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Company's Cross-border Transfer of Seat in the EU after *Cartesio*

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COMPANY'S CROSS-BORDER TRANSFER OF SEAT IN THE EU AFTER *CARTESIO*

By António Frada de Sousa *

Abstract

This paper analyses the present state of affairs of companies' cross-border mobility in the EU after the ECJ's judgment in *Cartesio*. This judgment is subject to an in-depth critical examination in light of the preceding case-law of the Court on companies' freedom of establishment. Departing from *Cartesio* the paper enters into the debate about the adoption of new harmonization measures designed to remove the existing barriers on companies' cross border mobility in the internal market that result from the divergent and deep rooted Member States' companies' private international law rules. The paper critically assesses the non-EU legislative initiatives regarding the adoption of the long awaited 14th company law directive on the cross-border transfer of registered office. It argues that such a harmonization measure should now be finally adopted allowing companies to transfer their registered office alone from one Member State to another. That legal instrument must, in any event, respect the boundaries of the 'abuse of law' put forward by the Court in *Cadbury Schweppes* in the context of the exercise of the community right of establishment by companies in the EU.

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1. Introduction

To migrate a company in the EU through the cross-border transfer of its seat is still, at present time, a very difficult operation to perform. Frequently it will even prove to be a mission impossible. This situation is strange indeed if we recall that article 48 of the EC Treaty expressly provides that EC companies shall be treated in the same way as natural persons who are nationals of Member States for the purposes of the application of the Treaty provisions on the right of establishment.

In the absence of community harmonization measures the success of a cross-border transfer of the registered office¹ and/or of the real seat² of an existing company, from one Member State to another in the EU ultimately depends on Member States company's Private International Law (PIL) rules.

These rules establish the connecting factors employed to ascertain the law governing companies (the *lex societatis*). They decisively determine whether a company may be recognized in another Member-State and whether it may transfer its registered office and/or its real seat from one Member State to another. Companies' PIL rules diverge strongly among member States, culminating in two largely irreconcilable theories: the incorporation theory and the real seat theory. These theories manage to cohabit somehow in the European Union in a way that, as Advocate general Miguel Poiares Maduro recently remarked in one of his opinions in a different context,³ irresistibly calls to mind Elizabeth Taylor's words to Paul Newman in the film *Cat on a Hot Tin Roof*⁴: 'I'm not living with you. We occupy the same cage, that's all'. In effect, these two theories are not actually living together in harmony in the EU. They simply continue to occupy the same cage. The discrepancy between the incorporation and the real seat theories poses considerable obstacles to the migration of companies in the EU and renders extremely difficult the adoption of Community legal instruments capable of effectively bridging the gap between these theories.

¹ By registered office I consider the company's official address in the State where it was incorporated which is registered in the official registry. I am aware that registered office and statutory seat (*siège statutaire*) do not mean exactly the same. The statutory seat is merely the place indicated in the company's statutes where its seat is supposed to be located. See Edwards (1999: 336). For the purposes of this article I may, however, use these two expressions interchangeably.

² By real seat I consider the place where the company's centre of administration and control is located. I shall also use interchangeably the expression, 'real seat', 'central headquarters' and company's 'head office'.

³ Opinion of AG Maduro in Joined Cases C-39/05 P and C-52/05 P, *Sweden v Council of the EU and others*, delivered on the 29th November 2007, paragraph 30.

⁴ Based on the play by Tennessee Williams.

National PIL obstacles to companies' mobility in the EU – resulting, as we will see, especially from the real seat theory, but also, although less strongly, from the incorporation theory – operate “upstream”. That is to say, they impinge decisively on a company's possibility of transferring its seat from one Member State to another even before the company is confronted with the tax obstacles traditionally raised by Member States on company's mobility.

In the light of the deep disparities in conception about companies and company law between ‘incorporation states’ and ‘real seat states’ one can understand how what seems to be, at first glance, a mere technical PIL divergence among Member States regarding the connecting factor adopted to determine a company's *lex societatis*, can ultimately block the resolution of the existing deficit of mobility of legal persons in the EU through the cross-border transfer of their registered office and/or head-office. Opting for the incorporation or the real seat theory is much more than a mere PIL technicality. Each of these theories embodies a completely different conception or ‘philosophy’ about companies and company law. Incorporation States view company law as basically enabling and facilitative, whereas real seat States view company law as mainly public and mandatory.

1.1. Incorporation States

The incorporation theory came into being in Common Law States, namely in the UK, earlier than the real seat theory, in the 18th century. According to this theory a company is governed by the law of the State where it was incorporated. The emergence of this theory in England was apparently determined by the needs of English companies engaged in overseas trading around the world.⁵ Those companies would remain subject to English law – as law of the place where they were born, i.e. their domicile of origin – irrespective of conducting all their activity abroad. Likewise, on comity grounds, companies incorporated abroad were easily recognized in England.⁶ That recognition appears as a corollary of the incorporation theory

⁵ See Edwards (1999: 335). See also Grossfeld (1986: 29) and Audit (1997: 883) pointing out that the incorporation theory is particularly convenient for ‘capital-exporting countries’.

⁶ The rule ‘incorporation by one state will be recognized in every other state’, is followed in England since the decisions in cases *Dutch West-India Co. v Henriques van Moses*, 1 Strange 612, 93 E.R. 733 (1724 K.B.) and *Henriques v The General Privileged Dutch Company Trading to the West Indies*, 2 Ld. Raymond 1532, 92 E.R. 494 (1730 K.B.) which dealt with the recognition of a Dutch company in England for the purposes of its admission in proceedings before English Courts. Companies incorporated abroad were recognized in the UK and subject to the law of their state of incorporation. See Grossfeld (1974: 346), quoting the reporting judge's opinion (Lord Raymond) on the 1730 decision, and Foote (1882: 473). Rammeloo (2001: 129) doubts, however, that these eighteenth century decisions already reveal a true commitment in favour of the incorporation theory since those two

which regards companies and company law basically as a product of private autonomy: the company's founders' are free to choose the State of incorporation, while retaining the company's central headquarters abroad, and consequently, although indirectly, they are capable of choosing the *lex societatis*.

Member States adopting the incorporation theory accept, moreover, with no particular difficulty the transfer of the companies' centre of administration and control to another Member State. A company will continue to be subject to the law of the Member State of incorporation irrespective of the place where its central headquarters are located.⁷ They are, however, restrictive, regarding the transfer of registered office, which is generally inadmissible. In effect, as Mr Justice Macnaghten put it, the law of the place of incorporation, 'the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence',⁸ like a turtle's house, governing all aspects of the affairs of the company. As a consequence, the UK Companies Act of 1985, for example,⁹ requires a company to state whether its registered office is in England and Wales or in Scotland and it is not possible to move the place of a companies' registered office outside the jurisdiction of formation even from England to Scotland.¹⁰ The transfer of registered office abroad is still today disallowed in the UK apparently on the basis that it would detrimentally affect the rights of shareholders, creditors and employees of the company and would cause major tax losses for the UK.¹¹

decisions only concerned the recognition of foreign companies for purposes of recognizing them capacity to take part in legal proceedings in England.

⁷ In the EU, the UK, Ireland and the Netherlands are the traditional followers of the incorporation theory. Sweden, Denmark and Finland adopt a Scandinavian version of the incorporation theory. Other States, such as Germany, seem to be currently shifting their company's PIL regime to the incorporation theory.

⁸ *Gasque v Inland Revenue Commissioners* [1940] 2 K.B. 80, p. 84. See Cheshire & North (1987: 177).

⁹ See Companies Act of 1985, section 2(1)(b), (7), 14, 287.

¹⁰ An attempt to make such a change would be ineffective, leaving the company status intact and the registered office unmoved, Rickford (2004: 1247). Dutch Company law also poses 'insurmountable problems' when it comes to the transfer of the registered office of a company incorporated under Dutch law to another country, Rammeloo (2001: 124-125).

¹¹ See Ringe (2005: 622 and 641). As regards the fears of major tax losses for the UK this could be, at first sight, less understandable since a company is traditionally regarded as having its tax residence in the UK when its 'central management and control' is located there. However, the Finance Act of 1988, Section 66, introduced the rule (subject, in any event, to significant exceptions) that a company incorporated in the UK is resident there for the purposes of the Taxes Acts. One may then understand the fears that tax losses could occur if UK companies were allowed to transfer their registered office abroad.

1.2. Real Seat States

Both the real seat theory and the incorporation theory consider that a company must be formed according to the law of the place where it is incorporated. The real seat theory, however, requires the centre of management and control of the company to be situated in the State of incorporation.¹²

The real seat theory emerged – as a ‘child’ of modern nationalistic trends¹³ and with a neo-mercantilist ‘tinge’¹⁴ – during the 19th century in European States, namely in Belgium, France and Germany.¹⁵ It reflects the territorialist principle according to which sovereign States have absolute control over their territories (the “arena” where the State exercises its authority), including both natural and legal persons conducting activity therein.¹⁶

¹² In this sense, according to Rabel (1947: 38) ‘the continental rule is no more than a variant of the common law rule’. It is a variant, however, that is more restrictive of company’ mobility, namely with respect to the cross-border transfer of the company’s central headquarters, than the incorporation theory. Among Member States adopting the real seat theory we find, for instance, Germany, Austria, France and Belgium.

¹³ Sandrock (1995: 136) considers that “the real seat theory is a child of the modern National State: a company must know only one sovereign, namely the one exercising power where the company’s seat is located.”

¹⁴ See Sandrock (1995: 137-138) referring the “merkantilistische ‘Färbung’ der Sitztheorie” in the sense that when a company incorporated in a foreign State conducts its activity in the territory of another State it creates a *de facto* conflict with the ‘concession system’ of the host State. The Author points out that the use of the real seat connecting factor by the host State, to the extent that it declines recognition to foreign companies with their head office in that State, operates as a sort of concession system (‘eine Art Konzessionssystem’) for domestic companies.

¹⁵ The Belgian legislator was apparently the first to adopt expressly the real seat rule in Article 129 of the Belgian Companies Act of 1873 which provided that ‘[t]oute société dont le principal établissement est en Belgique est soumise à la loi belge, bien que l’acte constitutif ait été passé en pays étranger.’ In France the notion of nationality of the company prevailed in the XIX century. In any event the *siège réel* became the dominant connecting factor used by French courts since the end of the XIX century to determine a company’s nationality. With the Law of the 24th July of 1966 the real seat theory was expressly endorsed by the French legislator. Article 1837 of the *Code Civil* now provides, in an unilateral manner, currently bilateralized, that “[t]oute société dont le siège est situé sur le territoire français est soumise aux dispositions de la loi française.” French courts have consistently understood this notion as the “siège social réel et non frauduleux”. See Loussouarn & Bourel (2001: 780) and Audit (1997: 885). In Germany the real seat theory has been consistently endorsed by the Courts since the early years of the XX century. See Grossfeld (1986: 21-22) with references to German case-law. See, for a more recent endorsement of the ‘Sitztheorie’ by the *Bundesgerichtshof*, the Judgment of the 21st March 1986, 97 BGHZ, p. 269 ss.

¹⁶ Drury (2005: 711-712) considers that the real seat system reflects a transposition, to legal persons, of the “domicile” (real domicile) connecting factor traditionally used in Europe to determine the personal law of natural persons, as opposed to the domicile of origin or domicile of birth. With the consolidation of the nationality connecting factor in continental Europe to determine the personal status of natural persons there was, however, a tendency in European States, namely in France and Italy, to make use of the ‘new’ legal concept of nationality to determine the law governing legal persons as well. See, for example, with regard to the nationality of legal persons in France, in the early 20th century, Arminjon (1902). The nationality of legal persons was, in any case, determined according to the place where the centre of administration and control of the company was located. Therefore, although indirectly, the real seat connecting factor continued to prevail as regards the determination of the ‘personal law’ of legal persons.

The real seat theory reflects a typical public-law conception of company law.¹⁷ It is traditionally regarded as a *shielding theory* ('Schutztheorie')¹⁸ which disallows a company operating in the territory of a State to be governed to the company law of another jurisdiction that may possibly disregard specific mandatory company law interests and provisions considered relevant for the State where the company has its centre of administration and control.¹⁹ Historically, the real seat theory gained terrain precisely because it disallowed companies to avoid the mandatory company law provisions of the State where they had their centre of control in favour of other States' company law regimes.²⁰

If the real seat principle is followed to its ultimate consequences, when a company moves its centre of management and control abroad it ceases to be subject to the law of the country where it was incorporated and had its real seat and, consequently, has to be wound up there and incorporated *ex novo* in the new State.²¹ This represents an outright ban on the possibility of transfer of a company's seat abroad. The incorporation theory forecloses only the cross-border transfer of the company's registered office with a change of the applicable law. The real seat

¹⁷ Whereas the incorporation model is based on the will of the shareholders as regards the choice of the *lex societatis*, the real seat model, under a typical governmental interest analysis, is based on the precedence of the State's will. See Alférez (2002: 67 and 70).

¹⁸ Knobbe-Keuk (1990: 326).

¹⁹ See Ebke (2002: text accompanying footnote 98) considering that the real seat connecting factor reflects 'the general attitude of a legal culture towards the socio-economic role of (large) corporations and the function of the substantive and procedural rules of the law of corporations for purposes of protecting and furthering the multifarious and sometimes hard to reconcile interests of shareholders, stakeholders, and affiliated companies.'

²⁰ Audit (1997: 885) affirms that in France the 'siège réel' criterion became dominant when French Courts were confronted 'à un certain nombre de cas où une société avait fixé son siège à l'étranger dans le but manifeste d'éviter les dispositions impératives de la loi française.' Rabel (1947: 43-45) describes, for instance, that in 1912 the promoters and managers of the well-known Moulin Rouge in Paris had sought to incorporate in London the 'Moulin Rouge Attraction Inc. Ltd' while continuing to carry on all its activity in France. They were punished for not having observed the company law requirements imposed for incorporation by French company law. From the French authorities' point of view, such incorporation in the UK basically entailed a "*fraude à la loi*". The real seat theory purported precisely to avoid what French authorities regarded as an illegitimate 'avoidance' of French Law, by requiring the coincidence between the real seat and the place where the company was incorporated. Rabel apparently shared the Common Law understanding according to which 'it is no fraud or evasion of the laws of a state for its citizens, intending to act only in their own state to form themselves into a corporation under the laws of another state.'

²¹ One example of a Member State adopting this strict view has been Germany. However, the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG) entered into force on the 1st November 2008 and apparently allows for GmbH's, and also AG's, incorporated in Germany to have their administrative seat abroad. By abandoning the mandatory requirement of concurrence of statutory seat and seat of the head office in the same place, both German GmbH's and AG's now have the opportunity to move their head office into a different State. See Fingerhuth & Rumpf (2008), arguing for the complete abandonment of the 'real seat' theory in Germany. One may doubt, however, that the modified § 4a of the *GmbH Gesetz* has accomplished that change on German companies' PIL in an effective and clear way. See Werner (2009: 194-196).

theory, however, goes further, being hostile both to a cross-border transfer of the centre of administration and control of the company and to a cross-border transfer of its registered office.

Still nowadays the main goal pursued by the real seat theory and its main justification is to prevent the circumvention of the mandatory national company law provisions of the State where the company has its centre of management and control.²² In particular, the concern with the protection of the interests of the company's stakeholders, such as workers and creditors, plays a central role on the modern justification of the theory.²³

Yet one may legitimately doubt that the real seat theory is entirely immune to "manipulations" since it seems to suffice for a company to avoid the *lex societatis* of the State where it conducts, for the most part, its economic activity, to move its executive head-office – which adopts the fundamental management decisions of the company – to a State with the most favourable legal regime.²⁴ In the context of increasingly transnational corporations with managers living in different States and communicating via internet and video-conference, a transfer of the centre of management of the company to another State (without being fictitious or a sham) becomes more and more feasible in light of the current telecommunications facilities. The real seat theory progressively loses its sense in a world where the internet has eroded the traditional geographical borders between States.²⁵

Moreover, the real seat theory, as far as it precludes the transfer abroad of the company's centre of administration and control, can be rightly regarded as a typical protectionist instrument adopted by States to prevent their businesses from moving to competing jurisdictions, namely for tax reasons.²⁶ Likewise, it also prevents foreign companies with their centre of administration in the territory of the host State and possibly subject to a more efficient company law regime of

²² See Holleaux, Foyer & Pradelle (1987: 134-135; Batiffol & Lagarde (1993: 336-337; Mayer & Heuzé (2007: 735-737) and von Hoffmann & Thorn (2005: 290).

²³ See Deakin (2001: 198) pointing out the existing link between the real seat theory and company law's 'stakeholder model'.

²⁴ For a description of the difficulties and divergences among States regarding the understanding of the notion of 'real seat' see Blanco-Morales Limones (1997: 72-77). One must recognize, however that the notion of 'real seat' as '*Verwaltungssitz*' put forward in the already mentioned judgment of the *Bundesgerichtshof* of the 21st March 1986, (97 BGHZ, pp. 269 ss, p. 272), as the place where 'the fundamental business decisions by the managers are being implemented effectively into day-to-day business activities' tends to render as difficult as possible any "manipulations", although it may not be easy to apply in practice.

²⁵ See Grossfeld (2000) posing the central question: '[w]here are the corporate "brains" when decisions are taken in internet conferences, when in a decentralized global world various headquarters are bound together and interact with each other over the Internet?'

²⁶ Mayer & Heuzé (2007: 753) expressly recognize that "le *changement de domicile* peut susciter des réticences de la part de l'Etat de l'ancien domicile. Il se traduit, en effet, par la fuite de capitaux à l'étranger, et par la disparition d'une source de revenus fiscaux."

their State of incorporation – which is likely to increase the company’s value – from competing with the national companies of the host State.²⁷ Provided that the real seat connecting factor subjects, on a territorial basis, all companies conducting their activity in the territory of the State where their ‘real seat’ is located, to the exclusive application of its company law regime, it forecloses access to foreign companies governed by a different company law. It denies therefore to foreign companies the possibility of benefiting from the competitive advantages resulting from being subject to a more efficient company law. It favours ‘path dependence’ and ultimately the ‘petrification’ of Member-States’ company laws.²⁸

During the 20th century the real seat became the dominant connecting factor to determine the *lex societatis* throughout continental Europe, though a number of Member States presently adopt only a mitigated form of the real seat theory by conceding a certain relevance to the statutory seat. This happens in particular in order to protect legitimate expectations of third parties when divergences arise between the location of the real seat and the location of the statutory seat of the company and those parties could legitimately expect that the law of the State where the statutory seat of the company would apply.²⁹

In addition, some States, like Germany, for example, appear to be more inclined than ever to abandon the real seat theory in favour of the incorporation theory. This reflects, to a large extent, a response of national legislators to a number of influential judgments of the Court of

²⁷ See Drury (2005: 712). The link between the real seat theory and the (non-)recognition of foreign companies on protectionist grounds is clear. See Grossfeld (1974: 358 ss) describing the protectionist concerns that during the second half of the XIX century lead Belgium, France and Germany, to be hostile towards the recognition of foreign companies.

²⁸ See Heine & Kerber (2002). From a public choice perspective see Carey (1997: 317-318), pointing out that the real seat theory protects those interest group bargains which lead to the formation of the company law of the State and reinforces interest group resistance to the introduction of changes on that law.

²⁹ See, in France, Article 3 of the Loi du 25 juillet 1966, providing that a company may not invoke against third parties the law of the real seat when that law diverges from the law of the statutory seat. See also article 1837, paragraph 2 of the Code civil. In Spain Articles 5 and 6 of the Real Decreto Legislativo 1.564/1989 de 22 Diciembre, por el que se aprueba el texto refundido de la Ley de Sociedades Anónimas and Articles 6 and 7 of the Ley 2/1995, de 23 de Marzo, sobre sociedades de responsabilidad limitada, provides, in a similar vein, that when the registered domicile of the company does not coincide with the real domicile, ‘los terceros podrán considerar como domicilio cualquiera de ellos.’ Portuguese Law also attenuates the real seat connecting factor in a similar manner. Article 3 of the Portuguese Código das Sociedades Comerciais of 1986, read in a bilateral way, provides that when a company has its real seat in a State other than the one where its registered office is situated, the company will not be allowed to invoke the law of its real seat against third parties, instead of the law of the registered office, unless those third parties had reasons to rely on the application of the law of the real seat. According to Pinheiro (2002: 98-100) there are apparently no court decisions in Portugal on which the law of the State where the real seat is located was applied to the detriment of the law of the State of the registered office. The law of the statutory seat will tend to prevail in practice.

Justice (namely *Centros*,³⁰ *Überseering*³¹ and *Inspire Art*³²) and the felt necessity to ensure the competitiveness of their companies and their company laws³³.

1.3. Real Seat Member States allowing the cross-border transfer of seat

Despite the recent changes introduced in Member States national companies' PIL, both real seat and incorporation Member States seem to be, by and large, hostile to substantial changes on their traditional rules, in a sense that facilitates their companies to move to other jurisdictions. This happens for path dependence reasons regarding their traditional rules, possibly combined with the already alluded protectionist concerns and the fear that tax major tax losses may occur.

In any event, a number of Member States who traditionally endorse the real seat theory have become aware of the shortcomings of the real seat approach in terms of companies' mobility and directly allow inbound and outbound cross-border transfers of a company's seat.

Portuguese Law, for example, since 1986 allows companies to transfer their seat, both to and from Portugal, with a change of their *lex societatis*, provided that certain requirements are fulfilled.³⁴ Since the divergence between the real seat and the statutory seat of a company is possible under Portuguese Law, both the inbound and the outbound transfer of the real seat of the company alone are allowed, without the company's loss of legal personality.³⁵ The company will, in principle, continue to be subject to the law of the State where the statutory seat is located

³⁰ Case C-212/97, *Centros*, [1999] ECR, p. I-1459.

³¹ Case C-208/00, *Überseering*, [2002] ECR, p. I-9919.

