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STUDENT PAPER

C-210/06 *Cartesio*
Increasing corporate mobility through outbound establishment

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1. Introduction

'If all the ingredients necessary to make a company[1] tick, *i.e.* people, capital, goods, services, are free to move within Europe, we could legitimately deduct that companies are not only free to move across borders, but that they actually do'.[2] This statement can be contrasted with the assessment of the current situation by Wymeersch: 'It is becoming increasingly apparent that the traditional legal set-up constitutes a significant burden on intra-European mobility of companies, and a drag on the competitiveness of Europe's overall economy'.[3] What the above statements have in common is that they agree on the desirability of corporate mobility, but they disagree to which extent this is already possible. In addition there is an economic rationale for removing obstacles to corporate mobility. Removing obstacles to corporate mobility facilitates the optimal allocation of available resources throughout the Community,[4] which in turn has the effect that the economy of the Community will be able to compete better with, for example, China or the United States.

Corporate mobility is the possibility to or the actual transfer of a company from one place to another. One of the rationales offered for the transfer of a company is that it becomes subject to a different legal regime which is more suitable for that company. This seeking of the 'most fitting corporate forms and company law rules' has been acknowledged to be the rationale underlying Articles 43 and 48 EC which provide for the freedom of establishment both for legal and natural persons.[5] The scope of this freedom has been the object of substantial judicial activity by the ECJ especially in the past decade. In *Daily Mail*[6] the ECJ dealt with the transfer of the

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1 The term company is used in this paper to refer to any form of business organisation.
2 P. Pelle, 'Companies crossing borders within Europe', 2008 *Utrecht Law Review*, no. 1, p. 6.
3 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 664.
4 J. Carruthers *et al.*, 'Company Law in Europe – Condoning the Continental Drift?', 2000 *European Business Law Review*, p. 92.
5 E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, p. 1356.
6 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483.

head office of the company from the UK to the Netherlands for tax purposes. The Daily Mail was unsuccessful in challenging the refusal of permission to do so by the UK Treasury Department. In *Centros*[7] the founders of a company that was registered in the UK, but carried out all of its business in Denmark, successfully challenged the refusal of the Danish commercial registry to register their company. The *Überseering*[8] case dealt with a refusal by a German court to recognise Überseering as a company because it was incorporated in the Netherlands but carried out the overwhelming majority of its business in Germany. This refusal was also challenged successfully. In *Inspire Art*[9] the ECJ held that the additional requirements laid down in Dutch law for registration in the commercial registry which applied only to companies incorporated outside the Netherlands were a violation of Community law. The final judgement is the *Cadburry Sweppes*[10] judgment, where a UK incorporated company had set up two subsidiaries in Ireland to benefit from tax advantages. The Court held that measures aimed at removing such advantages are a violation of Community law, except in situations where such advantages are themselves an abuse of Community law. These judgments have clarified a great deal but have, in turn, given rise to new questions.

In 2006 the Szeged Court of appeal (Hungary) requested a preliminary ruling in relation to a limited partnership incorporated in Hungary (Cartesio Bt) which wished to transfer its central place of administration to Italy whilst remaining subject to Hungarian company law. This was not allowed under Hungarian law and the compatibility of this prohibition with Articles 43 and 48 EC was referred to the ECJ for a preliminary ruling. As a result, the ECJ once again had the opportunity to consider the compatibility of an obstacle to corporate mobility with the freedom of establishment as enshrined by the Treaty.[11] This paper will analyse whether the legal space for corporate mobility under the freedom of establishment as guaranteed by Articles 43 and 48 EC has increased after the *Cartesio* judgement.

When analysing cross-border corporate mobility three distinctions must be kept in mind. First of all, each company has a registered seat and a central place of administration. The registered seat refers to the place in which the company is registered in either the national or sub-national register. The centre of main interest, on the other hand, is the place where the company conducts most of its business activities. Second, the process of a cross-border transfer is dissected into two aspects: outbound establishment and inbound establishment. Outbound establishment refers to the transfer of a company from its current place up to the border of the country where it is currently established. Inbound establishment refers to the transfer from the border of the country in which it is currently established to its establishment in the country of destination. Third, a distinction is made between primary establishment, the setting up of a company, and secondary establishment, the setting up of a branch of an already established company.

To answer the above-formulated question the following will be looked at in this paper. First, the company law background of this case is examined, then the issues related to private international law are considered, which in turn are followed by a summary of the AG's Opinion and the judgement of the Court. In assessing the impact of the judgement on corporate mobility, first the distinction between primary and secondary establishment is examined. This is followed by a review of the alleged distinctive treatment of outbound and inbound establishment scenarios by the ECJ. Subsequently, the impact of the judgement on the real seat and the incorporation

7 Case C-212/97, *Centros Ltd* v. *Erhvervs – og Selskabsstyrelsen*, [1999] *ECR* I-1459.
8 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-09919.
9 Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd*, [2003] *ECR* I-10155.
10 Case C-196/04, *Cadbury Schweppes*, [2006] *ECR* I-4585.
11 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgment delivered 16 December 2008).

doctrine is analysed. Finally, the justification of restrictions to the freedom of establishment is examined.

This paper does not deal with the abuse of Community law. Although this was an aspect in the *Centros*, *Inspire art* and *Cadbury Schweppes*[12] cases it was not addressed by the Court in the *Cartesio* case. In addition, only those aspects of *Cartesio* that relate to corporate mobility will be considered. Moreover, the transfer of the registered seat and the 14th Company Law Directive will not be dealt with. The Commission halted its work on that directive because it first wanted to await the outcome of the *Cartesio* case.[13] However, it transpired that the *Cartesio* case did not deal with the transfer of the registered seat and is therefore not part of this paper.

2. Company law background

One of the prerequisites set by the European Union for Hungary to join the EU was the approximation of Hungarian company law to Community law.[14] As a result of this, Hungarian company law was extensively amended in the period preceding 2004.

