corporate mobility.

## A. Introduction

This work was inspired by the recent European Court of Justice ("ECJ") ruling in Cartesio Oktató és Szolgáltató Bt (*Cartesio*),[1] which has been widely commented on in legal literature.[2] The general topic is corporate mobility and a company's

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1 C-210/06, *Cartesio Oktató és Szolgáltató Bt*, [2008] ECR I-9641.

2 J. Bohrenkämper, 'Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies?', *European Law Reporter* 3/2009; A.F. de Sousa, *Company's Cross-border Transfer of Seat in the EU after Cartesio*, Jean Monnet Working Paper 07/09 (<http://centers.law.nyu.edu/jeanmonnet/>, visited 10 September 2010); V. Bouček & L. Pejčić, 'Presuda Cartesio i osobni statut trgovačkog društva - (dis)kontinuitet sudske prakse Europskog suda', *Hrvatska pravna revija*, 9(2009) 10; A. Wisniewski & A. Opalski, 'Companies' Freedom of Establishment after the ECJ Cartesio Judgment', *European Business Organization Law Review* 10 (2009).

right to invoke the Community recognized freedom of establishment against national barriers to corporate mobility. The underlying intention of this work is not to provide an elaborate introduction to all aspects of corporate mobility. Instead, it will focus on a particular issue addressed in *Cartesio* – a company's right to transfer its administrative seat from the Member State of the company's original incorporation to another Member State. Nevertheless, in order to provide a better understanding of the intricate corporate mobility issues discussed in *Cartesio*, this work will provide an outline of corporate mobility in the general context of conflict of laws and European Union Law.

First, we will discuss corporate mobility in the conflict of laws context, followed by a brief introduction to the two conflicting theories used in various jurisdictions for determining the applicable company law in corporate mobility cases. Thereafter, we will analyze corporate mobility in the context of European Union Law and the freedom of establishment. Subsequently, we will introduce the work on the uniform Community level instrument that was to ensure an adequate level of corporate mobility and company seat transfer within the EU. Finally, we will introduce *Cartesio*; first, Advocate General Maduro's opinion, then the decision of the Court. We will conclude with our comments on the Court's reasoning and our analysis of *Cartesio*'s consequences.

## B. Conflict of Laws and Corporate Mobility

Entirely domestic legal relations are primarily governed by the national law provisions of the jurisdiction concerned.[3] In international legal relations, which inherently involve more than one jurisdiction, there is a need to determine which jurisdiction's national law should be applied before a dispute can be resolved.[4] If two or more competing national laws are applied simultaneously, their conjunction could lead to contradictory results, legal uncertainty, ineffective legal protection, and significant problems with court enforcement. In order to determine which one of potentially several competing national laws should be applied in a certain legal situation, private international law[5] developed a concept known as the "connecting factor". The connecting factor is a factual link between a certain person, entity, or legal relationship and the national legal order most closely related to that person, entity, or legal relationship; it directs the parties to the applicable

3 This is notwithstanding the right of the parties to determine the applicable law to their contractual relationship which can be different from the law of their country. However even in such situations the parties cannot bypass the application of mandatory rules of their country.

4 *E.g.* an international sales contract involving a seller and a buyer from different jurisdictions or in our case a company intending to transfer its administrative seat from one jurisdiction to another.

5 The term private international law is a synonym to international private law and conflict of laws. The usage of these terms generally depends on the legal order (*e.g.* common law legal orders usually use the term conflict of laws). In this article we will interchangeably use both conflict of laws and private international law in order to relate to the same concept.

law of that national legal order (the *lex societatis*). Connecting factors can be determined by international and national rules of law.[6]

Generally, corporate mobility represents the freedom of a company to conduct its business activities in a jurisdiction other than that of its original incorporation. It also encompasses a company's right to choose a set of national company law rules that best suit its business needs.[7] Corporate mobility includes situations in which a company incorporates in one jurisdiction but operates in another, or in which a company transfers from one jurisdiction to another, thereby subjecting itself to the national company law of that other jurisdiction.

Since the increasingly international nature of corporate activities necessarily concerns two or more jurisdictions, private international law plays an ever more important role in company law.[8] Virtually all corporate mobility situations result in legal issues that require the application of a conflict of laws rule in order to determine the applicable national company law provisions.[9] However, the determination of the applicable company law, the *lex societatis*, in an international context is often difficult since the conflict of law rules of the national jurisdictions involved frequently lead to the application of different *lex societatis*. This problem derives from the application of diverging connecting factors and may eventually lead to serious consequences for the company, including, in extreme cases, the company's termination.[10]

## C. Determination of the *Lex Societatis*

In view of the above, private international law has developed two general but diverging theories for determining the *lex societatis*: (i) the registered seat theory and (ii) the real seat theory. The registered seat theory is usually native to common law legal orders, while the real seat theory is generally associated with civil law legal orders.[11] Today, many jurisdictions adopt one of these theories with specific distinctions, resulting in private international law regulation that is unique

6 See the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents as an example of an international conflict of laws instrument and Switzerland's *Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG)* as an example of national conflict of laws rules.

7 M. Wyckaert & F. Jenné, Corporate Mobility, unpublished, p. 4 (<www.ssrn.com>, visited 10 September 2010).

8 De Sousa (2009), p. 3.

9 Company laws are important because they provide a set of rules that regulate a company's establishment, organization, every day operation and termination. In other words, to resolve a certain company issue it is the applicable company law that will first have to be determined and afterwards applied.

10 Wisniewski & Opalski (2009), p. 597; see also note 22 and the text following paragraph Consequences of Determining the *Lex Societatis*.

11 J. Barbić, *Pravo društava, Knjiga druga Društva kapitala*, (3rd edn.) Zagreb 2008, p. 378; De Sousa (2009), pp. 4, 6.

in almost any jurisdiction.[12] Hardly no two national legal orders have identical conflict of laws rules for determining the *lex societatis*.[13] Problematically, these two foundational theories refer to different connecting factors for determining the *lex societatis*.

The registered seat theory purports that the applicable company law is the law of the country where the company is registered/incorporated;[14] the connecting factor is the country where the company's registered seat is located.[15] A legal order that adopts this theory regards a company incorporated under its law as having that country's nationality.[16] The company cannot transfer its registered seat to another jurisdiction without losing the nationality of the first legal order,[17] as the transfer would break the link with the legal order of the company's original incorporation (*i.e.*, the national order which recognizes and thus "gives life" to that legal entity).[18] Since the connecting factor would afterwards refer to a jurisdiction other than the one under whose law the company was originally incorporated, a transfer of a company's registered seat would entail a change in the applicable company law. Consequently, that company could no longer exist as a company established under the law of its country of original incorporation; the link with that country's company law would also be severed.

12 For example, Croatia acknowledges both the real seat and the registered seat as connecting factors. Specifically, Croatian Company law in Article 37 (4) provides that: "If the management board of a company is located at a place other than that place entered into the commercial register as the company's seat [*author's comment: the administrative seat*], or if the company performs its activities in a place other than place entered into the commercial register as the seat [*author's comment: the administrative seat*], the place entered in the commercial register shall be regarded as the seat [*author's comment: the registered seat*]...". (Official Gazette of the Republic of Croatia Nos. 111/93, 34/99, 121/99, 118/03, 107/07, 146/08 and 137/09 ).

13 De Sousa (2009), p. 3, 9; Wisniewski & Opalski (2009), pp. 621-622.

14 Barbić (2008), p. 378; O. Valk, 'C-210/06 Cartesio Increasing Corporate Mobility Through Outbound Establishment', *Utrecht Law Review*, Vol. 6 issue 1 2010, p. 154, 164; F.M. Mucciarelli, 'Company "Emigration" and EC Freedom of Establishment: *Daily Mail* Revisited', *European Business Organization Law Review* (2008) 9, p. 283; Wyckaert & Jenné (unpublished), p. 5; Registered seat theory is native to common law legal orders like UK, Ireland, USA and the Netherlands.

15 The registered seat (also referred to as registered office) is the address of the company recorded in the company register. In other words, the registered seat represents an address which is registered with the government as the official address of a company, association or any other legal entity (also known as the seat of incorporation). The registered seat does not need to coincide with the place where company conducts its business or has its management; R. Szudockzy, 'How Does the European Court of Justice Treat Precedents in its Case Law? Cartesio and Damseaux from a Different Perspective: Part I', *Intertax*, (2009) Vol. 37, issue 6/7, pp. 349-350; Valk (2010), p. 152; De Sousa (2009), note 1.

16 It is important to note that human beings, *i.e.* individuals, are given rights upon birth, the same is recognized for legal entities like companies. However, unlike individuals who are recognized by the mere fact of being alive, the companies are recognized as legal entities and given certain right only under conditions set out by the law of the recognizing country of the company's incorporation. Therefore, it can be inferred that the country of recognition decides whether and under what conditions to give life to a legal entity. Companies that are given life under the law of a recognizing country are considered as nationals of that country, *i.e.* they belong to that national legal order.

17 De Sousa (2009), p. 5; Wisniewski & Opalski (2009), p. 618.

18 Szudockzy (2009), p. 350.

The advantage of the registered seat theory is that the seat of a company's management (the "administrative seat")[19] can be transferred to another country without breaking the link with the country of incorporation.[20] This permits a company to freely decide where to locate its administrative seat. The company can remain incorporated under the law of the country of incorporation while conducting all of its business and management activities in another jurisdiction.[21] Additionally, it is fairly easy to determine the *lex societatis* under the registered seat theory ; one must simply identify the jurisdiction of the company's incorporation.[22]

A disadvantage of the registered seat theory is that it facilitates the creation of "letter box" companies.[23] The jurisdiction of a company's incorporation also may find it hard to maintain oversight of the company's business operations (*e.g.*, for tax purposes). As a consequence there is a risk that a jurisdiction grounded in the registered seat theory will lose interest in companies that have only their registered seat located in its territory, resulting in the deterioration of national control mechanisms over those companies. In its purest form, the registered seat theory does not consider the interests of the jurisdiction where the company actually undertakes its business activities.[24] It is therefore often referred to as a formalistic theory, unlike its counterpart, the real seat theory.

19 The company's administrative seat is the address of the company's operational headquarters, the seat of company's central administration (also known as the real seat, operational seat, company headquarters or head office); M. Szydło, M., 'Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of Advocate General in Cartesio Case', *European Review of Private Law* 6-2008, p. 974; Szudockzy (2009), p. 350; De Sousa (2009), note 2.

20 Szudockzy (2009) p. 350; Bohrenkämper (2009), p. 86; De Sousa (2009), p. 5.

21 This theory was developed to facilitate the needs of UK companies that undertook their business operations in other countries (generally UK overseas colonies) during the 18th century; De Sousa (2009), p. 4.

22 This might not seem an easy task in regard to the real seat theory since it is often hard to determine where a company's administrative seat is actually located. Especially if we take into consideration that a company's management could organize its meetings in jurisdictions other than the jurisdiction of the company's original incorporation under the administrative seat theory. In such situations, the question arises whether the company's administrative seat (a link to the *lex societatis* of a jurisdiction grounded in the real seat theory) is located in the jurisdiction of the company's original incorporation grounded in the real seat theory or another jurisdiction where the management meetings are taking place. For example, if that other jurisdiction is grounded in the real seat theory as well, that jurisdiction might claim that the company requires incorporation under its laws in order to undertake business operations within its territory while the jurisdiction of the company's original incorporation might consider that the company is no longer a company registered under its laws since its management is not located anymore within its territory. This may even lead to the company's termination in the jurisdiction of original incorporation.

23 "Letter box" company is another expression used for pseudo foreign companies or offshore companies. Such companies are typically established in a jurisdiction in which they have minimal or no business activities. The motive behind incorporation of such companies is to facilitate tax evasion in the country where the company's business operations are conducted or to subject a company to a more liberal company law; Wyckaert & Jenné (unpublished), p. 6.

24 Valk (2010), p. 164.

Under the real seat theory, the applicable company law is always the national law of the country where the company's management is located or from where the company is administered.[25] This theory favors the jurisdiction where the company actually conducts its business activities, regardless of the company's place of incorporation.[26] Therefore, the connecting factor is the place from where the company is managed or where the company's management is situated.[27] In parallel to the registered seat theory, the transfer of the company's administrative seat results in severance of the link with the jurisdiction of the company's registration and, as a consequence, changes the *lex societatis* and may require winding up of the company.[28] As the registered seat theory prohibits the transfer of the registered seat, the real seat theory prohibits the transfer of the administrative seat.[29] Theoretically, the transfer of the registered seat from a jurisdiction grounded in the real seat theory should be permitted, since the real seat theory does not rely on the registered seat as its connecting factor. However, in practice, the transfer would make the applicable company law unenforceable.[30] Furthermore, company laws usually demand that a company register in the jurisdiction of the company's incorporation. Therefore, the company register likely will be located in the jurisdiction under whose law the company was originally incorporated.[31]

Neither the real seat theory nor the registered seat theory[32] permits the transfer of a company's registered seat from the jurisdiction of its incorporation. But because jurisdictions grounded in the real seat theory also forbid the transfer of the company's administrative seat,[33] those jurisdictions are generally more restrictive than jurisdictions grounded in the registered seat theory. The advantage of the real seat theory, however, is that it provides better protection for minority shareholders, creditors, and employees.[34] In addition, it prevents regulatory competition between countries and the establishment of "letter box" compa-

25 The real seat theory is native to civil law legal orders like Germany, France, Belgium, Spain, Greece; Mucciarelli (2008), p. 283; De Sousa (2009), p. 6; Wyckaert & Jenné (unpublished), p. 4.

26 Barbić (2008), p. 378; Valk (2010), pp. 154, 161-162; A. Johnston, 'Regulatory Competition in European Company Law After Cartesio', *European Law Review* (2009) 34(3), p. 382.

27 Szudockzy (2009), p. 350.

28 Bohrenkämper (2009), p. 86; De Sousa (2009), p. 7.

29 Szudockzy (2009), p. 350.

30 Mucciarelli (2008), p. 284; De Sousa (2009), p. 6.

31 Mucciarelli (2008), pp. 284-285; That is because a company register also represents a form of control over companies incorporated under the law of a jurisdiction where the company is incorporated and where such register is located. Such register is then enabled to force companies registered with it to comply with mandatory law requirements of the respective company law or face deletion (which corresponds to company's termination) from the register. Notwithstanding that company's subsidiaries and branches in other jurisdictions are generally also registered with respective company registers in those other jurisdictions. However, in such situation non-compliance with mandatory rules of that other jurisdiction will not result in company's termination but only impossibility to undertake its business operations in that other jurisdiction.

32 Since the registered seat represents the actual link with the jurisdiction ground in the registered seat theory.

33 De Sousa (2009), note 12.

34 De Sousa (2009), p. 8; Wisniewski & Opalski (2009), p. 609 – 610.

nies.[35] However, the inability to transfer both seats under the real seat theory severely restricts corporate mobility and may seem inflexible and overly burdensome to international business operators in the modern decentralized global economy.

### D. Consequences of Determining the *Lex Societatis*

The two theories generally described above manifestly contradict each other, and consequently, they create significant issues within the sphere of private international law and corporate mobility.[36] One obvious conflict between the two theories arises when a company incorporated in a registered seat theory jurisdiction establishes a subsidiary in a real seat theory jurisdiction for the sole purpose of undertaking all of its business activities in the subsidiary's jurisdiction. According to the registered seat theory, the *lex societatis* in this situation would be the law of the company's place of registration; while under to the real seat theory, the *lex societatis* would be the law of the place where the company undertakes its business activities. Each of these legal orders would direct to its own set of substantive company law rules, leading to the application of conflicting company laws and diverging legal solutions. This could lead to repudiation of the company's valid existence in the country that is grounded in the real seat theory.[37] Therefore, corporate mobility in the general international context is an intricate process where one should carefully consider the interplay of competing national conflict of laws rules and the effect of applicable company laws.[38]

This generates two practical questions: Why would a company want to transfer only its registered seat or only its administrative seat to another jurisdiction? And why would it want to transfer both of them simultaneously? Generally, corporate mobility enables companies to improve their business operations in the world market in several ways, depending on the actual form of the company seat transfer. However, the form of seat transfer that a company will choose usually depends on the business goals of that the company.

35 Valk (2010), p. 162; S. Lombardo, 'Regulatory Competition in Company Law in the European Union After Cartesio', *European Business Organization Law Review* (2009) 10, p. 636; Wyckaert & Jenné (unpublished), p. 6.

36 That is because one allows for transfer of company's administrative seat (the registered seat theory) while the other prevents such transfer (the administrative seat theory).

37 Bouček & Pejčić (2009), p. 59.

38 It should be pointed out that these two types of company seats normally coincide in one jurisdiction, especially for small business enterprises. But due to rapid development of the global market, that might change in the future. This conclusion is supported by the high interest of Community businessmen for that form of corporate mobility between Member States. 79% of respondents (stakeholders from the Community and several third countries) opted for adoption of the directive on transfer of registered seat within the Community. (Directorate General for Internal Market and Services, the Consultation on Future Priorities for the Action Plan on Company Law and Enhancing Corporate Governance, Summary Report, p. 16, (<http://ec.europa.eu/internal_market/company/>, visited 10 September 2010).

## E. Transfer of Company Seat

When a company transfers only its registered seat, that company is no longer incorporated under the home Member State's law; it becomes a company incorporated under the host Member State's law. Since every modern legal order has its own set of company law rules,[39] the main motive for such a seat transfer is a change in *lex societatis*[40] to one more favorable to the company's business intentions.[41] Some jurisdictions maintain company laws that are more liberal, while others are more restrictive in regulating everyday company operations.

Restrictive regulations are usually not without justification. For example, company control mechanisms can be put in place to enable adequate protection of certain interest groups, such as the company's shareholders, employees and/or creditors. Those mechanisms can also enable easier oversight of company business operations by state regulatory institutions. However, extensive regulations sometimes present overly burdensome requirements on the company. Some company laws might be overly restrictive toward certain company operations, like undertaking certain business activities, establishment in other jurisdictions, or company mergers or acquisitions. Being subject to these burdensome and restrictive regulations might result in a company's decision to transfer its registered seat to another jurisdiction, thereby replacing the burdensome company rules with more liberal rules. A change of *lex societatis* normally means that a company will have to adjust to the new *lex societatis,* which requires the company's reincorporation in the host jurisdiction.[42] Such a reincorporation must be possible under both the company law of the home jurisdiction and the host jurisdiction.

Unlike the sole registered seat transfer, when a company transfers only its administrative seat to another jurisdiction, the company remains incorporated in its original jurisdiction. Most of the reasons behind this transfer involve facilitating better mobility of company management and lowering associated company management costs. In the modern global market economy, an increasing number

39 G. Vossestein, 'Transfer of the Registered Office The European Commission's decision Not to Submit a Proposal for a Directive', *Utrecht Law Review*, Vol. 4, Issue 1, 2008, p. 54; E. Wymeersch, 'Is a Directive on Corporate Mobility Needed?', *European Business Organization Law Review* (2007) 8, p. 166.

40 The change of *lex societatis* is not always the only reason for such a seat transfer. For example, a company might also seek to minimize its tax liability in the jurisdiction of its original incorporation. Jurisdictions can tax domestic companies based on a company's worldwide income. Consequently, companies that conduct their business activities solely in other jurisdictions might want to transfer their registered seat to another jurisdiction and thus disable the ability of the home Member State to tax that company's worldwide income. Wymeersch (2007), p. 166.

41 S. Rammeloo, 'The 14th EC Company Law Directive on the Cross-border Transfer of the Registered Office of Limited Liability Companies – Now or Never', *Maastricht Journal of European and Comparative Law* (2008) 15(3), pp. 363-365; Wymeersch (2007), p. 166; To the best of our knowledge, Italy is the only country that permits transfer of a company's registered seat while being able to retain Italian *lex societatis*. (Rammeloo (2008)). However, it is uncertain what would an Italian company accomplish by transferring only its registered seat to another jurisdiction and what would be the consequences of such transfer for the Italian company in the target jurisdiction.