³² Case C-167/01, *Inspire Art*, [2003] ECR, p. I-10155.

³³ The recent German legislative initiatives seem, in effect, to have the purpose of creating conditions for German company law to 'play the regulatory competition game' in the EU, by allowing German companies, in particular German private limited companies (GmbH's), to have their real seat abroad while continuing to be subject to German law. Such possibility of 'exportation' of the German GmbH 'corporate product' was not allowed by German Law. In contrast, after the *Centros* and *Überseering* judgments, foreign Private Limited companies, for example incorporated in the UK, may keep their head office in Germany and will necessarily have to be recognized in Germany. The German legislator purported to eliminate this disadvantage for German companies generated by Community law. See Fingerhuth & Rumpf (2008).

³⁴ Article 3 (2) of the Portuguese Company's law act (Código das Sociedades Comerciais – "CSC") provides that 'the company transferring its effective seat to Portugal will keep its legal personality if the law which previously governed it allows, but will have to adapt its statutes to Portuguese law.' Article 3 (4) provides that 'the company with its effective seat in Portugal may transfer it to another country while keeping its legal personality if the law of this later country so allows.' According to Article 3 (5) the company's decision of transfer mentioned in article 3(4) 'must respect the requirements for the modification of the company's statutes and may not in any event be adopted by less than 75% of the votes representing the company's capital. The shareholders who have not voted in favour of the decision may withdraw from the company. They should notify the company about their decision within 60 days after the company's decision has been made public.'

³⁵ See Pinheiro (2002: 117) and Soares (2006: 61-62).

in result of the presumption of coincidence between its statutory seat and its real seat. The cross-border transfer of the statutory seat alone of a company is also admitted.³⁶ Such transfer will trigger a change of *lex societatis* and a change of the company's form in a case of inbound transfer of seat to Portugal.³⁷ One must not exclude, however, that if it becomes clear that the 'real seat' of the company is situated in another State, the law of this State will ultimately apply, in particular as regards the internal affairs of the company.³⁸

A few other Member States, such as Spain,³⁹ Italy⁴⁰ and, at least according to academic writing, France,⁴¹ also accept some form of transfer of seat. They all impose, however, very disparate conditions for such an inbound or outbound cross-border transfer to succeed.

The circumstance that most Member States do not have any legal rules permitting the inbound or outbound cross-border transfer of a company's seat (either its registered office or merely its head office) or, if they have such rules, they impose disparate conditions for a cross-border transfer to occur, make this operation largely impracticable in the EU.

The Community legislator seems to be unable to solve in a clear-cut manner the existing PIL controversy between the real seat and the incorporation theory with all its negative implications on the cross-border migration of companies in the EU. The long awaited 14th company law directive on the transfer of registered office has never materialized.⁴² In October 2007 the Commission decided, moreover, not to proceed with its work for the adoption of the 14th Company Law Directive.⁴³

³⁶ Article 3 does not expressly address this issue but it is pacifically accepted in academic writing that such possibility exists subject to the same requirements established for a transfer of 'real seat'. See Pinheiro (2002: 118-120) and Soares (2006: 63)

³⁷ See Soares (2006: footnote 25).

³⁸ With respect to the relations with third parties, assuming that the bilateralization of article 3 (1) of the CSC is possible, the company, as already mentioned, will not be allowed to invoke the law of its 'real seat' against third parties.

³⁹ See Blanco-Morales Limones (1997: 121-138).

⁴⁰ See article 25.^º, n.º 3 of the Private International Law Act of 1995. See, on the Italian regime of transfer of seat Ballarino (1999: 372).

⁴¹ See Mayer & Heuzé (2007: 754-756) and Batiffol & Lagarde (1993: 346-347).

⁴² For a full account of the studies and draft proposals made at Community level since 1993 until 2001 to further the cross-border mobility of companies in the EU either through the cross-border transfer of the companies' 'head office', or the transfer of their registered office without dissolution, see Rammeloo (2001: 282 ss). See also, more recently, Vossestein (2008: 53-57).

⁴³ At the Commission's website (http://ec.europa.eu/internal_market/company/seat-transfer/index_en.htm#ia – accessed on the 1st June 2009) one may read the following statement: 'having weighed the arguments advanced [on the Commission's Impact assessment on the Directive on the cross-border transfer of registered office (Commission Staff Working Document) of 12.12.2007 SEC(2007) 1707] Commissioner McCreevy has decided that there is no need for action at EU level on this issue. DG internal market has therefore stopped work on this area.'

As for the European Court of Justice (ECJ), the *Daily Mail and General Trust*⁴⁴ judgment, first, and now the recent judgment of the of the 16th December 2008 in *Cartesio*⁴⁵ reveal how elusive it is to count on the ECJ to facilitate, at least, the possibility of an outbound cross-border transfer of the companies' real seat.

I will first analyse the case-law of the Court of Justice on the compatibility of Member States companies' PIL and substantive rules with the community right of establishment prior to the recent judgment of the Court in *Cartesio*. I will focus on the impact of that case-law – starting with the *Daily Mail and General Trust* judgment – on the cross-border mobility of companies in the EU. Special attention will be given, subsequently, to the existing difficulties in reading as a coherent whole the Court's notion of the right of establishment and of abusive practices adopted in its recent judgment in *Cadbury Schweppes*,⁴⁶ with *Centros* and *Inspire Art*. The first part of this paper will be concluded with a critical assessment of the recent *Cartesio* judgment on which the Court revisited *Daily Mail*, twenty years and a long series of judgments on freedom of establishment after. I will consider the implications of *Cartesio* for the present understanding of the meaning and scope of *Daily Mail* and for Member States' legislation banning outright companies' emigration through the cross-border transfer of real seat to another Member State.

On the second part of this paper I will focus on the inactions of the Community legislator with respect to the adoption of the long awaited 14th Company Law directive on the cross-border transfer of registered office in the EU. The recent judgment in *Cartesio* surely constitutes an important incentive for the Community legislator to adopt that legal instrument. The central question, however, that still has to be answered, has to do with the definition of the aims and content of that 14th Company Law directive. Should it allow a transfer of registered office alone from one Member State to another or should it allow only the transfer of registered office accompanied by a transfer of the company's real seat? The cross-border merger directive 2005/56/CE of the 26 October 2005⁴⁷ and the *Societas Europaea* (SE) Regulation⁴⁸ have surely

⁴⁴ Judgment in Case 81/87, *Daily Mail and General Trust*, [1988] ECR p. 5483.

⁴⁵ Judgment in Case C-210/06, *Cartesio*, not yet reported.

⁴⁶ Judgment in Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR, p. I-7995.

⁴⁷ Directive 2005/56/EC of the European Parliament and the Council of 26th October 2005 on cross-border mergers of limited liability companies (OJ L 310 of 25.11.2005, pp. 1-9)

⁴⁸ Council Regulation EC 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) OJ L 294, p. 1 See also the linked Directive 2001/86/EC of 8 October 2001, supplementing the statute for a European Company with regard to the involvement of employees (OJ L 294, p. 22).

contributed to promote the cross-border mobility of companies in the internal market. But do these legal instruments render the adoption of the 14th Company law directive redundant as the Commission assumes to be case? To answer this question I will compare, on the last sections of this paper, the possibilities of cross-border transfer of registered office currently made available by these two legal instruments, with the possibilities of cross-border transfer of registered office that a future 14th company law directive may offer to companies in the EU.

2. The ECJ's case-law from *Daily Mail* to *Cartesio* – completing a full-circle

2.1. The pre-Europeanization stage of companies' PIL – *Daily Mail*

Until the end of the 90's, Member States' conflict of laws systems remained virtually 'state centred' and Private International Lawyers could basically ignore Community Law. The 1980 Rome Convention on the law applicable to contractual obligations, which came into force in 1994, despite being a 'intra-communitarian convention' adopted on an intergovernmental basis under the auspices of the then EEC⁴⁹, could be rightly regarded as an 'orphan'⁵⁰ in the context of EC conflict-of-laws. At least until the 1st August of 2004, when the protocols conferring competence to the ECJ for the interpretation of the Convention came into force⁵¹ it could be regarded just as one multilateral conflict-of-laws convention like many others.

With respect to companies' PIL, in particular, with the exception of those authors who alluded to the problematic articulation between the Treaty provisions on freedom of establishment and the traditional real seat doctrine,⁵² domestic PIL rules were basically regarded as a sort of reserved domain of the Member States not subject to EC primary law scrutiny. The *Daily Mail* judgment provides a good illustration of that pre-europeanization stage of PIL on

⁴⁹ According to the Giuliano / Lagarde Report (OJ C 282, 31.11.1980, p. 1), Point 4 of the Introduction, '[a]s for the legal basis of the work, it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions of Article 220 of the EEC Treaty [now article 293 EC] would be a natural sequel to the convention on jurisdiction and enforcement of judgments'.

⁵⁰ Lagarde (1994: 16) considering that the Rome Convention 'est une oeuvre réussie mais fragile (...) qui a tout à perdre à rester orpheline.'

⁵¹ The First Protocol of interpretation, 1988/1996 version (OJ C 27, 26.01.98, p. 47) and the Second Protocol, 1988/1996 version (OJ, C 27, 26.01.98, p. 52) came into force after the ratification by the Kingdom of Belgium on the 05.05.2004.

⁵² See Fletcher (1982: 254-255), for example, considering that 'the "real seat" theory, on its own terms, is incompatible with the exercise of the right of free movement across traditional jurisdictional boundaries'.

which national conflict-of-law rules were basically regarded as immune to the interference of Community Law.⁵³

Daily Mail was an exit tax case that the Court decided as a company's conflict of laws case even though no conflict of laws problem was really involved. In effect, both UK and Dutch law allowed for the intended transfer of Daily Mails' centre of administration to the Netherlands whilst retaining its legal personality and continuing to be subject to UK company law. The case merely concerned the UK Treasury's right to refuse to allow Daily Mail to transfer its tax residence without paying accumulated tax in the UK. To have made such a transfer of residence would not have led to a loss of legal personality: Daily Mail would have simply become subject 'to a heavy fine under English tax law'.⁵⁴

When we look at the *Daily Mail* judgment, twenty years and a series of judgments on freedom of establishment and direct taxation after, in particular *De Lasteyrie du Saillant*⁵⁵, we have the impression that the Court, in the late 80's, did not feel comfortable in dealing with *Daily Mail* as an exit tax case. It decided, therefore, to rephrase the questions posed by the referring jurisdiction – which clearly revealed the tax exit nature of the case – in such a way that the Court ended up providing an answer to a question that the referring jurisdiction had not really posed.⁵⁶ This allowed the Court to handle the case as a companies' conflict of laws case, even though it did not concern whatsoever the issue of the conformity of the real seat theory with Community law or the problem of knowing if a company such as Daily Mail was allowed to transfer its centre of administration and control to another Member State whilst retaining its legal personality. Patently none of these problems was actually at stake in *Daily Mail* since both the UK and the Netherlands followed the incorporation theory. With this strategy the Court was able

⁵³ Rickford (2004: 1232) considers that an explanation for *Daily Mail* is that this case is 'about lack of Community competence in PIL'.

⁵⁴ Rickford (2004: 1231). See also in the same sense Weber (2003: 351).

⁵⁵ *De Lasteyrie du Saillant*, C-9/02, ECR [2004], p. I-2409, concerned French tax legislation which demanded the payment of tax for unrealized increase in the value of securities due in the event of a taxpayer transferring his residence to another Member State. This tax regime amounted to a restriction 'on exit' of taxpayers which could not be treated less severely than a restriction 'on entry' and was not justified by virtue of the general terms on which it was imposed. It was therefore considered incompatible with the Treaty provision on freedom of establishment. One could argue that *De Lasteyrie du Saillant* merely concerned individuals and not companies. It is clear, however, that both the opinion of Advocate general Tizzano and the Court's judgment of 13 December 2005 in case C-411/03 *SEVIC Systems*, followed *De Lasteyrie du Saillant* in a context where companies were involved.

⁵⁶ See Behrens (1989: 357; Knobbe-Keuk (1990: 333) and Roth (1991: 647).

to take a firm stance in defence of the conformity with the EC Treaty of the real seat connecting factor, which, especially after the *Segers* judgment of 1986 had become under siege.⁵⁷

The *Daily Mail* case was thus decided upstream on the basis of an extremely restrictive understanding of the scope of application of the Treaty provisions on the freedom of establishment. The question whether a company incorporated in conformity with the laws of a Member State can transfer its registered office or head office to another Member State was considered to be an issue which belonged exclusively to the Member States to address and did not fall, therefore, within the scope of Articles 43 and 48 EC.

From the point of view of the final result reached by the Court, at tax level, the solution of the case may, perhaps, be regarded as correct.⁵⁸ In the context of a tax avoidance scheme such as the one at stake in *Daily Mail*, a company should not be allowed to invoke the community right of establishment to avoid having to settle its tax situation in the UK before transferring its head-office to another Member State. That result, however, was achieved at a too high price: the ruling in *Daily Mail* conferred, in effect, to real seat Member States a licence to ‘kill their companies at the border’ whenever those companies decided to transfer their seat abroad.⁵⁹

This judgment affirmed what we may call the *preliminary matter* theory,⁶⁰ which is ultimately grounded on the assertion that companies, as legal persons ‘are creatures of national law [and] exist only by virtue of varying national legislations which determines their incorporation and functioning’.⁶¹ The complex relations between company’s conflict-of-laws rules and EC Treaty provisions on freedom of establishment had, according to the ECJ, to be resolved by conventions concluded among Member States or harmonization measures adopted on the basis of Article 44(2)(g) EC.⁶² According to this preliminary matter thesis, since the

⁵⁷ *Segers* 79/85, ECR [1986], p. 2375. Prior to the judgment of the Court in *Daily Mail* Timmermans (1991: 134-135), for example, pointed out that the *Segers* Judgment seemed ‘to imply that recognition cannot be denied to a foreign company that can invoke Articles 52 and 58’, even if that company, as it happened in *Segers*, was just a pseudo-foreign company with its registered office alone in an incorporation State and having all its activity in another Member State. Accordingly, as Christian Timmermans – now the reporting judge in *Cartesio – Segers* apparently implied that ‘a Member State, like France which adheres to the classical form of the *siège réel* system would not be allowed to follow this approach with regard to EC companies.’

⁵⁸ See Behrens (1989: 361).

⁵⁹ See Wymeersch (2003: 675) referring to the German radical conception of the real seat theory. Knobbe-Keuk (1990: 356) also describes the situation in a suggestive way, remarking that ‘the escape from prison is punished with the death penalty.’

⁶⁰ The Court, in the *Cartesio*, N.º 109, expressly uses the term ‘preliminary matter’.

⁶¹ *Daily Mail*, paragraph 19. This theory is also named, for this reason, ‘creation theory’ (*Geschöpftheorie*) in German academic writing. See, for instance, Kindler (2009: 131).

⁶² *Daily Mail*, paragraphs 21-22.

existence of a company depends on the law of the State where it was created and Member States remain exclusively competent to determine the relevant factor connecting the company to a given legal order which will govern its formation and functioning, those national provisions remain outside the scope of application of the Treaty provisions on freedom of establishment. When the relevant connecting factor chosen by a Member State (for example, the real seat) is broken, namely upon transfer of its real seat abroad, the Member State of origin which, on the basis of that connecting factor, conferred legal existence to the company and governs it, may impose its “legal death”. The company, as long as it has ceased to exist, will not be able anymore to invoke the community freedom of establishment.⁶³

The extinction of a company by a Member-State, just like the decision to bring a company to life, would consequently fall outside the scope of application of Articles 43 EC and 48 EC. This theory, understandable as it was at a pre-europeanization stage of PIL, has the consequence that company’s conflict-of-law rules of the Member State of origin of a company, which ultimately determine the company’s existence, remain *a priori* exempted from primary Community Law scrutiny.⁶⁴

2.2. The *Centros* / *Überseering* / *Inspire Art* Trilogy – A ‘quiet’ European companies’ conflict-of-laws revolution

An important turn occurred in 1999. On that year the Amsterdam Treaty entered into force. Articles 61, c) and 65 b) of the EC Treaty expressly establish Community competences in the field of PIL, both as regards conflict of laws and conflict of jurisdictions.⁶⁵ Moreover the Court of Justice pronounced on that year its highly influential Judgment in the *Centros* case which paved the way to a series of important subsequent judgments, namely *Überseering* and

⁶³ This ‘preliminary matter’ approach was common in academic writing at the time. Twenty years before *Daily Mail* Renauld (1969: 247), for example, considered that ‘[s]ans nul dout, la libération de l’établissement n’interdit point aux états de continuer à considérer qu’une société constituée sous l’empire de leur législation entre, de plein droit, en dissolution si elle transfère à l’étranger son siège social. Et en ce cas, le [sic] société ne pourrait revendiquer le droit d’établissement au regard de l’état où elle comptait s’implanter puisqu’elle n’existerait plus au regard de sa loi d’origine.’

⁶⁴ See, in favour of this approach, Pinheiro (2005: 280-281). In particular in the field of company’s PIL this preliminary matter approach has served – at the stage of (un)development, in 1988, of the relations between national PIL systems and Community Law – the purpose of enabling the Court to avoid the risk of being regarded as implicitly ‘endorsing the incorporation theory at the expense of the real seat theory.’ Edwards (1999: 378).

⁶⁵ For a full account of the evolution of the process of Europeanization of Private International Law see, for instance, Partsch (2003). For an introductory description see Bogdan (2006: 6-14).

Inspire Art.⁶⁶ Altogether, these rulings have changed the landscape of company's PIL in the EU, operating a true 'European Conflict-of-Corporate-Laws Revolution'.⁶⁷

2.2.1. *Centros*

In *Daily Mail* the Court had closed the door to the possibility of *emigration* of a company's head office from one Member State to another, through the invocation of the community right of primary establishment conferred by Articles 43 and 48 EC. In *Centros*, however, the Court opened the door wide to the 'immigration' of companies in the EU by allowing them, in a particularly generous way, to invoke the community right of secondary establishment also conferred by the EC Treaty.⁶⁸

The Court ruled that a company that has been validly incorporated in a Member State and has legal existence there according to that Member State's law, is entitled to set up a secondary establishment in another Member State even if it conducts no economic activity in the Member State of incorporation. The Member State where the company has set up the secondary establishment must recognize that company as a legal person validly formed and existing under the law of the Member State of incorporation, despite the fact that it eventually conducts all its business activity in the Member State where its secondary establishment is located and has been incorporated in the other Member State with the sole purpose of avoiding mandatory company law rules of the Member State where all its business activity takes place.

Through a particularly generous functional interpretation of the EC Treaty provisions on the right of establishment *Centros* has given the possibility for citizens from one Member State to choose freely the Member State where to set up a company with the law that most pleases them.⁶⁹ The company will subsequently have to be recognized, as such, in another Member State where it conducts all its activity through a branch.

⁶⁶ Werlauff (1999: 310) regards *Centros* as "an epoch-making decision".

⁶⁷ Ebke (2005: 52) considering that 'the Court's judgments in *Centros*, *Überseering* and *Inspire Art* are not revolutionary, but they have revolutionary effects.'

⁶⁸ Ebke (2000: 631-632 and 640) and Zimmer (2000: 33-34), for example, emphasize that, unlike *Daily Mail* – which was clearly a primary establishment case consisting on the transfer of head office abroad – *Centros* was analysed by the Court from the different perspective of the exercise of the right of secondary establishment. See also Roth (2000: 151-152) considering that *Centros* 'follows the lines set by *Segers* in a fairly consistent manner' and was, therefore, like *Segers*, regarded, by the Court, as a secondary establishment case.

⁶⁹ See Kieninger (1999).

2.2.2. *Überseering*

Differently from *Centros*, *Überseering* concerned the transfer of the actual centre of administration of an existing company from one Member State (the Netherlands) to another Member State (Germany). Dutch law accorded legal personality to that company after the transfer of its head-office to Germany. German law, on the contrary, by virtue of the real seat theory, denied the company legal capacity, namely to bring legal proceedings in Germany. In its judgment the Court effectively avowed the possibility of a cross-border transfer of the ‘real seat’ of a company from one Member State to another. But it did so only from the perspective of the *host* Member State. After *Überseering*, an host Member State may not forbid anymore such transfer and deny, on the basis of the real seat theory, that company’s legal existence and capacity to stay in legal proceedings.⁷⁰ In *Überseering* the Court conferred, in essence, to every company in the EU, as long as it is regarded in its Member State of origin as an existing and validly incorporated company, the right to be fully recognized and conduct its activity in any other Member State to where its centre of administration and control has, meanwhile, been transferred.

2.2.3. *Inspire Art*

The *Inspire Art* case is structurally not different from *Centros*. Like *Centros*, *Inspire Art* concerned a private limited company incorporated in the UK which had all its activity in the Netherlands and none in the UK. Unlike Danish law in *Centros*, Dutch law allowed the registration of *Inspire Art*’s branch in the Netherlands. However, the ‘Dutch law on formally foreign companies’ determined that *Inspire Art*, being a company that did business only in the

⁷⁰ It is subject to debate, however, whether *Überseering* imposes a general obligation of recognition of the company with the legal personality, capacity and statute subject to the law of the Member State where its was incorporated, or if the host Member State remains capable of imposing modifications to the company’s statutes in order to adapt them to the mandatory requirements of the company law of the host Member State. *Überseering* – and latter *Inspire Art* – in light of its ‘spirit’, grounded on the principle of mutual recognition with respect to legal persons, gives support to the first understanding. In this light, Looijestijn-Clearie (2004: 417) considers that *Inspire Art*, read together with *Überseering*, ‘may have important ramifications for those member states adhering to the *siège réel* theory which do not go so far as to deny legal capacity to a company transferring its real seat to their territory but which attach to such an operation the requirement that the company concerned modifies its articles of association in order to comply with company law regime applicable in the host state.’ It must be remembered, however, that *formally*, *Inspire Art*, unlike *Überseering*, concerned not a transfer of seat, but the establishment of a branch in the Netherlands by a foreign company. In favour of the second interpretation, one may point out that the sole question addressed by the Court in *Überseering* concerned the conformity with the Community right of establishment of a situation of non-recognition, in the host-Member State, of a foreign company’s legal existence and capacity to stay in legal proceedings. See, in this sense, Roth (2003: 207).

