# OPINION OF ADVOCATE GENERAL POIARES MADURO

delivered on 22 May 2008 [1]

1. The reference for a preliminary ruling arises out of an appeal against a decision of the Bács-Kiskun Megyei Bíróság (Regional Court, Bács-Kiskun) (Hungary), sitting as a commercial court. It concerns a limited partnership that seeks to transfer its operational headquarters from Hungary to Italy, but wishes to remain registered in Hungary, so that its legal status may continue to be governed by Hungarian law. However, the commercial court, in the exercise of its task of maintaining the commercial register, refused to enter the new address in the local register on the ground that the transfer was not possible under Hungarian law. It held that a firm that wishes to transfer its operational headquarters to another Member State must first be wound up in Hungary and then reconstituted under the law of that Member State. In the framework of the appeal proceedings, the Szegedi Ítélőtábla (Court of Appeal, Szeged) has asked this Court for guidance in order to determine whether the relevant Hungarian legislation is compatible with the right to freedom of establishment. In addition, the referring court raises several questions regarding the application of Article 234 EC.

## I — Facts and reference for a preliminary ruling

2. Cartesio is a 'betéti társaság' (limited partnership) constituted in accordance with Hungarian law and registered in Baja (Hungary). It has two partners who are resident in Hungary and have Hungarian nationality: the limited partner, who is obliged to contribute a stipulated amount of capital — and is liable only for that amount — and the general partner, who is liable for all debts of the limited partnership. [2]

3. On 11 November 2005, Cartesio submitted an application to the commercial court to amend its registration in the local commercial register so as to record the following address as its new operational headquarters: '21013 Gallarate (Italy), Via Roma No 16'. The commercial court, however, rejected Cartesio's application. It held that Hungarian law did not offer companies the possibility of

1 — Original language: English.

2 — Despite Cartesio's legal status of partnership, the questions referred concern both partnerships and companies under Hungarian law. Therefore, the interpretative issues raised and Cartesio itself will be referred to under the broad description of 'company'. In the same way, references to 'incorporation' should, where appropriate, be construed as including references to the registration or constitution of a partnership.

transferring their operational headquarters to another Member State while retaining their legal status as a company governed by Hungarian law. Therefore, in order to change its operational headquarters, Cartesio would first have to be dissolved in Hungary and then reconstituted under Italian law.

4. Cartesio brought an appeal against the decision of the commercial court before the Szegedi Ítélőtábla (Court of Appeal, Szeged). That court referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration, entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is *inter partes*?

(2) In so far as an appeal court is included in the concept of "court or tribunal which is entitled to make a reference for a preliminary ruling" under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of community law to the Court of Justice of the European Communities?

(3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling, limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power — derived directly from Article 234 [EC] — if, in appeal proceedings the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?

(4) (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 seat to another Member State of the European

Union relying directly on community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?

(c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, is incompatible with Community law?

May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union, are incompatible with Community law?'

## II — Assessment

### A — *The first question*

5. By its first question, the referring court asks whether a reference for a preliminary ruling is admissible in proceedings on appeal against a decision from a lower court, where neither the proceedings before the lower court nor the appeal proceedings are *inter partes*. Thus, in a sense, the referring court begins by asking whether it may ask this Court a question. [3] The answer follows clearly from the case-law. In the context of the present case, the commercial court merely fulfilled a registry function: it made 'an administrative decision without being required to resolve a legal dispute'. [4] For the purposes of Article 234 EC, this must be classified as a non-judicial function, in the framework of which the commercial court is not entitled to request a reference for a preliminary ruling. [5] By contrast, the appeal proceedings against the decision of the commercial court are, from the perspective of Article 234 EC, judicial

3 — See also, for instance, Case 102/81 *Nordsee* v *Reederei Mond* [1982] ECR 1095.

4 — Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 14.

5 — *Lutz and Others*, cited in footnote 4, paragraph 13. See also: Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 15; order in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 11; order in Case C-447/00 *Holto* [2002] ECR I-735, paragraphs 17 and 18; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 25; and Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 14.

proceedings, notwithstanding the fact that they are *ex parte*. [6] A court seized in the framework of such proceedings is consequently entitled to request a reference for a preliminary ruling from the Court of Justice. [7] The conclusion, therefore, is that the first question referred by the national court is admissible and, moreover, must be answered in the affirmative.