42 Wymeersch (2007), p. 168.

of companies conduct their business activities in several jurisdictions. Undertaking these activities abroad likely requires increasing levels of a company's management mobility,[43] prompting a transfer of the company's management to the jurisdiction where most of its business activities occur. This can result in lower transaction costs because company management could get familiar with the laws and the business environment of the target jurisdiction.[44]

Generally, there is no problem concerning the administrative seat transfer of a company that is incorporated in a registered seat theory jurisdiction. Such jurisdictions permit transfers of administrative seats, as well as the retention of a company's nationality for as long as the company's registered seat is located in that jurisdiction. However, some registered seat theory jurisdictions set out certain restrictions regarding the transfer of a company's administrative seat.[45] Naturally, the real seat theory is less friendly towards the sole administrative seat transfer because the real seat theory relies on the location of the company's administrative seat as a link that connects a company to a certain jurisdiction.

There is also the possibility of simultaneous transfer of a company's registered and administrative seats from the jurisdiction of the company's original incorporation to another target jurisdiction. The reasons behind this transfer are those combined from the previous sole seat transfer situations described above. Where a company intends both to transfer its business activities abroad and to take advantage of the target jurisdiction's more suitable *lex societatis*, simultaneous seat transfer is appropriate.[46] This dual seat transfer usually requires a company's reincorporation in the jurisdiction where the transfer is to be effectuated. However, for reincorporation to be effective, it must be allowed by both the jurisdiction of original incorporation and the target jurisdiction.[47] Upon reincorporation, such a company would no longer be considered as a company established under the law of the jurisdiction of original incorporation, but rather as a company incorporated under the law of the target jurisdiction.[48]

When we examine corporate mobility in the context of the European Union ("EU"), the end result is significantly different. There, corporate mobility falls within the ambit of Community law, not various national conflict of laws rules. That is because Community level corporate mobility is covered by one of the fundamental freedoms of Community laww – the freedom of establishment. As a Community given right, the freedom of establishment imposes upon Member States a specific set of rules which regulate Member States' conduct with regard

43 R.R. Drury, 'Migrating Companies', *European Law Review*, Vol. 24. No. 4. August 1999, p. 354; De Sousa, (2009), p. 8.

44 Rammeloo (2008), pp. 362-363.

45 For example in Case 81/87, *the Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483 (hereinafter: *Daily Mail*), the UK as a Member State grounded in the registered seat theory, denied the company the right to transfer its administrative seat to another Member State due to tax evasion reasons.

46 Rammeloo (2008), p. 365.

47 Mucciarelli (2008), p. 286

48 S. Grundmann, *European Company Law: Organization, Finance and Capital Markets*, Antwerp 2007, para. 837.

to corporate mobility among them.[49] These rules supersede national company and conflict of laws rules relating to corporate mobility. However, at the current stage of Community law development, the freedom of establishment still does not resolve the major differences between the two conflict of laws theories discussed above, nor does it provide a solution that will ensure uniform rules on corporate mobility between Member States.

## F. The Primary Sources of Corporate Mobility Within the Meaning of Freedom of Establishment

The primary sources of Community law include the treaties establishing the European Communities and the European Union, including their annexes and protocols ("Treaties").[50] The Treaties provide a framework for the organization and operation of the EU and are administered through Community institutions;[51] they provide a legal basis for the everyday life of the EU. In this light, certain Treaty provisions are capable of having a direct effect with regard to individuals' rights.[52] Individuals are capable of directly invoking the Community given rights contained within the Treaties, either against Member States or against other individuals.[53] In addition, the national courts of Member States are obligated to recognize and enforce these directly effective Treaty provisions. Although some conditions must be fulfilled in order for a Treaty provision to be considered directly effective,[54] certain freedom of establishment provisions are considered directly

49 For more on freedom of establishment see the following chapter.

50 Treaty establishing the European Economic Community signed on 25 March 1957 (also known as the Rome Treaty), (<www.ena.lu/?lang=2&doc=16304>, visited 10 September 2010), (hereinafter: EEC Treaty); Treaty on European Union signed on 7 February 1992 (also known as the Treaty of Maastricht), OJ 1992 C 191, (hereinafter: TEU); Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and related acts signed on 2 October 1997 (also known as the Amsterdam Treaty), OJ 1997 C 340 (hereinafter: TEC); Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts signed on 26 February 2001 (known as the Nice Treaty), OJ 2001 C 80; Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (known as the Lisbon Treaty), OJ 2007 C 306 (hereinafter: TFEU).

51 However, Treaties cannot regulate every aspect of the vast and complex EU. Therefore, secondary sources of Community law like directives and the ECJ case law facilitate effective practical application of Community law in everyday situations. For more on secondary sources of Community law see the paragraph "The Directive on Cross-border Transfer of Company Seat" and note. 89.

52 T. Ćapeta, *Sudovi Europske unije: Nacionalni sudovi kao europski sudovi*, Zagreb 2002, p. 34.

53 This is also the difference between horizontal direct effect and vertical direct effect. The first enables individuals to invoke Community given rights against other individuals while the second enables individuals to invoke Community given rights against the Member States.

54 Two general conditions need to be fulfilled: (i) that the provision is sufficiently clear and (ii) unconditional. Regarding the (i) condition, a provision is considered to be clear when on the basis of its text it can be ascertained who is the holder of the right, who is the obliged person and what would be the content of that right or obligation; Ćapeta (2002), p. 32.

effective on the basis of ECJ case law.[55] In the Treaty establishing the European Economic Community ("TFEU"), the freedom of establishment rules substantially remain unchanged in relation to the corresponding provisions in the Treaties.

Although relevant Treaty provisions provide a general meaning for the freedom of establishment, the ECJ tried to provide a more practical definition in *Factortame II*. In its ruling, the ECJ stated that the freedom of establishment represents "the *actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*".[56] Not only does this statement provide a viable interpretation of the freedom of establishment, but it also provides the subjective criterion required for applying that freedom.[57] Specifically, in order for a company to invoke the freedom of establishment, the company should cumulatively: (i) pursue an actual business activity, (ii) pursue such business activity through a fixed establishment, (iii) such pursuit of actual business activity is to be taken in a Member State other than the Member State of company's original incorporation, and (iv) it should intend to undertake its business activities in another Member State for an indefinite period of time.

The freedom of establishment does not require that a company already pursue an actual business activity in the host Member State.[58] Otherwise the company would have already satisfied the requirement that it undertakes business activities in the host Member State for an unspecified amount of time, thereby diminishing the effectiveness of the right. Rather, it is enough that a company intends to pursue such business activity in the host Member State.[59] In addition to this requirement, a company must undertake business activities through a fixed establishment and for an indefinite period of time. Undertaking preparatory business activities, gathering information on a certain market, or using a warehouse solely for the delivering goods to customers do not constitute "fixed estab-

55 "It must be stated firstly that *Article 52 of the EEC Treaty embodies one of the fundamental principles of the Community and has been directly applicable in the Member States* [*emphasis added*] since the end of the transitional period." (Case C-270/83, *Commission v. France,* [1986] ECR 273, para. 13). To that effect see as well: Case C-270/83, *Commission v. France*, [1986] ECR 273, para. 26; Case C-11/77, *Patrick*, [1977] ECR 1199, para. 13; Case C-2/74, *Reyners*, [1974] ECR 631, paras. 10, 12, 25, 30; Case C-53/95, *Inasti*, [1996] ECR I-703, para. 9; Case C-143/87, *Stanton*, [1988] ECR 3877, para. 10; Notwithstanding, it is still questionable whether the same principle as applied to individuals can be applied to companies as well, for more on this issue see the section that relates to *Cartesio*.

56 Case C-221/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905, para. 20 (emphasis added) [hereinafter: *Factortame II*].

57 A. Looijestijn-Clearie, '*Centros* Ltd: A Complete U-Turn in the Right of Establishment for Companies?', *The International and Comparative Law Quarterly*, (2000) Vol. 49 No. 3, p. 623.

58 For the sake of defining, transfer of either the registered seat or administrative seat can be perceived both from the position of the home Member State (Member State from which the company transferring its seat also known as the Member State of origin) and from the position of the host Member State (Member State to which the company is transferring its seat also known as the target Member State). This differentiation between the home Member State and the host Member State is as well reflected in Community law. See also the text following note 79.

59 Case 53/81, *Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035, para. 21; Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para. 32 (hereinafter: *Gebhard*).

lishment" activities. Similarly, pursuing a time limited business objective in another Member State is not sufficient. The requirement that a company undertake its business activity in a Member State other than the Member State of the company's original incorporation only serves to provide a Community element to the company's right to invoke the freedom of establishment. In wholly domestic situations, that freedom cannot be invoked.[60]

The freedom of establishment was further refined by the *Gebhard* ruling, where the ECJ stated, "The *concept of establishment* within the meaning of the Treaty *is* therefore *a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom…*".[61]

Referring back to the Treaties, Articles 49 through 55 of the TFEU relate to the freedom of establishment for both individuals and companies or firms validly formed within the EU. These provisions offer more objective criteria and definition of the freedom of establishment. According to Article 49(2),[62] the freedom of establishment represents

> the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected….

This wording provides that individuals from one Member State have the right to pursue business activities in another Member State under the same conditions under which individuals of that other Member State conduct their business activities in that other Member State. Unlike the second paragraph, the first paragraph of Article 49 TFEU[63] is worded negatively. It provides the following:

> [R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State

Therefore, Article 49(1) TFEU prohibits restrictions on the exercise of the freedom of establishment imposed by a Members State upon nationals of another Member State. Member States must provide equal treatment to every individual as citizens of the Community.

60 Case C-108/98, *RI.SAN.*, [1999] ECR I-5219, para. 23; Case C-134/95, U*SSL*, [1997] ECR I-195, para. 19; Joined Cases C-54/88 *Eleonora & others* [1990] ECR 3537, para. 11; W. Ringe, *No Freedom of Emigration for Companies?*, unpublished version, p. 21 (available at: <www.ssrn.com>, visited 10 September 2010).

61 *Gebhard*, para. 25 (emphasis added).

62 For future reference, this article corresponds to Article 43 (2) TEC and Article 52 (2) EEC.

63 For future reference, this article corresponds to Article 43 (1) TEC and Article 52 (1) EEC.

From this Treaty provision, it appears that the freedom of establishment protects only Member State individuals (*i.e.*, natural persons). However, the freedom of establishment chapter contains a provision that extends its fundamental freedom to legal entities as well, provided certain additional requirements are met. Specifically, (i) the legal entity must be validly formed in accordance with the law of a Member State, and (ii) it must have its registered office, central administration or principal place of business within the EU.[64]

Unlike the ECJ's subjective requirements for applying the freedom of establishment, the TFEU provides purely objective requirements. Its requirement of having a registered office, central administration, or principal place of business within the EU applies alternatively, but acts cumulatively, with the requirement that a company is validly established under the law of a home Member State. From the wording of Article 54(1) TFEU it also can be perceived that the freedom of establishment is applicable to companies "in the same way" as it is applied to Member States' individuals. Consequently, it seems that the Treaties treat companies and individuals equally with regard to their right to invoke freedom of establishment protection.[65] Admittedly, there are distinctions between the two (*e.g.*, the artificial nature of a legal entity, as compared to the physical nature of an individual). However, the wording of Article 54(1) TFEU indicates that no distinction should exist. The only provided distinction concerns the different conditions required for applying the freedom of establishment to legal entities.[66]

Under Article 49(1) TFEU the prohibition of restrictions applies to both the "setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State" (second sentence) and the "establishment of nationals of a Member State in the territory of another Member State" (first sentence). It is important to note that these two sentences provide for two different rights of establishment. The first sentence refers to the right of primary establishment (*i.e.*, the freedom to set up and manage a company in any Member State),[67] while the second sentence represents the right of secondary establishment (*i.e.*, the establishment of agencies, branches or subsidiaries within territory of any Member State).[68]

64 Article 54 (1) TFEU. "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States." *Id.* (emphasis added). For future reference, this article corresponds to Article 48 (1) TEC and Article 58 (1) EEC.

65 C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, (2nd edn.) New York 2007, p. 331.

66 See the previous section of the text accompanying note 65.

67 The right of primary establishment also includes the right to transfer a company's seat to another Member State; *Daily Mail*, para. 12; De Sousa (2009), pp. 41-42; L. Cerioni, *The Cross-border Mobility of Companies Within the European Community After the Cartesio Ruling of the ECJ*, unpublished, text following note 1 (<www.ssrn.com>, visited 10 September 2010); Wyckaert & Jenné (unpublished), p. 3.

68 Bouček & Pejčić (2009). 2, p. 60; G. de Burca & P. Craig, *EU Law, Text, Cases, and Materials*, (4th edn.), Oxford/New York 1998, pp. 806-807; Mucciarelli (2008), p. 293; Barnard (2007), pp. 310, 332-333.

These two rights have different conditions required for their application. Article 49(1) TFEU sets out more rigorous requirements for secondary establishment than for primary establishment. It provides that restrictions on secondary establishment are prohibited for "nationals of any Member State" and for those that are "established in…any Member State". Therefore, in order for an individual to be able to invoke the right of secondary establishment he must (i) be a national of any Member State and (ii) already be established in any Member State. The individual's Member State and the Member State of establishment need not be the same.

An individual's right to invoke the freedom of establishment is governed solely by Article 49(1) TFEU, but when considering a company's right to invoke that freedom, Article 54(1) TFEU applies as well. Under Article 54(1) TFEU, the nationality requirement is replaced by the condition of valid company formation under Member State law and the requirement of having one of three effective links with that Member State (registered office, central administration or principal place of business).[69] However, the requirement of "being established" within any Member State remains the same.

The requirement that a company be established is distinct from the "valid formation" and "effective link" requirements also discussed above. Within the EU, a company is sufficiently established "when there is a *real and continuous link with the economy of a Member State*".[70] This means there exists a genuine pursuit of business activity within any Member State.[71] It was once suggested that secondary establishment actually demands genuine pursuit of a company's business activity in that company's home Member State.[72] The reasoning behind this assertion was to deny Community law protection to non-EU "letter box" companies. These companies primarily established in a certain Member State for the purpose of proliferating, by secondary establishment, to other Member States where the company's actual and genuine economic pursuit would then be undertaken.[73] However, this assertion was eventually quelled by ECJ case law and the Treaty, which clearly states, "established in the territory of *any* Member State".[74] Therefore, in order for a company to invoke the right of secondary establishment,

69 Case C-212/97, *Centros Ltd*, [1999] ECR I-1459 (hereinafter: *Centros*), para. 20; Case C-264/96, ICI, [1998] ECR I-4695, para. 20 (hereinafter: *ICI*).

70 Grundmann (2007), paras. 216, 837 (emphasis added).

71 Barnard (2007), p. 310; Looijestijn-Clearie (2000), p. 626; Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203, para. 19; Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* [2006] ECR I-7995, para. 54.

72 General Programme for the abolition of restrictions on freedom of establishment adopted on 18 December 1961, OJ 36/62, OJ Sp Edn 1974, Second Series IX (hereinafter: General Programme); Looijestijn-Clearie (2000), p. 627.

73 Grundmann (2007), para. 837.

74 Emphasis added. For the text of Article 49 (1) TFEU see previous text following notes 62-63. Furthermore, the ECJ case law suggests that a company complies with the requirement of being established if it is formed under the law of a Member State and has its registered seat within the Community; *Segers*, para. 16; *Centros*, para. 17; *Inspire Art*, paras. 86-97.

it is enough that it pursues genuine business activity within either a home or the host Member State.

Unlike secondary establishment, primary establishment from the preceding sentence of the same paragraph requires only that an individual seeking establishment in another Member State is a national of any Member State.[75] That is because there can be only one primary establishment, but it is possible to have multiple secondary establishments.

Article 54 TFEU[76] permits "companies or firms" to seek protection under the freedom of establishment, meaning "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".[77] That non-profit legal entities are expressly excluded from the scope of this broad definition is consistent with the general commercial focus of the Treaties and other Fundamental Freedoms.[78] The broad scope also means that Community law authorizes Member States to determine which entities are entitled to invoke freedom of establishment protection.[79]

When a certain company transfer is perceived from the position of the Member State of origin, the situation is called "company's emigration" or an outbound situation. When a certain seat transfer is perceived from the position of the host Member State, the situation is called "company's immigration" or an inbound situation.[80] If a certain Community recognized fundamental freedom, like the freedom of establishment or a freedom to provide services, is considered to provide protection from both the home (emigration situation) and host Member States (immigration situation) restriction, that freedom is considered a two-fold freedom. All fundamental freedoms were considered two-fold, except for the freedom of establishment; it was not clear whether that freedom was a two-fold freedom

75 Grundmann (2007), para. 219.

76 For future reference, this article corresponds to Article 48 (2) TEC and Article 58 (2) EEC.

77 Article 54 (2) TFEU.

78 De Burca & P. Craig (1998), p. 756. (*e.g.*, Freedom of Movement for Workers, Freedom to Provide Services).

79 That would be by determining the form of their specific national entities, *i.e.* whether a certain entity is to be regarded as a legal entity (*e.g.* company) or not; Lombardo (2009), p. 639.

80 Szydło (2008), p. 975; Valk (2010), p. 152.

or not.[81] Eventually it was established that the freedom of establishment is a two-fold freedom, but with certain restrictions with regard to emigration situations.[82]

There are several reasons why Member States restrict corporate mobility in emigration and immigration situations. In emigration situations, the home Mem-

81 The Treaty articles on freedom of establishment clearly cover the right of companies to pursue their business activities in the host Member State (*i.e.* immigration situations). According to Article 49 TFEU and Article 54 TFEU companies are entitled to conduct their business activities in the host Member State and such right cannot be restricted (*Centros*, para. 39; *Inspire Art*, paras. 104-105, *Überseering*, para. 82). However, the question arises whether freedom of establishment entitles companies in their home Member State to leave that Member State notwithstanding the national restrictions imposed by their home Member State (*i.e.* emigration situations). In other words, does the freedom of establishment enable the home Member States to restrict companies incorporated under its law to transfer their seat to another Member State? The issue referred to here is the one of the two-fold nature of the freedom of establishment. The answer should be affirmative. Free movement of goods, free movement of services and free movement of workers are all construed as two-fold freedoms. [Ringe (unpublished), pp. 23-28 (<www.ssrn.com>, visited 10 September 2010)]. In its landmark *Gebhard* ruling the ECJ clearly stated that all fundamental freedoms should be similarly construed. (*Gebhard*, para. 37; Bohrenkämper (2009), p. 87; Ringe (unpublished), pp. 29-30). In other words, that would also mean that all fundamental freedoms should be two-fold, including freedom of establishment as well. However, *Daily Mail* seems to suggest the opposite by stating that if the restriction comes from the direction of the home Member State, the company cannot invoke freedom of establishment. (*Daily Mail* para. 25). However, that same ruling initially clearly stated that: "Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 [emphasis added]. As the Commission rightly observed, the rights guaranteed by Articles 52 *et seq*. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State." (the *Daily Mail*, para. 16). Therefore, the *Daily Mail dictum* might not seem as straightforward as initially suggested. Furthermore, a restriction of freedom of establishment in the emigration situation can have a more serious consequence for corporate mobility than the restriction in immigration situation. In an immigration situation if a company is denied the right to enter a host Member State it can still seek to establish in a Member State other than the one initially intended that does not deny that company the right to establish. However, in an emigration situation where a home Member State prohibits company the right to exit her jurisdiction in order to establish in another Member State, a company is not only prevented from moving its seat to the intended host Member State but to any other Member State as well, since its right to transfer abroad is completely negated by its Member State of incorporation (Ringe (unpublished), p. 18). Consequently, while companies are generally enabled to invoke protection of freedom of establishment in immigration situations [*Centros*, Case C-208/00, *Überseeberseering*), and *Inspire Art* (altogether hereinafter: *Centros et al.* )] in regard to emigration situations [*e.g. Daily Mail* and *Cartesio*], although freedom of establishment covers these situation as well, it is an issue of what is required to trigger the application of freedom of establishment. An answer to this issue was one of the biggest contributions of *Cartesio* (*Cartesio*, paras. 108-110).