Netherlands, had to indicate in its name that it had the status of a pseudo foreign company. As a pseudo foreign company Inspire Art had, therefore, among other rules, to comply with Dutch minimum capital demands which have to be observed by Dutch private limited companies.

Compelling Inspire Art to respect the conditions established by the Dutch law on formally foreign companies was considered to infringe Articles 43 and 48 EC. The Court pushed further its previous *Centros* approach: compelling pseudo-foreign companies to become subject to national company law provisions of the Member State where they conduct all their business through a branch also constituted an obstacle to the exercise of the right of establishment which could hardly be justified on grounds of overriding reasons relating to the public interest.⁷¹

This trilogy of judgments allowed for a peculiar form of mobility of companies' head offices from incorporation Member States to real seat Member States. Every host Member State, even if it follows a strict version of the real seat theory, has to accept that a company incorporated in another Member State conducts all its business activity in the host Member State, while continuing to be subject to the *lex societatis* of the company's home Member State, if this State so allows.

As regards 'start up' companies these judgments have triggered a regulatory arbitrage among Member States, by allowing companies' founders to set up their company in the Member State with the most attractive company law. As regards already existing companies, however, reincorporations remain difficult, even after the adoption of the cross-border merger directive and the *Societas Europaea* (SE) Regulation, at least for companies wishing to transfer their registered office alone from one Member State to another.⁷²

2.2.4. The *Centros* / *Überseering* / *Inspire Art* pragmatic approach confronted with *Daily Mail*

To the extent that the trilogy *Centros* / *Überseering* / *Inspire Art* concerned 'inbound' situations – as it was already the case in *Segers* – the Court could easily distinguish them from *Daily Mail*, which involved an 'outbound' situation. The Member State of origin of a company remains free to prohibit its emigration by 'sentencing it to death'. On the contrary, a host

⁷¹ This judgment gave rise to a long list of articles and commentaries in academic writing. See, for instance, just to name a few, Hirt (2004; Looijestijn-Clearie (2004; Muir Watt (2004; Ebke (2005; Kirchner, Painter & Kaal (2005), Soares (2004), Vicente (2005: 150-151) and, especially critical on *Inspire Art*, Pinheiro (2005: 284-286).

⁷² See on this point, although with a less pessimistic view, Armour (2005: 380-381). See also on this point, *infra*, pp. 68-70.

Member State is compelled to recognize a foreign company as a company governed by the law of the Member State where it was incorporated, as long as that company has legal personality there and is, therefore, entitled to enjoy the right of establishment.⁷³

The Court in *Überseering* and *Inspire Art* eventually made use of this ‘exit/entry’ dichotomy to distinguish the situation in those cases from the situation in *Daily Mail*.⁷⁴ In both *Überseering* and *Inspire Art* the Court emphasized that, differently from *Daily Mail*, those cases concerned the analysis of the compatibility of the provisions of the *host* Member State with the Treaty provisions on freedom of establishment.

It was in this context that the Court restated the *dicta* in *Daily Mail* concerning the non-applicability of the Treaty provisions on freedom of establishment to companies that are prohibited from ‘moving out’ by the laws of their Member States of origin. It did so, however, with the sole purpose of distinguishing *Daily Mail* from *Überseering* and *Inspire Art* and one may say, also *Centros*, which involved companies ‘moving in’.⁷⁵ One could legitimately doubt, therefore, that the Court’s restatement of the *Daily Mail dicta* in those two judgments actually constituted a confirmation or endorsement of the narrow understanding of the scope of the right of establishment adopted by the Court in *Daily Mail* with respect to outbound situations.

The connecting factors indicated in article 48 EC – registered office, central administration and principal place of business – are equivalent for the purpose of defining the

⁷³ In this sense the judgments of the Court in *Centros / Überseering / Inspire Art* can be rightly regarded as having affirmed in the field of company law the principle of *mutual recognition* or the principle of the State of origin. A company validly incorporated and existing in one Member State, irrespective of conducting all its business in another Member-State, must be fully recognized in the host Member-State and governed by the law of the Member State (of origin) where it was incorporated. After *Centros Werlauff* (1999: 306 and 313) rightly pointed out that “[w]hat *Cassis de Dijon* did for the free movement of goods, *Centros* will do for the free establishment of companies.” See also Behrens (2000: 140; Garcimartín Alférez (2003: 677; Lombardo (2005: 362). This last author goes further considering that Article 48 CE ‘is not only a rule of recognition but a general conflict rule determining the laws applicable to a company.’ This last understanding raises legitimate doubts. At least in principle the host Member State continues to be able to compel the foreign company doing business in its territory to be subject to its national company law provisions, provided that they can be justified on grounds of general public interest.

⁷⁴ See *Überseering*, paragraphs 70-72 and *Inspire Art*, paragraph 103.

⁷⁵ It is interesting that neither the Court in its judgment in *Centros*, nor Advocate General La Pergola on his opinion made the slightest reference to *Daily Mail* despite the consequences that *Centros* had upon *Daily Mail*’s approach with respect to the relations between domestic company’s PIL and the Treaty Provisions on freedom of establishment. See critically on this regard Kohler (2004: 452). The Court, in *Centros*, seems to have deliberately ignored *Daily Mail*’s ‘embarrassing’ judgment. Several authors had actually considered that *Centros* had implicitly overruled *Daily Mail*. See Sedemund & Hausmann (1999) and Heine & Kerber (2002: 50). In the subsequent *Überseering* and *Inspire Art* cases the Court could simply not avoid anymore addressing that problem. It did so, as we have seen, by distinguishing those cases from *Daily Mail* on the basis of the ‘exit’ versus ‘entry’ criterion.

beneficiaries of the right of establishment.⁷⁶ Those connecting factors, however, are not necessarily equivalent as regards *the effects* resulting from their application on the freedom of movement of companies in the Community. From the point of view of those effects they are not absolutely equivalent⁷⁷ and nothing in Article 48 EC allows the conclusion that the real seat theory, or any other connecting factor adopted by the Member State of origin of the company, irrespective of how it is implemented in that Member States, cannot give rise to effects incompatible with the EC Treaty.

The *Überseering* and *Inspire Art* judgments precisely reveal that some *corollaries or effects* of the real seat connecting factor as traditionally applied by several Member States are not – contrary to the approach previously sanctioned in the ‘outbound’ case *Daily Mail* – conceptually exempt from scrutiny under the Treaty provisions on freedom of establishment. They were indeed considered incompatible with these provisions.

This ‘new’ approach of the Court, favouring the safeguard and promotion of the free movement of companies on the basis of a broad functional interpretation of the EC Treaty provisions on the right of establishment, may be characterized as pragmatic.⁷⁸ It is indeed a forward-looking, non-dogmatic, consequentialist and party-centred approach, which places the interests of the private actors involved at the core of the Court’s analysis.

The Court, in effect, does not assess the conformity with the community right of establishment of the real seat theory as such, that is, as a conflict of law’s category. Member States may legitimately choose the place where the centre of administration of the company is located as the relevant connecting factor to determine the *lex societatis* and nationality of companies. That connecting factor is not susceptible of being considered incompatible, as such, with Community Law and, in particular, with the Treaty provisions on the right of establishment.⁷⁹ For the Court what really matters are *the effects* that national regulations or

⁷⁶ This is precisely what the Court acknowledges in *Daily Mail*, paragraph 21.

⁷⁷ Advocate General Darmon, for example expressly recognized in *Daily Mail*, paragraph 13, that the incorporation theory is ‘more consistent with Community objectives in regard to establishment’.

⁷⁸ On ‘pragmatic adjudication’ see Posner (1998). See also Richard Posner’s ‘Pragmatist Manifesto’ in Posner (1990: 454). On that manifesto Judge Richard Posner puts forward a synthesis of the basic tenets of legal pragmatism, considering that ‘[in Law] there is too much emphasis on authority, certitude, rhetoric, and tradition [and] too little on consequences’, Posner (1990: 465).

⁷⁹ See similarly, in a different context, the position adopted by the Court in the recent Judgment of 16th October on Case C-353/06, *Grunkin-Paul*, [2008], not yet reported, about the compatibility, as such, of the nationality connecting factor used by most Member States to determine the law governing the personal status of natural person, with Community law, in particular with articles 12 EC and 18 EC.

practices, irrespective of their conceptual nature, might functionally have on freedom of establishment.⁸⁰ The Court, then, assesses the conformity of *such effects* with the rights conferred by the Treaty on individuals and firms to establish freely in the Member State of their choice with the company law regime that adds more value to the company and its shareholders.

This trilogy of judgments has led to the development of a phenomenon of regulatory competition among national company laws and ‘responsive lawmaking’ by national legislators across the EU.⁸¹ The Court was perfectly aware that those phenomena could eventually occur.⁸² After *Centros*, the emergence of regulatory competition at company law level in the EU seemed to be just a theoretical possibility that many considered to be implausible in practice.⁸³ Recent empirical data⁸⁴ have revealed, however, that an European variant of regulatory competition has actually turned into reality.⁸⁵

⁸⁰ See Advocate General Maduro, *Cartesio*, paragraph 30 and Advocate general Sharpston, *Grunkin-Paul*, paragraph 49.

⁸¹ See for a recent comparative analysis, Bratton, McCahery & Vermeulen (2009).

⁸² Advocate General La Pergola, on his highly influential Opinion in *Centros* stated, at point 20, that ‘in the absence of harmonization, competition among rules must be allowed free play in corporate matters.’ See equally, the Opinion of Advocate general Alber, *Inspire Art*, paragraphs 138-139.

⁸³ See sceptical about the possibility that a regulatory competition model may materialize in the EU, Barnard (2000: 78) (“the conditions for competitive federalism do not exist in the European Union”) and Deakin (2001: 203-208). See also Gelter (2005: 264), Tröger (2005: 63-64) and Pinheiro (2007: 268-271), considering regulatory competition to be implausible in the EU based on an analysis of the ‘supply side’ of company law rules.

⁸⁴ It is uncontested the large increase on the number of cross-country incorporations in the UK from EU Member States subsequent to the ECJ rulings in *Centros*, *Überseering* and *Inspire Art*. See Becht, Mayer & Wagner (2008). According to this study the number of private limited companies from all Member States incorporating in the U.K. per year has increased from 4400 firms pre-*Centros* to 28,000 firms post-*Centros*. Such incorporations are primarily driven by minimum capital requirements and setup costs in home countries. The numbers advanced by the authors concern only true *Centros*-type incorporations, namely firms that incorporated in the UK without any operational activity there. The largest flows of companies are from Germany and France.

⁸⁵ The current changes operated on Member States’ company laws reveal that national legislators make an effort to render their company laws more competitive in response to changes in other Member States’ company laws. See Bratton, McCahery & Vermeulen (2009: 378-384) and Armour (2005: 393-394) with several examples of this sort of “defensive” regulatory competition – as Armour calls it – actually taking place in the EU, as opposed to the “active” Delaware version of regulatory competition in the US. The French legislator, for example, abandoned the minimum capital requirement for the SARL (see Law of the 1st August 2003). Article 223-2 of the Code de Commerce now merely states that the amount of the capital of the SARL is determined by its constitution. Also in Germany, at the level of conflict of laws, the recent GmbH reform (referred *supra* on footnotes 21 and 33) expressly purported to eliminate comparative disadvantages for German Private limited companies which did not have the possibility of choosing their true place of business outside German territory while keeping their registered seat in Germany and continuing to be subject to German law as GmbH’s. This new German legislation creates the conditions for German company law to play the regulatory competition game in the EU by facilitating the ‘exportation’ of the German GmbH corporate form as a true ‘corporate product’ that may interest operators from other Member States.

2.3. Abuse of law and freedom of establishment – from *Centros* to *Cadbury Schweppes*

There is presently a significant point of friction with respect to companies' freedom of establishment and the concept of abuse of law that the Court has, so far, not addressed.⁸⁶ This problem of the abuse of law in the context of the Community freedom of establishment is perhaps one of the most interesting topics that the Court will have to face in the future. It is of the utmost relevance to determine to what extent a company will be capable of transferring its registered office alone from one Member State to another by setting up a shell subsidiary in another Member State which will subsequently absorb through a merger its foreign parent company. This situation may constitute an interesting test-case which would allow us to see to what extent is the Court capable of applying the *Cadbury Schweppes* genuine activity / artificial arrangements test in the field of company law.

At the outset one must recognize that it is presently difficult to read as a coherent whole the Court's notion of the right of establishment and of abusive practices as adopted, in particular, in its recent judgment in *Cadbury Schweppes* with *Centros* and *Inspire Art*.

2.3.1. The 'empty' notion of abuse of law in *Centros* / *Inspire Art*

The Court, in *Centros*, held a refusal by a Member State to register a branch of a UK company in its register of companies (and, in *Inspire Art*, to add certain conditions to that registration) to infringe article 43 EC. This was so, in spite of the fact that the companies involved, which had been set up in the UK, did not have any economic activity there and had been set up in the UK by their Danish and Dutch founders with the sole purpose of circumventing mandatory company law provisions of Denmark and the Netherlands, respectively. The Court considered, in this regard, that the right to form a company in accordance with the law of a Member State with less restrictive company-law rules and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty⁸⁷. The Court dismissed, in this manner, the objection of the existence of an abusive or fraudulent conduct.

In *Inspire Art* the Court restates and even reinforces this view to the extent that the Dutch legal regime on pseudo foreign companies – which the Court has sanctioned as incompatible

⁸⁶ Advocate General Maduro has alluded to this problem on his opinion in *Cartesio*. See paragraph 29 of the Opinion, quoted *infra* at pp. 26-27.

⁸⁷ *Centros*, paragraph 27 and *Inspire Art*, paragraph 138.

with articles 43 and 48 EC – seemed at first sight to be justified in light of an important *caveat* that the Court has included in the last paragraph of its *Centros* judgment. In that paragraph, in effect, the Court had stated that national authorities are not prevented from adopting ‘any appropriate measure for preventing or penalising fraud, either in relation to the company itself [...] or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.’⁸⁸

First, the Court in *Inspire Art* analysed this issue of the alleged abuse both at the level of the definition of the scope of the right of establishment. It considered in this regard that it was immaterial ‘that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or indeed the entire, business is to be conducted.’⁸⁹ The fact that *Inspire Art* had been formed in the UK with the sole purpose of circumventing Dutch company law ‘does not mean that that company’s establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 and 48 EC’.⁹⁰

Secondly, the Court analysed the issue of the abuse of law at the level of the justification of the national measures on grounds of mandatory requirements related to the public interest. The Court conceded that the aim ‘of combating improper recourse to freedom of establishment’ amounted to an overriding reason related to the public interest capable of justifying the application of the Dutch legal measures concerning pseudo-foreign companies.⁹¹ However, measures such as those at stake which limited the activity of *Inspire Art*’s branch in the Netherlands by imposing the obligation to respect certain conditions provided for in Dutch law in respect of company’s formation relating to minimum capital, could not be regarded, in the Court’s view, as justified on grounds of combating improper recourse to freedom of establishment. This was so, because the provisions of the Treaty on freedom of establishment were intended specifically to enable companies formed in accordance with the law of another Member State to pursue activities in other Member States, namely through the establishment of

⁸⁸ *Centros*, Paragraph 39. In *Überseering*, similarly, the Court has also affirmed, in paragraph 92 that ‘it is not inconceivable that overriding requirements relating to the general interest, such as the protection of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.’

⁸⁹ *Inspire Art*, paragraph 95.

⁹⁰ *Inspire Art*, paragraph 98.

⁹¹ *Inspire Art*, paragraph 132. At paragraph 136 the Court restated the *Centros caveat* quoted *supra* on this page.

branches there.⁹² Moreover, according to the Court, ‘the fact that a company does not conduct any business in the Member State in which it has its registered office [...] 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.’⁹³

After *Inspire Art* it becomes hard to imagine which national legislative measures may be adopted by Member States to prevent abusive practices that may be capable of passing the test of compatibility with community law.⁹⁴ The Court leaves only one trace in this regard in the last sentence of the judgment where it concludes that ‘save where the existence of an abuse is established on a case-by-case basis’ a company such as *Inspire Art* could not be deprived of the right to invoke the freedom of establishment guaranteed by the EC Treaty.⁹⁵ This is surely not much. It appears to be more an expression of rhetoric⁹⁶ than the recognition of an effective possibility conferred to Member States to adopt measures designed to prevent the circumvention of their national mandatory company law provisions.

2.3.2. The impact of *Cadbury Schweppes* on *Centros / Inspire Art*

Such a narrow understanding of the measures that Member States may adopt to prevent the avoidance of mandatory company law provisions of the Member State where a company conducts all its economic activity is currently difficult to articulate with the *Cadbury Schweppes* judgement, concerning the compatibility with the Treaty provisions on freedom of establishment of UK rules on corporate taxation of profits, in a case where subsidiaries of a British company were established in States with a lower level of taxation.

This has been expressly pointed out by Advocate general Maduro on his opinion in *Cartesio*. The relevant statement in this regard is as follows:

⁹² *Inspire Art*, paragraph 137.

⁹³ *Inspire Art*, paragraph 139.

⁹⁴ See Kramer (2005: 525) pointing out that such possibility, which was left open by the *Centros* and *Überseering* statements cited supra, has been, with *Inspire Art*, ‘*quasiment vidée de sens.*’

⁹⁵ *Inspire Art*, paragraph 143.

⁹⁶ See Sorensen (2006: 459) suggesting that Court decisions like *Centros* and *Inspire Art* lead to the conclusion that the principle of abuse, if it appeared, at first sight, ‘to be a principle of substance in Community law [it] is in fact very close to being mere rhetoric.’

‘[D]espite what the rulings in *Inspire Art* and *Centros* suggest, it may not always be possible to rely successfully on the right of establishment in order to establish a company nominally in another Member State for the sole purpose of circumventing one’s own national company law. In its recent judgment in *Cadbury Schweppes*, the Court reiterated that ‘the fact that [a] company was established in a Member State for the purpose of benefiting from more favourable legislation does not *in itself* suffice to constitute abuse of [the freedom of establishment]. However, the Court emphasised that Member States may take measures to prevent “wholly artificial arrangements which do not reflect economic reality” and which are aimed at circumventing national legislation. [...] In particular, the right of establishment does not preclude Member States from being wary of “letter box” or “front” companies. In my view this represents a significant qualification of the rulings in *Centros* and *Inspire Art*, as well as a reaffirmation of the established case-law on the principle of abuse of Community law, even though the Court continues to use the notion of abuse with considerable restraint – and rightly so.’⁹⁷

From *Cadbury Schweppes* it results that it is necessary to examine the behaviour of the taxpayer who incorporates a company in another Member State in light of the aim of the right of establishment in order to assess if the behaviour at stake is a mere exercise of the right of free movement or, on the contrary, if it is an abusive practice. The definition of the characteristics and aims of the right of establishment plays a central role in this judgment. In this regard the Court considered that the freedom of establishment requires a genuine intent to participate in a stable and continuous basis in the economic life of a Member State other than the State of origin.⁹⁸ As a consequence, according to the Court, a company may invoke the right of establishment in another Member State for the purpose of benefiting of a more advantageous legislation only if this establishment corresponds to a genuine set-up of the undertaking in the host State, which actually involves the exercise of genuine economic activity there.⁹⁹ The Court added further that such a finding ‘must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the controlled foreign company

⁹⁷ Paragraph 29 of the Opinion in *Cartesio* (footnotes and references omitted)

⁹⁸ *Cadbury Schweppes*, paragraph 53. The origins of this ‘genuine economic activity’ test can be traced back to paragraph 20 of the judgment in case C-221/89, *Factortame and Others* [1991] ECR I-3905 [*Factortame II*], and paragraph 21 of the judgment in Case C-246/89, *Commission v United Kingdom* [1991] ECR p. I-4585, where the Court has considered that the right of establishment requires the actual pursuit of an economic activity. Even before these two cases one may find that test in the opinion of Advocate General Darmon in *Daily Mail* that the Court declined to use in the judgment. After *Centros*, Looijestijn-Clearie (2000: 630-632 and 641) pointed out that when the Court allowed *Centros Ltd* to invoke the community right of establishment to register its branch in Denmark, it created a situation that is ‘difficult to reconcile’ with *Factortame II* where the Court had considered that the mere registration of a fishing vessel in one Member State was not in itself, according to the ‘*actual pursuit of an economic activity*’ test, covered by the notion of establishment. This inconsistency in the Court’s case-law arises again and in an even more visible way when we now compare *Centros / Inspire Art* with *Cadbury Schweppes*.

⁹⁹ *Cadbury Schweppes*, paragraph 66.

physically exists in terms of premises, staff and equipment', which cannot be the case if the company is merely a 'letterbox' or 'front' subsidiary¹⁰⁰.

Even though the criteria established in *Cadbury Schweppes* to determine whether an establishment has genuine economic activity in the host State are not free from difficulties in application, it is clear that the Court is aiming at excluding from a legitimate exercise of freedom of establishment 'abusive practices', namely 'wholly artificial arrangements which do not reflect economic reality'.¹⁰¹ The consequence is that, according to the ruling in *Cadbury Schweppes*, Member States are thus allowed – without illegitimately infringing the Treaty provisions on the right of establishment – to adopt measures against purely artificial arrangements which have no other *autonomous economically rational explanation* but the purpose of evading mandatory provisions of that Member State's law.¹⁰² The Court, in this manner, visibly moves away from *Centros* and *Inspire Art* through the introduction, in relation to freedom of establishment and at the moment of justification of the restrictive national measure, of a community law principle of prohibition of abusive practices 'imported' from the VAT domain, namely from the *Halifax* judgment.¹⁰³

It must be recalled, in this regard, that what the two Danish nationals, the Brydes, did, in *Centros*, was precisely to invoke their community right of establishment (in the form of primary establishment) to set up a private limited company in the United Kingdom – which has never exercised any genuine economic activity there – with the sole purpose of avoiding the less favourable mandatory rules of Danish company law on minimum share capital.