In Hungary significant changes have been made in the corporate establishment procedure, the minimum capital for listed companies and the role of the General Meeting of shareholders, but the most relevant amendment for this paper was the switch from the real seat to the incorporation doctrine.[15],[16] However, when the preliminary reference was made to the ECJ the real seat doctrine was still adhered to in Hungary. Regarding Italian company law it suffices to note that Italy adopts the real seat doctrine.[17] This is not accepted by all scholars, some argue that Italy adopts a qualified version of the incorporation doctrine.[18]

Cartesio Oktató és Szolgáltató Bt (hereafter Cartesio) was a limited partnership established and registered in Baja, Hungary.[19] Under Hungarian law this form of firm requires that there is at least one general (unlimited) partner and one limited partner.[20] Save where otherwise provided for in the articles of association, only the general partner is allowed to represent the partnership.[21] This form of partnership lacks legal personality.

In short, in *Cartesio* the ECJ dealt with a case in which a limited partnership under Hungarian law intended to transfer its central place of administration from a Member State (hereafter MS) adhering to the real seat doctrine to another MS adhering to the real seat

12 Case C- 196/04, *Cadbury Schweppes*, [2006] *ECR* I-4585.

13 G.-J. Vossestein, 'Transfer of the registered office, The European Commission's Decision not to submit a Proposal for a Directive', 2008 *Utrecht Law Review*, no. 1, p. 57.

14 A. Kisfaludi, 'The Harmonisation of Hungarian Company Law – A Pendular Process', 2004 *European Business Organization Law Review*, p. 706.

15 P. Pelle, 'Companies Crossing Borders within Europe', 2008 *Utrecht Law Review*, no. 1, p.11.

16 The real seat and incorporation doctrine will be explained in more detail in the next section.

17 K. Baelz *et al.*, 'The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Überseering of 5 November 2002 and its Impact on German and European Company Law', 2002 *German Law Journal*, no. 12 and J. Lowry, 'Eliminating Obstacles to Freedom of Establishment: the Competitive Edge of UK Company Law', 2004 *Cambridge Law Journal*, no. 2, p. 332.

18 W. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', 2002 *The International Lawyer*, p. 1016.

19 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgment delivered 16 December 2008), Para. 2.

20 Hungarian Investment and Trade Development Agency, *Corporate Legislation*, available on: <http://www.itdh.com/engine.aspx?page=Itdh_Corporate>, last visited 6 January 2009. Last update: August 2008. Therefore this form of company is comparable to the French *societé en commandite simple* (SCS), the German *Kommanditgesellschaft* (KG) and the UK limited partnership (LPA), see A. Dorresteijn *et al.*, *European Corporate Law*, 1994, pp. 26-27.

21 Hungarian Investment and Trade Development Agency, *Corporate Legislation*, available on: <http://www.itdh.com/engine.aspx?page=Itdh_Corporate>, last visited 6 January 2009. Last update: August 2008.

doctrine.[22] Although Cartesio Bt lacked legal personality the Court referred to Cartesio Bt as a company and treated it as such.

3. Private international law and corporate mobility

While it is absent from the Opinon of AG Maduro,[23] the Court refers in Paragraph 20 of the judgment to the relevant parts of private international law within Hungarian law. Below, first the appropriateness of private international law (PIL) to facilitate corporate mobility is examined and then the real seat and incorporation doctrine are looked at.

The company law-related rules of PIL laid down in national legislation determine which companies are governed by the respective national law. Benedettelli has argued that the currently existing 'legal regime on conflicts of jurisdiction and conflicts of law in company law' is unsatisfactory because it fails to remove obstacles to corporate mobility.[24] The legal regime referred to by Benedettelli consists of the 1968 Brussels Convention, the Brussels I Regulation and the 1980 Rome Convention.[25] Due to the choices these instruments leave to the MS, the MS have chosen to adopt different connecting factors, *i.e.* variations of the real seat and incorporation doctrines. This has resulted in the situation where no uniform PIL regime has emerged. This variety in connecting factors creates problems, for example: 'a company, validly established according to the law of a Member State, is considered non-existent within another Member State'.[26] The current legal regime of PIL does not offer a satisfactory solution to such problems and therefore hampers corporate mobility.

The real seat and incorporation doctrines can be considered conflict of laws rules because they determine which entities are recognised as companies and therefore also which national law is applicable to that entity. The real seat doctrine states that 'only one state should have the authority to regulate a corporation's internal affairs and that this authority belongs to the state in which the corporation has its real seat (*siege reel* or *effektiver Verwaltungssitz*)'.[27] In contrast the incorporation doctrine states that 'the existence of a company, as well as its subsequent dissolution, are governed by the law of the State of incorporation (State of incorporation doctrine or *Gründungstheorie*)'.[28]

The above shows that the failure of the indicated PIL treaties to create a system to deal with conflicts of law in company law matters provided at least a rationale and opportunity for states to develop their own conflict of law rules.[29] Moreover, one could argue that both the real seat and incorporation doctrine and the case law of the ECJ are an attempt to bridge the gaps that the PIL

22 Prior to the judgment of the ECJ there existed some doubts as to whether this case did indeed deal with the transfer of the central place of administration or to the registered seat, see M.-L. Lennarts, 'Company Mobility Within the EU, Fifty years on; From a Non-Issue to a Hot Topic', 2008 *Utrecht Law Review*, no. 1, p. 2.

23 AG P. Maduro in case C-210/06, *Cartesio*, delivered on 22 May 2008.

24 M. Bennedettelli, 'Conflicts of Jurisdiction and Conflicts of Law in Company Law Matters Within the EU 'Market for Corporate Models': Brussels I and Rome I after *Centros*', 2005 *European Business Law Review*, p. 55.

25 In particular Art. 53(1) and Art. 16 note 2 of the 1968 Brussels Convention, Art. 60(1) and (2) of the Brussels I Regulation and Art. 1(2) of the 1980 Rome Convention (the Rome Convention will be replaced by Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations that will enter into force on 17 December 2009).