82 The issue related is the one whether a home Member State can restrict companies incorporated under its law from invoking protection of freedom of establishment when they intend to transfer their company seat to another Member State. This is the issue that was resolved in *Cartesio* where the ECJ held that company's right to transfer its company seat is completely dependent upon the law of the home Member State (*Cartesio*, para. 109). In other words, the home Member State can freely decide whether to permit companies incorporated under its law to transfer their seat to another Member State or not.

ber State usually prohibits transfers to another Member State in order to protect its tax interests. Depending on the national tax system, the home Member State might lose a taxpayer by the transfer of a company's seat.[83] Another reason for the restriction is the preservation of a home Member State's control over a company incorporated under its law. A change of *lex societatis* would result in the loss of that Member State's ability to provide protection for certain interest groups (*e.g.*, shareholders, employees or creditors) through control mechanisms incorporated in its national company law.[84]

The primary reason a Member State sets restrictions on companies entering its jurisdiction is the fear of "unlimited corporate mobility".[85] This means a company incorporated under the law of the home Member State could conduct its business activities in another Member State according to the rules provided by the company law under which it was incorporated in the home Member State while disregarding conditions set out by the company law of the host Member State. Such a company could avoid the application of mandatory company law provisions of the host Member State (*e.g.*, minimum capital requirements for foreign subsidiaries).[86] This fear is generally attributed to the real seat theory, which, as a consequence, requires application of the company law at the place of a company's actual pursuit of business activities or the location of its corporate management, regardless of the jurisdiction of the company's incorporation. Real seat jurisdictions, therefore, mandate the undertaking of business operations by foreign companies within their territory by conforming to the mandatory requirements imposed by their respective company laws (*e.g.*, rules on minimal share capital).

To summarize, Articles 49 and 54 TFEU, in combination with the remaining provisions in the freedom of establishment chapter, provide ground rules on corporate mobility within the Community. Freedom of establishment means that a host Member State is not allowed to treat a company established in another Member State less favorably than a company incorporated under its own law (immigration situation). It should also mean that a home Member State cannot restrict a company from undertaking its business activities in another Member State (emigration situation).[87] The purpose of the freedom of establishment is to ensure equal treatment of foreign individuals in the host Member State as well as

83 Ringe (unpublished), p. 3; This was the situation in *Daily Mail* where the UK national tax law required consent of competent tax authorities in order for a company to transfer its administrative seat to another Member State. That was because according to the relevant UK tax law provision a company's tax residence was determined by the location of its administrative seat. By transferring the administrative seat outside UK, the transferring company was no longer deemed to be resident of the UK for tax purposes. (*Daily Mail*, paras. 2, 4).

84 Ringe, (unpublished), p. 3.

85 *Id.*, p. 4.

86 *Id.*, p. 4.

87 *ICI*, para 21; C-471/04, *Finanzamt Offenbach am Main-Land v. Keller Holding GmbH*, [2006] ECR I-2107, para. 30; Case C-293/06, *Deutsche Shell GmbH v. Finanzamt für Großunternehmen in Hamburg*, [2008] ECR I-1129, para. 29 (hereinafter: *Deutsche Shell*); D. Deak, 'Outbound Establishment Revisited in Cartesio', *EC Tax Review*, 2008/6, pp. 255-256.

to prohibit home Member State from preventing its own individuals from undertaking business activities in another Member State.[88]

## F. The Directive on Cross-Border Transfer of Company Seat

Although the previously discussed freedom of establishment provisions provide some ground rules with regard to corporate mobility and company seat transfer, these Treaty rules certainly cannot cover every legal situation that might occur in practice. It is upon other Community institutions to fill the legal gaps, either by

88 C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, [2005] ECR I-10837, para. 31; C-347/04, *Rewe Zentralfinanz eG v. Finanzamt Köln-Mitte*, [2007] ECR I-2647, para. 26; C-196/03, *Arnaldo Lucaccioni v. Commission of the European Communities,* [2004] ECR I-2683, para. 42; C-298/05, *Columbus Container Services BVBA & Co v. Finanzamt Bielefeld-Innenstadt*, [2007] ECR I-10451, para. 33; Deak (2008), p. 256.

interpreting the freedom of establishment provisions[89] or by providing a legal instrument that would facilitate such situations. An initiative to provide a legal instrument that would facilitate cross-border seat transfer is an old one.

The first idea arose in the form of a convention during the 1960s. The Member States of the European Economic Community recognized the need for a unifying legal instrument that would enable cross-border corporate mobility, and a

89 Since Treaties provide only for general rules in regard to application of Community law such generic provisions are open to diverse interpretations in every day application of Community law. However, this threat was recognized and consequently a Community level institution (*i.e.* the ECJ) was established that was to facilitate uniform application of Community law and quell such danger of varying interpretations of Community law. The ECJ's primary task is that of authoritative interpretation of Community law. (Ćapeta (2002), p. 183). Through such interpretative rulings the ECJ ensures uniform and steady interpretation of Community law which consequently facilitates effective application of Community law. (Ćapeta (2002), p. 180, 186). If there would be no such institution, every Member State's national court could interpret Community law on its own which would result in legal uncertainty and would in turn seriously diminish the effectiveness of Community law and thus even the purpose of internal market. However, although individuals and companies are free to invoke Community given rights before their national courts, it must be stressed that it is solely upon the Member State's national court and not a Member State individual or a company to initiate proceedings before the ECJ (in the form of preliminary ruling procedure). (De Burca & Craig (2008), p. 460 et seq.; Ćapeta (2002), p. 183). Therefore, only a Member State national court may seek preliminary ruling from the ECJ in order to clarify a certain Community law issue and thus provide a solution to the specific dispute that it was seized with. (Article 267 TFEU, corresponding to Article 234 TEC and Article 177 EEC). Once the preliminary ruling is given, the ECJ's ruling is binding for the referring Member State whose national court must comply with the interpretation given by the ECJ. (Craig & De Burca (2008), pp. 460 et seq.; R.R. Babayev, *Legal Autonomy vs. Political Power: What is the Role of the European Court of Justice in the European Integration?*, unpublished, p. 2 (<www.ssrn>.com, visited 10 September 2010); Ćapeta (2002), p. 184). However, it must be noted that the ECJ's ruling is not only binding for the referring national court but also for all other Member State's national courts that are engaged with the similar Community law issue. (Craig & De Burca (2008), p. 460 et seq.; Babayev (unpublished), p. 2). This rule of precedent was set out in the ECJ's case law where it was stated that an interpretation of Community law already given on a similar case releases the competent national court of its duty to refer questions to the ECJ regarding interpretation of Community law (as set out by Article 267 (3) TFEU). (Joined cases 28 to 30/62, *Da Costa en Schaake NV*, [1963] ECR 31; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, [1982] ECR 3415, paras. 13-14, 16 (hereinafter: *CILFIT*); Craig & De Burca (2008), p. 460 et seq.) Such principle of precedent placed the ECJ in a superior position against national courts of the Member States. Consequently, earlier ECJ rulings could be relied on by national courts faced with a similar issue already decided in previous ECJ case law. However, this does not deprive national courts faced with a similar Community law issue already decided by the ECJ case law to refer that issue once again to the ECJ for another preliminary ruling. (*CILFIT*, para. 15). Therefore, since its humble beginnings the ECJ has positioned itself as a significant factor in Community law development and the process of Community integration. (Craig & De Burca (2008), p. 460 et seq.; Szudockzy (2009), p. 347; Ćapeta (2002), p. 78.; Babayev (unpublished), p. 3). Through the preliminary ruling procedure the ECJ has given one of its most seminal rulings and established many of todays commonly used Community law principles like the principle of direct effect and supremacy of Community law. Consequently, it is impossible to disregard decades of Community law development that was primarily undertaken through the ECJ's case law on freedom of establishment and corporate mobility within EU. However, due to limited scope of this work we are unable to relate to freedom of establishment case law.

convention was signed by six Member States on 29 February 1968.[90] However, the convention never came into force because one of the Member States failed to ratify it.[91] The belief was that harmonization through this convention would strengthen the economy of the Member States. It has even been suggested that the Member States intended to find a way to avoid regulatory competition between their respective national company laws.[92]

The idea was revived in 1997, when the first draft for the "Proposal for Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or De Facto Head Office of a Company from One Member State to Another" ("14th Company Law Directive") was issued.[93] The legal basis for this proposal and the future directive were found in the Treaties. Namely, Article 50(1) TFEU[94] and Article 50(2)(g) TFEU[95] enabled Community institutions to issue a directive in order to attain freedom of establishment. In 2003, the Commission issued the "Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward" ("Commission's Action Plan"), which also provided for the creation of a proposal for the 14th Company Law Directive.[96] The 14th Company Law Directive would facilitate transfer of a company's registered office to another host Member State, where it would be registered as a company incorporated under the law of the host Member State.[97] In other words, the transfer of a registered seat would also entail a change of *lex societatis*, and the transferring company would have to conform to the conditions laid down by the new *lex societatis*. This mechanism would facilitate preservation of the company's legal personality and would not force a company to go through the process of liquidation.[98] However, after undergoing several consultations, which

90 Convention on Mutual Recognition of Companies and Legal Persons of 29 February 1968, Bulleting of the European Communities, Supplement No. 2-1969, pp. 7-16 (<http://aei.pitt.edu/5610/01/002314_1.pdf>, visited 10 September 2010).

91 Wymeersch (2007), p. 162.

92 *Id.*, p. 162.

93 Proposal for Fourteenth European Parliament and Council Directive on the Tansfer of the Registered Office or *De Facto* Head Office of a Company from One Member State to Another, 20 April 1997, XV/6002/97-EN REV.2.

94 "In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives." For future reference, this article corresponds to Article 44 (1) TEC and Article 54 (3) EEC.

95 "The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: ... (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union." For future reference, this article corresponds to Article 44 (2) g TEC and Article 54 (2) g EEC.

96 Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM(2003) 284 final, 21 May 2003.

97 The draft proposal of the 14th Company Law Directive is unfortunately not available anymore at the Commission's website.

98 Vossestein (2008), p. 54.

showed public support for the directive throughout 2003 to 2006,[99] the Commission suddenly decided to put the 14th Company Law Directive on hold on 28 June 2007.[100] Shortly thereafter, on 3 October 2007, the idea of the 14th Company Law Directive was abandoned.[101] The main reasons for abandonment were "political feasibility", a "lack of an economic case", and "the forthcoming ECJ's ruling".[102]

The political feasibility rationale concerned the varying approaches by Member States with regard to corporate mobility. This reason is not valid, however, because it represents a reality of the Community and its varying Member States that should be dealt with through the means of directive or through other means

99 *Id.*, p. 53; Company law: Commission consults on the cross-border transfer of companies' registered offices of 26 February 2004, IP/04/270; Consultation on future priorities for the Action Plan on modernizing company law and enhancing corporate governance in the European Union of 20 December 2005 (<http://ec.europa.eu/internal_market/company/docs/consultation/consultation_en.pdf>, visited 10 September 2010).

100 To that effect Commissioner for Internal Market Charlie McCreevy stated: "But there are also some unresolved issues concerning the cross-border transfer of a company's seat and stakeholders seek more legal certainty in that respect. The Commission had envisaged submitting a proposal for a directive this year. However, our preparatory work has led me to the conclusion that we should not rush forward with legislation. If we are to propose legislation, we must be sure there is a reasonable chance of a result with added value for business. The economic case is not as obvious or as clear-cut as it may seem and Member States currently follow very different approaches to which they are strongly attached. Moreover, the Court of Justice will soon take a decision in a case that could provide us with new insights on the current legal situation in Europe. As you know, the Court has already in the past delivered fundamental judgments in the area of company mobility. I am therefore convinced that we should wait for the outcome of this case which is likely to bring more clarity into this complicated matter. We expect the judgment to be delivered in the autumn of this year." (SPEECH/07/441 of 28 June 2007).

101 "The Commission had also suggested that a further means of improving mobility might be a directive stipulating the conditions for transfer of registered office in the EU (the so-called '14th Company Law' directive). As I informed the European Parliament, in reply to the oral question tabled by Mr Gargani, the results of the economic analysis of the possible added value of a directive were inconclusive. Companies already have legal means to effectuate cross-border transfer. Several companies have already transferred their registered office, using the possibilities offered by the European Company Statute. Soon the Cross-border Merger directive, which will enter into force in December, will give all limited liability companies, including SMEs, the option to transfer registered office. They could do so by setting up a subsidiary in the Member State to which they want to move and then merging the existing company into this subsidiary. To my mind it is only if this framework is found wanting, that further legislative action in the shape of a 14th Company Law directive would be justified. Therefore, I have decided not to proceed with the 14th Company Law Directive." (SPEECH/07/592 of 3 October 2007).

102 Vossestein (2008), p. 58.

(*e.g.*, convention, regulation, recommendation).[103] "Political feasibility" should not be an excuse for inactivity when such activity is required.

The lack of economic case rationale is based on the argument that companies already "have [the] legal means to effectuate cross-border transfer", such as the possibility offered by the Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L 294 ("SE Regulation") and the Directive 2005/56/CE of the Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ [2005] L 310/1 ("Cross-border Merger Directive"). However, none of these alternatives provide for an effective means of corporate mobility within the Community.[104] Directive in this field would lessen the costs associated with setting up the European Company for the transfer, or that of facilitating a cross-border merger.[105] Moreover, it would provide for a more simplified procedure than the one required by the European Company and the Cross-border Merger Directive.[106] The Commission's lack of economic case argument could hardly live up to these counterarguments.

The Commission's third rationale, "the forthcoming ECJ's ruling", referred to *Cartesio*. But the directive is still needed. A directive-based resolution to corporate mobility would provide for a more unifying and comprehensive Community level instrument than the one that was to be facilitated through the ECJ's case law. This is because the facilitation of corporate mobility by the ECJ will be generally undertaken on a case-by-case basis.[107] Contrarily, a directive-based approach would provide for a more coherent, uniform, and generally applicable instrument in all of the Member States.[108]

103 By means of convention based on Article 293 (3) TEC which provides that: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: ... – the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries." Although this article was repealed from the TFEU text it does not stop Member States from regulating this matter through a convention. However, convention represents the most burdensome instrument since it has to be ratified by all the signees. The best example is the failed 1968 Convention on Mutual Recognition of Companies and Legal Persons. Furthermore, the regulation provides for an overly rigid legal structure that has to be followed by varying Member States and recommendation being of only advisory character to the Member States; Rammeloo (2008), p. 372.

104 For elaboration see the subsequent text following notes 290-297.

105 Minutes of the sixth meeting of the Advisory group on Corporate Governance and Company Law held on 4 April 2007, p. 5, (<http://ec.europa.eu/internal_market/company/advisory/index_en.htm>, visited 10 September 2010).

106 Vossestein (2008), p. 60.

107 Wyckaer & Jenné (unpublished), p. 29 – 30.

108 For example, due to a Cross-border Merger Directive and ECJ's preceding ruling in *Sevic* that concerned a Community cross-border merger situation. *Sevic* already enabled companies to initiate cross-border mergers without the directive. However, such case law approach was afterwards replaced by a more coherent directive. This demonstrates that the ECJ cannot provide for the required level of legal certainty unlike for example a directive in that field; Vossestein (2008), p. 61; M. Lennarts, 'Company Mobility Within the EU, Fifty Years on from a Non-issue to a Hot Topic', *Utrecht Law Review*, Vol. 4, Issue 1 2008, p. 2; Wisniewski & Opalski (unpublished), pp. 620-621.

In the current state of Community law, there is a certain level of ongoing regulatory competition between the Member States. After *Inspire Art*, it was clear that companies incorporated in Member States grounded in the registered seat theory (*e.g.*, UK) could freely undertake their business activities or transfer their administrative seat to another Member State grounded in the real seat theory without fear of being denied such activities by the host Member State.[109] This enabled the UK to play the role of "European Delaware, being the State offering the most attractive, in this case, the cheapest incorporation service while offering a well developed and very flexible legal regime".[110] This resulted in situations where businessmen (mostly small enterprises) established their companies in the UK and then transferred their business back to the Member State of their business interest (usually the Member State grounded in the real seat theory, like Germany), thus avoiding the burdensome company law of that Member State.

Both Member States grounded in the real seat theory and those grounded in the registered seat theory recognized the danger of losing their investment and consequently initiated reforms of their respective company laws in order to make them more attractive to investors that are shopping for the most suitable Member State of incorporation.[111] Is competition in which company law standards are

109 In *Inspire Art* the court provided that: "That being so, as the Court confirmed in paragraph 27 of *Centros*, the fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty." (I *Inspire Art*, para. 138). It continued by stating: "In addition, it is clear from settled case-law (Segers, paragraph 16, and *Centros*, paragraph 29) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment." (*Inspire Art*, para. 139; Lennarts (2008), p. 2).

110 Wymeersch (2007), p. 164; After *Centros* the number of Ltd. companies in the UK increased from 4,400 initially registered companies to 28,000 registered companies. These companies only represent the number of companies that do not conduct any business activity within the UK but are solely incorporated for the purpose of conducting all of their business activities in another Member State (usually Germany and France); De Sousa (2009), note 84; Johnston (2009), p. 396.

111 For example, France has reduced the minimum capital requirement to 1 EUR for its *Société à Responsibilité Limitée* (Private Limited Company). (Wymeersch (2007), p. 164; De Sousa (2009), note 85; Johnston (2009), p. 397). Furthermore, in Germany two expert committees were formed in 2003 under the *Deutsche Rat für Internationales Privatrecht* that made a legislative proposal on cross-border seat transfer both from the European and the national position. (Rammeloo (2008), pp. 373-374; Wisniewski & Opalski (unpublished), p. 622). Eventually, in 2008 German authorities also commenced a procedure on adopting a law that would result in abandoning the real seat theory and adoption of the registered seat theory. In addition, Portugal has also reformed its law in order to facilitate transfer of company's seat. (De Sousa (2009), p. 10). In 2007, Hungary as well changed its legislation thus enabling companies to transfer their administrative seat to another Member State while remaining incorporated under Hungarian law. (Cerioni (unpublished), text following note 15; Deak (2008), p. 251). Finally, the discussion on enabling companies to transfer their registered seat to another Member State (something that is currently not permitted under competent UK company laws) was also initiated in the UK. (Johnston (2009), p. 400).

tailored in order to attract investments good for the creditors, minority shareholders, and company employees? A directive in this field would certainly strike the best possible uniform balance between the interests of the investors and the protection of a company's creditors, minority shareholders, and employees on the other.

Moreover, not all Member States hold equal ground with regard to this ongoing regulatory competition. Member States grounded in the registered seat theory are actively participating in such regulatory competition while the real seat theory Member States are forced to passively monitor the number of companies that are leaving their jurisdiction, or reform their respective national laws in order to facilitate a registered seat theory framework. Therefore, in order to provide equal opportunity to both the real and registered seat Member States, a uniform regulation applicable within the Community is needed. A revival of the Commission's work on the 14th Company Law Directive is more than welcome.[112]

## G. *Cartesio* Ruling

There have been almost a dozen rulings on the freedom of establishment and corporate mobility within the Community; however, some issues still await resolution. Some of these issues are presented by the stance of Community law in emigration situations, especially the right of a home Member State to deny its companies the freedom of establishment.[113] But the facts of *Cartesio* promised to clarify the position of Community law on these issues.

The belief that *Cartesio* would resolve pending Community Law issues was emphasized after Advocate General Maduro gave his opinion on *Cartesio*.[114] Due to more recent liberal case law on the freedom of establishment (*e.g., Centros, et*

112 In that regard there have been certain incentives given by the European Parliament. Namely, on 10 March 2009 the European Parliament adopted a resolution calling on the Commission to resume work on the 14th Company Law Directive. (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), P6_TA-PROV(2009)0086 (not published)).

113 There was already one prior case before Amtsgericht Heidelberg in Germany where similar issues arose but due to a procedural irregularity ECJ rejected the national court's request for preliminary ruling. (Order in Case C-86/00, *HSB-Wohnbau GmbH*, [2001] ECR I-5353; Bohrenkämper (2009), p. 89; Mucciarelli (2008), p. 270).

114 Opinion of Mr Advocate General Poiares Maduro delivered on 22 May 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, [2008] ECR I-9641 (hereinafter: AG Maduro's opinion).