Analytically, both the *Centros* and the *Inspire Art* cases involve a two-step U-turn operation and each of those steps is grounded on an invocation of the exercise of the community right of establishment.

The Court in *Centros* and in *Inspire Art* focused exclusively on the second step of the operation, that is, on the setting up, by *Centros* and *Inspire Art*, of a branch in Denmark and the

¹⁰⁰ *Cadbury Schweppes*, paragraphs 67-68.

¹⁰¹ The notion of 'abusive practices' and the notion of 'wholly artificial arrangements which do not reflect economic reality' appear as the two faces of the same coin. See *Cadbury Schweppes*, paragraph 55 stating that 'in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due'. See also, in this sense, Edwards & Farmer (2008: 214).

¹⁰² See Sousa (2007: 27-28) and Maduro & Sousa (2009: 147-148)

¹⁰³ See Sousa (2007: 27-28), Feria (2008: 428) and Maduro & Sousa (2009: 146).

Netherlands, respectively. It was, in particular, with regard to this second element of the operation that the Court considered that prohibiting the registration of that branch in Denmark (or the imposition of the conditions upon Inspire Art) was incompatible with the community right of secondary establishment, provided that the Treaty provisions on freedom of establishment were intended specifically to enable companies to pursue activities in other Member States, namely through the establishment of branches there.¹⁰⁴

The first part of the operation (the setting up of *Centros* and *Inspire Art* in the UK) was basically overlooked by the Court, although it also involved, in itself, an exercise of the right of establishment by the companies' founders. It is this first exercise of the right of establishment which is akin to the establishment of a subsidiary abroad in *Cadbury Schweppes*.¹⁰⁵ It is precisely with regard to this establishment that the Court in this judgment considered that Member States may legitimately take measures when the company that was set up in another Member State is merely a 'letter box company' deprived of genuine economic activity there. As regards the second step of the U-turn operation in *Centros* and *Inspire Art*, there are no doubts that those two companies intended to carry out a genuine economic activity in Denmark and the Netherlands, respectively. As regards the first step, however, there was an invocation of the right of establishment, by foreign citizens, to set up those two companies in the UK, but there was no genuine economic activity involved in the UK. Consequently the setting up of those two companies in the UK, respectively by the Danish and Dutch citizens, could have been regarded as failing to meet the *Cadbury Schweppes*' genuine economic activity test.¹⁰⁶

In this light, *Cadbury Schweppes*, as pointed out by Advocate General Maduro in the statement quoted above, introduces a 'significant qualification of the rulings in *Centros* and

¹⁰⁴ See *Inspire Art*, paragraph 137 and *Centros* paragraph 26. That the Court was considering these cases from the perspective of the exercise of the right of secondary establishment by the company is also made clear in paragraph 139 of *Inspire Art* and paragraph 29 and 30 of *Centros*. See, in this sense, with respect to *Centros* Ebke (2000: 631-632). The circumstance that the Court was focusing on the exercise of the right of secondary establishment in *Centros* may explain why the Court in this case did not even make a reference to *Daily Mail*. From this perspective both cases had nothing to do with one another.

¹⁰⁵ If the Brydes in *Centros* case were a company (and not natural persons as it was actually the case) the similarity with the situation in *Cadbury Schweppes* would be even greater. In any event, the circumstance that *Centros* Ltd was set up in the UK by two natural persons and not as a subsidiary of a foreign company does not allow us to conclude that, *as regards the exercise of the right of establishment to set a company in another Member State* the situation in *Centros* was, in substance, different from the situation in *Cadbury Schweppes*.

¹⁰⁶ Arriving at the same conclusion see Edwards & Farmer (2008: 218) for whom 'the real issue underlying the questions referred in *Centros* and *Inspire Art* [...] related not to the right of establishment of the company which was relying on that right to challenge national legislation but to the right of establishment of its founders [...]. In other words, the issue in those cases was the same as that in *Cadbury Schweppes*.'

Inspire Art’ with respect to the possibility for Member States to adopt measures to prevent the invocation of the right of establishment when a company set up abroad does not reflect any economic reality and has as sole purpose evading mandatory provisions of the law of the Member State where all its business activity takes place. This is particularly evident on the first of the two steps involved in *Centros* and *Inspire Art* just analysed.

Ideally, one could hope, like Advocate General Poiares Maduro, that the Court would interpret and apply uniformly the Treaty provisions on freedom of establishment based on *principle* and, therefore, that it would endorse a uniform notion of abusive practices or purely artificial arrangements which would not vary depending on the subject matter concerned. The problem, however, is that as regards the possibility for Member States to adopt measures to prevent the avoidance of national mandatory provisions through the invocation of the community freedom of establishment, the Court has, so far, adopted two parallel and irreconcilable approaches in, at least, two different domains: tax law and company law.¹⁰⁷

In company law cases the notion of abuse of law was understood (and used) with the utmost restraint. The Court in *Centros* and *Inspire Art* wanted to promote freedom of movement for companies in the EU by way of the right of secondary establishment and to allow EU companies to choose the most favourable *lex societatis* at the moment of their formation, even if, at the end, this would entail that certain mandatory company law rules of the Member States, in particular minimum capital requirements, would have to be sacrificed in the regulatory competition game triggered by these judgments.

Differently, in *Cadbury Schweppes*, which involved the invocation of freedom of establishment in relation to the setting up, by UK companies, of subsidiaries in other Member States with lower levels of taxation, the Court was much more aware of the need to allow Member States to prevent their tax provisions from being avoided by way of the invocation of the Treaty provisions on the right of establishment.¹⁰⁸ The Court adopted, therefore, with regard to Member States’ direct-taxation systems, a less rhetorical notion of ‘abuse’ and effectively

¹⁰⁷ For a comprehensive analysis of the entire case-law of the Court on the notion of abuse of law see Feria (2008). In my view, this analysis confirms that the Court has, in the context of company law, followed a course which diverges clearly from the rest of its case-law on the notion of ‘abuse’.

¹⁰⁸ The Court confirmed and even pushed slightly further this analysis in *Test Claimants* by extending the possibility of Member States do adopt measures to prevent abusive practices even when there are no doubts about the existence of genuine economic activity. See Sousa (2007: 28-30) and Edwards & Farmer (2008: 214-215).

allowed Member States to protect more effectively their tax systems and tax revenues against tax avoidance schemes.

Eventually it was in this field of direct taxation, along with the field of VAT, that the Court has pushed further the development and formulation of a community concept of abuse of law.

It has been recently argued that such concept appears as a general concept of abuse of law in Community law, applicable in all domains covered by Community law, despite the differences with respect to its intervention depending on the subject matter involved.¹⁰⁹ The concept of abuse, however, remains virtually meaningless or an ‘empty concept’ in the context of company law, in particular after *Inspire Art*. The intervention of that alleged general principle in the company law domain is currently so narrow that one may legitimately doubt that such general principle is actually regarded by the Court as an existing general principle of Community law uniformly applied with different degrees of intensity across all EU Law.

From a positive/descriptive analysis of the Court’s case-law, this discrepancy between *Centros / Inspire Art* on the one hand, and *Cadbury Schweppes* on the other, reveals that the Court deliberately adopts a much more cautious attitude with respect to the situation where the right of establishment is invoked to circumvent mandatory tax provisions of a Member State, than in case where the right of establishment is invoked to circumvent mandatory company law provisions. In the tax domain one may only invoke the community right of establishment to set up a company in another Member State if that company has genuine economic activity there, whereas in the company law field it seems that such requirement can be easily disregarded.¹¹⁰ In other words, Member States’ mandatory company law provisions seem to be regarded by the Court as less ‘mandatory’ than Member States’ mandatory tax law provisions.

In light of the utterly restrictive approach followed by the Court regarding the possibility for Member States to adopt anti-abuse measures in the field of company law, the ‘qualification’ of *Centros* and *Inspire Art*’s notion of abuse, suggested by Advocate general Maduro in *Cartesio*, would entail, in practice, an overruling of *Centros* and *Inspire Art*, under the label of a

¹⁰⁹ In this sense Feria (2008: 438) considering that *Cadbury Schweppes* is ‘the final confirmation of prohibition of abuse of law [...] as a general principle of Community law, capable of being used as an instrument of judicial review where national legislation falls within the scope of Community law. According to the author ‘the fact that the ECJ has not applied the principle for the purposes of judicial review uniformly, across all areas of EC law, should not be regarded as an obstacle to this conclusion.’

¹¹⁰ This situation has been rightly reputed ‘a case of double standards’ Edwards & Farmer (2008).

mere ‘qualification’ or ‘refinement’ of those judgments. In essence, what Advocate general Maduro was basically suggesting is that the Court should now endorse, twenty years after, the opinion of advocate general Darmon in *Daily Mail*¹¹¹ and build a bridge between *Daily Mail* and *Cadbury Schweppes* that would, in essence, lead to overrule, not only *Daily Mail*’s controversial *dicta*, but also *Centros* and *Inspire Art* narrow use of the abuse of law concept.

2.3.3. The Court’s refusal in *Cartesio* to revisit *Centros / Inspire Art* in light of *Cadbury Schweppes*

Contrary to the opinion of Advocate general Maduro, the Court did not take the opportunity, in *Cartesio*, to reassess its *Centros* and *Inspire Art* case-law in light of *Cadbury Schweppes*. This is understandable. Expecting the Court to apply in a consistent and uniform manner a community principle of prohibition of abusive practices as a general principle of community law, both in the field of taxation and in the field of company law, is simply not realistic, even if it could be desirable as a matter of principle.¹¹²

Firstly, the Court is reluctant to make this sort of ‘qualifications’ of its previous judgments. A particularly good example of this is, as I will develop further down, its remarkable attachment to its 20 year old *Daily Mail* judgment in *Cartesio*.

Secondly, the Court apparently regards *Centros/Inspire Art* and *Cadbury Scheppes/Test Claimants* as two parallel lines of cases that it does not intend to force to converge as long as they concern two different subject matters which raise completely different concerns.¹¹³

¹¹¹ Advocate General Maduro expressly points out, in footnote 42 of his Opinion, that ‘in fact, the Court’s approach [subsequent to *Daily Mail*] has come to resemble the approach of Advocate General Darmon in his opinion in *Daily Mail and General Trust*.’ Moreover, as we will see further down, it is clear that Advocate General Maduro returns, in essence (see paragraph 25 of the Opinion), to the conception of establishment put forward by advocate general Darmon in *Daily Mail* – see point 1 of the conclusion of Advocate General Darmon’s Opinion and paragraphs 5 and 9 – as requiring a ‘genuine integration’ of the company invoking the right of establishment ‘into the economic life of the host Member State’.

¹¹² The notion of abusive practices is not even uniformly interpreted and applied by the Court in the tax domain. It suffices to consider that in the VAT domain, for example, the judgment of the Court, *Part Service*, C-425/06, [2008] ECR p. I-897, clarifies *Halifax* in a way that allows national tax authorities to invoke more easily the concept of abusive practices to counter tax avoidance arrangements in the field of VAT than in the field of direct taxation.

¹¹³ There is, however, an interesting aspect on the *Cadbury Schweppes* judgment that may indicate that the Court is not entirely hostile to such convergence in the future. In effect the Court in paragraph 68 of its judgment expressly refers to *Eurofood IFSC*, C-341/04 [2006] ECR p. I-3813, paragraphs 34-35, as regards the characterization of the setting up of a subsidiary in another Member State with no genuine economic activity there as a ‘letterbox’ or ‘front subsidiary’ and therefore as a ‘wholly artificial arrangement’ that would not constitute a legitimate exercise of the right of establishment. *Eurofood IFSC* was, however, not at all a tax law case. It was a PIL case and more precisely a case dealing with company’s cross-border insolvency proceedings, governed by Regulation (EC) 1346/2000 of 29th May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

Finally, *Cartesio*'s transfer of head-office to Italy did not truly raise any concerns about a possible 'artificial operation' set-up with the sole purpose of circumventing Hungarian mandatory company or tax law provisions.

I am persuaded, in any event, that the Court in the future should give preference to an approach more in consonance with the *Cadbury Schweppes*' abusive practices test than with the "rethorical" and "empty" notion of abuse put forward in the *Centros* and *Inspire Art* rulings. These two rulings, despite the fact that they will hardly be expressly overruled by the Court, will most likely become isolated cases in the Court's overall jurisprudence on the abuse of law.

2.4. *Cartesio* – 'Back to *Daily Mail*...' but with a significant clarification

The *Cartesio* case gave the Court the opportunity to revisit, twenty years after, its *Daily Mail* judgment and to put an end to the current situation where each Member State has the utmost liberty to forbid its companies from 'moving out' their seat "by killing them at the border", but has virtually no liberty at all to create obstacles for other Member States' companies 'moving into' their territory.

Judgments on freedom of establishment subsequent to *Daily Mail* concern a very wide range of legal areas not so far covered by Community law harmonization measures – including companies' private international law and companies' direct taxation. Those judgments provide important insights on the Court's understanding of the scope of freedom of establishment with regard to companies since *Daily Mail*. As in Ronald Dworkin's metaphor of the chain novel,¹¹⁴ the Court, in *Cartesio*, added one more chapter to its already long line of cases initiated with *Daily Mail* – a real 'novel' with chief distinctions, some suspense and subtle *volte-faces* – on the complex relations between the Member States' PIL of companies and the fundamental freedom of establishment conferred to legal persons by Articles 43 EC and 48 EC.

2.4.1. Facts and questions submitted to the Court

Cartesio is a Hungarian limited partnership whose application for registration in Hungary of the transfer of its seat to Italy was rejected by the Hungarian authorities. The seat is defined by Hungarian law as the place where the company's central administration is situated,¹¹⁵ and

¹¹⁴ Dworkin (1986: 228-238).

¹¹⁵ See *Cartesio*, paragraph 17.

constitutes information that must be entered in the commercial register. At the time, Hungarian law apparently followed a strict version of the real seat theory, at least in practical terms, with respect to companies incorporated in Hungary.¹¹⁶ There were simply no legal rules in Hungary to resolve the issue of the transfer of seat abroad by Hungarian companies or partnerships. In the absence of such legislation, it was impossible for a company constituted under Hungarian law to transfer its seat abroad without having first to be wound up in Hungary and reconstituted under the host Member State's law.

Provided that Cartesio insisted that it wished to transfer its seat to Italy and have such transfer registered in Hungary (registration in Hungary has constitutive effect), Hungarian authorities refused, pure and simply and without any sort of conditions, to accept Cartesio's request. Cartesio would either have to be liquidated first and (re)incorporated *ex novo* abroad – a possibility that, conceptually, cannot be regarded as a transfer of seat – or give up on the projected transfer of seat and establish a branch in Italy instead, a possibility which was provided for by Hungarian law.

The questions referred to the Court of Justice¹¹⁷ reflected the circumstance that Hungarian legislation prevented Hungarian companies and partnerships from transferring their seat to another Member State, unconditionally, either with or without a change of the applicable *lex societatis*.¹¹⁸ The problem at stake was simply whether articles 43 and 48 EC preclude a

¹¹⁶ Apparently Hungarian Law has changed meanwhile to the incorporation theory. See Commission's Impact assessment on the Directive on the cross-border transfer of registered office, cit., p. 42, footnote 45.

¹¹⁷ It is worth noticing that the referring jurisdiction posed, on the first place, a series of three very interesting questions concerning the preliminary reference procedure, in particular on the issue of the compatibility with Article 234 EC of Hungarian legislation that allowed for a separate appeal to be brought against the decision making a reference for preliminary ruling and conferred jurisdiction to the appellate Court to vary the order for reference or even to set it aside. In spite of the practical and theoretical relevance of the answers provided by the Court on those procedural issues, in particular as regards the problem of the jurisdiction of appellate courts to revoke an order for preliminary ruling, I shall not analyse here the first part of the judgment where the Court addressed the first three questions posed by the referring jurisdiction.

¹¹⁸ The fourth, and last question, referred to the Court, concerning the conformity of Hungarian prohibition of Cartesio's transfer of head office abroad, was the following:

'A) If a company, constituted 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 registered office to another Member State of the European Union relying directly on community law (Articles 43 and 48 of the Treaty of Rome)? 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?

Member State from banning outright a company incorporated under its legislation, to transfer its operational headquarters administration to another Member State.¹¹⁹ However, relying on the circumstance that *Cartesio* ultimately hoped to be able to transfer its real seat to Italy while continuing to be governed by Hungarian law, the Court rephrased in a different manner the questions posed.¹²⁰

The Court assumed that Hungarian law refused only the cross border transfer of seat abroad with *no change* on the *lex societatis* of the company. In reality, however, Hungarian law disallowed *every possibility* of transfer of seat of Hungarian companies abroad. The Courts ‘interpretation’ and rephrase of the questions posed by the referring Court – taking as starting point the result that *Cartesio* ultimately expected to achieve and not the circumstance that Hungarian legislation’s simply banned outright every possibility of a cross-border transfer of seat of Hungarian companies to another Member State – significantly shaped the Court’s analysis and explains, at least in part, the divergence in reasoning between the judgment of the Court and the opinion of its Advocate General.

2.4.2. The judgment – a critical assessment

2.4.2.1. *Daily Mail* is, after all, ‘alive and kicking’

The first and crucial problem that the Court faced in *Cartesio* concerned the scope of application of the Treaty provisions on freedom of establishment. The problem was whether a request by a company formed in accordance with the laws of a Member State to transfer its head office to another Member State falls within the scope of Articles 43 and 48 EC and hence if that company is entitled to the right to freedom of establishment conferred by those provisions.

In *Daily Mail* the Court had, in substance, considered that an issue such as the request by a company incorporated according to the laws of a Member State to transfer of its centre of

C) May Articles 43 and 48 of the Treaty of Rome 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, is incompatible with Community law?

May Articles 43 and 48 of the Treaty of Rome 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, is incompatible with Community law? (emphasis added).

¹¹⁹ See, in this sense, Advocate general Maduro, *Cartesio*, Paragraph 23, rephrasing the fourth question posed by the referring jurisdiction.

¹²⁰ *Cartesio*, paragraph 99. The Court considered that ‘the referring Court essentially asks whether 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 whilst retaining its status as a company governed by the law of the Member State of incorporation.’

administration to another Member State falls outside the scope of the Treaty provisions on freedom of establishment.

The Court in *Cartesio* began precisely by recalling both *Daily Mail*¹²¹ and the restatement, in *Überseering*, of the *Daily Mail dicta* where the Court had ‘concluded that a Member State is 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 Member State subject to restrictions on the transfer of the company’s actual centre of administration to a foreign country.’

¹²²

It also recalled that the Court in *Daily Mail* and *Überseering* had considered that ‘in defining [in article 58 of the EEC Treaty] the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether – and, if so, how – the registered office (*siège statutaire*) or real head office (*siège réel*) 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 which must be dealt with by future legislation or conventions’.¹²³

The Court endorsed this view by reiterating, in what constitutes a central part of the judgment, that:

‘In 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 the company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that Article [...] 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 freedom 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 the right to that freedom.’¹²⁴

[...] Thus 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

¹²¹ *Cartesio*, paragraphs 104-106.

¹²² *Cartesio*, paragraph 107 referring to *Überseering*, paragraph 70.

¹²³ *Cartesio*, paragraph 108 referring to *Daily Mail*, paragraphs 21-23 and *Überseering*, paragraph 69.

¹²⁴ *Cartesio*, paragraph 109.

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 reorganize 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.’¹²⁵

Visibly, the Court regarded the situation in *Cartesio* as identical to the situation in *Daily Mail*. For the Court *Cartesio* had, therefore, to be handled according to the ‘preliminary matter’ approach formulated twenty years early in *Daily Mail*.

Despite the likeness of the situations in these two cases there are, however, decisive differences between them that the Court could have recognized. *Daily Mail* concerned an attempt by a company incorporated under English law to avoid the tax-law requirements associated in the United Kingdom with the transfer to another country of the company’s tax residence. As described above,¹²⁶ the Court denied that the community freedom of establishment provisions applied in order to confer to *Daily Mail* the rights that it claimed to have vis-à-vis UK tax authorities.¹²⁷ The Court, moreover, expressly acknowledged that the cross border transfer at stake was envisaged by *Daily Mail* for tax avoidance purposes.¹²⁸ In essence, *Daily Mail* involved merely the imposition of specific tax restrictions on the transfer abroad of a company’s actual centre of administration and control.¹²⁹

Differently, *Cartesio* dealt with Hungarian legislation and practice on the registration of companies that *did not allow* outright for the transfer of *Cartesio*’s centre of administration abroad, either with or without a change of *lex societatis*.

Cartesio was, therefore, significantly different from *Daily Mail*, although on grounds diverse from those which were retained by the Court to distinguish the trilogy *Centros / Überseering / Inspire Art* from *Daily Mail*. The difference was significant and provided the Court a fine pathway to distinguish *Daily Mail* from *Cartesio*. Yet, the Court has overlooked those differences and remained faithful to *Daily-Mail*’s narrow conception of the scope of the

¹²⁵ *Cartesio*, paragraph 110 (emphasis added).

¹²⁶ *Supra* pp. 14-16.

¹²⁷ *Daily Mail* claimed that it was entitled under Article 52 EC (now 43 EC) to transfer its residence to the Netherlands without the consent demanded by UK tax legislation or, in the alternative, that it was entitled under the same article of the Treaty to an unconditional consent of the Treasury. See point 5 of the report for the hearing at p. 5487.

¹²⁸ *Daily Mail*, paragraph 7. That the purpose of the transfer was tax avoidance also results from mere reading of the first question posed in the *Daily Mail* case by the High Court of Justice, in its reference for preliminary ruling.