26 M. Bennedettelli, 'Conflicts of Jurisdiction and Conflicts of Law in Company Law Matters Within the EU 'Market for Corporate Models': Brussels I and Rome I after *Centros*', 2005 *European Business Law Review*, p. 57.

27 W. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', 2002 *the International Lawyer*, pp. 1015 -1016.

28 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 14.

29 W. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', 2002 *The International Lawyer*, pp. 1016-1017 and 1021.

conventions left.[30] As such it is not surprising that the case law of the ECJ and these two doctrines interact.

4. AG Maduro's Opinion

4.1. Summary of the Opinion

For the present purpose it is only the answer that is given to the fourth question that is relevant. The other three deal with the procedure of a reference for a preliminary ruling. The AG reformulated question four as follows: 'whether Articles 43 EC and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State'.[31] First, a summary of the Opinion is given and subsequently some comments are presented.

In answering this question the AG started by qualifying the relevant parts of Hungarian company law as falling under the real seat doctrine. Moreover, it is concluded that this case falls within the scope of the freedom of establishment under Community law.[32] However, it is not clear from the text whether this is based on either the proposed discriminatory effect[33] or the excerpts from the case law that are referred to, or a combination of the two.[34]

Furthermore, having taken *Daily Mail* as a starting point we turn to the apparent contradictions between *Daily Mail*, on the one hand, and *Centros*, *Überseering* and *Inspire Art*, on the other. Instead of attempting to distinguish these cases the AG concluded on the basis of the *Cadbury Schweppes* judgment that all these cases have the following in common: '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'.[35] In addition, it is suggested that instead of exempting parts of national law from scrutiny as to compatibility with the freedom of establishment, the Court opted to look at the effect of national provisions on the freedom of establishment. The review of the case law will be completed by stating that what has been defined as the core of the *Daily Mail* case can at present no longer hold true.[36]

Finally, the conclusions from the review of the case law are applied to the *Cartesio* case. It is suggested that the relevant parts of Hungarian company law are a restriction of the freedom of establishment and therefore need to be justified on 'grounds of general public interest'.[37] However, in this case the restrictions could not be justified.[38] Therefore Maduro concluded that: 'Articles 43 and 48 EC [do] preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State'.[39]

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30 Rather than a cause and effect relation, the development of the case law is placed in the relevant context, when seen as an attempt to solve problems that could not be solved under PIL

31 AG Opinion, Para. 23.

32 AG Opinion, Paras 24-25.

33 In comparison with companies operating solely within Hungary, companies operating cross-border would be limited by the real seat doctrine in the amount of activity they can develop.

34 AG Opinion, Para. 25.

35 AG Opinion, Para. 29.

36 AG Opinion, Para. 31.

37 AG Opinion, Para. 32. The prevention of fraudulent conduct (Case C-196/04, *Cadbury Schweppes*, [2006] *ECR* I-4585, Paras 51-55) and the protection of the interests of creditors (Case C-208/00, *Überseering*, [2002] *ECR* I-9919, Para. 92) are mentioned as examples of this 'general public interest'.

38 AG Opinion, Paras 32-33.

39 AG Opinion, Para. 35.

4.2. Observations

Implicit in Maduro's Opinion is that the following distinctions are no longer relevant: that between inbound and outbound establishment and that between primary and secondary establishment.[40] Moreover, the attempt to explain the *Daily Mail*, *Centros*, *Überseering* and *Inspire Art* case law by a single principle underlying the *Cadbury Schweppes*[41] judgement is at least a progressive interpretation of this line of case law.[42]

5. Judgement of the Court (Grand Chamber)

Below a summary of the 26 paragraphs that the Court dedicated to question four is provided. The Court started by describing the situation and reformulating question four as: '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* [emphasis added]'.[43]

5.1. Summary of the judgement, Paragraphs 104-110 and 124

In answering this question the *Daily Mail* judgement is taken as the starting point for a review of the case law.[44] From that case the Court derived the premise that companies: 'exist only by virtue of the national legislation which determines its incorporation and functioning'.[45] Then it recited its findings from Paragraphs 20 and 21 of the *Daily Mail* judgement: there exists a variety in both the connecting factor stipulated by the MS and in the question whether after incorporation this connecting factor may be altered. Moreover, it is stated that the text of Article 48 EC places the various connecting factors on an equal footing.

The Court then turned to Paragraph 70 of the *Überseering* judgement. From that paragraph the Court recited its conclusion that an MS could: 'in the case of a company incorporated under its law, (…) 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'.[46]

Subsequently the Court concluded on the basis of both the *Daily Mail* and the *Überseering* cases that it follows from Article 48 EC that problems which arise from the transfer of the registered seat or the central place of administration between two MSs due to differences in connecting factors are not to be resolved under the rules regulating the freedom of establishment in Community law.[47] Instead, such problems are to be resolved by 'future legislation or conventions'. From the absence of such conventions it must be concluded that: 'the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article (…) can only be resolved by the applicable national law'.[48] As a consequence it will

40 D. Deak, 'Outbound Establishment Revisited in *Cartesio*', 2008 *EC Tax Review*, no. 6, p. 258 and T. O'Shea, 'News Analysis: Hungarian Tax Rule Violates EC Treaty, Advocate General Says', 2008 *Tax Notes International*, p. 395.
41 Case C-196/04, *Cadbury Schweppes*, [2006] *ECR* I-7995.
42 For criticism see: T. O'Shea, 'News Analysis: Hungarian Tax Rule Violates EC Treaty, Advocate General Says', 2008 *Tax Notes International*, p. 398.
43 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 99. Emphasis added because this part is different from the question as formulated by the AG.
44 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 104.
45 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 104.
46 The same wording is used in both cases: Case C-210/06, *Cartesio*, Para. 107 and the *Überseering* judgement, Para. 70.
47 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 108.
48 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 109.

be necessary to determine whether a company can rely on the freedom of establishment before that freedom is capable of being restricted.