*al.*),[115] AG Maduro considered the twenty-year-old reign of *Daily Mail*[116] restrictive and obsolete. A clear separation from *Daily Mail* was expected from the *Cartesio* ruling. However, the ECJ, quite to the contrary, decided to uphold, and thus revive, the *Daily Mail* position. This meant a "return to square one" for the free-

115 AG Maduro's opinion, paras. 31-35.

116 *Daily Mail* and General Trust PLC (hereinafter: *Daily Mail*) was a company incorporated under UK law and that had its registered office in the UK. The issue arose when *Daily Mail* tried to obtain the permission of the UK Treasury required for the transfer of its tax residence to Netherlands. According to the relevant UK tax regulation, a company's tax residence is determined by the place of the company's central management. The same legislation also prohibited companies' resident for tax purposes in the UK to change their tax residence without prior consent of the UK Treasury. Therefore, in order to change its tax residence, *Daily Mail* needed to transfer its central management from UK to another Member State. However, in order to do so it had to acquire UK Treasury's permission. Such permission was denied. It was common knowledge that the main reason behind the transfer of *Daily Mail*'s administrative seat to Netherlands was *Daily Mail*'s intention to avoid payment of due taxes to UK tax authority. Therefore, since *Daily Mail* tried to evade payment of due taxes, UK Treasury denied it the permission to transfer its administrative seat abroad. It must be noted that unlike UK tax legislation, the relevant UK company legislation permitted a company incorporated under UK law to transfer its administrative seat abroad without losing its legal personality or ceasing to exist as a company incorporated under UK law. Furthermore, it must be stressed that UK Treasury was willing to permit the transfer of *Daily Mail*'s administrative seat if at least a portion of due taxes was paid. However, lengthy negotiations failed which resulted in court proceedings and this ECJ ruling. ECJ first remarked that the freedom of establishment "would be rendered meaningless" if Member State of origin could prohibit companies incorporated under its law to leave and establish in another Member State. However, ECJ further elaborates that freedom of establishment in another Member State is usually exercised through agencies, branches or subsidiaries (*i.e.* the right of secondary establishment). In addition, companies may exercises right to freedom of establishment even by establishing a daughter company in another Member State. ECJ continues by stating that UK does not prohibit such methods of establishment. UK tax regulation only requires consent where company incorporated under UK law seeks to transfer its administrative seat to another Member State while at the same time maintaining legal personality and status as a company incorporated under the UK law. Therefore, ECJ stressed the following: "… it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. *They exist only by virtue of the varying national legislation which determines their incorporation and functioning* [emphasis added]." *(Daily Mail*, para. 19). In other words, ECJ purported that since companies are actually "creatures of national law" which means that their incorporation and functioning, *i.e.* their legal existence and functioning, is absolutely dependent on national legislation and not on Community law. Consequently, ECJ concluded that: "It must therefore be held that the *Treaty regards the differences in national legislation concerning the required connecting factor and the question whether* – and if so how – *the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which* are not resolved by the rules concerning the right of establishment but *must be dealt with by future legislation or conventions [emphasis added]*." (*Daily Mail*, para. 23). In other words, the Treaties do not entitle a company incorporated under law of the home Member State with the right to transfer its administrative seat to another Member State while at the same time retaining the status of a company incorporated under the law of the home Member State. Therefore, according to ECJ the right of a company to transfer its administrative seat to another Member State depends wholly upon national legislation of a home Member State before that situation is resolved on a Community level between the Member States.

dom of establishment in emigration situations.[117] In order to provide the best overview of *Cartesio*, we will first refer to the facts of the case, then to AG Maduro's opinion, followed by the findings of the court and finally our comments on *Cartesio*.

*I. Facts of the Case*

"Cartesio betéti társaság" ("Cartesio") was a limited liability partnership established in Baja, Hungary, under Hungarian law in 2004.[118] Cartesio desired to transfer its administrative seat and principal place of business, its operational headquarters, to another Member State, Italy, but keep its registered seat in Hungary. This would have enabled Cartesio to remain established as a company incorporated under Hungarian law. Cartesio applied to the Hungarian commercial register for a change of its Hungarian company management's address to an Italian location. Importantly, the issue at hand was not that of a registered seat transfer but that of an administrative seat transfer.[119] However, the Hungarian commercial register denied Cartesio's application, and in response, Cartesio brought an action against the commercial register's decision before the competent Hungarian first instance court.

The Hungarian first instance court confirmed the commercial register's denial of Cartesio's application. The court found that Hungarian law does not permit a company registered under Hungarian law to transfer its administrative seat to another Member State and remain incorporated under Hungarian law. The basis for this decision was found in two Hungarian substantive company law provisions: (i) Article 1(1) of Law No CXLIV of 1997 on commercial companies ("Hungarian law on commercial companies", and (ii) Article 16(1) of Hungarian law No CXLV of 1997 on the commercial register ("Hungarian law on commercial register"). The Hungarian law on commercial companies states, "This Law shall govern the incorporation, organisation and functioning of commercial companies *which have their seat in Hungary*...."[120] The Hungarian law on commercial register provides that the seat of company incorporated under Hungarian law "'shall be the place where central administration is situated....'"[121]

These two Hungarian law provisions determine the scope of the Hungarian law on commercial companies and related company bylaws.[122] Read together,

117 A.P. Dourado & P. Pistone, 'Looking Beyond Cartesio: Reconciliatory Interpretation as a Tool to Remove Tax Obstacles on the Exercise of the Primary Right to Freedom of Establishment by Companies and Other Legal Entities', *Intertax*, (2009) Vol. 37 issue 6/7, p. 342.

118 The limited liability partnership under Hungarian law is a specific company form consisting of two types of partners. One partner is jointly and severely liable for the company's debts while on the other hand the other type of partner has only limited liability in this regard. That partner's liability for the company's debts is tied only to the capital that he invested into the partnership. (*Cartesio*, paras. 21-22).

119 That is somewhat different than the position taken by Advocate General Maduro. (AG Maduro's opinion, para. 23). For elaboration see subsequent text following note 139 and note 204.

120 *Cartesio*, para. 11 (emphasis added).

121 *Cartesio*, para. 17.

122 C. Gerner-Beuerle & M. Schillig, *The Mysteries of Freedom of Establishment After Cartesio*, unpublished, note 70 (<www.ssrn.com>, visited 9 November 2010).

they mandate that companies incorporated under Hungarian law must have their company seat (*i.e.*, their administrative seat) within Hungary. In other words, the Hungarian law on commercial companies applies only to Hungarian companies whose administrative seat is located within Hungary. Consequently, the Hungarian law on commercial companies and its bylaws restricts Hungarian companies from transferring their administrative seat to another Member State. If a Hungarian company transfers its administrative seat to another Member State, the transfer would contradict these two mandatory provisions of Hungarian law. Therefore, Cartesio could not change its company seat to the Italian address.

In addition to the two Hungarian company law provisions, Article 18 of Decree-Law No 13 of 1979 on private international law rules (*i.e.*, conflict of laws rules) provides the following:

(1) The legal capacity of a legal person, its commercial status, the rights derived from its personality and the legal relationships between its members shall be determined in accordance with its [*lex societatis*].
(2) [The *lex societatis*] of a legal person shall be the law of the State in the territory of which it is registered.[123]

Viewed with the two substantive Hungarian company law provisions, the scope of the Hungarian conflict of laws provision is narrowed. Hungarian conflict of laws is clearly grounded in the registered seat theory; the *lex societatis* is always the law of the jurisdiction where the company is incorporated. The two Hungarian company law provisions, however, refer only to the administrative seat, mandating that it must be located within Hungary. Although the two Hungarian company law provisions are not primarily conflict of laws rules, they determine the scope of the international application of the two Hungarian laws irrespective of the conflict of laws rules.[124] However, by doing so, these two Hungarian provisions also touch upon the conflict of laws issue. Therefore, it can be said that they provide a hidden conflict of law rule.

Under the three Hungarian provisions combined, companies incorporated under Hungarian law are treated more restrictively than foreign companies with

123 *Cartesio*, para. 20.
124 Gerner-Beuerle & Schillig (unpublished), note 70.

regard to corporate mobility.[125] This is because Hungarian companies cannot transfer their administrative seat to another Member State while maintaining their nationality as a company incorporated under Hungarian law. Otherwise, the Hungarian conflict of laws rules would direct to that Hungarian company's registered seat, Hungary, for a determination of that company's *lex societatis*. This would lead to the application of the mandatory provisions of the Hungarian law on commercial companies and the Hungarian law on commercial register.

One cannot but wonder why Cartesio even applied to the competent Hungarian commercial register for the change of its administrative seat to Italy. What would Cartesio achieve by changing its administrative seat address in the Hungarian commercial register? The Hungarian law on commercial register states that the company seat is the place where the company's administration is located. Generally, every commercial company must have a company seat,[126] and in Hungary, that seat is equated with a company's administrative seat. Furthermore, according to Article 11 of the Hungarian law on commercial companies, a company's articles of association must specify its company's seat (*i.e.*, the company's administrative seat).[127] Article 12(1) of the Hungarian law on commercial register also provides that the Hungarian commercial register shall specify the company seat.[128] Further, Article 29(1)[129] and Article 34(1)[130] of the same law impose upon Hungarian companies an obligation to submit to the competent Hungarian com-

125 For example, a limited company incorporated in the UK conducted the bulk of its business operation in Hungary. Then a certain dispute arose before the Hungarian court that concerned that company's administrative seat transfer to Italy (disregarding the Community context of corporate mobility). First step for the Hungarian court would be to determine *lex societatis*. For that purpose Hungarian court will look to its national conflict of laws rules. Article 18 of Hungarian Decree-Law No 13 of 1979 on private international law rules (being grounded in the registered seat theory) will lead to application of UK law as *lex societatis.* There would be no problem for a UK company to transfer its administrative seat to Italy since that is permitted by the UK *lex societatis*. However, if the issue before the Hungarian court arose in regard to a Hungarian company (as was the case in *Cartesio*), the Hungarian court would apply the same conflict of laws rules and come to application of Hungarian *lex societatis* which would then, among other, lead to application of the disputed Article 1 (1) of the Hungarian law on commercial companies and Article 16 (1) of the Hungarian law on commercial register. These provisions deny Hungarian companies from transferring their administrative seat to Italy because they mandate that the company's administration must be located within Hungary.

126 Barbić (2008), p. 371.

127 "Under Article 11 of that law: 'The articles of association (the instrument of incorporation, the statutes of the company) shall specify: (a) the name and seat of the commercial company." (*Cartesio*, para. 12).

128 "The information on companies referred to in this Law shall be entered in the commercial register. For all companies, the register shall specify: … (d) the company seat …." (*Cartesio*, para. 16).

129 "Save as otherwise provided, any application for registration of amendments to information registered in relation to companies must be presented to the commercial court within 30 days of the event giving rise to the amendment." (*Cartesio*, para. 18).

130 "Every transfer of a company seat to the jurisdiction of another court responsible for maintaining the commercial register must, by reason of the change entailed, be submitted to the court with jurisdiction in respect of the former seat. After examining the applications for amendment of the information in the register prior to the change of company seat, the latter court shall endorse the transfer." (*Cartesio*, para. 19).

mercial register an application for the change of any company information registered with the commercial register. In other words, Cartesio was under obligation to apply to the Hungarian commercial register because it intended to change the registered location of its company seat.

After the first instance court's denial, Cartesio appealed to the Hungarian second instance court. In support of its appeal, Cartesio stated that the prohibitive Hungarian company law is contrary to the Community granted rights under the freedom of establishment and the ECJ's case law. Cartesio specifically cited C-411/03, *Sevic Systems AG*, [2005] ECR I-10805 (*Sevic*).[131] In response, the Hungarian second instance court, recalling the *Daily Mail* ruling, noted that Community law does not recognize such rights to companies. If the applicable substantive company law in the home Member State (*i.e.*, the Hungarian law on commercial companies and the Hungarian law on commercial register) denies Cartesio the right to transfer its administrative seat to another Member State, Cartesio must comply with the Hungarian company law provisions in order to remain a company incorporated under that law. Therefore, the Hungarian commercial register was within its rights to deny Cartesio the transfer of its administrative seat to another Member State. In order for Cartesio to transfer its administrative seat to another Member State, Cartesio would have to be wound up in Hungary and reestablished as a new company in the host Member State.

However, the Hungarian second instance court acknowledged the possibility that the Community law's position on the issue had developed since *Daily Mail* and referred several questions to the ECJ for a preliminary ruling. The court's

131 *Sevic* concerned a merger between a German company (Sevic) and a Luxembourg company (Security Vision). The merger intended the dissolution of the Luxembourg company and the transfer of all of its assets to *Sevic* as the absorbing company. However, the merger was denied by a German court because the German law (German Law on Transforming Companies of 28 October 1994, BGBl. 1994 I, p. 3210, amended in 1995) did not permit such cross-border mergers. That law allowed only for mergers between companies incorporated under German law. The ECJ eventually ruled that German rules that denied registration of a cross-border merger between these two companies were contrary to the freedom of establishment. To that effect, ECJ elaborated that freedom of establishment "covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same condition as national operators". (*Sevic*, para. 18). In other words, the freedom of establishment provides "effective means of transforming companies in that it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter". (*Sevic*, para. 21). Therefore, since cross-border mergers are considered to be under protection of the freedom of establishment, a justification was required before the German court could deny such merger to *Sevic* Company. In response, the German court claimed that such restriction was necessary for the protection of the "interests of creditors, minority shareholders and employees, effectiveness of fiscal supervision, fairness of commercial transactions" (*Sevic*, para. 23). The ECJ rejected all of these justifications on the ground that such refusal to register all cross-border mergers even when such interests were not threatened at all went beyond what was necessary to protect the those interests.

questions regarding the application of the freedom of establishment[132] were as follows:

> (a) If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?
> (b) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?
> (c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?
> (d) May Articles 43 [EC] and 48 [EC]be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?[133]

Of the four substantive issues referred to the ECJ, the court only considered question (a) in its ruling. In doing so, the ECJ rephrased that question as

> [W]hether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State

132 "(1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration [*author's comment: of a company*] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is inter partes? (2) In so far as an appeal court is included in the concept of a "court or tribunal which is entitled to make a reference for a preliminary ruling" under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities? (3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?..." (*Cartesio*, para. 40).

133 *Cartesio*, para. 40.

> whilst retaining its status as a company governed by the law of the Member State of incorporation.[134]

According to this rephrase, the issue is not whether a company is permitted to transfer its administrative seat but whether it can transfer its administrative seat while remaining established under the law of its home Member State. The ECJ shifted the issue from a company's right to transfer its administrative seat under the protection of the freedom of establishment to the issue of what extent that freedom entitles the home Member State to determine the link that a company must maintain with that Member State. In other words, whether home Member States are entitled to and to what extent are they entitled to determine conditions under which its companies are considered companies established under its law and thus entitled to freedom of establishment.[135] This question could also be formulated as whether the freedom of establishment directly affects the right of Member States to determine the conditions under which the corporate mobility of companies incorporated under their law can be undertaken. By addressing this substantive issue, the ECJ concluded that the remaining three questions required no further clarification. The facts and issues of *Cartesio* received much attention, including that of AG Maduro, who provided his opinion on the issues raised in the case.

*II. Opinion of Advocate General Maduro*

Advocate General Maduro began his opinion by pointing out the problem with the Hungarian law mandate that a company's registered seat coincide with its administrative seat.[136] Under Hungarian law, as AG Maduro puts it, "the operational headquarters [of a company incorporated under Hungarian law] must remain in Hungary".[137]

AG Maduro then asserted that Article 16(1) of the Hungarian law on commercial register actually provides that a company's administrative seat must coincide with its registered seat. This provision merely states that "the seat…shall be the place where central administration is situated…". It does not mention the registered seat, but only the seat of a company. "Company seat" is a much broader term than "administrative seat" and "registered seat"; this is evident in Article 16(1), which confines the company seat to the location of the company's administrative seat. Article 1(1) of the Hungarian law on commercial companies also supports AG Maduro's assertion. This Article provides that companies incorporated under Hungarian law must have their seat in Hungary because they are registered there. Since the Hungarian law on commercial register equates the company seat with a company's administrative seat, and since the Hungarian law on commercial companies mandates that such company seat must be located within Hungary (*i.e.*, where the company has its registered seat), it can be concluded that the

134 *Cartesio*, para. 99.
135 Szudockzy (2009), p. 356.
136 AG Maduro's opinion, para. 22.
137 *Id.*, para. 6.

administrative or company seat of the Hungarian company must coincide with the company's registered seat.

AG Maduro thereby reaches the rigid conclusion that Hungarian company law is actually grounded in the real seat theory.[138] However, it is more accurately stated that Hungarian company law narrows the scope of Hungarian conflict of laws rule, which is actually grounded in the registered seat theory, not in the real seat theory.[139]

AG Maduro continues by analyzing the arguments put forward by some Member States (*e.g.*, Poland, Slovenia, UK), which claimed that Cartesio cannot invoke the protection of the freedom of establishment. AG Maduro claims this view is incorrect. He clarifies, "National rules that allow a company [incorporated under that national law] to transfer its operational headquarters only within the national territory clearly treat cross-border situations less favorably than purely national situations. In effect, such rules amount to discrimination against the exercise of freedom of movement".[140]

According to AG Maduro, not only does the freedom of establishment apply in the present case, but because Cartesio wants to pursue genuine business activity in another Member State, the Hungarian rules represent a clear violation of that right. AG Maduro seems to suggest that freedom of establishment provisions concerning companies are directly effective. Consequently, companies can directly invoke the protection of the freedom of establishment before their Member States' national courts.

Referring to *Sevic*, AG Maduro quotes his colleague Advocate General Tizzano for the proposition that restrictions on company immigration or emigration are forbidden.[141] AG Maduro purports that companies are entitled to invoke the direct effect of freedom of establishment provisions, and he claims that the direct effect applies to both immigration and emigration situations. In other words, AG Maduro suggests that the freedom of establishment is a two-fold right with regard to companies.[142]

AG Maduro continues by trying to distinguish *Cartesio* from *Daily Mail*, which has been a thorn in the side of corporate mobility between Member States since

138 For the wording of Article 18 (2) of Decree-Law No 13 of 1979 on Private International Law Rules (*i.e.* Hungarian conflict of laws) see previous text following note 125. According to that article, the personal law of a legal person (*lex* societatis) is the one applicable in the territory where that company was registered. Clearly, this article alone does not purport that the applicable company law would be the law where a company's central administration is situated; Bohrenkämper (2009) p. 86; Gerner-Beuerle & Schillig (unpublished), note 70.

139 For elaboration on the narrowing see previous text following note 126.

140 AG Maduro's opinion, para. 25.

141 *Id.*, para. 28: "Furthermore, 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. (18) In other words, restrictions 'on entering' or 'on leaving' national territory are prohibited." (Opinion of Mr Advocate General Tizzano delivered on 7 July 2005, Case C-411/03, *Sevic Systems AG*, [2005] ECR I-10805, para. 45).

142 For elaboration on the issue of the two-fold nature of freedom of establishment see previous note 81.

the late 1980s.[143] AG Maduro is of the position that the reasoning of *Centros et al*. demonstrated that *Daily Mail* should be considered a leftover from more conservative times in the development of Community law.[144] All that is missing is a clear and unambiguous detachment of the ECJ and Community law from *Daily Mail*'s obsolete heritage. To that effect, AG Maduro briefly introduced the facts of *Daily Mail* and offered its main highlights. In *Daily Mail*,

> [t]he Court rejected the company's view that the tax authorities had infringed the right of establishment. Mindful of the differences between the company laws of the Member States, the Court stated that *companies exist only by virtue of national law and that 'the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.'* The suggestion, therefore, is that the terms of the 'life and death' of a company are determined solely by the State under whose laws that company was created. The State gave; and so we must acquiesce when the State hath taken away.[145]

To elaborate, the ECJ stated that because companies are actually creatures of the law, their legal existence is wholly dependent on their home Member States' laws. Since companies owe their existence to their home Member States' laws, companies, unlike natural persons, cannot invoke the protection of the freedom of establishment when they want to transfer their seat to another Member State. For this reason, *Daily Mail* purports that such situations of corporate mobility are outside the scope of the freedom of establishment.

In response, AG Maduro states, "[T]he *case law on the right of establishment of companies has developed since the ruling in Daily Mail and General Trust* and the Court's approach has become more refined".[146] He supplements this statement by calling upon "a number of contradictory signals" from the subsequent ECJ rulings, like *Centros et al*. According to AG Maduro, the ECJ set out in those rulings that corporate mobility falls within the scope of the freedom of establishment, unlike in *Daily Mail*.[147]

Afterwards, AG Maduro criticized various attempts to justify the *Daily Mail* reasoning. Specifically, he criticized justification based on differences between primary and secondary establishment and between emigration and immigration situations. In short, AG Maduro claims that such justifications did not fit the initial frame set out in *Daily Mail*. The ECJ initially stated that "rights guaranteed by [freedom of establishment provisions] would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to

143 For *Daily Mail* facts see previous note 115.
144 AG Maduro's opinion, para. 27.
145 *Id.*, para. 26 (emphasis added).
146 *Id.*, para. 27 (emphasis added).
147 *Id.*, para. 27.

establish themselves in another Member State".[148] *Daily Mail* seems to suggest that an outright negation of corporate mobility would indeed infringe the freedom of establishment. Therefore, *Daily Mail* might represent situations where there is no such outright negation of corporate mobility, unlike in *Centros et al*.