B — *The second question*

6. Second, the referring court asks whether it must be regarded as a court or tribunal against whose decisions there is no judicial remedy under national law and which is under the obligation referred to in the third paragraph of Article 234 EC. It might be argued that that question is inadmissible, because the answer to it is not necessary to resolve the dispute in the main proceedings — after all, the referring court has decided to submit its other questions for a preliminary ruling regardless. However, when a question is clearly of wider practical significance for the uniform interpretation and application of Community law and is not artificially related to the facts, [8] the rules of admissibility should not be applied in a manner that renders them virtually insurmountable. Thus, when the only realistic option for a national court is to submit such a question in the framework of proceedings where the answer might not be strictly necessary for the resolution of the case before it, the threshold of admissibility should, in my opinion, not be placed too high. [9]

7. As to the question currently at issue, it is difficult to see any alternative means by which it might realistically reach the Court, despite its obvious relevance for the functioning of the preliminary reference procedure and given that its relationship with the facts of the case cannot be described as being an artificial one. It would be excessively burdensome to require a national court, as a first step, to submit a reference for a preliminary ruling only to ask whether it is under the obligation referred to in Article 234 EC and then, as a second step if the answer turns out to be a positive one, to refer its actual questions for a preliminary ruling. [10] Therefore, I suggest that the Court provide assistance in this matter, as it did in a similar context in the case of *Lyckeskog*. [11]

6 — *Job Centre*, cited in footnote 5, paragraph 11; *Holto*, cited in footnote 5, paragraph 19.

7 — See also, by implication, Case C-411/03 *SEVIC Systems* [2005] ECR I-10805.

8 — See Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, where the Court recognises questions of 'general importance' which are only abstractly connected to a set of facts. See also the analysis of Advocate General Jacobs in this case, arguing for a restrictive interpretation of the concept of hypothetical questions.

9 — The case-law of the Court appears to confirm that the admissibility rules have to be interpreted bearing in mind the absence of a viable alternative to bring such questions before the Court, in the light of national procedural rules, litigation costs and concerns for procedural economy. See, for instance, Case C-415/93 *Bosman* [1995] ECR I-4921, in particular the questions concerning the nationality clauses. This point is treated below in more detail in relation to the third question.

10 — Alternative paths through which the question might reach the Court would appear to be even more onerous: see, for instance, Case C-224/01 *Köbler* [2003] ECR I-10239.

11 — Case C-99/00 [2002] ECR I-4839.

8. According to the order for reference, in cases such as the one currently at issue, the party concerned may bring an appeal against the decision of the Ítélőtábla before the Legfelsőbb Bíróság (Supreme Court). The referring court notes, however, that an appeal to the Legfelsőbb Bíróság is limited to points of law. In that regard, the referring court mentions Article 270(2) of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law III of 1952 on Civil Procedure), which provides: 'the parties, interveners and persons affected by the decision may, in respect of the part of that decision which refers to them, bring an appeal on a point of law only before the Legfelsőbb Bíróság against final judgments and orders which bring proceedings to an end, pleading infringement of the law'. In addition, the referring court points out that appeal proceedings do not have automatic suspensory effect. The first sentence of Article 273(3) of the same law states: 'the institution of appeal proceedings shall not have suspensory effect but, where a party so requests, the Legfelsőbb Bíróság may exceptionally suspend enforcement of a judgment'.

9. Yet, these limitations do not warrant the conclusion that the Ítélőtábla must be regarded as a 'court or tribunal against whose decisions there is no judicial remedy under national law'. Presumably, any issue relating to the validity or interpretation of Community law constitutes a point of law and could therefore be subject to appeal. Moreover, national procedural rules according to which such an appeal has suspensory effect only in exceptional circumstances are in principle compatible with Community law, provided, first, that such rules are not applied in a manner that treats appeals on points of Community law less favourably than those based on points of domestic law (principle of equivalence) and, second, that they do not, in practice, render the exercise of rights conferred by Community law impossible or excessively difficult (principle of effectiveness). [12]

10. Thus, the fact that an appeal against a decision of a national court or tribunal is limited to points of law and lacks automatic suspensory effect does not imply that that court or tribunal is under the obligation referred to in the third paragraph of Article 234 EC.

## C — *The third question*

11. The third question referred for a preliminary ruling relates to the possibility, existing under Hungarian civil procedural law, to bring a separate appeal against a decision to make a reference for a preliminary ruling.