Therefore an MS has the power to determine the connecting factor for a company that wishes to become incorporated under its national law and what is required if an incorporated company wants to maintain that status. The Court explicitly confirmed that this includes the power not to allow companies to remain incorporated under their national law when they break the chosen connecting factor.

In the light of the above reasoning the Court answered question four as follows: as Community law currently stands, Articles 43 and 48 EC do not rule out legislation of an MS that prohibits the transfer of the central place of administration of a company incorporated under the law of that MS to another MS, while continuing to be a company governed by the law of that MS.

5.2. Situation in which the law applicable to a company changes, Paragraphs 111-113

The Court distinguished the situation in which a company moves its central place of administration to another MS, and intends to remain incorporated under the national law of the state of origin, from the situation where after such a transfer the company is converted into a company governed by the law of the host MS.[49] In the latter situation the Court stated that national legislation which requires 'winding-up or liquidation' prior to a conversion of a company 'constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC'.[50] The conversion of a company boils down to the company transforming from a company under the law of the MS of origin to a company under the law of the host MS. In relation to the 'overriding requirements of public interest' the Court referred to Paragraphs 11 and 17 of the *Caixa-Bank* case.[51]

On this particular issue the Court left two substantial points unclear. The first relates to the phrase 'to the extent that it is permitted under that law to do so' in Paragraph 112 of the judgement. While being absent from Paragraph 113, one may wonder if outbound establishment with a simultaneous change of national law has been made dependent on the national law of the host MS. Although it seems illogical to make the exercise of a treaty freedom dependent on the national law of the host MS, the Court left the option open.[52] Secondly, it is not clear how situations in which the national law changes are to be distinguished from those in which it does not change. Does it follow from the interaction between the national laws of the two concerned MSs or is it the intention of the company which desires to transfer is central place of administration that is decisive in assessing whether the applicable national law changes.

6. Primary and secondary establishment distinguished

In assessing the scope of the implications of the *Cartesio* judgement it must be determined if there is a difference between primary and secondary establishment in the case law of the ECJ. If there is no difference then the *Cartesio* judgement will have an impact not only on primary, but also on secondary establishment.

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49 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 111.
50 Interpretation of the English and Dutch texts of Paras 112 and 113 of Case C-210/06, *Cartesio.*.
51 Case C-442/02, *Caixa-Bank France*, 5 October 2004.
52 Especially because the Court recognised that in that situation one can actually rely on the freedom of establishment.

It could be argued on the basis of a textual interpretation of Article 43 EC that there is a distinction between primary and secondary establishment.[53] In the literature primary establishment relates to: 'transferring the seat – the registered office or the head office – into another Member State', whereas secondary establishment refers to: 'the setting up of agencies, branches or subsidiaries in another Member State'.[54] The current situation is that the case law regarding primary establishment is far less certain and favourable to companies than the case law on secondary establishment.[55]

However, one could also argue that the distinction is of little relevance. Both in *Segers*[56] and *Centros* the form and language used was that of secondary establishment; however, what in fact took place was a transfer of the central place of administration. AG Colomer stated that distinguishing *Daily Mail* as a primary establishment from *Centros* as being a secondary establishment results in the following distinction: 'on no apparent grounds, between a – very qualified – right of primary establishment and a practically unlimited right of secondary establishment'.[57] In addition, Wymeersch relies on the text of Article 48 EC to argue that the difference between primary and secondary establishment is 'moot: any of the three connecting factors in the State of origin will suffice to allow the company to avail itself of the Treaty freedom'.[58]

In short the *Cartesio* situation is one which is qualified as primary establishment. Although the literature has rendered strong arguments as to why no distinction should be made between primary and secondary establishment, the Court has not indicated that it will no longer make this distinction. At least part of the current uncertainty in the primary/secondary establishment debate is due to the fact that the *Centros* and *Inspire Art* judgements used the language of secondary establishment, while they *de facto* dealt with primary establishment.[59] Therefore, absent an explicit indication in the *Cartesio* judgement, the effects of this judgement cannot be applied to secondary establishment scenarios without question.

7. The inbound and outbound scenario distinction

*7.1. Distinguishing the case law pre-*Cartesio

It has been argued that the ECJ treats the *Daily Mail* situation or outbound establishment differently from *Centros, Uberseering* and *Inspire Art* or inbound establishment. The reasons for an MS to place restrictions on corporate mobility provide a rationale for the differential treatment of the various company migration scenarios. Where companies seek to leave their home MS, that MS is likely to lose a tax debtor. Restrictions on emigration are therefore likely to be related to tax issues. Where companies seek to move from an MS with a more liberal company law to an MS with a less liberal company law, that latter MS is likely to place restrictions on company immigration to prevent the circumvention of its laws.

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53 D. Wyatt *et al.*, *European Union law*, 2006, p. 841.

54 W.-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, p. 621. E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, p. 1351.

55 At an earlier date the Court showed its willingness to declare national provisions as restrictions of secondary establishment compared to finding restrictions of primary establishment. See, for example, Case 270/83, *Commission* v. *France*, [1986] *ECR* 273 and Case 79/85, *Segers* v. *Bestuur van de Bedrijfsvereniging voor Bank en Verzekeringswezen, Groothandel and Vrije Beroepen*, [1985] *ECR* 2375. E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, pp. 1351 -1352.

56 Case 79/85, *Segers* v. *bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen*, [1986] *ECR* 2375.

57 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, Opinion of AG R.-J. Colomer delivered on 4 December 2001, Para. 26.

58 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 680.

59 Part of this uncertainty is how the distinction between primary and secondary establishment should be assessed or what is *de facto* actually happening.

After the *Centros*[60] judgement a substantial debate arose on whether a distinction had been made by the ECJ between outbound and inbound scenarios.[61] Arguments were put forward that such a distinction would lead to undesirable results and should be dispensed with. Below it will be examined whether the Court really distinguished between inbound and outbound or used a different criterion. Secondly, the impact of *Cartesio* on this debate is examined and, finally, the situation post-*Cartesio* will be commented upon.