In *Daily Mail*, companies were allowed to transfer their administrative seat to another Member State upon acquiring permission from the UK tax authorities. This permission, however, was denied.[149] Because the company was not denied other means of transferring its business abroad (*e.g.*, setting up of a branch or a subsidiary in another Member State, incorporation of a new daughter company abroad), the ECJ did not acknowledge the company the protection of the freedom of establishment.[150] *Daily Mail* further held that the Treaties recognize various differences between Member States' legal orders; namely, that the transfer of company can be subject to various conditions set out by a Member State's national law. This is because the Treaty puts on the same level various connecting factors, such as "the registered office, central administration and the principal place of business of a company".[151] Subsequently, the ECJ more clearly stated that regulation of corporate mobility is not the immediate subject matter of freedom of establishment provisions, but rather a future agreement between Member States. Since no agreement was reached at the time of the *Daily Mail* ruling, the ECJ denied the company the right to invoke the protection of the freedom of establishment.[152] AG Maduro opposed these *Daily Mail* assertions:

> It is impossible, in my view, to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. Otherwise, Member States would have carte blanche to impose a 'death sentence' on a com-

148 *Daily Mail*, para. 16.

149 *Daily Mail* did not represent a situation of outright negation of right to invoke freedom of establishment since the restrictive national regulation allowed transfer of the administrative seat upon receiving permission of the relevant tax authority. (*Daily Mail*, para. 5). On the other hand, in *Cartesio* the restriction to administrative seat transfer was outright because the relevant national law provision did not even recognize for a possibility of a conditioned right of a company established in Hungary to transfer its administrative seat to another Member State (*Cartesio*, paras. 11, 17). This can be one of additional reasons upon which *Daily Mail* can be distinguished from being applicable to *Cartesio*. For further distinguishing *Cartesio* and *Daily Mail*, see the subsequent text following note 217.

150 According to *Daily Mail*, it seems that not every situation is outside the scope of freedom of establishment. It would be interesting to see what would be the stance of Community law if the Member State's national law in *Daily Mail* presented an outright negation. Would the ECJ then activate its own *dictum* that stated that 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" (*Daily Mail*, para. 16).

151 *Daily Mail*, para. 21.

152 See Article 293 (3) TEC in note 103. However, since no agreement to that effect was reached between the Member States this provision was repealed from the latest TFEU Treaty.

> pany constituted under its laws just because it had decided to exercise the freedom of establishment.[153]

AG Maduro asserts that the recent ECJ case law[154] concerning the freedom of establishment seems to have oriented towards a different and opposite approach from the one taken in *Daily Mail*. AG Maduro argues that Member States are free to choose either a real seat or registered seat theory; Community law does not preference either of the two theories. However, AG Maduro points out that there is a need for a certain level of harmonization between varying national legal orders. Otherwise, no legal order should be allowed to force exclusive application of its national rules concerning corporate mobility without violating the freedom of establishment.[155]

AG Maduro continues by emphasizing that if a Member State is given "absolute freedom to determine the 'life and death' of company constituted under its domestic law, irrespective of the consequences for the freedom of establishment",[156] it would result in serious consequences for the realization of the company's effective and genuine business activity in another Member State. For example, there is an administrative burden and costly consequences of having to wind up a company and then reincorporate anew in another Member State. This in addition to the fact that the company will not be able to undertake its business activities in a period between its winding up and establishing anew. In other words, AG Maduro reiterates the following well affirmed *dictum*: "According to settled case-law, all measures which prohibit, impede or render less attractive the exercise of...[the freedom of establishment] must be regarded as obstacles (see Case C-55/94, *Gebhard*, [1995] ECR I-4165, paragraph 37, and Case C-442/02, *CaixaBank France*, [2004] ECR I-8961, paragraph 11)."[157] Since the right of a home Member State to determine the "life and death" of a company incorporated under its law would surely constitute a measure that prohibits, impedes or renders less attractive the exercise of the freedom of establishment, home Member States should not be allowed that discretion.

Finally, AG Maduro somewhat relaxes his approach towards the Member States' prerogatives. He concludes that Member States are not at the "gunpoint of Community law"; there is an exception through which Member States can exclude application of the freedom of establishment, but only on certain narrowly con-

153 AG Maduro's opinion, para. 31.
154 *Centros et al.*
155 AG Maduro's opinion, para. 30.
156 *Id.*, para. 31.
157 *Deutsche Shell*, para. 28.

strued grounds[158] and only to protect the general public interest. Such interests include the prevention of abuse or fraudulent conduct and the protection of the interests of creditors, minority shareholders, employees or the tax authorities.[159] AG Maduro points out that a Member State is entitled to set out certain requirements for the transfer of a company's administrative seat to another Member State. He admits that companies are not entitled to the protection of the freedom of establishment unconditionally. Certain standards for non-application of the freedom of establishment must exist, because, among other things, Member States are entitled to protect certain interest groups (*e.g.*, company's shareholders or employees) and to prevent the abuse of Community law (*e.g.*, circumvention of such protective national provisions by calling upon the right to freedom of establishment). Consequently, according to AG Maduro, the freedom of establishment can be restricted only to protect the general public interest. However, this was not the situation in *Cartesio*. As AG Maduro points out:

> The [Hungarian] rules currently under consideration completely deny the possibility for a company constituted under Hungarian law to transfer its operational headquarters to another Member State. Hungarian law, as applied by the commercial court, does not merely set conditions for such a transfer, but instead requires that the company be dissolved. Especially since the Hungarian Government has not put forward any grounds of justification, *it is difficult to see how such 'an outright negation of the freedom of establishment' could be necessary for reasons of public interest*.[160]

158 Article 52 (1) TFEU provides: "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." Therefore, that Treaty article provides that under certain narrowly construed grounds of public policy, public security or public health, the right to freedom of establishment can be restricted by Member State's national provisions. Application of this rule (*i.e.* possibility to restrict application of freedom of establishment) was further elaborated in *Inspire Art*. The national measure that was liable to hinder application of freedom of establishment must pass a specific test in order for it not to be considered contrary to Community law. Such national measure should be proportionate and justified by a public goal it seeks to achieve. (Mucciarelli (2008), p. 299). More specifically, (i) hindering national measure should be applied in a non-discriminatory manner, (ii) it must be justified by imperative requirements in the public interest, (iii) it must be suitable for securing the attainment of the objective which it pursues and finally (iv) it must not go beyond what is necessary in order to attain it. (*Inspire Art*, para. 133). For example, it can be considered that it is in public interest that a Member State should be able to prevent its taxable substance from freely transferring abroad in order to prevent tax evasion in its jurisdiction. Therefore, it can be considered "proportionate" that a transfer of a company abroad would be subject to payment of all due taxes in the leaving jurisdiction. However, that reason alone is too disproportionate for an outright prohibition of company transfer. (E. Wymeersch, *The Transfer of Company's Seat in European Company Law*, unpublished version, p. 19 (available at: <www.ssrn.com, visited 9 November 2010>)). Consequently, the home Member State should not be allowed to restrict companies from transferring abroad because it is possible to recover due taxes in other EU jurisdictions (Wymeersch (unpublished), p. 19).

159 AG Maduro's opinion, para. 32.

160 *Id.*, para. 34 (emphasis added).

AG Maduro comes to the conclusion that the ECJ should not deny Cartesio the protection of the freedom of establishment. Instead, *Cartesio* should rule that freedom of establishment provisions overrule national rules that make administrative seat transfer impossible. AG Maduro suggests that the freedom of establishment is directly effective and facilitates the company's right to move its administrative seat to another Member State.[161]

Overall, it seems that AG Maduro advocates for an interpretation of the freedom of establishment that would enable significantly less restrictive corporate mobility between Member States. Although this conclusion is inherent in his arguments, AG Maduro does not clearly mention that freedom of establishment provisions are directly effective to companies as they are to natural persons.[162] Therefore, since the freedom of establishment should be directly effective, Member States could exclude the application of this fundamental freedom only on a certain narrowly defined legal grounds (*i.e.*, protection of general public interest). Although AG Maduro relaxes his tone towards the end of his opinion,[163] he closes his argument by stating that, in the present case, he can hardly see how such an outright negation by the Hungarian national rules could be justified on the basis of protection of public interest.[164]

AG Maduro tried to offer a fresh perspective on the meaning and purpose of the freedom of establishment and accompanying ECJ case law. In doing so, he openly criticized various attempts to reconcile two different sets of ECJ case law; those based on *Centros et al*. and the one established by *Daily Mail*. As a resolution, AG Maduro opted for a clear disassociation from the *Daily Mail* heritage, but unfortunately, as the next section will demonstrate, his opinion was completely ignored by the ECJ. The ECJ adopted its own unique approach, which was more in line with the reasoning purported in *Daily Mail*. Nevertheless, AG Maduro suggested that "the Court give the following reply to the fourth question referred by the national court: 'Articles 43 EC and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State'".[165]

### *III. Findings of the Court*

The ECJ started its *Cartesio* opinion by introducing the facts of the case. The court then presented the arguments asserted by Cartesio. Specifically, Cartesio claimed that Hungarian law distinguishes between companies established in Hungary and those established in other Member States. Unlike companies established in other Member States, Hungarian companies are required to have both their

161 For elaboration on direct effect see previous text following notes 51-56.

162 AG Maduro's opinion, paras. 30-31, 33, 34; Szydło (2008), pp. 990, 992.

163 Advocate General Maduro first attacked the reasoning of *Daily Mail* calling its consequences as "carte blanche to impose a 'death sentence' on a company" of the respective Member States. However, afterwards he acknowledges that certain limits to application of freedom of establishment must exist. Consequently, Member States are allowed to preclude application of freedom of establishment on the ground of protection of general public interest.

164 AG Maduro opinion, para. 34.

165 *Id.*, para. 35.

registered and administrative seat located within Hungary. Invoking *Sevic*, *Cartesio* claimed that this distinction amounted to a restriction on the freedom of establishment.[166]

In the same manner, the ECJ presented the referring Hungarian second instance court's arguments, which were somewhat carefully construed. Although the referring court submitted its own arguments, it also acknowledged the possibility that the position of Community law might be different from the position advocated by the referring court.[167] Such uncertainty was one of the main reasons it referred to the ECJ for a preliminary ruling on the issues at hand. However, in support of its arguments, the referring court repeated the well-known *Daily Mail* reasoning:

> [The freedom of establishment] does not include the right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, should the competent authorities object to this.[168]

The referring court also presented examples of other possible rights with which Hungarian companies were vested that enabled them to transfer their company seats to other Member States without a prior winding up.[169] In doing so, the referring court only wanted to demonstrate before the ECJ that, if a company incorporated under Hungarian law wanted to transfer its seat to another Member State without having to wind up in Hungary, there were other options available.

The ECJ first identified the substantive Community law issue at hand. It stated that the issue was whether a company wishing to transfer its administrative seat to another Member State (Italy) can invoke the protection of the freedom of establishment in a situation where the transfer of the administrative seat is forbidden by the law of the home Member State (Hungary). The ECJ continued by pointing out some arguments set out in its previous case law, confirming them as applicable to *Cartesio*. First, it recalled several arguments set out in *Daily Mail*; namely, "companies are creatures of national law", and that they "exist only by virtue of the national legislation".[170] Additionally, Member States' laws recognize various connecting factors that provide a link to a certain national legislation, and as a consequence, the means and results of corporate mobility differ widely from one Member State to another. Consequently, a transfer of administrative seat is

166 *Cartesio*, para. 26.
167 *Cartesio*, paras. 35-38.
168 *Cartesio*, para. 34.
169 These arguments included the possibility of establishing one of the Community company forms. These were the European Economic Interest Grouping based on Council Regulation 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ 1985 L 199, p. 1, (hereinafter: EEIG Regulation) and SE Regulation. For detailed comments see subsequent text following note 290; See *Cartesio*, para. 39.
170 *Cartesio*, para. 104.

allowed in some Member States while denied or subject to certain restrictions in others.

Moreover, the ECJ stated that the Treaty acknowledges a variety of Member State legislations. Article 54 TFEU applies the freedom of establishment to companies and sets out certain requirements for the application of that freedom. Along with the requirement of a company's valid formation, that provision provides that a company must have a registered office, central administration, or principal place of business within the EU. By recognizing these three different connecting factors,[171] *Daily Mail* reasons that Community law does not preference any particular connecting factor. In other words, that Community law acknowledges the differences between various Member State legislations and does not opt for either the registered seat theory or the real seat theory.[172] Since Community law is neutral in this regard, the ECJ is not entitled to preference either of the named connecting factors.

For its next argument, the ECJ referred to *Überseering*.[173] *Überseering* held that the ability of a company to transfer its registered office or administrative seat to another Member State while remaining established under the law of its home Member State is wholly determined by the national law of that home Member State. In this light, the home Member State is granted the right to subject a company's seat transfer to certain restrictions.[174] In addition, *Überseering* repeated the position introduced in *Daily Mail*; that the Treaty provisions recognize variety among Member States concerning corporate mobility. As a consequence, when a company transfers its seat to another jurisdiction it cannot invoke the protection of the freedom of establishment against its home Member State's restrictive regulation. But these issues would have to be first settled by an agreement between Member States on a Community level.[175]

After recalling this freedom of establishment case law, the ECJ provided its own analysis of the Cartesio dispute at hand. The ECJ stated,

> [I]n accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, *the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom* enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – *is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the free-*

171 Each of these connecting factors is originally inherent to either the registered seat theory (registered seat) or to the real seat theory (central administration or principal place of business).

172 *Cartesio*, paras. 105-106.

173 Although representing a clear immigration situation case, *Überseering* in its *obiter dicta* relates to some of the issues that concerned emigration situations. For a detailed overview of *Überseering* see the subsequent note 244.

174 *Cartesio*, para. 107.

175 *Cartesio*, para. 108.

> *dom of establishment*, within the meaning of Article 43 EC, *can arise only if it has been established*, in the light of the conditions laid down in Article 48 EC, *that the company actually has a right to that freedom*.[176]

The ECJ seems to suggest that it is entirely upon a national Member State's law to determine whether it will permit companies established under its law to invoke the freedom of establishment. If a company is not recognized as having the nationality of the home Member State, the company is not entitled to the freedom of establishment. After the right to invoke the freedom of establishment has been granted to a company by its home Member State, that company must meet the requirements set out in Article 54(1) TFEU. Only after the company is both recognized by the home Member State as a company incorporated under its law and in compliance with the requirements set out by Article 54(1) TFEU is it entitled to invoke the freedom of establishment. The ECJ further clarifies the extent of the home Member State's discretion to determine whether a company can be regarded as a company incorporated under its law. The court stated the following:

> [A] *Member State has the power to define both the connecting factor* required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, *and that required* if the *company is to be able subsequently to maintain that status*. That *power includes 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 Member 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*.[177]

Not only is a company's home Member State permitted to determine the connecting factor that links to the legal order of the company's home Member State, but the company is also required to maintain that connection with the home Member State. If a company is not able to maintain the link with its home Member State (*e.g.*, by transferring its seat to another Member State which would result in breaking the connection with the home Member State), the home Member State is authorized to deny that company the right to retain the status of a company incorporated under its law. Consequently, such company would not be entitled rights under the freedom of establishment. In other words, it is entirely upon the home Member State to determine the connection that a company incorporated under its law must have in order to be considered a company incorporated under that Member State's law. These restrictions on corporate mobility would constitute a violation of the freedom of establishment only when it has been previously

176 *Cartesio*, para. 109 (emphasis added).
177 *Cartesio*, para. 110 (emphasis added).

established that a company "actually has right to that freedom".[178] If the right to transfer a company was not previously recognized by the legal order under which the company was incorporated, as was the case in *Cartesio*, the company cannot invoke the protection of the freedom of establishment.

However, the ECJ somewhat relaxed its approach by emphasizing that there are certain corporate mobility situations that do fall within the ambit of the freedom of establishment. The ECJ identified two situations that must be distinguished: (i) where the company seat is transferred to another Member State without the change of the *lex societatis* and (ii) where the company seat is transferred to another Member State resulting in the change of the *lex societatis*. In the second situation, the company is actually transformed into a company governed by the law of the target Member State.[179] The home Member State is not authorized to deny the company the right to transfer to another host Member State, where it will then transform into a company established under the law of that target Member State. In situations where transfer changes the *lex societatis*, the power of a Member State to prohibit a company incorporated under its law from maintaining that status, and consequently, to require the company's winding in the home Member State, "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 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…[the law of the other Member State] to do so".[180]

It seems that the home Member State cannot require dissolution of a company established under its law if that company wishes to transfer to another target Member State and transform into a company established under the law of that other Member State. However, the ECJ points out as a condition precedent, that the law of the host Member State permits a foreign company to transform into a company of the host Member State, thus facilitating a change in the company's *lex societatis*.[181] The ECJ further stresses that, in this situation, the protection of the freedom of establishment can be excluded by the home Member State on the basis of "overriding requirements in the public interest".[182] Consequently, national regulation that prohibits a company transfer in the situation resulting in the change of *lex societatis* results would not infringe that company's right to the freedom of establishment if it could be justified on the ground of general public interest protection.

178 According to *Cartesio* the company is entitled the right to Freedom of Establishment if (i) it is recognized nationality of the home Member State, (ii) it is able to maintain that status and (iii) if it complies with the requirements set out by Article 54 (1) TFEU.

179 *Cartesio*, para. 111.

180 *Cartesio*, para. 112 (emphasis added).

181 Such change in *lex societatis* means a change from the substantive company law of the home Member State to the substantive company law of the target Member State.

182 *Cartesio*, para. 113.

Afterwards, the ECJ repeated the well-known *Daily Mail* argument that issues concerning corporate mobility should be resolved by a future agreement on a Community level.[183] In addition, the ECJ referred to the Commission's argument that the absence of harmonizing Community law was actually remedied by other Community regulations on company transfer from one Member State to another. Specifically, the Commission identified the Council Regulations that concerned specific Community legal entities, such as EEIG, SE, and SCE.[184] These Community regulations govern the corporate mobility of those specific Community entity forms, among other things (*e.g.*, company formation, organization or dissolution). In this light, what the Commission suggested is that due to lack of a specific Community level regulation issues of company transfer should be resolved by adequate application of provisions set out in these regulations.[185] However, these regulations only relate to those specific company forms. Notwithstanding, the ECJ replied to the Commission's argument by stating,

> [A]lthough those regulations…in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (siège statutaire) and, accordingly, also their real seat (siège réel) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, *such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer*.[186]

In other words, if these regulations were to be used for transfer of a company's registered or administrative seats between the Member States, that transfer would require a change in the company's *lex societatis*.[187] But this was not what Cartesio intended to achieve. Cartesio wanted to transfer only its administrative seat to Italy, while remaining established under Hungarian law; Cartesio wanted to keep Hungarian law as its *lex societatis*.[188] Since Cartesio did not want to change its applicable company law, the noted regulation could not apply. That regulation mandated a change of *lex societatis* upon transfer of the company seat. Consequently, the ECJ ruled out the Commission's suggestion.[189]

183 *Cartesio*, para. 114; *Daily Mail*, paras. 21 – 23; For the text of Article 293 (3) TEC see previous note 103 and for comment on application of this Article as a solution for corporate mobility see subsequent note 244.

184 *Cartesio*, para. 115; EEIG Regulation, SE Regulation and Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ 2003 L 207 (hereinafter: SCE Regulation).

185 *Cartesio*, para. 116.

186 *Cartesio*, para. 117.

187 See Articles 7 to 9(1)(c)(ii) of the SE Regulation (emphasis added).

188 *Cartesio*, para. 119.

189 *Cartesio*, para. 120.