¹²⁹ This is expressly emphasized by the Court in *Überseering*, paragraph 70, where it stated that ‘[the Court in *Daily Mail*] concluded 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 company’s actual centre of administration to a foreign country’ (emphasis added).

community freedom of establishment as regards companies intending to transfer their seat abroad.

On the one hand, the Court returned to *Daily Mail*'s formalist and conceptual reasoning of the 'preliminary matter doctrine' that the Court refused to apply in *Centros*, *Überseering* and *Inspire Art*¹³⁰ in relation to inbound situations and, even more recently, in the intricate context of cross-border mergers, in *SEVIC*.

On the other hand, the way how the Court, in *Cartesio*, returns to *Daily Mail*'s preliminary matter approach as regards companies intending to leave their Member State of origin perpetuates the disparate treatment between outbound and inbound situations. Such disparate treatment is anchored on a formalist reasoning which does not reflect the functional sense of the freedom of establishment provided by the EC Treaty. A company purporting to 'move in' may more easily invoke the protection of the community right to freedom of establishment, than a company wishing to 'move out' of its Member State of origin. It must be recalled that the trilogy *Centros / Überseering / Inspire Art* concerned the immigration of foreign companies which had to be recognized in the host Member State as subject to the law of their Member-State of origin.¹³¹ This allowed the Court in *Überseering* and *Inspire Art*¹³², to distinguish easily the situations at stake from *Daily Mail* which involved an 'emigration' case.

The restatement of *Daily Mail* in *Cartesio* could, in a certain way, be anticipated as highly probable. In particular since the Court was not willing to distinguish the two cases, it would have to remain hostage of the 'jurisprudential trap' that it had created in *Überseering* and *Inspire Art* where it assumed that *exit* situations (*Daily Mail*) and *entry* situations (*Centros / Überseering / Inspire Art*) could legitimately be handled differently from the point of view of the community right of establishment.¹³³ Only in a few cases the Court has expressly overruled or expressly reconsidered previous judgments in the light of subsequent developments of its case-law.¹³⁴

¹³⁰ Pinheiro (2005: 283), a partisan of the 'preliminary matter' theory, points out, for example, that in *Centros* the registration of the pseudo-branch in Denmark of the UK company also involved PIL 'preliminary issues' which belonged exclusively to national law to resolve.

¹³¹ Judgments *Centros*, *Überseering* and *Inspire Art* are clearly an expression in the field of company law of the principle of mutual recognition. See, for instance, Garcimartín Alférez (2003: 677).

¹³² V. *Überseering*, paragraphs 70-72 and *Inspire Art*, paragraph 103.

¹³³ See Ringe (2005: 641) ('Probably, the Court will not dare to overrule the explanation it gave in *Überseering* and *Inspire Art* in the near future').

¹³⁴ Examples to date are judgments *HAG GF ("Hag II")*, C-10/89, [1990] ECR, p. I-3711, paragraph 10 and *Keck and Mithouard*, C-267/91 and C-268/91 [1993], ECR I-6097, paragraph 16. On the recent judgment *Metock*, C-

It is clear, however, that with the notable exception of *Daily Mail* (and now *Cartesio*), as advocate general Maduro stressed (with abundant references to case-law on the most diverse domains, from direct taxation to foreign security police and social policy), presently ‘the Court does not exclude in an *a priori* conceptual way, any particular segments of the law of the Member States from the scope of the right of establishment’.¹³⁵ One could expect, in the light of the Court’s case law subsequent to *Daily Mail*, that there were currently no domestic law ‘sacred cows’ exempt from Community Law scrutiny. *Daily Mail* and *Cartesio* contradict this logic and appear as a remarkable anomaly in the overall picture of the Court’s case-law on freedom of establishment.

The Court’s current broad understanding of the scope of the right of establishment – with which *Daily Mail* and *Cartesio* collide – is particularly visible in the Court’s judgment of the 13th December 2006, in *SEVIC Systems*. The Court in *Cartesio* was, moreover, expressly asked by the referring jurisdiction to consider the possible implications of *SEVIC* on *Daily Mail*.¹³⁶

2.4.2.2. ‘Circumventing’ *SEVIC Systems* and narrowing the scope of the right of establishment

At issue in *SEVIC* was a cross-border merger between SEVIC Systems, a German company, and SVC, a company from Luxembourg. The merger contract provided for the dissolution without liquidation of SVC and the transfer of all its assets to SEVIC Systems. The competent German authorities refused the application for registration of the merger in the German commercial register on the ground that German law provided only for mergers between legal entities established in Germany.

The Court’s interpretation of the scope of Articles 43 and 48 EC in *Daily Mail*, which was, as I have pointed out, particularly narrow and mainly concerned with rescuing the ‘real seat’ theory endorsed at the time by the vast majority of Member States, contrasts sharply with the Court’s broader conception of the scope of the right of establishment expressed on its case-

127/08, [2008] not yet reported, paragraph 58, the Court also expressly reconsidered the position previously adopted in its judgment on case C-109/01, *Akrich* [2003] ECR I-9607, paragraphs 50-51.

¹³⁵ Advocate general Maduro in *Cartesio*, paragraph 30.

¹³⁶ This was made evident by the judgment in paragraphs 26, 35 and 37 where the Court describes the dispute in the main proceedings and the questions referred for preliminary ruling. In academic writing the tension between *SEVIC* and *Daily Mail* was remarked by several authors. See, for example, Ballarino (2006: 723; Behrens (2006: 1676-1677; Heymann (2006: 676; Teichmann (2006: 357-358; Schmidtbleicher (2007).

law subsequent to *Daily Mail*. That conception – progressively crystallized in the Court’s case-law during these last twenty years – was synthesized in *SEVIC Systems* in the following way:

‘[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.’¹³⁷

This definition of the scope of the right of establishment is definitely broad.¹³⁸ In *SEVIC* the Full Court appears to have returned to the ‘simplicity’ of the black-letter and the teleology of the Treaty provisions as regards the definition of the scope of the right of establishment. One must recall, in effect, that the sole requirement imposed by Article 48 EC for a company to be conferred the right of establishment stated in Article 43 EC – be it primary or secondary establishment – is that the company must have been formed in accordance with the law of a Member State and have its registered office, central administration or principal place of business within the Community. Article 48 EC does not require its centre of administration to be situated in the Member State where the company was constituted.¹³⁹ These articles, moreover, do not distinguish, in substance, between primary and secondary right of establishment and do not give rise to a distinction between these two forms of establishment in a way that would lead us to conclude that primary establishment situations deserve, *a priori*, less protection by the EC Treaty than cases of secondary establishment. Neither do these articles allow the conclusion that restrictions on exit should deserve an inferior level of scrutiny in the light of the Treaty provisions on the right of establishment, than restrictions on entry.

Most significantly, the Court, in *SEVIC*, relying on the general and abstract definition of the scope of the right of establishment just stated, dismissed the *Daily Mail*’s ‘preliminary matter’ argument which had been submitted by the German and the Netherlands governments. These two Member States had, in effect, considered that Articles 43 EC and 48 EC should not apply to a merger situation such as that at issue in *SEVIC* since there was a preliminary issue that belonged exclusively to the domestic law of the Member States to resolve: to be able to invoke the community right of establishment companies participating in the cross-border merger would,

¹³⁷ See *SEVIC*, paragraph 18 and the case-law cited therein.

¹³⁸ It virtually makes the *possibility* of exercising a particular form of establishment fall, in itself, within the scope of the community freedom of establishment. See Ballarino (2006: 725).

¹³⁹ This has been clearly assumed by the Court in *Überseering*.

first of all, have to exist. German law dogmatically regarded a merger, according to the ‘theory of dissolution with universal succession’, as involving the extinction with no liquidation of the absorbed company with the transfer of all its assets to the incorporating company.¹⁴⁰ Consequently, a foreign absorbed company, to the extent that, according to German law, would become extinct in the course of the merger, could not logically enjoy the community right of establishment anymore – understood by the Court’s consistent case-law, as the right ‘to participate effectively in the economic life’ of the Member State of the incorporating company. The right of establishment conferred by the EC Treaty could not, therefore, be invoked against the prohibition of the registration of the merger in Germany.¹⁴¹

Advocate general Tizzano did not share this formalistic view that visibly echoes *Daily Mail*’s ‘preliminary matter’ logic. A consequence of the merger, namely the dissolution of the incorporated company, imposed by German law, was precisely the reason why the company was unable to carry out the merger anymore. This, according to the Advocate general, followed ‘an inverted logic’. German law deprived, in effect, an existing company, which enjoyed the right of establishment, of the possibility of benefiting from that right, simply because it would have to be liquidated in consequence of the merger and would, therefore, cease to exist.¹⁴² The Court joined its advocate general’s view and, dismissed the claim that the situation at stake was not covered by the Treaty provisions on freedom of establishment through the adoption of the general definition of the scope of the right of establishment quoted above. The Court broke in this manner with the preliminary matter theory philosophy.

SEVIC without raising doubts about the *solution* provided by the Court in *Daily Mail* – justified as it was in the context of the particular tax avoidance circumstances of the case – reveals that the Court presently conceives the scope of the right of establishment in broader terms.

¹⁴⁰ See Mucciarelli (2004: 424) comparing the German dogmatic conception of the merger through incorporation with the Italian conception which regards such a merger as a mere modification of the statutes of the absorbed company (statutory modification theory). According to this later view the dissolution of the incorporated company is to be regarded as a mere legal effect of the modification of the company’s statutes. The author points out that the Italian conception basically corresponds to the view implicitly endorsed by Advocate general Tizzano on his opinion in *SEVIC*.

¹⁴¹ See, in favour of this understanding, before and after *SEVIC*, Kindler (2006: 314, Rnd 878).

¹⁴² See Advocate General Tizzano in *SEVIC*, paragraphs 25-27. Kindler (2006: 481) replied to the Advocate general saying that ‘se si deve parlare di “logica rovesciata” [...] essa vada individuate dalla parte dell’Avvocato Generale e della Corte stessa. [...] Come può un soggetto venuto meno, per usare le parole della stessa Corte, “partecipare effettivamente ... alla vita economica (di un) paese” [...] contenuto essenziale, questo, della libertà di stabilimento?’

That broad definition of the scope of the right of establishment put forward in *SEVIC* seemed to be particularly relevant for the purpose of determining whether Articles 43 EC and 48 EC should also apply in a situation of cross-border transfer of seat such as the one in *Cartesio*.¹⁴³ During the last years preceding *Cartesio*, the Court appeared to be so distant from the *Daily Mail*'s preliminary matter reasoning that it came to the point of stating, in a 2007 judgment, that 'exercise of a right created by Community law, such as establishment of a company in another Member State or transfer of its effective seat', cannot in itself warrant the suspicion of abuse.¹⁴⁴ The Court, therefore, expressly recognized that the transfer abroad of a company's effective seat constituted a form of exercise of the community right of establishment.

Moreover Advocate general Tizzano and the judgment itself in *SEVIC* had also considered that according to the Court's case-law on freedom of establishment, namely *De Lasteyrie du Saillant*, Article 43 EC prohibits restrictions 'on entering' and restrictions 'on leaving' alike.¹⁴⁵ In this way the Court applied *De Lasteyrie du Saillant* – which explicitly treated on an equal basis restrictions on exit and restrictions on entry – for the first time in relation to legal persons in consonance with Article 48 EC where natural and legal persons are placed on same footing.¹⁴⁶

In light of all this, one could conclude that an outbound transfer of the seat of a company from one Member State to another, such as the transfer at stake in *Cartesio*, would fall within the scope of articles 43 EC and 48 EC. On the first place, *Daily Mail*'s preliminary matter logic had been rejected by the Court.¹⁴⁷ Secondly, the transfer of the head office of a company from one Member State to another, no less than a cross-border merger, constitutes a typical form of

¹⁴³ Some authors have indeed regarded *SEVIC* as the 'clue' for the solution of *Cartesio*. In this sense, Schmidtleicher (2007). See also Behrens (2006: 1676-1677).

¹⁴⁴ *Commission/Hellenic Republic*, C-178/05, [2007] ECR p. I-4185, paragraph 32.

¹⁴⁵ Advocate General Tizzano, *SEVIC*, paragraph 45. One must recall that in the context of freedom of movement of goods, articles 28 EC and 29 EC, as interpreted by the Court, handle differently restrictions on entry and restrictions on exit. In the context of freedom of establishment, however, the case-law of the Court, as *De Lasteyrie du Saillant* demonstrates, does not make such a differentiation.

¹⁴⁶ The judgment in *SEVIC*, paragraph 23, makes an explicit reference to *De Lasteyrie du Saillant* stating that the refusal of registration of the cross-border merger constituted a restriction within the meaning of Articles 43 EC and 48 EC. *De Lasteyrie du Saillant* became applicable also as regards companies' emigration. See also *supra*, footnote 55.

¹⁴⁷ Heymann (2006: 676) for example, considered that 'il est permis de penser, au vu de l'arrêt rapporté [*SEVIC Systems*], que la décision *Daily Mail* précité n'est plus de droit positif'.

exercise of the right of primary establishment, covered by Article 43 EC,¹⁴⁸ which has been interpreted as expressly conferring the freedom for economic operators, beneficiaries of that right, ‘to choose the most appropriate legal form for the pursuit of activities in another Member State’.¹⁴⁹ On the third place, there was no doubt that *Cartesio* intended to participate ‘on a stable and continuous basis, in the economic life of another Member State for an indefinite period’¹⁵⁰ or according to *Cadbury Schweppes*, *Cartesio* intended to pursue a ‘genuine economic activity through a fixed establishment’ in Italy.¹⁵¹

The Court in *Cartesio* remained far distant from these considerations. Instead of recalling the definition of the scope of the right of establishment that it had formulated in *SEVIC*, it has simply decided to distinguish *Cartesio* from *SEVIC*. It returned therefore, twenty years after, to the preliminary matter doctrine.¹⁵²

According to the Court, the issue at stake in *SEVIC* was not whether the German incorporating company could be regarded as an existing company according to German law. Differently, in *Cartesio*, according to the Court, the question was whether *Cartesio* could continue to be regarded as a company under Hungarian law after transferring its head-office abroad and, consequently, whether *Cartesio* remained capable of enjoying the community right of establishment.

The Court was visibly at pains to avoid *SEVIC*’s general and abstract definition of the scope of freedom of establishment. It decided, on this regard, to distinguish both cases on

¹⁴⁸ That the transfer of head-office of a company constitutes a form of primary establishment is commonly affirmed in academic writing. See, for instance, Edwards (1999: 375). Moreover, that is beyond doubt also for the Court. See for instance, explicitly, judgment of 2007 in Case *Commission v Hellenic Republic*, paragraph 32.

¹⁴⁹ See the judgment on Case C-307/97, *Saint-Gobain*, [1999] ECR p. I-6161, paragraph 43. For small and medium-sized companies, in particular, as Advocate general Maduro, *Cartesio*, paragraph 31, pointed out, a transfer abroad of their centre of administration is a simple form of conducting their activity into another Member State without having to face the burdens resulting from the need to interrupt its activity or having to face the relevant costs inherent to other more complex and burdensome forms of exercise of establishment in another member State. Surely other possibilities of establishment in another Member State may exist, such as the setting up of a subsidiary, an agency or branch or the participation on the capital of a company in another Member State, but this does not exclude the utility of the transfer of seat as a modality of primary establishment, in particular when a company realizes that the success of its business activity lays somewhere else.

¹⁵⁰ *Factortame*, C-221/89, [1991] ECR, p. I-3905, paragraph 20. See *Gebhard*, C-55/94 [1995] ECR, p. I-4165, paragraph 25, with a similar notion of the right of establishment.

¹⁵¹ *Cadbury Schweppes*, paragraph 54. See also with respect to this requirement of genuine economic activity what I have written supra pp. 27-28. Besides, it is well established that the intentions or purposes of the economic operators in exercising their freedom of establishment are irrelevant, save in case of fraud. See, explicitly in this sense, *Inspire Art*, paragraph 95.

¹⁵² *Cartesio*, paragraph 123, where the Court states the difference between *SEVIC* and *Daily Mail*.

grounds that are markedly formal. That distinction, however, did not solve the conflict which, in substance, continues to exist between *SEVIC* and *Daily Mail*.

When the Court in *SEVIC* described the scope of the right of establishment using the broad definition already alluded, it did so in general and abstract terms. The Court was not putting forward a definition of the right of establishment exclusively conceived to delineate the scope of that right in relation solely to cross-border mergers.¹⁵³ A cross-border merger, which necessarily involves two companies, is different from a cross-border transfer of head-office which involves only one company. Yet, both operations constitute modalities of exercise of the right of establishment in light of the general definition of this community right's scope put forward in *SEVIC* and the case law of the Court of the last years. Moreover, the claim that a company which ceases to exist in result of its participation on a certain cross-border establishment operation could not invoke the community right of establishment in order to take part on that operation had been raised in *SEVIC* and was effectively addressed and rejected by Court.

I do not intend to suggest that in the present state of the relations between Community Law and the national laws of the Member States there are simply no preliminary issues that have to be governed by the national laws of the Member States.

Surely it is necessary to set the boundaries between the community legal order and the national laws of the Member States in the field of company law. That demarcation will be made, specifically, through a conflicts' rule allocating to the domestic company laws of the Member States the competence to govern the preliminary matters of the existence, constitutive statutes, winding-up and dissolution of companies.¹⁵⁴ It results, moreover, from Article 48 EC that companies are beneficiaries of the right of establishment only to the extent that they actually

¹⁵³ Behrens (2006: 1676) rightly characterizes the Court's statement defining the scope of the right of establishment as having the 'legal nature [...] of a major premise which would then require the application to the facts of the case, i.e. to cross-border mergers.' This is emphasized by the paragraph of the Court's judgment in *SEVIC*, subsequent to the definition of 'establishment', where it considered that 'cross-border mergers, like other company transformation operations [...] constitute particular methods of exercise of the freedom of establishment [...] and are [...] amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC' [emphasis added].

¹⁵⁴ See Drobnič (1970: 530). As early as 1959 the Court has expressly formulated such a rule in its judgment on case 18/57, *Firme I. Nold KG contre Haute Autorité*, [1959] ECR (English Special Edition), p. 41, where it stated that provided that 'the limited partnership Nold was formed and established in Germany [...] its partnership deed, winding up and dissolution are governed by the national law provisions applying to the place where it has its registered office.'

exist in their Member State of origin and Member States surely remain competent to impose the extinction of their companies.

However, when the *extinction* of a company is imposed by the law of the Member State of origin of that company *in direct result* of its purported exercise of a particular modality of establishment in another Member State – namely by transferring its centre of administration abroad as a typical form of primary establishment – such extinction cannot be regarded as mere data immune to the scrutiny of the Treaty provisions on freedom of establishment. To follow such a reasoning would reflect exactly the same logic that the Court rejected in *SEVIC* and Advocate general Tizzano reputed an ‘inverted logic’, since the consequence of the transfer of head-office abroad (that is to say, the legal death of the company) is precisely the reason why the company cannot transfer its head office abroad as long as it does not exist anymore and, therefore, ceases to be entitled to enjoy the community right of establishment.

As Advocate general Maduro rightly pointed out, endorsing such a reasoning would amount to conferring on ‘Member States *carte blanche* to impose a ‘death sentence’ on companies constituted under their laws whenever such companies intended to exercise particular modalities of establishment to pursue their economic activity in other Member States.¹⁵⁵ It would deprive of meaning the right of establishment provided for by the Treaty with regard to those forms of establishment that the Member State of origin of the company may consider to cause its dissolution. So it would be, irrespective of the importance that such forms of establishment might have for the functioning of the internal market as useful means for a company to carry out its economic activity in another Member State.

Contrary to this line of reasoning, the Court, in *Cartesio*, admits that Member States, by controlling their companies’ incorporation and functioning have exclusive control over those companies ability to invoke the community right of establishment when they intend to transfer their seat abroad.

The Court reinforces, moreover, its endorsement of the preliminary matter theory by making a parallel between companies and natural persons. The Court states, in effect, that also with regard to natural persons the question whether a person is national of a Member State and ‘hence entitled to enjoy that freedom [of establishment] can *only* be resolved by the applicable

¹⁵⁵ Advocate General Maduro in *Cartesio*, paragraph 31.

national law' of the Member State of origin of a natural person.¹⁵⁶ This is remarkable in two regards.

On the one hand, the comparison made by the Court between companies and natural persons is grounded on the concept of nationality. The Court assumes that just as a Member State has the exclusive prerogative to decide which natural persons are to be characterized as nationals of that Member State and to what extent they may keep that nationality, the same happens with regard to companies. The Court reasons as if it was the loss of *Cartesio*'s Hungarian nationality that was at stake as a consequence of transferring its seat abroad. This is confirmed by paragraph 123 of the Judgment¹⁵⁷. This reference to the notion of nationality with regard to companies is misleading. What was at stake in *Cartesio* was, in effect, *Cartesio*'s "legal death" imposed by Hungarian law as a consequence of its transfer of seat abroad and not simply the withdrawal of its nationality.¹⁵⁸

On the other hand, and more important, the Court seems to imply that Member States have exclusive control over the definition of who are their nationals and, therefore, remain free to withdraw the nationality of their citizens even if such withdrawal occurs precisely because they intended to exercise the right of establishment by moving into another Member State.

Fortunately, one may doubt that the Court when confronted with a case where a Member State decided to withdraw the national citizenship to certain 'categories' of its nationals simply because they wished to move to another Member State to exercise an economic activity there, would reaffirm the *obiter dictum* now expressed in paragraph 109 of the judgment in *Cartesio*.¹⁵⁹ It is common ground that the Court does not interfere with the decision of a Member State to confer its nationality to a natural person (and, thus, according to article 17 EC, the European citizenship), even if that State is particularly generous on granting that national

¹⁵⁶ *Cartesio*, paragraph 109 [emphasis added].