7.1.1. Daily Mail

In the *Daily Mail* judgement the ECJ made a distinction between the various situations of corporate mobility. It stated that the 'right to establishment' applied to secondary establishment by 'the setting-up of agencies, branches or subsidiaries' and 'a company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State'.[62] The Court distinguished these scenarios from the one in the *Daily Mail* case. In that case the English law related to situations in which a: 'company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company'.[63] As such the Court made a distinction not between inbound and outbound, but between, on the one hand, inbound and outbound with a simultaneous change of the national law applicable to a company and, on the other hand, outbound with no simultaneous change of national law. However, when the applicable national law does change, the freedom of establishment can be relied upon, but national law may require the 'winding-up and, consequently, the settlement of the tax position' in the home MS.[64] This last position is at odds with the conclusion that in that situation the freedom of establishment can be relied upon. Where the national law which is applicable to a company changes, this entails the reincorporation of the company under the law of the host MS. In making this distinction the Court pointed out that; 'unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law'.[65]

The Court concluded that the relevant parts of English law did not restrict the freedom of establishment. What is not explicit but follows rather covertly from the statement that companies are creatures of national law is that the freedom of establishment is not restricted because companies that transfer their central place of administration with no simultaneous change in the applicable national law cannot rely on the freedom of establishment at all.

7.1.2. Centros, Überseering *and* Inspire Art

Even though the *Centros* judgement does not contain a reference to other corporate mobility scenarios, *Überseering* does.[66] In *Überseering* the Court explained that the *Daily Mail* scenario of corporate mobility was that the company in question 'wished to transfer its centre of administration to another Member State without losing its legal personality or ceasing to be a company incorporated under English law'.[67] This is in contrast to the *Überseering* scenario which relates to 'the way in which one Member State treats a company which is validly incorporated in another

60 Case C-212/97, *Centros Ltd* v. *Erhvervs – og Selskabsstyrelsen*, [1999] *ECR* I-1459.
61 W.-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, p. 623.
62 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483, Para. 17.
63 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483, Para. 18.
64 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483, Para. 18.
65 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483, Para. 19.
66 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-9919.
67 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-9919, Para. 65.

Member State and which is exercising its freedom of establishment in the first Member State'.[68] While setting aside the *Daily Mail* scenario as one in which the freedom of establishment cannot be relied upon, the Court was less exhaustive in defining the scenarios in which a company can rely on the freedom of establishment.

Having distinguished *Überseering* from *Daily Mail*, the Court held that the company in question could rely on the freedom of establishment. The application of the real seat doctrine which led to a denial of legal personality before the German court was a restriction of that freedom which could not be justified.

The *Inspire Art* case also dealt with an inbound establishment scenario. In its judgement the Court made a statement that confirmed the distinction as it had been made in *Überseering*.[69]

7.2. Impact of Cartesio

Due to the fact that *Cartesio* relates to a scenario similar to *Daily Mail*, the Court had the option to revisit outbound establishment. In answering the question posed to the Court it confirmed the *Daily Mail* judgement in the *Daily Mail* scenario.[70]

However, the Court also took a sidestep to consider the outbound transfer of a company's central place of administration with a simultaneous change of the applicable national law.[71] In this scenario the company can rely on the freedom of establishment against the MS in which it has been formed. Contrary to *Daily Mail* the Court held that: 'a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the national law of the host MS is a restriction on the freedom of establishment'.[72] Such a barrier would be prohibited, unless it can be justified under 'overriding requirements in the public interest'.[73] This determination corrects the apparent contradiction in the *Daily Mail* judgement indicated above.[74]

The question then arises whether outbound and inbound cases are dealt with differently. On the one hand, one could answer this question in the negative. Both in inbound and outbound situations with a simultaneous change of law scenarios a company can rely on the freedom of establishment. On the other hand, reliance on the freedom of establishment in outbound cases is confined to situations where there is a simultaneous change of the applicable law, a distinction which is not made with regard to inbound scenarios.

This debate is directly linked to the question of when one can rely on Community law. Based on a comparative analysis of the freedom of movement relating to goods, services and workers Ringe finds that: 'The aim of 'moving out' is a sufficient connecting factor to the Internal Market. If this condition is fulfilled, the freedom of establishment applies'.[75] However, one could argue that the differences between corporate establishment and the other fundamental freedoms prevent any generalisation of the connecting factor (the Internal Market) concerning corporate establishment. It is important to debate this issue, but for the time being the judgement of the Court in *Cartesio* is the reality one has to deal with.

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68 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-9919, Para. 66.
69 Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd*, [2003] *ECR* I-10155, Paras. 102-103.
70 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 110.
71 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 111.
72 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 113.
73 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 113.
74 See Section 7.1.1.
75 W-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, p. 639.

*7.3. Comments on the post-*Cartesio *situation*

As is pointed out by Ringe, the ECJ's distinctive treatment of the two outbound situations is based on the following reasoning: if a state 'offers its nationals the opportunity to organise themselves into a separate legal entity called a company and decides to confer certain rights to this entity, the State is consequently free to set limits to these rights at the same time'.[76] That the Court relies on this reasoning can be inferred from its constant reference as follows: 'unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law'.[77]

With this reasoning the Court adopts a position in the theory of legal personality debate. In this debate there are three main positions that could be adopted.[78] The oldest originates from Von Savigny, who argued that only natural persons are capable of having rights or obligations.[79] When non-natural persons are held to be similarly capable of having rights and obligations this is based on a fiction.[80] The opposite of the fiction theory is the reality theory which derives from the work of Von Gierke.[81] In the reality theory legal persons are regarded as being no less real than natural persons. From this it follows that legal persons should also be capable of having rights and obligations. The third position is the goal theory, developed by Brinz, which holds that a legal person is capable of having rights and obligations because it serves to attain a specific goal.[82] The position taken by the ECJ corresponds to the fiction theory. In the debate on the theory of legal personality none of the three positions has emerged as superior which makes it surprising that the Court insists on adopting the fiction theory.