Finally, the ECJ responded to Cartesio's *Sevic* argument.[190] The ECJ held that *Sevic* does not qualify the scope of the *Daily Mail* and *Überseering* rulings. *Sevic* "do[es] not relate to the same problem" as *Daily Mail* and *Überseering*.[191]

> The case which gave rise to the judgment in *Sevic* Systems *concerned* the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of *a cross-border merger, which is a situation fundamentally different from the circumstances at issue in the case which gave rise to the judgment in Daily Mail and General Trust [emphasis added]*, but similar to the situations considered in other judgments of the Court (see Case C-212/97, *Centros*, [1999] ECR I-1459; *Überseering*; and Case C-167/01, Inspire Art, [2003]ECR I-10155).[192]

The ECJ pointed out that *Sevic* was more similar to the other line of ECJ case law (*i.e., Centros et al.*). To clarify, the ECJ further defined the issues resolved in those rulings:

> In such [immigration] situations, the issue which must first be decided is not the question…[of] whether the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated[193] *but, rather, the question [of] whether or not that company* – which, it is common ground, is a company governed by the law of a Member State – *is faced with a restriction in the exercise of its right of establishment in another Member State*.[194]

Consequently, the ECJ held that the preliminary issue in *Cartesio* and *Daily Mail* was whether a company can be considered a company incorporated under the law of the home Member State (*i.e.*, whether a company possesses the nationality of the home Member State). While in *Centros et al.*, the preliminary issue was whether a company that is already recognized to have the nationality of a home Member State, and subsequently certain rights under the freedom of establishment, can be denied such rights under the freedom of establishment in another Member State.

Based on these arguments, the ECJ finally answered the substantive issue referred to it for preliminary ruling. The court concluded,

190 "Relying on the judgment in Case C-411/03 *Sevic Systems* [2005] ECR I-10805, Cartesio claimed before the Szegedi Ítélőtábla that, to the extent that Hungarian law draws a distinction between commercial companies according to the Member State in which they have their seat, that law is contrary to Articles 43 EC and 48 EC. It follows from those articles that Hungarian law cannot require Hungarian companies to choose to establish their seat in Hungary." (*Cartesio*, para. 26).

191 *Cartesio*, para. 121.

192 *Cartesio*, para. 122.

193 That was the question posed in *Daily Mail* and *Cartesio* (i.e., emigration situations).

194 *Cartesio*, para. 123 (emphasis added).

> [A]s Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.[195]

In short, the ECJ denied Cartesio the protection of the freedom of establishment because the Treaty does not preclude the application of the Hungarian regulation restricting Cartesio from transferring its administrative seat to Italy.

*IV. Comments on the Court's Findings*

From the outset, the ECJ's favorable treatment of *Daily Mail* indicated that the court was going to take a path different than the one suggested by AG Maduro. AG Maduro proposed a less restrictive approach towards corporate mobility, which seemed like a logical continuation of the more recent ECJ case law (*Centros et al.*). AG Maduro focused on the actual consequences of home Member State restrictions on the freedom of establishment. His approach effectively enabled companies to engage in business activities in other Member States.[196] Both the inbound and outbound situations fell within the scope of the freedom of establishment and no distinction should be made regarding the right to invoke the protection of this freedom in those two situations. At the same time, AG Maduro preserved home Member States' interests by authorizing them to restrict access to the freedom of establishment in order to protect the general public interest. The ECJ's reasoning deviated significantly from these suggestions. The court opted for a restrictive approach to corporate mobility.

Before continuing, there are two *Cartesio* particularities that should be mentioned. First, Cartesio is a limited partnership, not a company that was the legal form at issue in other ECJ rulings on the freedom of establishment.[197] *Cartesio* was actually the first administrative seat transfer case concerning a partnership and not a company.[198] In some Member States (*e.g.*, Germany, UK, France), certain forms of partnerships are not considered legal entities that have a separate legal personality from the personality of their founders.[199] These partnerships do not qualify under Article 54 TFEU, but they could qualify under Article 49 TFEU,

195 *Cartesio*, para. 124.

196 For example, Advocate General Maduro recognized companies incorporated under Member State laws the right to directly invoke freedom of establishment.

197 *Cartesio*, paras. 21-22.

198 Lombardo (2009), p. 638.

199 For more elaborate reference on Article 54 and whether limited partnerships would be encompassed by the Article wording "other legal persons" see the text following note 77; M.M. Siems, *Regulatory Competition in Partnership Law*, unpublished, pp. 16, 21, 29 (<www.ssrn.com>, visited 9 November 2010); Bohrenkämper (2009), p. 85.

which concerns an individual's right to the freedom of establishment.[200] Therefore, some doubts could have been raised as to whether the ECJ would grant Cartesio, as a limited partnership, protection within the scope of Article 54 TFEU. However, the ECJ did not even consider this issue[201]; the court treated the partnership as a company and went straight to the subject matter of the dispute. It can therefore be presumed that Hungarian limited partnerships and other similar business partnerships fall under the scope of Article 54 TFEU.[202]

Another particularity is that, from the outset, the ECJ's interpretation of the *Cartesio* facts was enveloped with misunderstandings. As a consequence, several Member States intervened before the ECJ, basing their procedural activity on these misunderstood facts.[203] This was due primarily to a mistranslation of the question referred by the Hungarian court for preliminary ruling. The English translation of the Hungarian court's question stated that Cartesio intended to transfer its "registered seat", not its administrative seat.[204] Adding to this confusion was the Commission's impact assessment on cross-border transfer of registered office, which confirmed that *Cartesio* sought to transfer its registered seat.[205] AG Maduro further aggravated these misconceptions by stating in his opinion that Hungarian company law is grounded in the real seat theory.[206] This misunderstanding lead to interference by the UK and Ireland delegations, which submitted arguments against the "transfer of registered office", which was not at issue in the case. Eventually, the ECJ resolved the misunderstanding by clearly pointing out that the issue "relates not to the transfer of the registered office of the company concerned in the main proceedings but to the transfer of its 'real seat'".[207]

*a. Confirmation of* Daily Mail

*Daily Mail* has been the foremost topic of many debates on the freedom of establishment, and a case that dealt with the heritage of *Daily Mail* was a long time

200 Article 49 TFEU concern individuals and provides the following: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of *nationals* [*emphasis added*] of a Member State in the territory of another Member State shall be prohibited.". Moreover, since Article 49 TFEU relates to individuals it means that the dispute in regard to the legal relationship (*i.e.* partnership which is not recognized as a legal entity) is regarded as a contractual relationship and thus regulated by Regulation 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177. (Lombardo (2009), p. 639).

201 It is unknown whether under Hungarian law on commercial companies Cartesio as a limited partnership had legal personality. However, if it had such separate personality, that might be the reason why the ECJ did not even consider that issue as suggested.

202 Bohrenkämper (2009), p. 85.

203 *Id*., p. 85; Cerioni (unpublished), text following note 17.

204 Bohrenkämper (2009), p. 85.

205 Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, 12 December 2007, SEC(2007) 1707, pp. 5-6; Gerner-Beuerle & Schillig (unpublished), p. 5.

206 For a more elaborate reference see the note 45 and the text following that note; see also AG Maduro's opinion, para. 23.

207 *Cartesio*, paras. 47-50.

coming. But after twenty years, with corporate mobility significantly developed and evolved, *Cartesio* presented ECJ with a two-fold choice. The court could either acknowledge the old *Daily Mail* heritage, thus halting further development of corporate mobility, or renounce *Daily Mail* in favor of *Centros et al.*, which would fuel further development of corporate mobility within the Community. Ultimately, the ECJ chose to save *Daily Mail*, overlooking the possible consequences of its actions. By opting for the *Daily Mail* approach, the ECJ adopted a business concept that does not conform to the needs of the modern and evolved internal market of the Community. Therefore, *Cartesio* failed to bring about a much-needed advancement in an important part of Community law – corporate mobility within Community.

AG Maduro clearly stated what was expected from *Cartesio*. He invited the ECJ to openly declare that *Daily Mail* is inapplicable.[208] It is not unusual for Advocate Generals to seize initiative and criticize obscure and unclear ECJ rulings; even the ECJ is known to have overruled its own obscure and unclear *dictum*.[209] In light of the recent case law, like *Centros et al*., the abandonment of *Daily Mail* was a valid expectation. Moreover, the ECJ had a clear opportunity to distinguish *Daily Mail* from *Cartesio*.[210] But instead, the ECJ clearly confirmed *Daily Mail* as "a good law". But why did the court also distinguish *Cartesio* from *Sevic* and *Centros et al.*? Further, what would have been the consequence of rejecting *Daily Mail*, and what impact would be the of that on Community law?

The biggest consequence would be that the ruling would "kill" the real seat theory within the Community.[211] Restrictions on administrative seat transfer in a home Member State grounded in the real seat theory would then be considered contrary to the freedom of establishment and therefore forbidden. This would

208 AG Maduro's opinion, paras. 25, 28, 35; Szudockzy (2009), p. 352.

209 De Sousa (2009), p. 37; However, the ECJ overules its own *dicta* usually implicitly by providing later *dicta* contrary to its previous *dicta* (Szudockzy (2009), pp. 347-348).

210 *Daily Mail* dealt with a national restriction that was imposed in order to disable company tax evasion mechanisms while *Cartesio* dealt with an outright negation of company's transfer to another jurisdiction imposed by national company law legislation. (De Sousa (2009), p. 36).

211 At the current state of Community law, Member States can freely opt for either the real seat theory or the registered seat theory. The problem with the real seat theory is that this theory does not allow for transfer of company's administrative seat to another country. If such a company that is incorporated in the real seat theory Member State transfers its administrative seat to another Member State, the home Member State grounded in the administrative seat theory could deny that company legal personality because it transferred its administrative seat to another Member State. In other words, the conflict of laws rules of the home Member State no longer refers to the company law of the home Member State under whose law it was initially incorporated and given legal personality. Consequently, home Member State is entitled to demand winding up of such a company. Furthermore, Germany as the foremost representative of a Member State grounded in the real seat theory in January 2008 initiated procedure on adopting a law that would result in abandoning the real seat theory and adoption of the registered seat theory (*i.e. Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen*). However, more than two years have passed and this law had not been adopted yet. For actual information on the process see the web page of German Ministry of Justice (<www.bmj.bund.de/enid/Gesellschaftsrecht/Internationales_Gesellschaftsrecht_1fi.html>, visited 9 November 2010.).

enable any company incorporated within the Community to transfer its administrative seat to any other Member State and retain its legal personality in doing so. In other words, the transfer of administrative seat would allow a company incorporated within any Member State to freely choose where to conduct its business activities within the Community and where to locate its administrative seat while still having its registered seat in its home Member State. It seems that the ECJ did not want to meddle with a home Member State's prerogative to determine the connection that will link companies to its own national law (*i.e.*, the applicability of its own *lex societatis*). However, the ECJ had previously promoted and widened the Community law's sphere of application.[212] Community law has established mechanisms that exclude the right to invoke the freedom of establishment in situations that could endanger Member States' valid interests.[213]

The ECJ could have also been conscious of the fact that Article 293 TEC was repealed from the TFEU text.[214] Article 293 TEC obligated Member States to enter into negotiations in order to ensure mutual recognition of companies and retention of legal personality in the event of company seat transfer. However, that article was long considered to be a dead letter of the Treaty and, as such, was repealed.[215] Under circumstances where Member States are obviously unable to reach an agreement, the ECJ, as an important participant in Community law, could have taken the lead and broken the deadlock between the Member States. However, it chose to acknowledge *Daily Mail*, resulting in yet another peculiar ECJ ruling that does not resolve the open issues. *Cartesio* only adds confusion to the application of the freedom of establishment and corporate mobility.

The ECJ also argued that *Cartesio* has more in common with *Daily Mail* than with *Centros et al*.[216] But there are as many differences between *Cartesio* and *Daily Mail* as between *Cartesio* and *Centros et al*. For example, unlike in *Cartesio*, the *Daily Mail* freedom of establishment issue did not arise from a national company law restriction or national conflict of laws rules. Rather, the Member States in *Daily Mail*, UK and Netherlands, were countries grounded in the registered seat theory, under which private international law presents no problems with the transfer of a company's administrative seat. The *Daily Mail* dispute arose solely

212 Szudockzy (2009), p. 347; Vossestein (2008) , pp. 60–61.

213 For the text of Article 52 (1) TFEU see previous note 160.

214 See the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 30 April 2008, 6655/1/08 REV 1, Tables of Equivalences on p. 478. For further elaboration on this matter see subsequent note 244.

215 See previous note 154 and the text following that note.

216 *Cartesio*, para. 122.

from a national tax law restriction.[217] This type of restriction is usually qualified as a Community tax issue and, as such, is considered to form a line of ECJ case

217 In *Daily Mail*, the competent tax authority denied a company validly established under UK law to transfer its administrative seat abroad in order to prevent avoidance of exit tax payment. Therefore, one might wonder why the ECJ considered this case on the basis of company nationality and corporate mobility especially having in mind that the issue was not concerning conflict of laws or substantive company law whatsoever. Moreover, UK company law and its conflict of laws permitted transfer of administrative seat abroad. The only restriction to such transfer was posed by UK tax regulation that demanded prior payment of due exit taxes by the departing company. However, in *Daily Mail* the ECJ focused on the issue whether the company is permitted to transfer its administrative seat abroad under protection of Freedom of Establishment. By doing so, the ECJ seems to have overlooked what actually was at stake in *Daily Mail*, *i.e.* a pure exit tax issue. Consequently, *Daily Mail* deprived Articles 49 and 54 TFEU of their direct application based on a wrong qualification of the case. (Bohrenkämper (2009), p. 84). One cannot but wonder why did the ECJ resolve such an obviously "exit tax" issue as a conflict of laws issue? One of the answers might be that at the time of *Daily Mail* ruling in the 80's, the time of early development of freedom of establishment case law, the ECJ was not at ease with dealing the *Daily Mail* as an exit tax issue. (De Sousa (2009), p. 14).

law that is separate and distinct from the case law established by *Centros et al*.[218] *Daily Mail* should have been qualified as a tax issue and resolved as such.[219] But wrongly decided, *Daily Mail* represented an important precedent for resolving *Cartesio*, which presented a purely national company and conflict of laws issue.

The fundamentally different motives for transferring the companies' administrative seats present another distinction between the cases. In *Daily Mail*, it was

218 Case C-436/00, *X, Y v. Riksskatteverket* [2002], ECR I-10829 (hereinafter: *X and Y*) was the first case that dealt with the restrictive tax regulation of the Member State. (H. Schneeweiss, 'Exit Taxation after Cartesio: The European Fundamental Freedom's Impact on Taxing Migrating Companies', Intertax, (2009) volume 37 issue 6/7, p. 364). That case concerned a transfer of Swedish company shares belonging to Swedish individuals to a subsidiary of a foreign company. Swedish tax regulation demanded immediate taxation in order to prevent possible tax avoidance. The ECJ first concluded that such prohibitive national tax regulation was contrary to Freedom of Establishment. Then it stated "that rules that generally exclude cross-border situations from favorable treatment can be justified neither on the basis of risk of tax evasion nor by effectiveness of fiscal supervision" (Schneeweiss (2009), p. 365). In other two cases, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, [2004] ECR I-2409 (hereinafter: De Lasteyrie) and Case C-470/04, *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, [2006] ECR I-7409 (hereinafter: N), the issue concerned national exit taxes. *De Lasteyrie* was about a shareholder of a French company that wanted to relocate to another Member State. In such situation relevant French tax regulation required for taxation of unrealized gains in shares. In line with the reasoning established in *X and Y*, the ECJ first held that such French exit tax rules are contrary to freedom of establishment and afterward that such rules could not even be justified on the basis of overriding reasons of public interest. (Schneeweiss (2009), pp. 365-366). Similarly, in the latest *N* ruling the ECJ came to the same conclusion as *De Lasteyrie*. (Schneeweiss (2009), p. 366). In *Daily Mail*, the transfer of administrative seat was prohibited solely from the direction of the home Member State's tax regulation as in the mentioned tax case law. Admittedly, there is a plausible distinction between *Daily Mail* on one side and *X and Y, De Lasteyrie* and *N* on the other. Namely, that the latter tax case law was dealing with individual's rights as compared to *Daily Mail* where it was the company that sought protection of freedom of establishment. Notwithstanding, if we imagine that *Daily Mail* was not about a company but about individual's right to emigrate to another Member State and if we consequently apply the two step approach from *X and Y, De Lasteyrie* and *N*, we would come to quite the contrary conclusion that the one that was reached in *Daily Mail*. Foremost, there could be little doubt that the ECJ would not hold that such restriction of individual's right to emigrate to another Member State would not present a restriction of freedom of establishment. Moving on to the justification of such restriction, indeed in *Daily Mail* it was clear that the main motive for the transfer of company's administrative seat was tax avoidance. (*Daily Mail*, para. 7). Consequently, considering *Daily Mail* from individual's point of view, tax authorities might have an argument for justification of such restriction due to individual's intention to abuse Freedom of Establishment in order to avoid taxes. One of the standards used for justification of such restrictive national rules is the standard of applying the least restrictive measure. (Schneeweiss (2009), pp. 365-366). Even under such aggravating Daily Mail circumstances, i.e. clear intention to avoid payment of due taxes, it is doubtful that such negation of individual's right to emigrate would be justified. Section 482 (1) (a) of the Income and Corporation Taxes Act 1970 (i.e. the relevant UK tax provision) was not designed to specifically prevent tax avoidance but on the contrary it was worded generally. Namely, it provided that "companies" (for the sake of argumentation lets presume that the regulation stated "individuals") resident for tax purposes in UK are prohibited from ceasing to be UK resident without a prior consent of the relevant Tax authorities. (*Daily Mail*, para. 5). Such general prohibition could hardly satisfy the mentioned "standard of applying the least restrictive measure". Consequently, if *Daily Mail* was about an individual, in light of currently applicable the ECJ case law, the outcome would have probably been different.

clear that the main reason for the administrative seat transfer was the company's fraudulent intention to avoid payment of taxes in its home Member State. But in *Cartesio*, there is no indication of any fraudulent behavior; the company sought to transfer its administrative seat to another Member State where it intended to pursue its business activities. The fraudulent intention in *Daily Mail* represents a sound basis for denying protection of the freedom of establishment,[220] but by denying that protection in *Cartesio*, the ECJ denied a company with genuine and legitimate intentions the right to transfer its administrative seat.

AG Maduro introduced yet another distinction – the "outright negation" of the freedom of establishment.[221] Specifically, in *Daily Mail* the national tax law restriction was not absolute. The company could transfer its administrative seat upon receiving permission from the relevant national tax authority. Moreover, despite the company's intention to avoid payment of taxes, the competent national tax authority was willing to permit administrative seat transfer if at least a portion of due taxes were paid. In *Cartesio*, the restriction was absolute. The competent Hungarian law provisions required that the registered seat coincides with the administrative seat, excluding all possibilities for a Hungarian company to transfer its administrative seat to another Member State. Community law protection is justified in situations with this clear and absolute denial of corporate mobility. In *Daily Mail*, the denial was discretionary and merely dependent upon payment of due taxes. *Daily Mail* introduced the notion that an outright negation of corporate mobility would present a violation of freedom of establishment.[222]

219 In light of arguments presented in the previous note, one cannot but wonder wether the same reasoning from *X and Y*, *De Lasteyrie* could be applied to *Daily Mail*? In *Centros et al*. and even *Cartesio* for that matter, the issue did not arise due to restrictive tax regulation but due to restrictive substantive company law provisions. Furthermore, the facts of *De Lasteyrie* are very similar to the ones in *Daily Mail*. The only apparent distinction between the two was that *Daily Mail* concerned a company, *i.e.* a legal entity, and not an individual as was the situation in *De Lasteyrie*. Therefore, it seems that an answer to this question would primarily depend upon on the issue whether a different reasoning in this matter is applied to individuals as compared to companies. In other case law the ECJ did not find any problems when it applied Community law principles to both individuals and companies. (Schneeweiss (2009), p. 371). Furthermore, not just that such discrimination between individuals and companies would seem to be contrary to the wording of Article 54 TFEU, the ECJ itself in *Sevic*, which concerned company cross-border merger and thus case law of our interest, cited *X and Y* and *De Lasteyrie* – case law that concerned individuals. (*Sevic*, para. 23; Schneeweiss (2009), p. 371).