¹⁵⁷ In this paragraph the Court states that the question in *Cartesio* and *Daily Mail* is the question of determining whether 'the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated'.

¹⁵⁸ It is regrettable that the Court insists on employing this outdated concept of nationality with respect to companies. When Article 48 EC determines the conditions for a company to be beneficiary of the community right of establishment, it does not use the concept of nationality with respect to companies. It merely determines which companies shall 'be treated in the same way as natural persons who are nationals of Member States.'

¹⁵⁹ Accepting this logic of the Court would render meaningless for example the Court's judgment in *De Lasteyrie du Saillant*. After all a Member State would do better to withdraw national citizenship to those of its nationals who decided to emigrate to another Member State without paying taxes on unrealized capital gains in their home Member State... See, on this regards Leible & Hoffmann (2009: 60) also criticizing the Court in *Cartesio* for having completely overlooked *De Lasteyrie du Saillant*.

citizenship.¹⁶⁰ But when it comes to the inverse situation where a Member State *withdraws* the nationality that it had previously granted to one of its citizens (and, consequently, the European citizenship) because that individual intends to exercise the community freedom of movement granted by the EC Treaty, it would be untenable that a Member could adopt such a measure with total immunity as regards the Treaty. It would ultimately mean that the more draconian the restrictions imposed by a Member State on the freedom of movement of their nationals – namely by withdrawing their nationality – the easier it would be for that Member State to avoid infringing the Treaty provisions on freedom of movement. The Court would surely not tolerate such situation.¹⁶¹ Interestingly, as regards companies, the Court in *Cartesio* unexplainably follows a divergent course.¹⁶² That happens regardless of the fact that the Court has introduced, as we will now see, a significant *caveat* in the judgment with respect to its preliminary matter approach.

2.4.2.3. Clarifying *Daily Mail* – The ‘squaring of the circle’

The Court realized that endorsing *Daily Mail*’s preliminary matter approach without spelling out its limits would entail that Member States would have at their disposal an unrestricted possibility of depriving the community freedom of establishment of all its meaning. Member States would, in effect, have the possibility of freely ‘killing at the border’ their companies as long as those companies intended to exercise the community right of primary establishment by moving their head-office abroad.

The Court refined, therefore, the ‘preliminary matter theory’ stated in paragraphs 109 and 110 of the judgment by making clear that it does not mean that Member States benefit of an ‘immunity’ to regulate the matter of cross-border transfer of seat in a way that completely forbids such transfer, namely when that transfer is accompanied with a change on the law governing the company’s personal status.¹⁶³

The Court’s analysis is based on a distinction between a company wishing to move-out its real seat while continuing to be subject to the same *lex societatis*, and a company wishing to move-out its seat with a change of *lex societatis*. This must be saluted as a progress in the case-

¹⁶⁰ To date one of the best example of such non-interference, can be found in the judgment on Case C-200/02, *Zhu and Chen*, [2004] ECR, p. I-9925. See, in particular, paragraphs 37-39.

¹⁶¹ See also in this sense, Szydło (2009: 715).

¹⁶² See Leible & Hoffmann (2009: 59-60) also criticizing this aspect of the judgment in *Cartesio*.

¹⁶³ *Cartesio*, paragraphs 111-112.

law of the Court vis-à-vis *Daily Mail* where that distinction had not been expressly made.¹⁶⁴ However, the manner how the Court achieves that result looks somehow like performing the ‘squaring of the circle’ which is recognized as an impossible operation in geometry.

In the first situation the Court considers that the connecting factor adopted by the real seat Member State of incorporation of a company – which requires the coincidence between its real seat and the place of incorporation – is broken when the company moves its head office abroad. In this case a Member State remains free to prohibit such a transfer by requiring the company to wind-up. Such situation will remain outside the scope of the freedom of establishment because the company, according to national law, does not exist anymore in the Member State where it was incorporated in result of having transferred its seat abroad.

In the second situation, however, the Court considers that the Member State cannot prevent the company, by requiring its liquidation, to transfer its seat to another Member State since the company ‘is converted into a form of company which is governed by the law of the Member State to which it has moved.’ According to the Court, this last situation, differently from the first, will be covered by the Treaty provisions on the freedom of establishment. This is so even if the transfer abroad of the company’s real seat occurs in this case (just like in the first situation) and the Member State of origin of the Company may equally consider that by transferring its central administration to another Member State the company ceases to exist and, consequently, cannot benefit anymore of the community right of establishment.

What the Court basically does is to dictate a ‘rule’, distinguishing between moving out the real head office with a change of *lex societatis*, and moving out the real head office without a change of *lex societatis*. The problem is not on the distinction in itself – it is important that it has been made – but instead on the manner how the Court makes that distinction and explains it.

Firstly, the Court contradicts the premises of the preliminary matter theory which constitutes the foundation and starting point of the Court’s own reasoning. It turns out, in effect, that it is self-contradictory that the ‘preliminary matter’ theory is valid only in the first situation when, in both cases, according to the national legislation of the Member State of incorporation,

¹⁶⁴ See Roth (2003: 207) suggesting a reading of *Daily Mail* largely along the lines now followed by the Court in *Cartesio*.

the required connecting factor might, to use the words of the Court, have been equally “broken”.¹⁶⁵

The starting point of the Court’s reasoning in *Cartesio* is that the question whether Article 43 EC applies to companies which seek to rely on the fundamental freedom of establishment is a matter that can only be resolved by the applicable national law. It belongs solely to that law to decide whether the companies incorporated therein exist and that existence is the precondition for those companies to enjoy the community freedom of establishment. The law of the Member State where the company is incorporated, by requiring the coincidence between the registered office and the real head office – the element which, as the Court expressly recalled, is the characteristic feature of the real seat theory¹⁶⁶ – may lead to the result that the real seat connecting factor is broken both in the case of transfer of seat with change of applicable law and in the case of transfer of seat without a change of applicable law. In both cases, according to the ‘preliminary matter’ logic, the company by ceasing to exist in its State of origin would not be capable anymore of benefiting of the right of establishment conferred by article 43 EC.

Secondly, as regards the explanation provided for that distinction, the Court spells out that in the situation of the transfer of seat with a change of the applicable law ‘the company is converted into a different form of company which is governed by the law of the Member State to which it has moved’.¹⁶⁷ This reflects an understanding of a cross-border transfer of seat with a change of *lex societatis* as involving a ‘conversion’¹⁶⁸ of the company into a different company in the host member State. However, a cross-border transfer of seat with a change of *lex societatis* does not necessarily have to entail a conversion of the company into a different company of the host Member State.¹⁶⁹ This laconic explanation provided by the Court seems insufficient to make the situation of the transfer of seat with a change of applicable law fall within the scope of the EC Treaty.

The distinction made by the Court between the two situations is, in any event, appropriate from the point of view of the result achieved: Member States may legitimately counter their

¹⁶⁵ See *Cartesio*, paragraph 110.

¹⁶⁶ See *Cartesio*, paragraph 105, restating paragraph 20 of *Daily Mail*.

¹⁶⁷ *Cartesio*, paragraph 111.

¹⁶⁸ See, expressly, *Cartesio*, paragraph 112.

¹⁶⁹ Article 8 of the SE Regulation n.° 2157/2001, for example, provides that the transfer ‘shall not result in the winding up of the SE or in the creation of a new legal person’. The SE company that transfers its seat abroad remains, therefore, the same, before and after the transfer, despite the fact that the transfer necessarily entails a change as regards the national law that will govern the SE.

companies' intentions to transfer their head office abroad while continuing to be subject to the *lex societatis* of origin, but they cannot prevent their companies from transferring their head-office abroad with a change of *lex societatis*.

It would have been, however, more appropriate and coherent with the case-law on freedom of establishment, if the Court had followed the suggestion of Advocate general Maduro and avoid trying to equate the preliminary matter theory of *Daily Mail*'s extraction with the felt need to include in the scope of the right of establishment the situation of the transfer of seat with the change of *lex societatis*.

On his Opinion Advocate General Maduro considered, in effect, that what is decisive in order to determine whether a company may invoke the right of establishment, is that such company, as stated by the Court in several occasions, has in mind the 'actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'.¹⁷⁰

Without invoking expressly *SEVIC*'s broad definition of the scope of the right of establishment, Advocate general Maduro substantially shared a similar view, in spite of the already mentioned concerns with respect to the situations where the establishment in another Member State constituted a purely artificial arrangement, such as a 'letterbox' or 'front' establishment. Accordingly, the Hungarian rules that allowed Hungarian companies to transfer their operational headquarters only within Hungarian territory, could not but be regarded by the Advocate general, as discriminatory against the exercise of the community right of establishment.¹⁷¹

Such rules could, however, be justified on grounds relating to the public interest such as the prevention of abuse and the need to protect the interests of creditors, workers, minority shareholders, among others. In this regard the Advocate general pointed out that not only 'the Hungarian government had not put forward any grounds of justification' but also it was 'difficult

¹⁷⁰ See paragraph 25 of the Opinion referring to judgments in case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 20; Case C-246/89, *Commission v United Kingdom* [1991] ECR p. I-4585, paragraph 21 and *Cadbury Schweppes*, paragraphs 54 and 66. In this last judgment the Court added that the concept of establishment 'presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there'. Interestingly it was precisely this 'genuine economic activity' test that Advocate General Darmon suggested that the Court should have followed in *Daily Mail* to determine whether the purported transfer of head-office by Daily Mail to the Netherlands was covered by the Treaty provisions on freedom of establishment.

¹⁷¹ Advocate General Maduro, *Cartesio*, paragraph 25.

to see how [...] an “outright negation of the freedom of establishment” could be necessary for reasons of public interest.’¹⁷²

A decisive *caveat* was in any event added, on this regard, by the Advocate general. He stated that ‘it may be acceptable for a Member State to set certain conditions before a company constituted under its own national company law can transfer its operational headquarters abroad. It might, for instance, be possible for the Member State to consider that it will no longer be able to exercise any effective control over the company and, therefore, to require that the company amends its constitution and ceases to be governed by the full measure of the company law under which it was constituted.’¹⁷³

With this *caveat* the Advocate general arrived at a result which is similar to the result reached by the Court: a Member State is allowed to deny a company the possibility of transferring its head-office abroad while continuing to be subject to its *lex societatis* of origin. Following the logic of the Advocate general, it would also be acceptable that the Member State of origin of the company could also impose the condition for the cross-border transfer of seat that such transfer is permitted by the host Member State, thus avoiding that the company could become a sort of *stateless entity*. This matches perfectly with the judgment at the point where it says that a Member State does not enjoy an immunity from the Treaty provisions on freedom of establishment when it forbids a company, by requiring its dissolution, ‘from converting itself into a company governed by the law of the other Member State, *to the extent that it is permitted under that law to do so.*’¹⁷⁴

This last *dictum* does not mean that the Court is conferring an unrestricted freedom to the Member State of destination to refuse the conversion and inbound transfer of seat by companies from other Member-States. The Court was not confronted in *Cartesio* with an inbound situation. In my view, notwithstanding the broad formulation of this *dictum* in the last part of paragraph 112 of the judgment, the Court merely purported to allow Member State’s of origin to prevent their companies from becoming *stateless companies* as a result of their transfer of seat abroad. This may eventually occur, for instance, in situations where it is impossible to establish a correspondence between the form of the company wishing to transfer its seat abroad with a change of *lex societatis* and the forms of companies known in the Member State of

¹⁷² Advocate General Maduro, *Cartesio*, paragraph 34.

¹⁷³ Advocate General Maduro, *Cartesio*, paragraph 33.

¹⁷⁴ *Cartesio*, paragraph 112. The emphasis is mine.

destination.¹⁷⁵ In such cases it would be legitimate for the Member State of origin to disallow the transfer, provided that the Member State of destination rightfully refuses to accept the company's conversion and immigration.

Faced with a case actually concerning an inbound situation (which was not the case in *Cartesio*) the Court, in any event, would have to subject to scrutiny the national provisions of the Member State of destination which refuse the conversion of another Member State's company into a company governed by its own law. Such refusal, in an 'immigration' context, would not benefit *a priori* of any particular immunity from the EC Treaty provisions on freedom of establishment. It would amount to a restriction on entry which could possibly be justified on grounds of general public interest.¹⁷⁶

In sum, the reasoning of the Advocate general appears to be largely coincident, in terms of result, with the Court's judgment. His reasoning was placed, however, at the more appropriate level of the justification, on grounds of general public interest, of the national measure forbidding the outbound transfer of head office which was regarded as restricting the exercise of the community right of establishment. The Advocate General avoided, in this manner, sanctioning the real seat connecting factor as incompatible with the Treaty and replacing it by an incorporation rule that would ultimately be imposed by the Court (acting as a *de facto* legislator) on the basis of the mere interpretation of articles 43 and 48 EC. Contrary to the judgment, the Advocate general, did not reach that result upstream, at the level of the definition of the scope of the right of establishment.

2.4.2.4. *Cartesio* as an invitation for harmonization measures on companies' cross-border transfer of seat

In *Cartesio* the Court rescued *in extremis* the last remnants of 'real seat theory' that had been left alive in Member States after the revolution operated by the *Centros / Überseering / Inspire Art* trilogy. The Court has avoided burying the real seat theory and forcing its

¹⁷⁵ The Draft proposal for a Fourteenth Directive on the transfer of the registered office of a company from one member state to another with a change of the applicable law makes express reference to this problem, pointing out, for example, the cases of UK charitable companies or Finish fisheries companies (*Kalatuskunta*) where it is impossible to establish such a correspondence (See comments concerning article 1). The draft proposal suggests that these companies should be excluded from the Directive's scope and therefore may ultimately be unable to transfer their registered office to another Member State.

¹⁷⁶ This is also revealed by the *Überseering* judgment where the Court refused the preliminary matter logic in an inbound seat transfer case.

replacement by an incorporation theory of primary Community Law extraction. Regrettably it has reached that result by sticking firmly to a preliminary matter theory which largely corresponds to a stage of pre-europeanization of PIL in the EC and remains, nowadays, an *avis rara* in the landscape of the case-law of the Court on freedom of establishment.

With the *Centros / Überseering / Inspire Art* trilogy the Court has decisively induced Member States to abandon the real seat theory.¹⁷⁷ With its pragmatic stance on that trilogy of cases the Court did not reveal much appreciation for the dogmatic dimension and coherence of Member State's company's PIL systems adopting the real seat theory. Neither did it reveal any remorse for the deconstruction of the real seat theory that those judgments, in substance, entail. Somehow paradoxically the Court, in *Cartesio*, appears to be trying to save now, on a conceptual and formalist basis, what still remains of the real seat doctrine.

In any event, *Cartesio* indicates that real seat Member States must now allow their companies, at least, to transfer their seat abroad with a change of *lex societatis*, without being wound up or liquidated, through cross-border conversion. If right now there are only a few real seat Member States allowing their companies to transfer their head office abroad with a change on the applicable law, one can imagine that the number of States allowing for this possibility cannot but grow.¹⁷⁸ Member States must, in light of the EC Treaty provisions on the right of establishment, give their companies no less than the possibility of transferring their seat abroad with a change of *lex societatis* through the conversion of the emigrating company in a form of company of the host Member State. If Member States do not allow for such a possibility they will be infringing the directly applicable EC Treaty provisions on the right of establishment.

The Court's ruling in *Cartesio* constitutes a clear incentive for the Commission to put forward a proposal of 14th Directive on the cross-border transfer of seat permitting a transfer of head-office with a change on the applicable law through the company's cross-border conversion into a form of company of the host Member State.¹⁷⁹ In light of the disparity of requirements

¹⁷⁷ Alférez (2006: 139) convincingly demonstrates that it is presently absurd for a Member State to continue to adopt the real seat theory. Drury (2005: 716) after *Überseering*, rightly pointed out that 'we appear to be on the verge of the total dismemberment of the protective effect of the real seat doctrine'. See, similarly, Pinheiro (2005: 286).

¹⁷⁸ Portuguese law is on the right track on this regard. It has aroused curiosity in other Member States that now, with *Cartesio*, are supposed to provide their companies with the possibility of transferring their seat abroad with a change of *lex societatis* through a cross-border conversion. See, for example, Leible & Hoffmann (2009: 60) with a reference to the original transfer of seat regime of Portuguese Law that the ECJ now implicitly endorses.

¹⁷⁹ See Vossestein (2009: 123) considering that in light of *Cartesio* it is possible to argue that there is an urgent need for such a 14th company law directive establishing an harmonized regime of companies' cross-border conversion.

imposed by Member States for both inbound and outbound cross-border transfers of seat, the creation of a harmonized regime governing the cross-border transfer of seat through a cross-border conversion appears as step that the EC legislator will now have to make.

The question that still has to be answered has to do, however, with the definition of the content of that future 14th company law directive. Provided that the recent judgment of the Court in *Cartesio* does not indicate that the Court wishes to reinvigorate the real seat theory (with its requirement of coincidence between real head office and registered office in the same State), should a future 14th company law directive permit only a transfer of registered office accompanied by the company's real seat, if so required by the law of the Member States involved, through a cross-border conversion?¹⁸⁰ Should not the EC legislator go further and allow companies to enter into a cross-border transfer of registered office alone with a change of applicable law? I will try to answer these questions in the following pages.

3. The non-EU legislative initiatives regarding the adoption of a 14th company law directive on the cross-border transfer of registered office – a critique

In *Daily Mail* and in *Cartesio* the Court expressly considered that the problem of the cross border transfer of the registered office and/or of the real seat of a company had to be dealt with by community legislation or conventions.¹⁸¹ However, twenty years after *Daily Mail* we are still waiting for a community legal instrument directly addressing that problem. Not even a proposal of that Directive has been put forward by the Commission. The best that has been achieved so far is a draft proposal of Directive which has seen daylight in 2004.¹⁸² Moreover, the efforts of the Commission regarding the adoption of such a 14th Directive were put to an end in late 2007.¹⁸³

The Commission took this decision notwithstanding the fact that the European Parliament, in its Resolution of the 4th July 2006 on recent developments and prospects in relation to company law, had expressly called 'the Commission to present in the near future a

¹⁸⁰ This is apparently what Vossestein (2009) suggests.

¹⁸¹ See *Daily Mail*, paragraphs 21-22 and *Cartesio*, paragraph 108.

¹⁸² That draft proposal is not available anymore at the Commission's website. One may still have access to that draft proposal at <http://www.uv.es/cde/TEXTOS/14th CLDd.pdf>

¹⁸³ On the 3rd October 2007 the European Commissioner for the Internal Market and Services (Mr Charlie McCreevy) delivered a speech at the European Parliament's Legal Affairs Committee (SPEECH/07/592) on which he has affirmed that the Commission has decided not to pursue its efforts concerning the adoption of the long awaited 14th Company law directive. See *supra* footnote 43

proposal concerning the Fourteenth Company Law Directive on the cross-border transfer of registered office of limited companies'.¹⁸⁴ On its resolution of the 25th October 2007, on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat, the European Parliament 'regret[ed] that the Commission, after a considerable delay, has now informed Parliament that it intends to make no legislative proposal for a Fourteenth Company Law directive on the transfer of seat' and '[r]eserv[ed] the right [...] to take further action with regard to the question of cross-border transfer of company seats'.¹⁸⁵ Eventually, on the 10 March 2009, the European Parliament adopted a Resolution with recommendations to the Commission concerning the adoption of a directive on company's cross-border transfers of the registered office.¹⁸⁶ In spite of all this pressure by the European Parliament the Commission does not reveal any signs of intending to move forward and deliver a proposal of 14th Company Law Directive.

3.1. Why we still have not found the 14th company law directive that for decades we been looking for?

The reasons for the Commission's current 'no-action' strategy regarding the adoption of a 14th Company Law Directive on the cross-border transfer of registered office are, apparently, two-fold.¹⁸⁷

First, the Commission apparently considers that after the entry into force in particular of the cross-border merger Directive of 2005, but also of the European Company Statute – the *Societas Europaea* (SE) Regulation – companies now have at their disposal the legal means to effectuate a cross-border transfer of registered office.¹⁸⁸ The cross-border merger Directive, in particular would provide to limited liability companies in the EU the possibility of transferring

¹⁸⁴ European Parliament resolution of 4 July 2006 on recent developments and prospects in relation to company law, P6_TA(2006)0295 (OJ C 3003 E, 13.12.2006, p. 114), point 33.

¹⁸⁵ European Parliament Resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat (P6_TA(2007)0491 (OJ C 263E, 16.10.2008, p. 671) points 5-6.

¹⁸⁶ European Parliament Resolution of 10 March with recommendations to the Commission on cross-border transfers of the registered office of a company (2008/2196(INI)), P6_TA-PROV(2009)0086 (not yet published).

¹⁸⁷ See Commissioner's McCreevy Speech in Berlin on the 28th June 2007 at the European Corporate Governance and Company Law Conference, SPEECH/07/441 of 28 June 2007 (Company law and governance today – 5th European Corporate Governance and Company Law Conference, Berlin); Mr. McCreevy's statement on the 3rd October 2007 (SPEECH/07/592) at the European Parliament's Legal Affairs Committee, Brussels, and the Commission's Impact assessment on the Directive on the cross-border transfer of registered office (Commission Staff Working Document) of 12.12.2007, SEC(2007) 1707, Part I, p. 24-25.

¹⁸⁸ See Mr Charlie McCreevy's Speech of the 3rd October 2007.

their registered office to another Member State with a change of *lex societatis* through a cross border merger. The company wishing to transfer its registered office to another Member State would be absorbed by a company previously set up in the Member State of destination.¹⁸⁹ The SE regulation would also give public limited liability companies the possibility of transferring their registered office from one Member State to another after being converted into SE's in their home Member State.¹⁹⁰ If these possibilities of indirect cross-border transfer of registered office from one Member State to another prove to be effective, the planned 14th company law directive would, in effect, become virtually redundant.