However, it must also be noted that the post-*Cartesio* situation makes many of the arguments that were raised against the differential treatment of inbound and outbound cases somewhat less reliable. For example, the argument that emigration is a necessary precursor to immigration and that therefore outbound establishment should also be brought under the heading of free movement is no longer valid.[83] The same holds true for the argument that, based on the *Gebhard* judgement,[84] all fundamental freedoms should be treated alike and that none of the fundamental freedoms differentiate between the inbound and outbound scenarios.[85]

8. Implications for the real seat doctrine

8.1. The real seat doctrine

Although the real seat doctrine is referred to as having a single meaning in every jurisdiction, in reality many variations exist. As stated above, the core of this doctrine can be defined as follows: 'only one state should have the authority to regulate a corporation's internal affairs and that this authority belongs to the state in which the corporation has its real seat (*siege reel* or *effektiver*

76 W-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, p. 631.
77 *Daily Mail*, Para. 19, *Überseering*, Para. 67, *Cartesio*, Para. 104.
78 The following classification is derived from the Dutch literature on this topic; for a comparative analysis of this debate in France and the UK see: N. Foster, 'Company Law Theory in Comparative Perspective: England and France', 2000 *The American Journal of Comparative Law*, pp. 573 -622.
79 C. Asser, *Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Vertegenwoordiging en Rechtspersoon, de Rechtspersoon*, 1997, p. 1.
80 Related is the concession theory which is based on the historical fact that, in medieval times, legal personality could only be bestowed upon an entity after a royal decision to that effect.
81 A. Pitlo *et al.*, *Het Nederlands Burgerlijk Recht, deel 2, Vennootschaps- en rechtspersonenrecht*, 2000, p. 39.
82 Contrary to the reality and fiction theory this theory does not primarily base itself on an analogy with natural persons.
83 The same holds true for the reverse discrimination argument. W.-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, pp. 632 - 635.
84 Case C-55/95, *Reinhard Gebhard* v. *Consiglio dellÓrdine degli Avvocati e Procuratori di Milano*, [1995] *ECR* I-4165, Para. 37.
85 W.-G. Ringe, 'No Freedom of Emigration for Companies', 2005 *European Business Law Review*, p. 639.

Verwaltungssitz)'.[86] The *Bundesgerichtshof* (German Supreme Court) has interpreted 'real seat' as: 'the place where the fundamental business decisions by the managers are being implemented effectively into day-to-day business activities'.[87] By adopting the real seat doctrine an MS ensures that equal treatment is given to all companies having their real seat within its jurisdiction.[88]

On a policy level the application of the real seat doctrine aims 'at effectuating material legal, economic, and social values of the country having the most significant relationship with a particular company'.[89] In addition, the real seat doctrine has been defended by referring to its supportive effect on 'creditor and minority shareholder protection' and its ability to prevent the 'Delaware effect' from kicking in.[90]

*8.2. Impact of the pre-***Cartesio** *case law on the real seat doctrine*

In the past the real seat doctrine has been declared dead and buried on numerous occasions,[91] while in fact only its effects have been limited. The case law of the ECJ does not directly scrutinize national company law provisions. Instead, the Court only deals with the effects of national company law provisions on the freedom of establishment as guaranteed by the Treaty.[92] Therefore even where the provisions of national company law are found to be in conflict with Community law, such provisions continue to operate freely except when they conflict with Community law.

8.3. Impact of **Cartesio**

8.3.1. The real seat doctrine still stands but its effects are again limited

First and foremost it must be concluded that in the *Cartesio* judgement the Court did not limit the scope of application to such an extent that the real seat doctrine can no longer be considered to exist. The core of the real seat doctrine is that the national law of the MS in which the central place of administration is located has to be complied with by the company. If the central place of administration is not within the jurisdiction applying the real seat doctrine then the national law of that MS does not apply. According to the ECJ's answer to the question posed by the Hungarian court, this part of the real seat doctrine remains untouched.

However, the sidestep in Paragraphs 111 to 113 of the judgement does limit the effects of the real seat doctrine due to a conflict with the freedom of establishment. Pursuant to *Cartesio*, if the national law applicable to a company changes, a national law that requires a 'winding-up or liquidation'[93] prior to the transfer of the central place of administration to the host MS is a restriction on the freedom of establishment. Yet one of the effects of the application of the real seat doctrine was that upon a transfer of the central place of administration to another MS the company would cease to exist under the law of the home MS. In other words, the company had

86 W. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', 2002 *the International Lawyer*, pp. 1015-1016.
87 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 13.
88 W. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', 2002 *the International Lawyer*, pp. 1027-1028.
89 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 14.
90 J. Lowry, 'Eliminating Obstacles to Freedom of Establishment: the Competitive Edge of UK Company Law', 2004 *Cambridge Law Journal*, no. 2, p. 332.
91 J. Lowry, 'Eliminating Obstacles to Freedom of Establishment: the Competitive Edge of UK Company Law', 2004 *Cambridge Law Journal*, no. 2, p. 343. H. Halbhuber, 'National Doctrinal Structures and European Company Law', 2001 *Common Market Law Review*, p. 1388.
92 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 681.
93 Usually the winding-up entails the settling of tax issues and can involve the payment of substantial sums of money to the tax authorities.

to be liquidated or wound-up. Therefore in the situation where the national law which is applicable to a company changes, the effect of the real seat doctrine that the company has to be liquidated will be qualified as a restriction of the freedom of establishment. Such restrictions are only allowed if they can be justified.

In short, a company may only be killed off at the border if it seeks to remain a company governed by the law of the home MS. In other words, an MS applying the real seat doctrine can still decide when its national law applies. However, if the national law applicable to the company that seeks to transfer its central place of administration does change, that company may no longer be killed off at the border, unless this can be justified. On this point there is some similarity with *Überseering* which also limited the effects of the real seat doctrine.