220 For example if the ECJ established that such national tax law measure was disproportionate and that it could not be justified in relation to the public goal it seeks to achieve (*i.e.* preservation of Member State's right to combat tax evasion). For more on justification of a restrictive national measure see previous note 160.

221 For elaboration see the text following previous note 150; AG Maduro's opinion, para. 31.

222 *Daily Mail* stated that Freedom of Establishment "… would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State". (*Daily Mail*, para. 16).

However, this argument might not be as straightforward because *Daily Mail* further elaborated on its notion.[223]

The only clear similarity between *Daily Mail* and *Cartesio* seems to be that both cases concern emigration situations (*i.e.*, restrictions on corporate mobility by the home Member State). Is this similarity enough to qualify *Daily Mail* as applicable in *Cartesio*? The ECJ is positive that it is.

An additional controversy arose from *Daily Mail dicta*. *Cartesio* invoked and confirmed that "companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning".[224] Therefore, it is the home Member State's national law on which a company's existence depends. By so ruling, the ECJ effectively deprived the freedom of establishment of its intended purpose. Fundamental freedoms like the freedom of establishment are primarily intended to provide rights to individuals and companies against restrictive provisions of Member States' laws.[225] To that end, Article 54 TFEU clearly provides that individuals and companies are to be treated in the same way with regard to rights deriving from the freedom of establishment.[226] The function of that article is to determine which companies can invoke the protection of the freedom of establishment.[227] The reason Article 54 TFEU

223 *Daily Mail* further elaborated on its previous *dictum* by stating: "In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company." (*Daily Mail*, para. 17). The ECJ continued by referring to the actual facts of *Daily Mail*: "The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company." (*Daily Mail*, para. 18). Therefore, it is questionable whether *Cartesio*, which concerned the absolute denial of the administrative seat transfer could qualify under the quoted *Daily Mail dictum* because it seems that Cartesio was permitted to undertake business activities in Italy. The denial of Hungarian authorities only concerned the transfer of the administrative seat. However, in his opinion Advocate General Maduro has taken a different view on this issue of "outright negation". He quoted *Überseering* and *Sevic*, but in those rulings it was indeed the case of absolute denial of conducting business activities by the Member State. In *Überseerring*, the German authorities denied legal capacity to a company validly established in Netherlands. (*Überseering*, paras. 80, 93). In *Sevic*, the German authorities refused to register a cross-border merger of a German company (the absorbing company) and a Luxembourg company (the absorbed company). (*Sevic*, paras. 29–30). Notwithstanding, the question remains whether denial of Hungarian authorities in regard to company's administrative seat transfer could be qualified as a case of "outright negation".

224 *Cartesio*, para. 104.

225 Bohrenkämper (2009) p. 87; See previous text following note 53.

226 For the text of Article 54 (1) TFEU see previous text following note 65.

227 Szudockzy (2009), 356.

provides different connecting factors is only to recognize different grounds upon which companies are considered to have a link to a Member State and thus the freedom of establishment.[228] It was not, as *Daily Mail* and *Cartesio* suggest,[229] to emphasize only that the Treaty regards all connecting factors as equals. That the Treaty recognizes three different connecting factors does not resolve the Community Law issue of which connecting factor determines which companies have the right to invoke freedom of establishment.[230] Article 54 TFEU aims to provide to all companies, in an equal manner as provided to individuals, the right to protection under the freedom of establishment, so long as they comply with any of the three stipulated connecting factors.[231] The *Daily Mail* and *Cartesio* conclusions are contrary to the clear wording of Article 54 TFEU.[232] By repeating the *Daily Mail* assertion in *Cartesio*, the ECJ deprived Article 54 TFEU of its intended function[233] and narrowed the scope of the freedom of establishment.

According to *Daily Mail* and *Cartesio*, since Member State legislation is so diverse,[234] the transfer of administrative seat should be resolved by future Community level legislation or an agreement between the Member States.[235] Until such harmonization is achieved among Member States, the ECJ's position is that it is best to consider the issues raised in *Daily Mail* and *Cartesio* as covered by Member States' national legislation, not by the freedom of establishment.[236] However, it must be pointed out that the freedom of establishment greatly evolved after *Daily Mail*, and as a consequence, it should be highly questioned whether the *Daily Mail* argument is sustainable. Namely, the recent *Sevic* ruling held that the argument of insufficient harmonization of Community law, including freedom of establishment issues, cannot be used as an excuse for non-applica-

228 Other solution for the wording might have been for Article 54 to expressly provide that companies established under Member State law have the right to freedom of establishment. However, such wording would have lead to difficulties since it would actually mean, in light of different connecting factors adopted by Member States, that companies established in one Member State under one connecting factor might not be recognized as companies another Member State that recognizes a different connecting factor. (Szudockzy (2009), 356).

229 *Daily Mail*, para. 20; *Cartesio*, para. 105.

230 Notwithstanding, even if we accept this ECJ statement and if we consider that Article 54 TFEU actually provides a Community rule which determines which national companies can be regarded as Community entities, then we could also argue contrary to the ECJ position. Namely, since, Treaty does not opt for either of the stated connecting factors but as ECJ puts it "treats them all as equals", the ECJ is not enabled to entitle any Member State with the right to decide on whether a certain company can be considered a Community entity or not because the Treaty does not provide for a single connecting factor. Instead it provides for three equally placed connecting factors which determine the scope of a Community given right (and not a national right) of freedom of establishment (Wisniewski & Opalski (unpublished), pp. 606-607).

231 De Sousa (2009), p. 39; Wisniewski Opalski (unpublished), pp. 606- 607.

232 Szudockzy (2009), p. 356.

233 *Id.*, p. 357.

234 *Daily Mail*, para. 20; *Cartesio*, para. 105.

235 *Id.*, para. 23; *Cartesio*, para. 106.

236 *Id.*, paras. 24-25.

tion of the Community's fundamental freedoms.[237] Any subsequent harmonization can only complement Community rights that have previously been established. Nevertheless, *Cartesio* confirmed the *Daily Mail* reasoning,[238] which included the lack of sufficient Community law harmonization argument refuted by *Sevic*.

*Cartesio* actually extended *Daily Mail*'s argument by stating that the issue of whether a company can actually rely on the freedom of establishment is an issue that can only be resolved by a company's home Member State's national law.[239] It is only after the applicable national law has acknowledged a company's right to the freedom of establishment that the company is entitled to invoke the protections of this freedom.[240] This *Cartesio* assertion seems to be at odds with the logic of *Daily Mail*, which suggests (i) that the freedom of establishment does cover transfer of administrative seat incorporated under the law of home Member State to the host Member State[241] and (ii) that due to insufficient harmonization of Community law, it is best, for the time being, that this issue remains under the competence of home Member State's national law.[242]

237 "It should be noted in that respect that, whilst Community harmonisation rules are useful for facilitating cross-border mergers, the existence of such harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment laid down by Articles 43 EC and 48 EC (see, to that effect, Case C 204/90, *Bachmann*, [1992] ECR I-249, paragraph 11)." (*Sevic*, para. 26); Deak (2008), p. 255; Cerioni (unpublished), see text following notes 74-75.

238 *Cartesio*, paras. 108-109.

239 In *Daily Mail* the tone was of a more temporary nature due to lack of a competent Community level harmonization at that time in regard to corporate mobility between Member States. Therefore, in *Cartesio* it might have been that ECJ was aware that the required harmonization between Member States was unlikely after 20 years had passed since *Daily Mail*. Therefore, the ECJ held that it is now completely upon Member State's national law to determine whether a company is entitled to invoke rights under freedom of establishment.

240 *Cartesio*, para. 109.

241 *Daily Mail*, para. 16.

242 *Id.*, paras. 21- 23.

*b.* Überseering *in Support of* Daily Mail's Dictum

In support of its *Daily Mail* argument, the ECJ repeated *dictum* from its opinion in *Überseering*. [243] However, since the remainder of *Überseering* was contrary to the position *Cartesio* took on corporate mobility, the ECJ later disqualified it as inapplicable in *Cartesio*.[244] The favorable *dictum* from *Überseering* provided that the right to the freedom of establishment, and thus the right to transfer a company's administrative seat to another Member State, is determined by the law of the

243 *Cartesio*, paras. 107-108; The *Überseering* facts are as follows. Überseering BV was a company incorporated in Netherlands (hereinafter: Überseering) that purchased some land in Germany. It contracted a German company Nordic Construction Company Baumanagement GmbH (hereinafer: NCC) to do some construction work (i.e. refurbish a garage and a motel on the site). Eventually a dispute arose when Überseering claimed that NCC failed to perform according to the construction contract due to some defective paintwork. In the meanwhile, all of the Überseering shares were acquired by two German nationals. When an action was brought against NCC, the first instance German court dismissed the action. The second instance court upheld that decision. The basis for their decision was the fact that Überseering had transferred its actual centre of administration to Germany once its shares had been acquired by the two German nationals. Therefore, since Überseering was a company incorporated under Netherlands law, it was denied legal capacity in Germany. That is because Germany is grounded in the real seat theory, meaning that the legal capacity of a legal entity is determined by the company law applicable in the place where the company's actual administration is located. Since the shareholders of the company were German nationals resident in Germany, German authorities considered that the *lex societatis* which, among other, determines the company's legal capacity is the respective German company law. Therefore, since Überseering was not a company incorporated in Germany, but in Netherlands, German court denied Überseering legal capacity and the right to bring an action before a German court against another party. In order for Überseering to be recognized legal capacity it had to reincorporate under German law as a German company. Eventually, Überseering appealed to the third instance court which referred this issue to the ECJ for preliminary ruling. Foremost, the ECJ rejected arguments based on Article 293 EEC Treaty that there are currently no directives or conventions in place that relate to the transfer of company's seat. In response, the ECJ stated: "More specifically, it is important to point out that, although the conventions which may be entered into pursuant to Article 293 EC may, like the harmonising directives provided for in Article 44 EC, facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions" (*Überseering*, para. 55). Furthermore, the ECJ clearly distinguished the *Überseering* situation from the one in Daily Mail (*Überseering*, para. 62). It concluded on *Daily Mail* by stating: "There are, therefore, no grounds for concluding from Daily Mail and General Trust that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State" (*Überseering*, para. 62). Doing so, the ECJ repeated the *Daily Mail* dicta for the first time in twenty years that sent out a signal that maybe the *Daily Mail* heritage may not be as dead as it seemed until *Überseering*. Finally, the ECJ stated that the transfer of shares to German residents did not purport the loss of Überseering's legal personality according to the applicable Netherland's company law (*Überseering*, para. 80). Consequently, denial of legal personality by the competent German authorities was tantamount to an outright negation of freedom of establishment and consequently incompatible with freedom of establishment (*Überseering*, paras. 81-82).

244 *Cartesio*, para. 121.

home Member State, not by Community law.[245] *Cartesio* further stressed that *Überseering* reached this conclusion on the basis of Article 54 TFEU. The Treaty recognizes that differences between Member State's connecting factors and corporate mobility within the Community are issues that must be dealt with by future legislation.[246] However, it can be argued that the ECJ incorporated the *Überseering dictum* only to distinguish *Überseering* from *Daily Mail*, not to confirm *Daily Mail* as good law.[247] The position that *Überseering* confirmed *Daily Mail* is peculiar in light of the ECJ's statement that a "Member State was able, in the case of a company incorporated under its law, to make the *company's right to retain its legal personality* under the law of that State subject to restrictions on the transfer of the companys actual centre of administration to a foreign country".[248]

Although *Überseering* stated that home Member States were within their right to subject company seat transfers to their national laws, *Überseering* also acknowledged the "company's right to retain its legal personality". It has been suggested that this might be an extension of *Daily Mail dicta*, and that the ECJ actually meant that a home Member State is allowed to restrict administrative seat transfer to other Member States on the condition that such restriction does not amount to liquidation of the company and loss of its legal personality.[249] But *Cartesio* held that this was not the case. Rather, *Cartesio* held that a company's right to seat transfer is resolved solely by national law of the home Member State. Moreover, *Cartesio* stressed that a company that cannot maintain the link with its home Member State could face liquidation and loss of its legal personality under the law of its home Member State.[250] This conclusion is completely at odds with the wording and interpretation of the *Überseering dicta* above.

*c.* Sevic, *the Lost Link in Freedom of Establishment Case Law*

In light of the more recent *Centros et al*. ruling, the extent of the ECJ's efforts to save and justify *Daily Mail* goes beyond reasonable expectations. The ECJ even re-qualified the *Cartesio* issue in order to make all the pieces of the "freedom of establishment puzzle" fit into place. *Cartesio*'s main argument seems to be aimed at differentiating immigration and emigration freedom of establishment case law. *Centros et al*. acknowledged a company's right to invoke the freedom of establishment in immigration situations; *Daily Mail* excluded that right in emigration situations.

Notwithstanding the case law division, another ruling pre-dated *Cartesio* and was, in some aspects, factually similar to *Cartesio* and *Daily Mail* – the *Sevic* ruling. *Sevic*, *Daily Mail*, and now *Cartesio* all concerned the restriction on corporate mobility from the direction of the home Member State. *Sevic* held that a home Member State's national law that enabled the registration of a merger only

245 *Überseering*, p. 70.
246 *Cartesio*, para. 108; For reference see as well previous note 115.
247 De Sousa (2009), p. 20.
248 *Überseering*, para. 70 (emphasis added).
249 M. Szydło, 'Case C-210/06 *Cartesio* Oktató és Szolgáltató Bt Judgment of the Grand Chamber of the Court of Justice of 16 December 2008', *Common Market Law Review*, 46 (2009), pp. 711-712.
250 *Cartesio*, paras. 109-110; See previous text following note 182.

between two domestic companies did not authorize the home Member State to refuse registration of a cross-border merger between a domestic company and a company established in another Member State.[251] In other words, *Sevic* provided that the home Member State restriction does not exclude the right to the freedom of establishment, specifically the right to initiate a cross-border merger. The referring Hungarian court recognized this when it expressed doubts concerning its position in *Cartesio*. It stated that *Sevic* might have "refined" the position of Community law in regard to a home Member State's right to restrict corporate mobility as originally suggested by *Daily Mail*.[252]

The ECJ found itself in a difficult situation; *Daily Mail* was hardly reconcilable with *Sevic*. As a solution, the ECJ had to qualify the *Cartesio* issue differently. Specifically, the court stated that *Cartesio* was not about whether a company is permitted to transfer its administrative seat, but whether a company can transfer its administrative seat while remaining a company established under the law of its home Member State.[253] This ingeniously shifted the emphasis from the criticized immigration-emigration division of freedom of establishment case law to another particularity. *Daily Mail* and *Cartesio* both deal with the particular issue of company nationality and the consequences of losing it. Whereas *Sevic*, admittedly an emigration case, and *Centros et al*. deal with the issue of whether a company can be denied the right to the freedom of establishment where its nationality as a validly incorporated company under the law of the home Member State is not questioned. This is unlike *Daily Mail* and now *Cartesio*.[254]

In order to determine whether a company can have the right to the freedom of establishment under *Daily Mail* and *Centros*, the validity of a company's incorporation under the law of the home Member State and the maintenance of that status must first be addressed. Under *Sevic* and the other mentioned cases, that preliminary issue is not in question because the company is already considered validly established under the law of its home Member State – its nationality is not questioned. By this maneuver, the ECJ was able to declare that *Sevic* was unique since it deals specifically with cross-border mergers, while *Daily Mail* and *Cartesio* were unique because they deal with the issue of a company maintaining its nationality. Although both issues fall within the emigration-based freedom of establishment case law, neither can be applied to the other.

*Überseering* and *Inspire Art* both invoke *Daily Mail* in order to differentiate their facts from *Daily Mail*:

> *Daily Mail* and General Trust concerned relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to

251 See previous note 133.
252 *Cartesio*, paras. 35, 37.
253 *Id.*, para. 99.
254 Szudockzy (2009), p. 353.

> another Member State whilst retaining its legal personality in the State of incorporation....[255]

Since both *Überseering* and *Inspire Art* concerned situations where a company, already validly established and recognized under the law of its home Member State, was faced with restrictions coming from the host Member State, these two rulings were easily distinguished from *Daily Mail*. However, in those rulings, the ECJ never mentioned the preliminary nature of the *Daily Mail* issue, as clearly set out by *Cartesio*. Thus, this "preliminary nature" approach seems to be the ECJ's new interpretation only to extend the life of *Daily Mail*'s reasoning. One can only wonder which emigration situation would not present a preliminary issue like the ones found in *Daily Mail* and *Cartesio*. Clearly, that issue was not present in *Sevic*.[256] However, according to *Cartesio*'s analysis of *Sevic*, cross-border merger is a particular issue and is easily discerned from other freedom of establishment case law. Consequently, it would seem that *Cartesio* suggested that almost all emigration cases, except *Sevic*, would present issues based primarily on the *Daily Mail* and *Cartesio* preliminary issue approach (*i.e.*, whether a company is a recognized nationality of the home Member State and whether that company can maintain that nationality).

That is because the first problem that comes to mind when considering emigration situations in the context of the freedom of establishment and Member States grounded in the real seat theory is the issue of whether a company has a recognized right to maintain its legal personality after it transfers its administrative seat to another Member State. According to *Cartesio*, a company cannot maintain its personality when it transfers its administrative seat to another Member State if the home Member State grounded in the real seat theory does not tolerate such a transfer. Therefore, the "preliminary nature" of *Daily Mail* and *Cartesio* is not something specific, as ECJ claims, but the core of the problem in emigration situations. The *Sevic* situation presents an exception since the legal personality of the company in that ruling was not questioned. In light of these arguments, one cannot but wonder, what does that mean for the freedom of establishment in emigration situations? Clearly a company cannot invoke the protection of the freedom of establishment when its respective home Member State does not recognize the company's right to invoke that freedom. In other words, one can conclude that there is almost no right to invoke the protection of

255 *Inspire Art*, para. 103; *Überseering*, para. 62.

256 A German company validly established in Germany wanted to merge with a company from another Member State. German authorities denied registration of such cross-border merger. In *Sevic*, the legal personality and continuity of a German company came into question. The issue was only that a German company could not according to German law register a cross-border merger with the competent company register.

the freedom of establishment in emigration situations.[257] Thus, by saving *Daily Mail*, the ECJ condemned the freedom of establishment in immigration situations to a partial, and thus meager, effectiveness.

There is one final particularity mentioned in *Sevic*. The ECJ stated,

> [T]he *right of establishment covers all measures* which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.[258]

This *dictum* presents a very broad definition of the scope of the freedom of establishment. One cannot but wonder whether the transfer of a company's administrative seat to another Member State would represent a measure "which permits or even merely facilitates access to another Member State for the purpose of conducting company's economic activity in that other Member State and thus participate in the economic life of that other Member State"? It is hard to see why not, especially if we take into consideration that a transfer of a company's administrative seat represents an exercise of the right of primary establishment.[259] The transfer would certainly not represent less of a measure than the exercise of cross-border merger, which was the immediate topic of *Sevic*.[260] Furthermore, AG Tizzano's opinion on *Sevic* quoted *De Lasteyrie* for the proposition that immigration and emigration situations should be treated equally; a proposition that *Sevic* later confirmed. Although *De Lasteyrie* concerned natural persons, *Sevic* dealt exclusively with legal and entities by referring to *De Lasteyrie dictum*, and the ECJ confirmed that this *dictum* related to companies as well. In other words, there should be no distinction in the application of the freedom of establishment with regard to immigration and emigration situations. But this is contrary to the position taken in *Daily Mail* and *Cartesio*.[261]

*d. The New Interpretation of Article 54 TFEU*

*Cartesio* also provided a new interpretation of Article 54 TFEU that relates to corporate mobility. According to the clear wording of that article, a company is entitled to invoke the protection of the freedom of establishment only if the company complies with the article's requirements. However, the ECJ's interpretation adds

257 If a Member State is grounded in the real seat theory, it is entitled not to permit companies incorporated under its law the right to transfer their seat (administrative or registered) to another Member State. On the other hand, if a Member State is grounded in the registered seat theory, it is also entitled not to permit its companies the right to transfer their seat (administrative or registered) to another Member State. However, in the latter situation, Member States grounded in the registered seat theory usually permit administrative seat transfer, but that is regardless of Community law.

258 *Sevic*, para. 18 (emphasis added).