12 — See, by analogy, Case 33/76 *Rewe* [1976] ECR 1989; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17; and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

Article 155/A of Law III of 1952 on Civil Procedure provides: 'a separate appeal may be brought against a decision to make a reference for a preliminary ruling. A separate appeal cannot be brought against a decision dismissing a request for a reference for a preliminary ruling'. [13] It would appear that, in this context, the general rules concerning the suspensory effect of an appeal apply. [14] The referring court explains in its order for reference that, if an appeal is brought against an order for reference for a preliminary ruling, the court which hears the appeal may amend the order for reference, or render the request for a preliminary ruling inoperative and order the court which made the order for reference to resume the national proceedings which had been suspended. By its third question, the referring court asks whether such national procedural rules are compatible with the preliminary ruling procedure established under the Treaty.

12. Again, it may be argued that this question is inadmissible given the fact that, in the present case, no appeal seems to have been brought against the order for reference. [15] None the less, the possibility of an appeal is a point of national law which is for the national court to determine. Moreover, I believe that in the present case the Court should be particularly respectful of the wishes of the national court and benefit from the opportunity to provide guidance on the matter. The reasons for this are the same as the reasons for which I would consider the second question to be admissible.

13. First, this question is not strictly hypothetical. It is closely related to the facts of the case (the reality of which is undisputed) and the answer to be provided to the national court might certainly be relevant to its decision if there were to be an appeal — a reality which the national court deemed to be relevant when drafting the order. In my view, there is a hypothetical question, justifying a judgement of inadmissibility, only when either the facts are themselves artificial or it is the relationship of the question with the facts that is artificial. It is only in such cases that the reasons which justify the inadmissibility of hypothetical questions (misconception of the facts, prejudging and the risk of abuse) are at play. [16] In the present case, however, the Court would not be providing a legal answer on the basis of a hypothetical factual context which could, by bypassing the actual context surrounding the interpretation and application of a legal rule, affect the quality and legitimacy of the judicial ruling. The only so-called hypothetical aspect in this

13 — In addition, Article 249/A provides that a separate appeal 'may also be brought against a decision made at *second* instance *dismissing* a request for a preliminary ruling' (emphasis added).

14 — According to the provision governing references for a preliminary ruling in Article 259 of Law III of 1952 on Civil Procedure.

15 — The Commission has raised the point of the order for reference having become final. However, this aspect is not part of the order for reference and, in my view, it ought not be determinant in deciding the admissibility of the question.

16 — See the Opinion of Advocate General Jacobs in *Österreichischer Gewerkschaftbund*, cited in footnote 8, at points 53 to 55.

case is, in reality, better qualified as an element of contingency: the fact that the answer to be provided by the Court might end up not being determinant for the resolution of the dispute in the main proceedings if no appeal is, in fact, to be brought against the order to refer. However, such a contingent element is not absent from other legal questions that the Court routinely answers. The Court can never be absolutely certain that the answer it is providing will, in fact, be relevant to the outcome of the dispute in the main proceedings. The national court may, for example, end up deciding the case on the basis of a national procedural point of law without ever applying the Community law answer provided by the Court of Justice. That does not mean that the Court has answered a hypothetical question, so long as the question arose from genuine facts whose relationship with Community law was not artificial. One must distinguish between a question based on artificial facts or unrelated to the facts of the case (which, in my view, is hypothetical and inadmissible) and a question that is related to the facts of the case but might prove not to be determinant in its final outcome (which, in my view, is not hypothetical and ought to be admissible).

14. Second, in spite of its obvious relevance for the functioning of the preliminary reference procedure, it is difficult to see how the issue might otherwise reach the Court. Of course, it is theoretically conceivable that a party in national proceedings before a lower court might bring an appeal against an order for reference before a superior court and that, notwithstanding national procedural rules according to which the appeal has suspensory effect, the lower court might maintain its order for reference. In such circumstances, the issue of the effect of the appeal would certainly be of immediate relevance. However, this scenario would also require the lower court to disobey its domestic rules of procedure without knowing whether Community law gives it the power to do so. Clearly, that would put the lower court in a very uncomfortable situation. [17] This is probably what explains why such a question has never been expressly raised before the Court even if some previous cases and well-known national laws and practices might indicate that it is indeed of considerable relevance in the day to day application of Community law by national courts. [18] My suggestion to the Court, therefore, would be to defer to the judgment of the national court on the relevance of such question for the national proceedings by answering the third question of the Szegedi