8.3.2. Understanding Cartesio *by considering the alternative conclusion*

The judgement in *Cartesio* should be seen in the light of the stance that the ECJ took in the *Daily Mail* judgement. In Paragraph 23 the Court stated:

> 'It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions'.[94]

In *Überseering* the Court qualified this position by holding that the possibility of relying on the freedom of establishment did not depend on the creation and adoption of a convention under Article 293 EC.[95] However, it did confirm its position in *Daily Mail*, taking into account this qualification, in *Überseering*[96] and *Cartesio.*[97] The core of this position is that the Court is unwilling to outlaw or make mandatory the adoption of either the real seat or incorporation doctrine.

How the above judicial restraint leads to a better understanding of the judgement in *Cartesio* is demonstrated when the impact of the alternative conclusion in the *Cartesio* situation is considered. The alternative conclusion would be that Community law precludes an MS from prohibiting the transfer of the real seat of a company incorporated under its law while remaining incorporated under the same law.[98] In essence the result would be that an MS is precluded from determining which companies are subject to its national law by reference to the location of its real seat. However, a determination of the applicable national law by reference to the location of a company's real seat is the core of the real seat doctrine. Therefore had the Court reached the alternative conclusion it would have prohibited the central aspect of the real seat doctrine from being applied.[99] Given the above doctrine of judicial restraint this is a conclusion that the Court itself declared it would not reach. While not providing a justification for the *Cartesio* judgement it does provide a rationale for its adoption.

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94 Case 81/87, *R* v. *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] *ECR* 5483, Para. 23.
95 Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-9919, Para. 55. E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, p. 1352.
96 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] *ECR* I-9919, Paras. 68 -69.
97 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 105.
98 Basically the word 'not' is removed from the second sentence of Para. 124 of the *Cartesio* judgement.
99 This strikes more at the heart of the real seat doctrine than the judgment in *Überseering*.

9. Implications for the incorporation doctrine

9.1. The incorporation doctrine

Again while in theory often referred to as a single concept, in practice many variations of the incorporation doctrine exist. As stated above, the core of this doctrine can be defined as follows: 'the existence of a company, as well as its subsequent dissolution, are governed by the law of the State of incorporation (State of incorporation doctrine or *Gründungstheorie*)'.[100] This definition has two direct consequences. First, by moving the central place of administration out of the MS of incorporation a company will not cease to exist,[101] but this does not mean that the MS will in fact allow such a transfer. Moreover, it must be noted that while MSs that adhere to the incorporation doctrine allow a transfer of the central place of administration, this does not mean that they welcome companies not reincorporating but transferring their central place of administration to their jurisdiction. Ebke finds that: 'the desire of a State to make applicable specific local rules to foreign corporations the business, shareholders and personnel of which are predominantly identified in that State is by no means limited to jurisdictions that have adopted the real seat doctrine'.[102] Second, the company is locked into the national law of the MS in which it is registered.[103] If it seeks to change the applicable national law, this can only be done through liquidation and reincorporation in another MS.

On a policy level the incorporation doctrine emphasises 'the incorporators' freedom to choose the proper law of corporation', as such the applicable law is the result of a choice made by the incorporators.[104] In general states applying the incorporation doctrine will be more supportive of 'party autonomy in corporate law matters' than those applying the real seat doctrine.[105]

One of the points of criticism that has been levied against the incorporation doctrine is that it would facilitate the creation of mere letterbox companies.[106] The letterbox argument is however often accompanied by the argument that such letterbox companies facilitate 'sometimes rather controversial transactions in more or less fictitious companies, located in exotic places' and 'unhealthy practises might result'.[107] In addition, this theory can be criticised by arguing that it does not properly 'take into account that a company's incorporation and activities affect the interests of third parties and of the country in which it runs its principal business'.[108]

9.2. Impact of Cartesio

The incorporation doctrine was in principle left untouched by the *Cartesio* judgement. The situation was one which related to outbound establishment through the transfer of the central place of administration from an MS that applied the real seat doctrine.

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100 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 14.
101 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 666.
102 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 30. An example is the Dutch Companies Formally Registered Abroad Act (*Wet op de formeel buitenlandse vennootschappen)* which was challenged in the *Inspire Art* case.
103 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 678.
104 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 14.
105 W. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', 2005 *European Business Law Review*, p. 14.
106 E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, p. 1349.
107 E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', 2003 *Common Market Law Review*, p. 662.
108 E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, p. 1349.

However, the judgement has a potential discriminatory effect on companies incorporated in an MS that adheres to the incorporation doctrine.[109] After *Cartesio* a company that seeks to transfer its central place of administration from a real seat MS can now rely on the freedom of establishment because the applicable law will no longer be that of the home MS. If, however, a company seeks to transfer its central place of administration from an incorporation doctrine MS the national law which is applicable will not change from the perspective of the home MS and subsequently the freedom of establishment cannot be relied upon against the home MS. However, as has been indicated above the application of the incorporation doctrine by no means entails that the MS will allow companies to freely transfer their central place of administration to another MS.[110] When it restricts such a transfer, this will not be qualified as a restriction of the freedom of establishment. Therefore the judgement has a potential discriminatory effect in that companies seeking to transfer their central place of administration from an incorporation doctrine MS cannot rely on the freedom of establishment while those incorporated in a real seat doctrine MS can rely thereon.