259 See previous note 68.

260 De Sousa (2009), p. 42; Cerioni (unpublished), text following note 74.

261 *Id.*, pp. 41-42.

that a company once validly established in a home Member State must also maintain that status.[262]

It should be noted that Cartesio was already a company validly established in Hungary.[263] However, Cartesio wanted to transfer its administrative seat to another Member State, which would have resulted in breaking the link with the country of its incorporation. Therefore, Cartesio would no longer have its administrative seat in its home Member State as was required by the mandatory provisions. In order to cover this situation, the ECJ extended the scope of Article 54 TFEU to require that a company maintain its status, but this reasoning is contrary to the language of Article 54 TFEU. Article 54 TFEU clearly provides that

> Companies or firms *formed in accordance* with the law of a Member State *and having* their registered office, central administration or principal place of business within the Union *shall*, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.[264]

The Article sets out only the two conditions: (i) that a company is "formed in accordance with" the law of the home Member State and (ii) that it has a registered office, central administration, or principal place of business within the Community.[265] At that time the company is entitled to invoke the protection of the freedom of establishment, and it can be inferred that the company becomes a "Community entity" that is outside the complete competence of its home Member State.[266] Therefore, according to Article 54 TFEU, Member States should not be allowed any discretion. Once a company is validly established under its home Member State's law, which will usually entail having one of mentioned connecting factors in that Member State,[267] that Member State will not be able to deny the protection of the freedom of establishment to that company.

To the contrary, *Cartesio* interprets Article 54 TFEU as if it reads, Companies "formed *and existing* in accordance with" the law of the home Member State.[268] This interpretation means that a company must continually comply with the requirements set out by the national law of its home Member State in order to preserve its nationality of that home Member State, which grants the company its legal personality. If the company cannot maintain that status, the home Member State is within its right to deny nationality to the company incorporated under its law. Since that company will no longer be considered a company established under the law of the home Member State, or any other Member State, it would face inevitable winding up and loss of legal personality in its home Member State.

262 *Cartesio*, para. 110.
263 *Id*., para. 21.
264 Article 54 TFEU (emphasis added)
265 For elaboration on conditions required for application of freedom of establishment see previous text following note 65.
266 Szydło (2009), pp. 714-715.
267 The registered office, central administration or principal place of business as suggested by Article 54 (1) TFEU.
268 Szydł (2009), p. 716.

This conclusion is further supported by comparing the purpose of Article 54 TFEU to that of Article 49 TFEU. The purpose of Article 49 TFEU is clear and undisputed when considering an individual's right to the freedom of establishment. Article 54 TFEU extends the freedom of establishment to companies as legal entities. If a home Member State is permitted to demand a company's dissolution upon transfer of its administrative seat, the company will either have to give up on its intention to transfer its seat or face winding up in the home Member State. If the company winds up, it is likely the intention and interest of the company's shareholders to register a new company in the target Member State.[269] The company's shareholders, as individuals, fall under the scope of Article 49 TFEU, and as such, their right to invoke th protection of the freedom of establishment is undisputed. What then is the purpose of Article 54 TFEU other than to recognize protection of the freedom of establishment to companies in the same manner as it is recognized to individuals under Article 49 TFEU?[270] Accepting *Cartesio*'s interpretation that a home Member State is entitled to determine whether the company incorporated under it's law can invoke the freedom of establishment would be contrary to the meaning and purpose of Article 54 TFEU. According to *Cartesio*, the Treaty could exist with only Article 49 TFEU; Article 54 TFEU is redundant.[271] Not to be mistaken, companies are indeed artificial entities that are given legal personality by the applicable national laws of their home Member State, and as such, they are different from individuals as natural persons of "bone and flesh" as suggested by *Daily Mail*. However, the distinction between individuals and legal entities is well recognized by the wording of Article 54 TFEU, which stipulates additional conditions that companies must comply with in order to be entitled the same protection as individuals under the freedom of establishment.

*Cartesio* also provides,

> [T]he question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law....[272]

In other words, the ECJ considers an individual's nationality and a company's nationality on equal grounds. Understanding that *Cartesio* did not refer to the withdrawal of a company's nationality but to the company's "legal death", it seems that *Cartesio* suggested that Member States are also free to determine the manner in which nationality is awarded to and taken from individuals. Although the ECJ does not interfere with a Member State's right to confer nationality to

269 Mucciarelli (2008), p. 297; Gerner-Beuerle & Schillig (unpublished), pp. 8-9.

270 However, this argument is questionable if we put into perspective the notion that company's shareholders can also be other legal entities, and not only physical individuals as suggested.

271 Instead of referring to companies as legal entities, we could have shareholders as individuals under Article 49 TFEU.

272 *Cartesio*, para. 109.

individuals, it is highly doubtful that the ECJ would remain idle if faced with the situation of a Member State threatening to withdraw an individual's nationality because that individual intended to pursue economical activity in another Member State.[273]

*e. Company's Right to Reincorporate*

*Cartesio* states "only" the company's home Member State can determine whether a company established under its law is entitled to the freedom of establishment,[274] and then comes to the contrary conclusion that it might not always be so only several paragraphs later. Through this *obiter dicta*, as hard as it might seem, *Cartesio* actually deviated significantly from the path initially set out by *Daily Mail*. *Daily Mail*'s total exclusion of the freedom of establishment in emigration situations was no longer applicable.[275] *Cartesio* distinguished two situations in determining whether a home Member State is entitled to deny companies the protection of the freedom of establishment:[276] (i) when a company transfers to another Member State with no intention to change its *lex societatis* and (ii) when a company transfers to another Member State with intention to change its *lex societatis*, *i.e.* to reincorporate in the host Member State. A company in the first situation is not entitled to the freedom of establishment, while a company in the second situation is entitled to that freedom. However, the latter is entitled to the freedom of establishment only on the condition that the host Member State provides for the possibility of conversion, meaning reincorporation of a company established under the law of the home Member State into a company established solely under the law of the host Member State. Reincorporation results in a change in *lex societatis*. A reincorporated company is considered to have a new nationality, that of the host Member State. *Cartesio* provides that if a host Member State provides foreign companies with the possibility to reincorporate, the home Member State is not allowed to demand winding up of that company. But the reincorporating company will have to comply with the mandatory requirements of the host Member State's company law, which could include changing the legal form of the company. The benefit of reincorporation, as opposed to new establishment, is the maintenance and preservation of a company's legal personality.[277] However, Member States might be disinclined to facilitate reincorpora-

273 De Sousa (2009), pp. 44-46.

274 *Cartesio*, para. 109.

275 Johnston (2009), p. 388; B. Węgrzynowska, 'Cartesio: Analysis of the Case', *European Journal of Legal Studies*, 2009 (2, 2), p. 73.

276 *Cartesio*, para. 111.

277 Notwithstanding, one cannot but wonder whether this decision of the ECJ was a good call because it represents an exchange of a supposedly simpler transfer of company's seat procedure (in relation to emigration situations) for a somewhat more complex conversion procedure? That is because conversion affects the rights of the third parties (shareholders, employees, creditors) more severely than the transfer of the administrative seat. They would have to conform to the new mandatory rules of the reincorporating Member State. Having in mind the right of the home Member State to restrict such conversion on certain grounds (see the text following this fuss note) it is still possible that not all interests of the interested parties would be properly satisfied. (Wisniewski & Opalski (2009), p. 623).

tion on the ground that they would not be able to adequately protect their due tax interests with regard to assets being removed from the home Member State. But note, the ECJ also stated that the home Member State is enabled to restrict reincorporation on the basis of the "overriding requirements in the public interest".[278] In this light, if the law of the reincorporating Member State does not provide, for example, that the conversion will not affect the company's existing liabilities and obligations, the home Member State will probably be able to restrict the conversion.[279]

One additional fear of the home Member State relates to maintaining the level of employee participation in the management of the company after reincorporation. The home Member State's ability to restrict reincorporation because of this issue will probably depend on the host Member State's reincorporation rules. For example, if the host Member State permits maintenance of the existing level of employee participation, then it will be unlikely that the home Member State could deny reincorporation. But if the host Member State does not provide this reincorporation rule, it is likely that the home Member State will be able to restrict the company's right to reincorporate.[280] However, the company's right to reincorporate would certainly have to be ascertained on a case-by-case basis. The continuance on the work of the 14th Company Law Directive would facilitate legal certainty in this situation by introducing some minimum requirements with regard to the reincorporation process among the Member States.[281]

Although the ECJ's *dictum* offers some hope for corporate mobility, it also introduces some inconsistencies and issues. For example, at one moment, a company that is not validly established under the law of its home Member State is not entitled to the freedom of establishment, while that same company, being unable to maintain the nationality of its home Member State, is entitled to the freedom of establishment on the condition that a host Member State permits its reincorporation. Additionally, it is not completely clear from the ECJ's statements whether any company within the Community can demand reincorporation, even if the host Member State does not provide it as a possibility. The logic applied in *Sevic* may provide an affirmative answer here. *Sevic* stated that cross-border mergers between Member States cannot be denied, even if that procedure is not recognized by the home Member State.[282] Therefore, one might wonder why the right to reincorporate would be denied while cross-border merger is permitted.[283] Furthermore, reincorporation of a company is a process similar to the transfor-

278 *Cartesio*, para. 113; Although *Cartesio* only generally referred to the possibility of restriction perhaps a valid example could be provided by *Sevic* where it was stated that a restriction on freedom of establishment "…can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest" (*Sevic*, para. 23).

279 Johnston (2009), p. 400.

280 *Id.*, p. 401.

281 *Id.*, p. 402; Lombardo (2009), pp. 646-648; Węgrzynowska (2009), pp. 80-81.

282 Szudockzy (2009), p. 359; Wisniewski & Opalski (2009), p. 614.

283 That is because conversion does not represent a more complicated procedure than a cross-border merger foremost because conversion involves one subject and not two like the cross-border merger (Wisniewski & Opalski (2009), p. 615).

mation of the company. Transformation represents a mechanism for changing a company's legal form to another form recognized in that company's Member State without losing the company's personality and continuity.[284] Whereas reincorporation has a cross-border element, transformation is a purely domestic tool. In addition, unlike reincorporation, transformation is generally recognized in the domestic context by Member States' legal orders. It would seem discriminatory to allow transformation (which is generally recognized) but prevent foreign companies from reincorporating. Furthermore, because the ECJ cannot dictate conditions under which Member States can introduce conversion provisions into their respective legal orders, it would be much easier to apply existing domestic conversion provisions.[285] Moreover, if the possibility of reincorporation must be recognized by the host Member State in order for a company to invoke the protection of the freedom of establishment, and thus have the right to reincorporate in the host Member State, reincorporation could end up being a "dead *dictum*", since there are very few jurisdictions that actually provide for the possibility of reincorporation (*e.g.*, Switzerland).[286] Therefore, it would be more effective if every company within the Community was entitled to invoke the right to reincorporate in another Member State, regardless of its home Member State's law. Notwithstanding, there is a reasonable chance that this *Cartesio obiter dicta* could facilitate a new wave of regulatory competition based on enabling companies the right to reincorporate within their jurisdiction.[287]

*f. Alternative Approaches to Corporate Mobility Between Member States*

In both *Daily Mail* and *Cartesio*, the ECJ noted that Community law has not yet addressed the differences between various Member States with regard to different connecting factors and corporate mobility.[288] The Commission responded in *Cartesio* by proposing that the issue be remedied with existing Community rules (*i.e.*, the EEIG Regulation, SE Regulation and SCE Regulation).[289] However, *Cartesio* quickly ruled out these solutions since the regulations mandate the simultane-

284 It could also be argued that reincorporation was already facilitated on the Community level by the Cross-border Merger Directive. Cross-border Merger Directive permits national companies by means of merging with a daughter (shell) company to reincorporate into a company recognized by the law of the host Member State. For a more detailed overview of this process of merging with the daughter company see the subsequent text following note 296. (Johnston (2009), p. 398).

285 Wisniewsk & Opalski (2009), p. 615; Of course at the same time observing the right of the home Member State to restrict such right to conversion as proposed in the previous text following note 279.

286 Mucciarelli (2008), pp. 286-287; Szydło (2009), p. 720; Szudockzy (2009), p. 359; Wisniewski & Opalski (2009), p. 618.

287 In support of that conclusion, note that in the USA Delaware reformed its General Corporate Law in 1999 in order to facilitate non-Delaware corporations to convert into a Delaware corporation in an easy one step procedure. This was followed by Ohio which introduced similar rules (Johnston (2009), pp. 396, 399).

288 *Cartesio*, paras. 115-116.

289 For easier reference hereafter we will refer only to the SE Regulation being the most important among the three mentioned regulations. However, note that most of the relevant provisions in these three regulations are based on similar principles.

ous transfer of both the registered and administrative seats, resulting in a change in *lex societatis*. Cartesio only intended to transfer its administrative seat; it wanted to remain governed by the law of its home Member State (*i.e.*, Cartesio did not want to change its *lex societatis*). Therefore, the solutions facilitated by these Community regulations could not be applied to Cartesio.

Moreover, these regulations are applicable to and tailor made for specific Community entities (*i.e.* EEIG, SE, SCE). Therefore, a company would first have to transform into one of these Community entities, which is not practical. The transformation of limited company into SE cannot take place until two years have elapsed since that limited company has established a subsidiary company in another Member State.[290] After transformation,[291] that SE can transfer its seat to the host Member State, but the regulation mandates that the transfer must include both the registered and administrative seats.[292] Once both seats are transferred to the host Member State, the SE can again transform into a company form recognized by the law of the host Member State.[293] This lengthy three-step process, which includes two transformations and demands the transfer of both seats, hardly ensures an adequate level of corporate mobility between Member States.

Existing Community law allows for another possibility, facilitated by the Cross-border Merger Directive. This relatively recent directive provides a regula-

290 Article 2 (4) SE Regulation provides: "A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State." Similarly see Article 37 SE Regulation.

291 Furthermore, SE requires minimum capital of at least 120,000 EUR (see Article 4 (2) SE Regulation), significant employee involvement (see Article 1 (4) SE Regulation) and sets out other burdensome requirements which can reduce the appeal of this mechanism.

292 Article 7 SE Regulation provides: "The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place."

293 Article 66 SE Regulation provides: "(1) An SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved. (2) The conversion of an SE into a public limited-liability company shall not result in the winding up of the company or in the creation of a new legal person. (3) The management or administrative organ of the SE shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees. (4) The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called to decide thereon. (5) Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject shall certify that the company has assets at least equivalent to its capital. (6) The general meeting of the SE shall approve the draft terms of conversion together with the statutes of the public limited-liability company. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC."

tory framework for mergers, and it bans restrictions imposed on merging companies by a company's home Member State. The directive also enables a cross-border vertical reverse merger, through which a subsidiary company merges with its parent company (*i.e.*, subsidiary company absorbs its parent company and the parent company ceases to exist).[294] This two-step mechanism would require only the incorporation of a new company in the host Member State and the undertaking of a subsequent merger. Furthermore, unlike the SE transformation, this merger mechanism does not necessarily require a considerable amount of time. The length of this process would largely depend upon the overall efficiency and business friendly attitude of both the home and host Member States' courts. But each of the companies involved in the merger would have to comply with the provisions of its own *lex societatis* (*e.g.*, decision making process), which might prove quite burdensome in some cases.[295] Since the goal of the Community as a single market is to ensure a unified legal area where legal entities are not restricted in undertaking their business activities, our position is that neither the proposed merger mechanism nor the SE mechanism would be effective. Community entrepreneurs require a one-step, cross-border company seat transfer mechanism that will allow them to transfer their business in the simplest manner possible.

## H. Conclusion

Ultimately, *Cartesio* can be considered a landmark ruling for the freedom of establishment. For the first time since *Daily Mail*, the ECJ provided a clear take on Community law with regard to emigration situations. In conjunction with the more recent *Centros et al*. ruling, the scope of the freedom of establishment and a company's right to transfer its seat between Member States can be identified. The determination of whether a company is entitled to transfer its seat, registered or administrative, depends on the relevant national rules of the home Member

294 Bohrenkämper (2009), p. 89.

295 Vossestein (2008), p. 60; For example see Article 4 of the Cross-border Merger Directive which provides for some burdensome requirements that must satisfied by the merging companies: "(1) Save as otherwise provided in this Directive, (a) cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and (b) a *company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject* [*emphasis added*]. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable. (2) The *provisions and formalities referred to in paragraph 1 (b) shall, in particular, include those concerning the decision making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees* [emphasis added] as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger."

State. Practically, *Cartesio*'s conclusion can be summarized in the following manner:

i) If a company intends to transfer its administrative seat alone, without the change of *lex societatis*, it can do so only if permitted by its home Member State. The outcome will generally depend upon whether the home Member State is grounded in the real seat theory or the registered seat theory, with the former precluding the possibility of seat transfer and the latter generally allowing it.
ii) If a company intends to transfer its registered seat alone without the change of *lex societatis*, it should be enabled to do so on the condition that the home Member State does not preclude that transfer.

Regrettably, the heritage of *Cartesio* places transnational Community law under the scrutiny of the home Member State so that companies cannot directly invoke the freedom of establishment in emigration situations. However, the heritage of *Centros et al*. remains unaffected by *Cartesio*'s conclusion. A host Member State cannot impose restrictions on a foreign company that has, according to the applicable law of its home Member State, validly transferred its seat to that host Member State (*i.e.*, without the change of *lex societatis*). Consequently, while the freedom of establishment is directly applicable in immigration situations, it cannot be considered directly applicable in emigration situations.

One additional *Cartesio* particularity, however, introduces a new take on previous case law. That is, that all company emigration situations do not fall under the complete scrutiny of home Member States. Namely, if a company intends to transfer its registered seat, either alone or with its administrative seat, with the attendant change of *lex societatis*, it would be allowed to do so on the condition that the host Member State permits that company to reincorporate under its own host Member State's *lex societatis*. In the ECJ's words "convert into a form of company which is governed by the law of the host Member State". However, even then, the home Member State could deny that company the right to leave its jurisdiction on the basis of overriding requirements in the public interest. Thus, it can be concluded that all of these mechanisms effectively leave the freedom of establishment under the full scrutiny of the concerned Member State, be it the home Member State in emigration situations or the host Member State in the conversion scenario. Consequently, the freedom of establishment cannot be considered a two-fold Community-given right like other freedoms. Not only is it one of the general intentions of Community law to vest Community subjects with certain rights against concerned Member States, but also, *Cartesio*'s trade-off of the emigration scenario for the conversion scenario seems like a poor substitute when compared with the directly applicable company right to emigrate that was ultimately denied by *Cartesio*.

Although *Cartesio* resolved some previous uncertainties by introducing the new notion of company conversion, the case equally generated others. (*e.g.*, conditions, procedure and minimal standards for such company conversion). In light of these uncertainties, and the ECJ's complete disregard for the freedom of estab-

lishment in emigration situations, a new 14th Company Law Directive is required more than ever before. A new directive would need to go even further than the original draft of the 14th Company Law Directive of 2007, facilitating the transfer of a company's registered and administrative seats, whether alone or together. One good solution is the path taken by the Proposal for a Council Regulation on the Statute for a European private company, COM (2008) 396/3. That approach would provide equal ground for all Member States with regard to ongoing regulatory competition. At the current state of regulatory competition, only Member States grounded in the registered seat theory can adequately participate, while the real seat Member States can only reform in order to facilitate the registered seat theory or passively monitor the outflow of companies from their jurisdiction. Furthermore, the draft of the 14th Company Law Directive of 2007 only facilitated the simultaneous transfer of the registered and administrative seats. That proposal represented a big concession to the real seat theory, providing only a partial solution that would not resolve the pending issues. A new directive would not only put the right to invoke the freedom of establishment and emigration situations back on the same track, but it would also provide some minimum standards for facilitating the company conversion process that was introduced by *Cartesio*. However, anticipating a new wave of regulatory competition concerning foreign companies' ability to convert under a host Member State's *lex societatis*, a standard that host Member States could introduce into their legal orders remains unknown.

To conclude, the current state of Community law provides that companies are "creatures of national law", but one cannot but wonder which national law because every Member State can provide a different answer. This situation should be remedied by introducing a Community directive that would enable companies to freely move between Member States, while providing Member States with a uniform tool that enables them to restrict corporate mobility when their national interests demand it. However, these restrictions should only be possible according to specifically defined and narrowly construed grounds in order to ensure uniform application of the right to the freedom of establishment.