The second reason for the non-EU initiatives on the issue of the cross-border transfer of the registered office has to do with the fact that, according to the Commission, that matter could be clarified by the Court of Justice in *Cartesio*.¹⁹¹

In light of these arguments one could legitimately wonder if it still makes sense to adopt a community legal instrument directly addressing the issue of the cross-border transfer of registered office.

I submit that this 'no-action' strategy is currently unsustainable. With respect to the argument that *Cartesio* would contribute to clarify the problem of the cross-border transfer of registered office, it must be recalled that *Cartesio* only concerned the problem of the cross-border transfer of 'real seat'. The Court considered, on the one hand, that it is not incompatible with the community freedom of establishment that a Member State prevents companies incorporated under its law to transfer their head office abroad while continuing to be subject to the *lex societatis* of their home Member State. It considered, on the other hand, that Member States may not forbid their companies, by sentencing them 'to death', to transfer their seat abroad with a change of *lex societatis* through a conversion into a form of company of the host Member State.

¹⁸⁹ In the words of Mr. McCreevy, on his Speech of the 3rd October 2007, limited liability companies presently have the option to transfer their registered office through a cross-border merger, 'by setting up a subsidiary in the Member State to which they want to move and then merging the existing company into that subsidiary.'

¹⁹⁰ See same Speech. For a description of such process of transfer of registered office by way of the SE Regulation see Vossestein (2008: 60) and, more recently, the analysis of Van Eck & Roelofs (2009) dealing, *inter alia*, with the issue of the transfer of registered office of a public limited liability company at the same time of a conversion into an SE and suggesting future amendments to the SE Regulation.

¹⁹¹ See Commissioner's McCreevy Speech in Berlin on the 28 June 2007 and Commission's Impact assessment on the Directive on the cross-border transfer of registered office, *cit.*, pp. 24-25 and p. 38.

As I have already tried to explain, *Cartesio* constitutes an incentive for the Community legislator to adopt a legal instrument setting an harmonized legal framework which allows companies in the EU at least to transfer their seat abroad through a cross-border conversion into a form of company of the host Member State. *Cartesio* provides no justification for the Commissions' no-action strategy with regarding the adoption of the 14th company law directive.

As regards the argument that a 14th company law directive is not necessary anymore in light of the existing possibilities for cross-border transfer of registered office already permitted by the SE Regulation and the Cross-border merger directive, I shall consider, first, whether the possibilities that limited liability companies currently have to transfer their registered office in the EU are capable of justifying the decision of the Commission not to submit a proposal for a legislative instrument on company's cross-border transfer of registered office. Then, I shall try to envisage, in general terms, what the content of a future 14th company law directive should be in light of the recent case-law of the Court on the freedom of establishment. In this respect, I will argue that the recent judgment in *Cadbury Schweppes* should be taken into account in a future 14th company law directive which allows companies with share capital to transfer their registered office alone from one Member State to another.

3.2. The possible content of a 14th company law directive – two different approaches in a cross-roads

To determine whether the existing possibilities for a company to transfer its registered office from one Member State to another – either through a cross-border merger or through a conversion into an SE which will afterwards transfer its registered office to another Member-State – are capable of making the adoption of the 14th Company law directive on the cross-border transfer of seat unnecessary, one must consider the possible content of a future 14th company law directive.

There are basically two legislative approaches available for the Community legislator with respect to the creation of a community legal instrument on the cross-border transfer of companies registered offices with a change on the applicable law. The future 14th company law directive may either allow companies to transfer their registered office alone to another Member State, or it may allow only the transfer of registered office simultaneously with the transfer of the

company's real seat. The first approach may be characterized as 'broad' and the second as 'narrow'.¹⁹²

3.2.1 The 'narrow' approach

According to the narrow approach, a Member State applying the real seat principle would be allowed to require a company wishing to transfer its registered office to its territory to transfer also its real seat. Companies could relocate their registered office alone when moving to an incorporation Member State, but would have to relocate both registered and head-office when moving to a real seat Member State. In all cases, the applicable *lex societatis* would change with the transfer.

This narrow approach corresponds, in essence, to the solution of the draft proposal for a 14th Directive on the transfer of the registered office of a company from one Member State to another as it stood in 2007. It basically offers companies in the EU the possibility of converting themselves, without losing their legal personality and being wound up in the Member State of origin, into a form of company of the host-Member State and subject to its *lex societatis*.

In effect, Article 2 of the draft proposal defines the registered office of a company as including, 'depending on the law applicable to it', either 'the place where the company is registered' or 'the place where the company has its central administration and is registered.' As long as the 'registered office' is defined as including also the place where the company has its central administration and is registered an important concession is made to real seat Member States which require the coincidence between the registered office and the real head office of the company.¹⁹³ If this narrow approach is followed, the EU legislator will not impinge on Member States options regarding the relevant connecting factors adopted to determine the law applicable to companies. In any event, Member States, irrespective of whether they follow the 'incorporation' or 'real seat' theory, may not prohibit their companies to transfer their registered office to another Member State with a change on the applicable law.

In result of this, if a company from an incorporation Member State moves its registered office to another incorporation Member State it will be allowed to do so without the company

¹⁹² The Commission's Impact assessment on the Directive on the cross-border transfer of registered office, *cit.*, p. 42, presents these two approaches as the 'limited approach' and the 'extensive approach'.

¹⁹³ Drury (1999: 363-364) rightly considering that the draft proposal 'is more responsive to the demands of real seat states'.

having to be wound up or liquidated and reincorporated anew in the host Member State. This constitutes a major change for incorporation States which, as already pointed out, do not permit such transfer.¹⁹⁴ If, however, a company, either from an incorporation Member State or from a real seat Member State, intends to transfer its registered office to a real seat Member State, that company will have to transfer not only its registered office but also its head office into the host Member State.¹⁹⁵

Differently, a company from a real seat Member State may apparently transfer its registered office to an incorporation Member State and leave its central headquarters “behind”, in the home Member State, as long as the Member State of destination does not demand that the real seat is also transferred alongside with the company’s registered office. Even though the definition of registered office, according to Article 2 of the draft proposal includes, in alternative (b), the ‘place where the company has its central administration *and* is registered’, it does not seem acceptable that a real seat Member State of origin may object to such a transfer. Before the transfer, when the pre-transfer acts and formalities have to be completed, it will be virtually impossible for the authorities of the real seat Member State of origin of the company to object to the outbound transfer on grounds that the company has not transferred its real seat alongside with its registered office to the host Member State. Only *ex post* will it be possible to assess if the transfer of the company’s head office has, *de facto*, occurred or not. By then, however, the company will already be a company validly incorporated in another Member State and subject to its *lex societatis*. In light of *Überseering*, it will necessarily have to be recognized as such by the Member State where its real head office is located.¹⁹⁶

In any event, according to the narrow approach on the cross-border transfer of seat, Member States which accept companies to have their registered offices in their territories while retaining their central administration elsewhere are in a better position to attract companies to re-incorporate there and, therefore, to choose the company law that will govern them. Differently, Member States requiring the coincidence between real seat and registered office will remain on

¹⁹⁴ See *supra* pp. 5-6.

¹⁹⁵ This clearly results from article 10 (2) of the draft proposal according to which ‘a Member State may refuse to register a company [...] where the company’s central administration is not situated in that Member State.’

¹⁹⁶ See, differently Drury (1999: 366) considering, before *Überseering*, that ‘if a company starts from a real seat jurisdiction, because the definition of registered office in such cases includes the central administration, it must transfer all of this to the new State.’

the “loser’s side” on this regulatory arbitration game, being incapable of attracting foreign companies to re-incorporate in their territory.

A future 14th company law directive adopting such a narrow approach will not permit the development of a true market for re-incorporations in the EU similar to the one that actually exists in the US. There, the widely accepted *lex incorporationis* rule provides, at the outset, a level playing field for all States involved.¹⁹⁷ In the EU, on the contrary, we still have a ‘non-level playing field’,¹⁹⁸ as a result of the persistent adherence of several Member State to the real seat theory.

I shall now compare this narrow approach (possibly adopted by a future 14th company law directive) with the currently existing EC legislative measures facilitating the cross-border mobility of companies, namely the *Societas Europaeae* (SE) Regulation and the cross-border merger directive. This comparison attempts to determine whether these two legal instruments actually provide companies in the EU with an effective possibility of transferring their registered office from one Member State to another which is capable of rendering superfluous the adoption of a 14th company law directive that follows a narrow approach.

3.2.1.1. The ‘narrow’ approach and the *Societas Europaeae* (SE) Regulation compared

According to article 8(1) of the SE Regulation, an SE is allowed to transfer its ‘registered office’ to another Member State without the company having to lose its personality. Article 7, however, requires that ‘both registered office and head office be located in the same Member State’. This article even provides that a Member State may choose to require both elements – registered office and head office – to be located at the same address. It is not possible for an SE to transfer its registered office alone to another Member State while keeping its real head office elsewhere. This reveals that there is in the SE Regulation a predominance of the real seat theory.¹⁹⁹ The sanctions for possible violations of this requirement of coincidence between

¹⁹⁷ Roberta Romano stresses, in this regard, the crucial role that the internal affairs doctrine plays in the US in creating the conditions for a state competition for charters to occur. See Romano (1999: 370 ss. esp. 372)

¹⁹⁸ Wymeersch (2003: 690) (‘The present regulations create a non-level playing field: companies located in incorporation States enjoy a greater flexibility to move around in Europe than those in “*siège reel*” States. The same applies to legal systems: the former are more export-orientated than the latter.’)

¹⁹⁹ See Wymeersch (2003: 691) for possible explanations for the obligation of this requirement of coincidence between real and statutory seat, namely the need to tackle letter-box companies.

registered office and real head office are drastic.²⁰⁰ These sanctions are difficult to understand in light of Articles 43 and 48 EC as interpreted, in particular, in *Überseering*.²⁰¹

If the cross-border transfer of registered office to be adopted by a future 14th company law directive follows a restrictive approach it will be possible for an equivalent transfer of registered office accompanied by the transfer of real seat to occur on the basis of the SE Regulation. The public limited company intending to transfer its seat abroad will, however, first have to convert itself into an SE in its home Member State. The SE will subsequently transfer its registered office to the host Member State and finally, convert itself back, in the host Member State, into a public limited company subject to the *lex societatis* of that host Member State.²⁰² This operation requires, in principle, three different steps to be taken, whereas the transfer of registered office through the 14th company law directive would involve only one step. Therefore, even if it is possible for a public limited company to transfer its registered office from one Member State to another, through the SE Regulation, it would be cost saving to adopt the 14th company law directive.²⁰³

3.2.1.2. The ‘narrow’ approach and the cross-border merger directive compared

The cross-border mergers directive was adopted on the 26th October 2005 after a long struggle of more than thirty years.²⁰⁴ Article 4(1) of the cross border merger Directive provides

²⁰⁰ Article 64 (1) determines that ‘[w]hen an SE no longer complies with the requirement laid down in Article 7, the Member State in which the SE’s registered office is situated shall take appropriate measures to oblige the SE to regularize its position within a specified period either: (a) by re-establishing its head office in the Member State in which its registered office is situated or (b) by transferring the registered office by means of the procedure laid down in Article 8. Article 64 (2) provides, moreover, that ‘[t]he Member State in which the SE’s registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated’ and Article 64 (3) compels the Member State in which the SE’s registered office is situated to ‘set up a judicial remedy with regard to any established infringement of Article 7.’

²⁰¹ Some authors have rightly considered that sanctioning the lack of coincidence of the head office of an SE with its registered office in the same Member State is incompatible with the EC Treaty law in the light of *Überseering*. See, for instance, Wymeersch (2003: 693).

²⁰² See Vossestein (2008: 60) and Van Eck & Roelofs (2009).

²⁰³ See, already in this sense, Vossestein (2008: 60).

²⁰⁴ The first proposal for a legal instrument intended to facilitate cross-border merges dates back to 1973, when the Goldman Commission advocated the adoption of such an instrument on the basis of article 220.^o of the then EEC Treaty. The Commission presented a proposal for a tenth Company Law Directive on Cross-border mergers on the 14th January 1985 (COM 84/727, OJ C 23.01.1985). The main controversial issue blocking the adoption of such an instrument has always been the issue of employee co-determination with certain Member States and the EP rejecting its adoption on the basis that it could be used to circumvent national regulations on employee participation on companies’ supervisory boards. With the approval of the *Societas Europaea* regulation and in particular with the adoption of its complimentary directive on employee co-determination (Directive 86/2001 of the 8th October 2001, OJ L 294, 10.11.2001, pp. 22-32) gave a new push to the adoption of a directive on cross-border mergers with the

that each company taking part in the cross-border merger must comply with the provisions and formalities of the national law to which it is subject. According to the explanatory memorandum of the Commission, this provision is ‘designed to identify the law applicable in the event of a cross border merger to each of the merging companies’ which will remain subject to its national law. The Directive is neutral regarding the connecting factors adopted by the Member States to determine the *lex societatis* of the companies participating on the cross border merger. The only thing we know is that the national provisions adopted must, of course, comply with the EC Treaty provisions on the right of establishment.²⁰⁵

The cross-border merger directive gives to limited liability companies the possibility of transferring their registered offices from one Member State to another with a change of *lex societatis*. A limited liability company from one Member State may do so by setting up a subsidiary in the Member State where it wants to move its registered office and then merging into that subsidiary.

Even if both the home and the host Member States adopt the real seat theory the company will be able to transfer its registered office with a change of applicable law through a cross border merger, provided that it relocates its centre of control and management in the real seat Member State of destination. Furthermore, if the host Member State adopts the incorporation theory or, in substance, accepts the registered office to be severed from the company’s real seat, the company will be capable of transferring its registered office alone to the host Member State while retaining its central administration elsewhere.

In case that a future 14th company law directive adopts a narrow approach – as it happens in the draft proposal – then that legal instrument will not introduce, in substance, major improvements vis-à-vis the cross-border merger directive, with respect to the possibility of cross-border transfer of a company’s registered office that this directive presently gives to limited liability companies in the EU. In both cases, Member States adopting the incorporation theory

presentation of a brand new proposal by the Commission on the 18.11.2003. The *SEVIC* case may be rightly regarded as the last incentive necessary for the Council to move on and approve this Directive. See Behrens (2006: 1688). Only a few months before the adoption of his directive, Advocate General Tizzano delivered his opinion on the SEVIC case where he advocated the incompatibility with the Treaty rules on freedom of establishment of the German legislation which ruled out the possibility of a cross-border merger involving two companies, one German (the resulting company) and the other from Luxembourg (the absorbed company).

²⁰⁵ This is expressly recalled by recital 3 of the Directive.

will have a significant advantage in comparison with real seat Member States as regards their ability to attract foreign companies' registered offices.²⁰⁶

The basic difference between the cross-border merger directive and a 14th company law directive adopting a narrow approach lays in the fact that the cross-border merger Directive confers, *indirectly*, only a limited possibility of cross-border transfer of registered office, whereas the projected 14th company law directive would *directly* confer a similar possibility of cross-border transfer of registered office.

A cross-border transfer of a company's registered office through a cross-border merger will, in any event, constitute an indirect form of cross-border transfer of registered office from one Member State to another. Unlike a direct cross-border transfer, it will necessarily require the company to overcome the extra and cumbersome burden of having to set up a company in the Member State of destination which will subsequently absorb the foreign participating company.

The possibility that now limited liability companies have to emigrate from one Member State to another through a cross-border merger does not, therefore, render superfluous the adoption of a community legal instrument specifically addressing the issue of the direct transfer of the registered office from one Member State to another, even if that legal instrument follows a limited approach. There are many different roads leading to Rome... but if one road proves to be shorter than the others, we would better choose that one.²⁰⁷

A direct transfer of registered office to another Member State is, moreover, one of the simplest ways at the disposal of a company, in particular if it is a small or medium sized company, to move its business activity into another Member without having to face the additional costs and uncertainties, inherent to the operation of setting up of a shell company to merge into in the Member State of destination.

²⁰⁶ This is emphasized by the Commission on the Impact assessment on the Directive on the cross-border transfer of registered office, cit., p. 42. According to the Commission, Member States adopting the incorporation theory 'are likely to become the most popular reincorporation choices. [...] This may result in a disadvantageous position of the Member States applying the real seat principle as they may experience considerable outflow of companies registered in their territories and increased number of foreign legal forms operating on their national market.'

²⁰⁷ See Vossestein (2008: 60) also considering that a 'Directive on transfer of the registered office would thus be cost-saving'. The author adds that the possibility of transfer of the registered office of a public limited company through the SE Regulation would be even a more costly operation.

3.2.2 The ‘broad’ approach

A future 14th company law directive may adopt a broad approach with respect to the cross border transfer of registered office, in the sense that it may allow companies to transfer their registered office *alone* from one Member State to another with a change on the applicable law.²⁰⁸

According to this approach, a Member State may not require that a company moving its registered office into its territory also transfers its central administration there. Companies would consequently have the possibility of relocating solely their registered office into the Member State of their choice, with a change on the applicable law corresponding to the company’s needs, namely in terms of financing opportunities that may increase with a change of the company’s *lex societatis*.²⁰⁹

For Member States applying the incorporation doctrine this broad approach would not represent a major development vis-à-vis the limited approach. In effect, both approaches would enable companies from incorporation Member States to transfer their registered offices to another Member State without having to be wound up or liquidated in the home Member State and reincorporated anew in the host Member State. Differently, however, for real seat Member States – which disallow a transfer of a company’s registered office alone to another Member State with a change of *lex societatis* while retaining the company’s real head office in the Member State of origin – this broad approach would, in essence, represent a major shift on their traditional company’s PIL rules. It would definitely create a new era for companies’ free re-incorporation in the EU.

The adoption of such a wide approach would ensure a higher level of regulatory competition among member States²¹⁰ by conferring on all existing companies in the EU the possibility of choosing, at any moment of their corporate life, the applicable corporate legal

²⁰⁸ This is explicitly pointed out at the Commissions impact assessment report.

²⁰⁹ See Minutes of the 6th meeting of the 8th March 2007 of the Advisory Group on Corporate Governance and Company Law, p. 4, accessed at http://ec.europa.eu/internal_market/company/advisory/index_en.htm

²¹⁰ This is expressly acknowledged by the European Commission (Impact Assessment on the Directive on the cross-border transfer of registered office, cit., p. 28) when it states that ‘improving efficiency and the competitive position of existing companies by providing them with the possibility to choose the corporate legal framework that best suits their needs, while ensuring that the interests of the stakeholders are properly protected, contributes to the achievement of the Lisbon objectives. Making an option to transfer registered offices available to European businesses would make EU markets more open and enhance corporate mobility. Opening the borders for companies would also increase the pressure on EU Member States to make their laws more flexible and business friendly. This would contribute to the Lisbon aim to simplify and modernise regulatory environment and cut the red tape.’

framework that best suits their needs and enhances their value, without forcing the company to transfer its real seat to the Member State of destination.

This approach would have the advantage of providing an opportunity to regulate the regulatory competition that actually exists in the EU, by creating a level playing field among Member States regarding the conditions for company's cross-border mobility in the EU through re-incorporation. All Member States would, in effect, be placed on the same footing as regards the capacity to attract foreign companies' registered offices. In contrast with the narrow approach described above – or the currently existing situation created by the cross-border merger directive and the SE Regulation – incorporation Member States would not anymore have the privilege of occupying alone the 'pole position' on the regulatory competition race as the most likely destination for companies looking for the most advantageous *lex societatis* in the EU.

3.2.2.1. The 'broad' approach and the *Societas Europaeae* (SE) Regulation compared

The SE Regulation, as it presently exists, would not provide a possibility of transfer of registered office alone which may compare with a 14th company law directive that follows an extensive approach. As we have seen, the SE Regulation presently requires that the centre of administration of the SE and its registered office are located in the territory of the same State.

This requirement of coincidence between registered office and central administration in the same Member-State is subject to a reassessment procedure established in Article 69 of the SE Regulation. It is true that the recent proposal of the Commission for a Council Regulation on the Statute for a European private company (SEP)²¹¹ reveals that the Community legislator may, in the near future, cease to impose the coincidence between the head office and the registered office of an SE in the same Member State. In effect, the proposal of Statute for SEP allows the transferral of registered office – with no winding-up or any interruption or loss of legal personality,²¹² but with a change on the national applicable law²¹³ – from one Member State to another without a transferral of the SEP's centre of administration and control. A SEP may even be incorporated from the very beginning in a Member State while keeping its central

²¹¹ (COM/2008/396/final) of 25.6.2008

²¹² See Article 35 of the Proposed SEP Regulation.

²¹³ Article 4 of the Proposed SEP Regulation provides that 'where a matter is not covered by the articles of this Regulation or by Annex I, an SPE shall be governed by the law [...] which applies to private limited-liability companies in the Member State in which the SPE has its registered office'.

administration or principal place of business in a different Member State.²¹⁴ Be as it may, the requirement of coincidence between the company's registered office and its central headquarters on the *Societas Europaea* statute, despite being subject to heavy criticism,²¹⁵ is still the law in the SE Regulation as it presently stands.

The adoption of a 14th company law directive following an extensive approach would, therefore, give public limited companies in the EU the possibility of transferring their registered office alone from one Member State to another with a change of *lex societatis*, a possibility that they actually do not have on the basis of the SE Regulation.

3.2.2.2. The 'broad' approach and the cross-border merger directive compared

As we have seen, the cross-border merger Directive apparently confers to limited liability companies in the EU the possibility of indirectly transferring their registered office *alone* from one Member State to another. If the participating companies and the company resulting from the cross-border merger are from incorporation Member States there will be no obstacles for a successful transfer of registered office alone to take place through that merger. None of the Member States involved will require the head office of the resulting company to be located in the Member State of the registered office of that company.