10. Justification of restrictions

Now that outbound establishment also falls under the freedom of establishment it becomes more important to look at how restrictions of that freedom can be justified. Prior to *Cartesio* justifications for restrictions on the freedom of establishment would be assessed through the so-called 'four-factor test'. Within the context of the freedom of establishment for legal persons this test has been applied in, for example, *Centros*.[111] The test used in *Centros* strongly resembles the test used in the context of the freedom of establishment for natural persons. [112]

In *Cartesio* the Court stated that restrictions on the freedom of establishment should be justified based on 'overriding requirements in the pubic interest' and thereby it specifically referred to the *Caixa-Bank* judgement Paragraphs 11 and 17.[113] In Paragraph 11 of the *Caixa-Bank* judgement the 'hinder or make less attractive' threshold is repeated in more or less identical words.[114] In Paragraph 17 the Court defines that a restrictive measure is justified if: 'it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective it pursues and does not go beyond what is necessary in order to attain it'.[115]

If one compares the test formulated under *Gebhard* and *Inspire Art* with that of *Caixa-Bank* they are almost identical. The only difference is that under *Gebhard* the test includes the requirement that the measure must be applied in a non-discriminatory fashion which is absent from the *Caixa-Bank* test. Nevertheless, given that the Court only refers to *Caxia-Bank* as an example and does not exhaustively define the test in the judgement itself, the four-factor test of *Gebhard* can still be considered as good law.

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109 This depends on whether the Court is willing to apply the *Cartesio* judgement to situations in which a company seeks to transfer its central place of administration from an MS adhering to the incorporation doctrine. Given the potential discriminatory effect, it is more likely that it will distinguish the situation.

110 As is shown by the *Daily Mail* case.

111 Case C-212/97, *Centros Ltd* v. *Erhvervs – og Selskabsstyrelsen*, [1999] *ECR* I-1459, Para. 34. J. Lowry, 'Eliminating Obstacles to Freedom of Establishment: the Competitive Edge of UK Company Law', 2004 *Cambridge Law Journal*, no. 2, p. 342.

112 See, for example, the test applied in the *Gebhard* case. Case C-55/95, *Reinhard Gebhard* v. *Consiglio dellÓrdine degli Avvocati e Procuratori di Milano*, [1995] *ECR* I-4165, Para. 37.

113 Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, (judgement delivered 16 December 2008), Para. 113.

114 In that judgement the Court used the words; 'All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions'. Case C-442/02, *Caixa-Bank France* v. *Ministère de l'Économie, des Finances et de l'Industrie*, [2004] *ECR* I-08961, Para. 11.

115 Case C-442/02, *Caixa-Bank France* v. *Ministère de l'Économie, des Finances et de l'Industrie* [2004] *ECR* I-08961, Para. 17.

11. Conclusion

To examine if corporate mobility has increased after the delivery of the *Cartesio* judgement a number of preliminary issues had to be looked at. First, the company law background of the case was looked at. This case dealt with the outbound transfer of the central place of administration from one MS adhering to the real seat doctrine to another. However, the issue that it deals with is confined to leaving the home MS. Second, the choice of an MS to adopt either the real seat doctrine or the incorporation doctrine is a reaction to the failure of private international law to create a satisfactory regime for corporate mobility. Because Community law is also an attempt to remove obstacles to corporate mobility, it is not surprising that Community law and the real seat or incorporation doctrine have collision points.

In his Opinion the AG stated that in the current situation Cartesio Bt could rely on the freedom of establishment. In analysing the pre-*Cartesio* case law he argued that *Daily Mail*, *Centros*, *Überseering*, *Inspire Art* and *Cadburry Schweppes* have in common that the ECJ will only look at the effect of the national provisions on the freedom of establishment. The AG came to the conclusion that in the *Cartesio* case there was a restriction of the freedom of establishment which could not be justified.

The ECJ stated that *Cartesio* should be distinguished on the facts from *Centros*, *Überseering* and *Inspire Art* but was similar to the *Daily Mail* situation. It held that absent harmonisation on a Community level, Cartesio Bt could not rely on the freedom of establishment. However, it also took a sidestep to consider the situation of the outbound transfer of the central place of administration with a simultaneous change of the applicable law. It found that in that situation one could rely on the freedom of establishment and any restriction would have to be justified.

In analysing the effects of *Cartesio* one first has to address the difference between primary and secondary establishment. *Cartesio* is a case that deals with primary establishment. Although good arguments have been put forward to the effect that the distinction between primary and secondary establishment is irrelevant, it is not clear whether the ECJ treats primary and secondary establishment alike. Therefore absent an indication in the judgement of the Court to the contrary, the impact of *Cartesio* is limited to primary establishment.

Second, pre-*Cartesio* it was argued in the literature that the Court treated outbound establishment scenarios differently from inbound scenarios. While already present in the pre-*Cartesio* case law, post-*Cartesio* the following distinction is made: in inbound establishment and outbound establishment with a simultaneous change of the applicable law one can rely on the treaty freedom whereas in the outbound scenario without a simultaneous change of national law one cannot. This is based on the rationale that companies are creatures of national law. The ECJ thereby favours the fiction theory in the theory of legal personality debate. Nevertheless, the confirmation that one can rely on the freedom of establishment against the home MS increases the scope for corporate mobility.

Third, the effect of the judgement on the real seat and incorporation doctrines was looked at. While leaving sufficient scope for the real seat doctrine to continue to exist, its effects have again been limited where they conflict with the treaty freedoms. Where a change in the applicable national law is foreseen with the transfer of the central place of administration companies may not be killed off at the border unless this can be justified. With regard to the incorporation doctrine, one could argue that there are no implications at all because the case deals with a real seat MS. However, by applying the judgement to outbound establishment from an incorporation doctrine MS a potential discriminatory effect emerges. Contrary to the situation in which the

central place of administration is moved from a real seat doctrine, a company seeking such a transfer from an incorporation jurisdiction cannot rely on the treaty freedom. Fourth, the justifications for those measures that restrict the freedom of establishment continue post-*Cartesio* to be subject to the four-factor test first formulated in *Gebhard*.

Therefore, by removing obstacles to corporate establishment, the legal scope for corporate mobility has increased after the *Cartesio* judgement. This is based on the finding that in outbound establishment with a simultaneous change of the national law one can rely on the treaty freedom and that in that same situation the transfer of the central place of administration from a real seat doctrine MS may no longer result in companies being killed off at the border. That is to say, such obstacles are no longer allowed under the treaty unless they can be justified.