17 — One might also consider the reverse alternative: that the superior court, to which an appeal is made against the order requesting a preliminary ruling, might first stay the proceedings in order to ask the Court of Justice for a preliminary ruling on the compatibility of such an appeal with Community law. However, the likelihood of such a hypothesis also seems doubtful. Moreover, if the national superior court were indeed to decide to request a preliminary ruling from the Court of Justice, it is reasonable to assume that it would, for reasons of procedural economy simply, do so on the substantive questions of Community law initially raised by the lower national court (as happened in Case 19/84 *Pharmon* v *Hoechst* [1985] ECR 2281, which was originally a reference from a lower court, registered as Case 271/80, and which was appealed against and subsequently removed from the register) or, at least, by including the latter (with the consequence that the initial procedural question might, itself, be challenged as hypothetical in the light of the referral of the substantive questions). This would amount in effect to placing national courts in a kind of 'Catch 22' situation and might, again, explain why such a question has never expressly been raised before the Court (see O'Keeffe, D., 'Appeals against an Order to Refer under Article 177 of the EEC Treaty', 9 *European Law Review* (1984) 87, at p.101).

18 — In his Opinion in Cases 146/73 and 166/73 *Rheinmühlen* [1974] ECR 40, Advocate General Warner notes at page 44 that such a right of appeal, which he considered contrary to Community law, was in force in, at least, several Member States by virtue of national procedural rules.

Ítélőtábla, using this opportunity to address this issue of great practical importance for Community law. In this way, the Court may be able to forestall obstacles that may arise in the future as regards the cooperation between itself and those national courts whose orders for reference could become subject to appeal.

15. Article 234 EC provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of interpretation or validity relating to Community law is necessary to enable it to give judgment. [19] Hence, national courts derive the power to make a reference for a preliminary ruling from the Treaty itself. Moreover, they enjoy 'the widest discretion' in referring matters to the Court of Justice. [20]

16. Naturally, a decision of a lower court that contains a reference for a preliminary ruling is not, by virtue of Community law, exempt from remedies normally available under national law. [21] Nonetheless, where an appeal has been lodged against a decision containing an order for reference, the Court of Justice will in principle abide by the request for a preliminary ruling, so long as the referring court has not revoked its questions. [22] The Court of Justice may suspend the preliminary ruling proceedings pending the outcome of the national appellate proceedings if the appeal has suspensory effect and if the Court of Justice has been notified thereof by the referring court: the notification is regarded as an implicit request to suspend the preliminary ruling proceedings. [23] However, the Court of Justice will simply proceed with the preliminary ruling procedure, despite the effects that an appeal might have under national law, if the referring court has expressly requested the Court of Justice to do so. [24]

17. The crucial question is whether national procedural rules may oblige lower courts to suspend or even revoke a request for a preliminary ruling in circumstances where an appeal has been brought against an order for reference. That question has, in fact, been addressed by Advocate-General Warner in his Opinion in *Rheinmühlen* [25] — and I would almost be tempted merely to refer to that Opinion, in which he argued that no fetter can be placed by national law on the power of a lower court in any Member State to refer questions to this Court. I shall not even attempt to emulate the force and clarity with

19 — See also Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 19.

20 — Case 166/73 *Rheinmühlen I* [1974] ECR 33, paragraph 4.

21 — Case 146/73 *Rheinmühlen II* [1974] ECR 139, paragraph 3.

22 — *Rheinmühlen II*, cited in footnote 21, paragraph 3; Case 13/61 *De Geus* [1962] ECR 45, paragraph 50; and Joined Cases 2/82 to 4/82 *Delhaize* [1983] ECR 2973, paragraph 9.

23 — See, for instance, order of 3 June 1969 in Case 31/68 *Chanel* [1970] ECR 403 and order of 14 July 1992 in Case C-269/92 *Bosman* (not published in the European Court Reports).

24 — Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 3. See also O'Keeffe, D., 'Appeals against an Order to Refer under Article 177 of the EEC Treaty', 9 *European Law Review* (1984) 87.

25 — Opinion of 12 December 1973 in Cases 146/73 and 166/73 [1974] ECR 40.

which he set out the arguments that brought him to this conclusion. Instead, I shall limit myself to expressing my agreement with his Opinion and making a few additional remarks.