That would resemble the possibility that companies in the United States have to reincorporate in another sister State through a merger into a subsidiary shell company incorporated in the State of the new domicile. In the US, apparently, a transfer of registered office can only be effectuated by means of a merger of the existing company into a subsidiary set up in the state of the new domicile.²¹⁶ In the EU, however, the differences among Member States' PIL systems on companies are bigger than those existing in the US. Even though conflict of laws and company law matters in the US remain basically governed by State law, not by Federal law, the incorporation principle and the internal affairs doctrine, which determines the application of the law of the State of incorporation to govern internal corporate affairs, is

²¹⁴ Article 7 (2) of the Proposed SEP Regulation provides that 'an SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered Office.'

²¹⁵ See, for example, Wymeersch (2003) and Werlauff (2004).

²¹⁶ See Romano (1993: 34). This is understandable in the light of the principles upon which the incorporation theory is based.

dominant.²¹⁷ There is, of course, the case of the State of California which submits to parts of California's Corporate Code those firms who do more than a half of their business in California and have more than a half of their shares owned by Californians.²¹⁸ In any case, the situation in the US is different from the situation in the EU where a significant number of Member States remains faithful to the real seat principle.

The question of knowing whether it will be possible, in general, for a company to transfer its registered office alone to another Member State through a cross-border merger will ultimately depend on the companies' conflict-of-laws rules of the Member States involved. A close regard allows us to conclude that a limited liability company intending to transfer its registered office alone from one Member State to another with a change of *lex societatis* through a cross-border merger may be unable to carry out that transfer when real seat Member States are involved. In effect, when the company resulting from the cross-border merger intends to have its registered office in a real seat Member State while retaining its head office elsewhere, that company will be confronted with the real seat Member State's requirement that the centre of administration of the resulting company be also located in its territory for its law to apply.²¹⁹

It is true that some commentators argue that the Directive confers a right of establishment, through a cross-border merger, to all companies in the Community.²²⁰ According to this view, the national PIL rules of the Member State of the resulting company requiring the company's head office to be situated in the same State as its registered office should be regarded as restricting the community right of establishment and ultimately incompatible with the EC Treaty. This view is questionable.

The cross-border merger directive does not contain any conflicts' rules to determine the *lex societatis* in place of the existing national conflict of law rules of the Member States. The Community legislator remained neutral with respect to the real seat *versus* place of incorporation everlasting controversy. The extent to which national conflict's rules may collide with the EC

²¹⁷ In the *McDermott Inc. v. Lewis*, 531 A.2d 206, of 1987, for example, Justice Moore of the Delaware Supreme Court remarked that a review of US cases since the early fifties 'finds that in all but a few, the law of the state of incorporation was applied without any discussion'. *Apud* Symeonides, Perdue & von Mehren (1998: 430, 433).

²¹⁸ See Symeonides, Perdue & von Mehren (1998: 438) and Brilmayer & Goldsmith (2002: 94).

²¹⁹ Article 4(1) b) of the cross-border merger Directive does not disallow a real seat Member State to decline the application of its law and, consequently, to frustrate the merger by insisting on the application of its real seat connecting factor.

²²⁰ See Rickford (2005: 1406-1407).

Treaty provisions on the right of establishment will ultimately have to be assessed by the Court of Justice.

In this respect it seems clear, after *Cartesio*, that the refusal by a Member State to apply its law, as *lex societatis*, to a company whose real seat is situated elsewhere, is not contrary to Community Law. *Cartesio* indicates that a Member State remains free to deny the application of its law to a company incorporated in that State when the company's head office is located elsewhere. Therefore, when a Member State decides that a company resulting from a cross-border merger cannot be governed by its law because it does not have its centre of administration in the territory of that State such demand is deemed compatible with Community Law. The Member State of the resulting company may then frustrate a cross-border merger based on the fact that the resulting company does not have its real seat in that State. In other words, the cross-border merger directive and the EC Treaty are not likely to compel a Member State to continue to subject to its company law companies having solely their registered office in that State. For Member States adopting the incorporation theory this situation poses no problem. Differently, however, a Member State with a more public and mandatory view of company law may rightfully decline the application of its law to companies upon which it cannot exercise effective supervision to the extent that their centre of administration and control is situated outside its jurisdiction. In sum, a company intending to transfer its registered office alone to a real seat Member State, through a cross-border merger with a subsidiary set up in the Member State of destination, may be disallowed to do so by this last State, on grounds that the company resulting from the merger does not have its central headquarters there.

Differently, if the resulting company has its registered office in an incorporation Member State, it will be possible for a participating company to succeed in transferring its registered office to that Member State with a change on the applicable law. This may be possible, in principle, even if the participating company intending to transfer its registered office is from a real seat Member State and the resulting company intends to keep its head office in that real seat State. That is to say, if, for instance, a company from a real seat Member State is absorbed through a merger by a company incorporated in the UK, the real seat State's company will succeed in transferring its registered office to the UK with a change of the *lex societatis*. If the resulting company intends to keep its centre of administration in the real seat Member State this situation is simply a case of a foreign company (the resulting company validly incorporated in

the UK and subject to UK law), with its centre of administration in a real seat State. This last State, in the light of *Überseering*, will have to recognize that company with the legal status that it enjoys in the Member State where it was formed.²²¹

In this last case, however, one must consider that if the UK company was set up there as a subsidiary of the real seat State's company but with no genuine economic activity in the UK, it may be doubtful, in light of the recent case-law of the Court on freedom of establishment and 'abusive practices' or 'purely artificial arrangements', that this situation will constitute a legitimate exercise of the community freedom of establishment. The whole idea of a company transferring its registered office to another Member State by setting up a shell company in the Member State of destination, which will subsequently absorb the first company through a cross-border merger, inevitably calls to our mind the case-law of the Court on the notion of abuse with respect to the community freedom of establishment, namely the *Cadbury Schweppes* judgment.

This last case, in particular, as we have already alluded,²²² reveals that there is presently a significant point of friction with respect to companies' freedom of establishment and the concept of abuse of law that the Court will have to address. This problem of the abuse of law in the context of the Community freedom of establishment is a fascinating issue that the Court will have to face in the near future. It is of the utmost relevance to determine to what extent a company will be capable of transferring its registered office alone from one Member State to another by setting up a shell subsidiary in another Member State which will subsequently absorb, through a merger, its foreign parent company. This last situation constitutes an interesting test-case which would allow us to see to what extent is the Court willing to apply the *Cadbury Schweppes* genuine activity / artificial arrangements test in the field of company law.

In light of *Cadbury Schweppes* I argue that the authorities of the Member State of origin of a company wishing to transfer its registered office alone to another Member State by setting a shell subsidiary in that Member State of destination, may legitimately adopt measures designed to prevent its mandatory provisions from being circumvented through that merger. Such defensive measures could in my view be adopted, when the setting up of a subsidiary in the Member State of destination, which will then absorb the emigrating company (of the Member

²²¹ See in this sense Rickford (2005: 1407), but based on a different reasoning. He considers, pure and simply, that the participating company's Member State has no legitimate interest, as a matter of public policy, on the location of the seat of the resulting company. This is not so evident because one State may surely claim to have a legitimate interest as long as the real seat of the company is located in its territory.

²²² See *supra* pp. 23-31.

State of origin), was solely intended to avoid the application of mandatory provisions of the Member State of origin in favour of the more advantageous company law of the other Member State and the company resulting from the merger retains all its economic activity in the Member State of origin of the emigrating company.

Cadbury Schweppes constitutes, therefore, an obstacle to the possibility of the transfer of registered office alone through a cross-border merger when the company set up in the Member State of destination has no genuine economic activity there.

Moreover, *Cadbury Schweppes* has relevance, as I will now try to explain, still at another level, when it comes to the definition by the EC legislator of the content of a future 14th company law directive on the transfer of registered office.

3.2.3. The ‘broad approach’ in light of the Courts’ case-law on freedom of establishment – Should it be followed? And how ‘broad’ should it be?

Through a particularly generous functional interpretation of the EC Treaty provisions on the right of establishment, *Centros* has established an era of freedom of choice of *lex societatis* for companies’ founders who may freely choose the Member State which offers the law that most pleases them and set up a company there. The company will subsequently have to be recognized, as such, in another Member State where it conducts all its activity through a branch. Alongside with *Überseering* and *Inspire Art*, *Centros* allowed for a peculiar form of mobility of companies’ head offices from incorporation Member States to real seat Member States. Every host Member State, irrespective of following the real seat theory, has to accept that a company incorporated in another Member State conducts all its business activity in the host Member State, while continuing to be subject to the *lex societatis* of the company’s home Member State, if this Member State so allows.

As regards ‘start up’ companies, in particular, these judgments have triggered a regulatory arbitrage among Member States by allowing companies’ founders to set up their company in the Member State with the most attractive company law. However, with respect to existing companies, the issue of reincorporation remains largely impossible in the EU. The cross border merger directive and the SE Regulation have introduced some possibilities of reincorporation for existing companies, but, overall, these legal instruments do not seem capable of establishing a new era of ‘free reincorporation’ for companies in the EU by allowing them to

transfer freely their registered office alone from one Member State to another. This is mainly due, as we have seen, to the real seat theory which remains deeply-rooted in several Member States.

It is true that the Court in *Cartesio* did not consider the issue of the cross-border transfer of the company's registered office alone from one Member State to another. In any event, it tackled the problem of a company wishing to 'relocate' its seat (i.e. the company's head office which was necessarily subject to registration according to Hungarian Law), without having to be wound up or liquidated in the home Member State, by converting itself into a form of company of the host Member State and governed by that Member State's law. Forbidding the company, in these circumstances, in its home Member State, to transfer its seat abroad was considered contrary to the EC Treaty provisions on freedom of establishment.

Conferring to companies in the EU the possibility of transferring their registered office alone from one Member State to another is not directly imposed by the EC Treaty provisions on freedom of establishment as interpreted by the Court in *Cartesio*. In any case, the Court reveals its commitment to guarantee freedom of establishment for companies in the EU, namely by considering that the EC Treaty provisions on freedom of establishment require Member States to allow outbound cross-border transfers of a company's registered office with a change of *lex societatis*, through a cross-border conversion. The *Cartesio* judgment, in sum, does not impose the adoption of a 'broad' approach with respect to a future 14th company law directive, but it does not preclude it either.

The severance of the location of a company's real head office from the location of its registered office should be permitted by a future 14th company law directive on the cross-border transfer of registered office. Companies should, therefore, have the possibility of transferring their registered office *alone* from one Member State to another and this possibility is in no way precluded by the recent *Cartesio* judgment.

On the first place, this solution appears as a corollary of the freedom of incorporation that start up company's presently have in the EU in light of *Centros / Überseering / Inspire Art*. The approach followed on this now famous trilogy should now be transposed to existing companies. The recent developments on the SPE (*Societas Privata Europea*) Regulation, which, according to the Commission's proposal, make possible a cross-border transfer of registered office without a transfer of the company's real seat, may provide an important indication about whether the EC

legislator will be capable of endorsing an equivalent approach on a future 14th Company Law directive on cross-border transfer of seat.²²³ *Cartesio* must not be understood, in this context, as providing any evidence that the Court wishes to reinvigorate the real seat theory with its requirement of coincidence of real head office and registered office in the same State. The circumstance that the Court did not consider the real seat theory, in itself (as a legal category adopted by several member States), to be incompatible with the community right of establishment, does not mean that the Court endorses the real seat theory in general terms and whatever its adverse effects on freedom of establishment might be. The Court is not really interested in PIL doctrines and legal rules as such but instead on possible adverse effects of those theories and rules on freedom of establishment.²²⁴

Secondly, the adoption of a broad approach on a future 14th company law directive is even more compelling if the Community legislator ceases to require the coincidence between registered office and registered office on the SPE and the SE Regulations.²²⁵ It has been recently suggested that conferring a similar level of mobility to national forms of company through the adoption of a 14th company law directive adopting a broad approach ‘might take away from the relative attractiveness of the SPE’ (and the SE), which constitute the new corporate forms that the Commission presently wants to promote.²²⁶

I agree that it might be appropriate to adopt the 14th company law directive only after the SPE Regulation is enacted. The adoption of the SPE Regulation does not, however, give any reason for the non-adoption of the 14th company law directive, or for the adoption of a 14th company law directive endorsing only a ‘narrow’ approach. On the contrary, the adoption of a ‘broad approach’ on a future 14th company law directive will be of the utmost importance to guarantee conditions for a ‘fair’ competition to arise between the newly created SE and SPE corporate forms and the traditional corporate forms of the Member States. Conferring better

²²³ The recent European Parliament Legislative Resolution on the proposal for a Council regulation on the Statute for a European private company (A6-0044/2009 of 4 February 2009, adopted on the 10 March 2009) approved, with amendments, the Commission proposal. Article 7 of the proposal did not suffer significant modifications. This central article of the proposal determines that ‘[a]n SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office.’

²²⁴ The *Überseering* judgment provides a particularly good illustration of this. In effect, at least since *Überseering*, it is clear that the Court does not consider compatible with the community freedom of establishment that an host Member State adheres to the real seat in such a way that companies are prohibited from transferring their head office into that State while continuing to be subject to the *lex societatis* of the home Member State.

²²⁵ As I have just pointed out the recent Proposal for a Council Regulation on the Statute for e European Private Company clearly moves in this direction and this may anticipate a future change on Article 7 of the SE Regulation.

²²⁶ Vossestein (2009: 123).

mobility conditions to SPE's and SE's than those given to national companies would be hard to justify. It would strongly induce national companies to convert into SPE's or SE's in order to benefit from the advantages of mobility of these later corporate forms. In the long run it would lead to the extinction of national corporate forms of real seat Member States. That extinction, moreover, would not necessarily be a consequence of the intrinsic inefficiencies of those national corporate forms. It would instead be the result of the inaction of the EU legislator which fails to stand up to its task in creating equivalent conditions of mobility (i.e., a genuine level playing field) for all companies (SPE's, SE's and national companies alike), in the internal market. It is convenient, therefore, that the Community legislator adopts, right after the enactment of the SPE Regulation, a 14th company law directive allowing Member State's limited liability companies to transfer their registered office alone from one Member State to another.

One must bear in mind, however, that allowing a company to transfer its registered office while retaining its real seat in the home Member State is substantially different from allowing a company to transfer its registered office alone to another Member State without exercising any sort of genuine economic activity in that host Member State.

This last option could possibly be justified on political and economic grounds as adequate to promote an even higher level of regulatory competition among Member States. In effect, a company would not only be allowed to maintain its real seat in the Member State of origin but, moreover, would not be compelled to exercise any sort of economic activity in the Member State to where the registered office is transferred. One must recognize, however, that the company in this situation would not be exercising the right of establishment conferred to companies by EC Treaty. This is problematic since the legal basis for the action of the EC legislator regarding the adoption of a future 14th company law directive is the attainment of freedom of establishment for companies.²²⁷ Anchoring such a broad approach – which would concede the highest level of freedom of reincorporation for companies in the EU – on the need to ensure companies' freedom of establishment, when a company transfers only its registered office to the Member State of its choice, *without exercising any economic activity* in that Member State, can hardly be justified as necessary to ensure that companies enjoy freedom of establishment in the internal market. Allowing for such a possibility would surely serve the purpose of promoting regulatory

²²⁷ Article 44(1) of the EC Treaty requires the Council to act by means of directives to attain freedom of establishment.

competition among Member States. However, the objective of the EC Treaty is the promotion of freedom of establishment for companies in the EU, and not the promotion, as a self-standing objective, of regulatory competition in the field of company law, which merely constitutes an effect or consequence of the community freedom of establishment.

In light of the Court's case law on freedom of establishment, in particular in light of *Cadbury Schweppes*, it is doubtful that the mere search by a company of the 'better' company law of another Member State – either through a transfer of registered office alone with no genuine economic activity in the host Member State, or the setting up of a company in the host Member State (with no genuine economic activity there) which will then absorb, through a merger, the parent company in the home Member State – may be regarded as a *form of exercise of the right of establishment*. The mere act of transferring a company's registered office to another State, or the setting up of a shell company there, does not necessarily entail any sort of participation 'on a stable and continuous basis in the economic life of [another] Member State'²²⁸ or (according to the *Cadbury Schweppes* test), it does not involve any exercise of genuine economic activity in that State. Such genuine economic activity is, as we know, an indispensable element for the community right of establishment to be invoked against national measures restricting its exercise.

The broad approach to be adopted in a future 14th company law directive should, therefore, in my view, reflect this concern and include a safeguard clause allowing Member States to prevent a transfer of registered office when the company does not have any genuine economic activity in the home Member State and such transfer is, as a consequence, solely intended to escape mandatory provisions of its Member State of origin.²²⁹ In these circumstances, the Member State of origin of the company should be allowed to object to a transfer of registered office alone when the sole aim of the operation, *in the absence of any exercise of economic activity in the host Member State*, is to circumvent the application of less advantageous mandatory provisions of the company's home Member State.²³⁰

²²⁸ *Gebhard*, paragraph 25.

²²⁹ See, already in this sense, Drury (1999: 371), in the context of the 'limited approach' of the draft proposal of the 14th Company law directive. The author points out that the draft proposal despite being 'a very significant and viable approach' to the problems posed by companies' migration in the internal market, 'does not tackle the problem of potential abuse where companies are moving just in order to escape unwanted tax provisions or to accomplish some nefarious purpose.'

²³⁰ See, apparently in this sense, the European Parliament Resolution of 10 March 2009 with recommendations to the Commission on cross-border transfers of the registered office of a company (2008/2196(INI)), P6_TA-

The circumstance that the EC legislator may adopt specific provisions designed to protect specific national mandatory provisions (for example, on workers co-determination) against the risk of circumvention resulting from a transfer of registered office alone of a company to a Member State which does not have any sort of co-determination regime – as the Commission actually did in the proposal for the SPE Regulation²³¹ – is not enough to ensure the safeguard of other mandatory company law provisions of the home Member State – such as, for example, minimum capital requirements or provisions on shareholders or managers liability – which could also be illegitimately circumvented through a cross-border transfer of registered office alone without the exercise of any sort of genuine economic activity in the host Member State.

It would be appropriate that the EC legislator adopts a broad approach on the future 14th company law directive by conferring on Member State's companies the right to move their registered office to another Member State, with a change of the applicable law, even if they intend to keep their centre of administration in the Member State of origin. However, a future 14th company law directive, should allow Member States to prevent companies from entering, through the cross-border transfer of registered office alone to another Member State, into artificial arrangements purporting solely to circumvent mandatory provisions of the national law applicable of the company's home Member State.

4. Conclusion

In *Cartesio* the Court rescued *in extremis* the last remnants of the 'real seat theory' that had been left alive in Member States after the revolution operated by the *Centros / Überseering / Inspire Art* trilogy. The Court has avoided burying the real seat theory and forcing its replacement by an incorporation theory of primary Community Law extraction. Regrettably it has reached that result by sticking firmly to a 'preliminary matter theory' which largely

PROV(2009)0086 (not yet published in the OJ). This Resolution requests 'the Commission to submit to the European Parliament, during 2009, on the basis of Article 44 EC, a legislative proposal for a directive laying down measures for coordinating Member States' national legislation in order to facilitate the cross-border transfer within the Community of the registered office of a company formed in accordance with the legislation of a Member State' (point 1). Interestingly, this resolution expressly points out that such proposal must have regard to the recent judgment of the Court in *Cadbury Schweppes* (footnote 9). This reference to *Cadbury Schweppes* reveals that the EP is concerned with the need to allow Member States to prevent artificial arrangements, such as, for example the cross-border transfer of registered office alone of a company to another Member State without the exercise of any genuine economic activity in the host Member State. In the same vein, Recommendation 1 on the Annex to the Resolution stresses that 'the transfer shall not circumvent legal, social and fiscal conditions'.

²³¹ See Article 38 of the Proposal.

corresponds to a stage of pre-europeanization of PIL in the EC and remains, nowadays, an *avis rara* in the landscape of the case-law of the Court on freedom of establishment.

In any event, *Cartesio* indicates that real seat Member States must now allow their companies, at least to be capable of transferring their seat abroad with a change of *lex societatis*, without being wound up or liquidated, namely through a cross-border conversion. If right now there are only a few real seat Member States allowing their companies to transfer their head office abroad with a change on the applicable law, one can imagine that the number of States allowing for this possibility cannot but grow.

Cartesio constitutes an important incentive for the Community legislator to adopt, at last, a 14th company law directive on the cross-border transfer of registered office.

The possibility of cross-border transfer of a company's registered office, either through a cross border merger, or on the basis of the SE regulation, presently faces significant pitfalls and uncertainties which render untenable the Commission's current no-action strategy regarding the adoption of the 14th company law directive on the cross-border transfer of registered office. In particular, a cross-border transfer of registered office alone from one Member State to another through a cross-border merger with a company incorporated in the Member State of destination is actually unavailable, at least for companies wishing to relocate their registered office to a real seat Member State while keeping their central headquarters elsewhere. If a future 14th company law directive allows a transfer of registered office alone – and I argue that it should allow for this possibility – then it will, in no way, be redundant vis-à-vis the cross-border merger directive. Even if a future 14th company law directive purports only to allow a transfer of registered office accompanied by the transfer of the company's real seat, it will still be more efficient (i.e. cost-saving) to adopt that directive, than relying on the possibilities of cross-border transfer of registered office presently offered by the SE Regulation and the cross-border merger directive.

In essence, the central question has to do with the definition of the aims and content the 14th Company law directive to be adopted and not whether it should be adopted at all. On this regard I argue that the EC legislator should adopt a 'broad approach' on the future 14th company law directive and allow companies to transfer their registered offices *alone* from one Member State to another with a change on the applicable *lex societatis*. The *Cartesio* judgment does not endorse this approach but it does not disallow it either.

While following such a broad approach the EC legislator should, in any event, take into account the recent case-law of the Court on freedom of establishment and abusive practices, in particular *Cadbury Schweppes*. It should, therefore, expressly allow Member States to prevent companies from entering, through the cross-border transfer of their registered office alone to another Member State into artificial arrangements solely designed to circumvent mandatory provisions of the national law applicable of the company's home Member State.

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