18. There may be several reasons why a lower court might *want* to revoke its request for a preliminary ruling after an appeal has been lodged against the decision containing the order for reference. For instance, the parties may have found an alternative way to settle their dispute during the appellate proceedings. [26] It may also be the case that the judgment on appeal has rendered the questions referred for a preliminary ruling moot, because it has turned out, for instance, that the action brought before the lower court was inadmissible. Hence, appellate proceedings and their outcome may very well prompt a lower court to ask for a suspension of its request for a preliminary ruling or even to revoke that request. However, this should not lead us to conclude that there are circumstances in which a judgment of an appellate court may *oblige* a lower court to do so.

19. The possibility for a lower court in any Member State to interact directly with the Court of Justice is vital to the uniform interpretation and the effective application of Community law. It is also the instrument that makes of all national courts Community law courts. Through the request for a preliminary ruling, the national court becomes part of a Community law discourse without depending on other national powers or judicial instances. [27] The Treaty did not intend that such a dialogue should be filtered by any other national courts, no matter what the judicial hierarchy in a State may be. As stated by the Irish Supreme Court (in refusing to hear an appeal against an order for reference): "the power is conferred on [the lower court] by the Treaty without any qualification, express or implied, to the effect that it is capable of being overruled by any other national court." [28]

20. Therefore, the issue of the necessity for a request for a preliminary ruling is a matter that falls to be decided between the referring court and the Court of Justice. Indeed, that is why, ultimately, the admissibility of a request for a preliminary ruling is determined by the Court of Justice — and not by domestic courts which, within the national procedural framework, are superior to the referring court. If the opposite were true, it could happen that, by virtue of a national rule or practice, orders for reference by lower courts would systematically become subject to appeal, giving rise to a situation in which — at least de facto — national law allowed only courts of last instance to refer questions for a preliminary ruling. The risk of treating such question as a

26 — See, for example, *Chanel*, cited in footnote 23.

27 — Sarmiento, D., Poder Judicial e integración europea, Thomson-Civitas, Madrid, 2004, p.58.

28 — *Campus Oil Ltd and Others v. The Minister for Industry and Energy, Ireland, The Attorney General, and the Irish National Petroleum Co. Ltd*, judgment of the Irish Supreme Court of 17 June 1983 [1984] 1 CMLR 479.

question of national procedural law and not Community law is highlighted by the present case in which the national law permits a separate appeal against a decision to make a reference for a preliminary ruling. It would be tantamount to allowing national procedural law to alter the conditions set out in Article 234 EC for a reference to the Court of Justice.

21. In short, Community law gives any court in any Member State the authority to refer questions for a preliminary ruling to the Court of Justice. That authority cannot be qualified by national law. I accordingly conclude that Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for a preliminary ruling.

D — *The fourth question*

22. The fourth question concerns the right of establishment. Pursuant to Hungarian company law, as set out in the order for reference, the seat of a company constituted under Hungarian law is the place where its operational headquarters ('központi ügyintézés helye') are situated. [29] In other words, the place where a company has its operational headquarters is supposed to coincide with its place of incorporation. A transfer of the operational headquarters of a company constituted under Hungarian law will normally be entered into the commercial register if the transfer takes place within Hungary. [30] It follows from the facts as they are stated in the order for reference that Cartesio seeks to transfer its operational headquarters to Italy. However, instead of reconstituting itself as an Italian company, Cartesio wishes to remain incorporated in Hungary and thus subject to Hungarian company law.

23. Hungarian company law, so it would appear, is grounded in the 'real seat' theory, according to which a company must comply with the full requirements of company law applicable in the State where it has its real seat. [31] Indeed, the real seat theory 'inextricably entwines a company's nationality and residence'. [32] Taking this theory to its full extent, Hungarian company law — as interpreted and applied by the commercial court — prohibits the 'export' of a Hungarian legal person to the territory of another Member

29 — Article 16(1) of the cégnyilvántartásról, a cégnyilvánosságról és a bírosági cégeljárásról szóló 1997. évi CXLV. törvény (Law CXLV of 1997 on the commercial register, company advertising and legal procedures in commercial matters). According to that provision: 'The seat … shall be the place in which the operational headquarters are situated and must be indicated by means of a plate.'

30 — Article 34(1) of Law CXLV of 1997: 'Every transfer of the seat of a company to a place that falls within the jurisdiction of another court having responsibility for maintaining the register of companies must be registered, as a change, with the court having jurisdiction in the area of the former seat. The latter will examine the applications relating to changes occurring prior to the change of the seat and will endorse the transfer.'

31 — Edwards, V., *EC Company Law*, Oxford: Clarendon Press 1999, p. 336.

32 — Ibid.

State. While it may be possible for a company constituted under Hungarian company law to pursue economic activities in another Member State or establish a subsidiary there, the operational headquarters must remain in Hungary. By its fourth question, the referring court essentially asks 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.

24. The Hungarian Government argues that the present case falls outside the scope of Articles 43 EC and 48 EC. Ireland and the governments of Poland, Slovenia and the United Kingdom take the same view. On the other hand, Cartesio, the Commission and the Netherlands Government submit that there has been a restriction on the right of establishment and that, accordingly, Articles 43 EC and 48 EC apply.

25. The view that the present case falls outside to scope of the Treaty rules on the right of establishment is, in my opinion, incorrect. National rules that allow a company to transfer its operational headquarters only within the national territory clearly treat cross-border situations less favourably than purely national situations. [33] In effect, such rules amount to discrimination against the exercise of freedom of movement. [34] Cartesio seeks to transfer its operational headquarters to Italy. It appears, therefore, that what Cartesio proposes is the 'actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. [35] In those circumstances, the Treaty rules on the right of establishment clearly apply. [36]

26. It is true that, in its judgment in *Daily Mail and General Trust*, the Court held that a company could not rely on the right to freedom of establishment in order to transfer its central management and control to another Member State (the Netherlands) for the purpose of selling a significant part of its non-permanent assets and using the proceeds of that sale to buy its own shares without having to pay the tax normally due on such transactions in the Member State of origin (the United Kingdom). [37] Under United Kingdom company law, companies were allowed — subject to authorisation by the tax authorities — to move their central

33 — See, to the same effect: Case C-200/98 *X and Y* [1999] ECR I-8261, paragraphs 26 to 28; Case C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409, paragraphs 42 and 46; *SEVIC Systems*, cited in footnote 7, paragraphs 14, 22 and 23; and Case C-231/05 *Oy* [2007] ECR I-6373, paragraphs 31 to 43.

34 — See also my Opinion in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* [2006] ECR I-8135, at points 41 and 46.

35 — Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 20. See also Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 21, and Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, paragraphs 54 and 66.

36 — See, for example, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11 and the case-law cited therein.

37 — Case 81/87 [1988] ECR 5483, paragraph 7.

management and control to another Member State without losing their legal personality or ceasing to be a company incorporated in the United Kingdom. [38] Yet, in the circumstances at issue, the tax authorities objected to the transfer and maintained that the company should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom. [39] The Court rejected the company's view that the tax authorities had infringed the right of establishment. Mindful of the differences between the company laws of the Member States, the Court stated that companies exist only by virtue of national law and that 'the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State'. [40] The suggestion, therefore, is that the terms of the 'life and death' of a company are determined solely by the State under whose laws that company was created. [41] The State gave; and so we must acquiesce when the State hath taken away.

27. However, the case-law on the right of establishment of companies has developed since the ruling in *Daily Mail and General Trust* and the Court's approach has become more refined. [42] Admittedly, this development has been accompanied by a number of contradictory signals in the case-law. In particular as a result of the judgments in *Centros*, [43] *Überseering*, [44] and *Inspire Art*, [45] the case-law appeared to be moving in precisely the opposite direction to the one the Court had followed in *Daily Mail and General Trust*. That is to say, the Court consistently rejected the argument that rules of national company law should fall outside the scope of the Treaty provisions on the right of establishment. For instance, in *Inspire Art*, the Court stated: 'the fact that Inspire Art was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares 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 EC and 48 EC'. [46] Such a statement is fundamentally at odds with the idea that the incorporation and functioning of companies is determined exclusively by the varying national legislation of the Member States.

28. Several efforts were made — including by the Court itself — to distinguish *Daily Mail and General Trust* on the facts from *Centros, Überseering* and *Inspire Art*, by focusing on

38 — *Daily Mail and General Trust*, paragraphs 3 and 5.
39 — *Daily Mail and General Trust*, paragraph 8.
40 — *Daily Mail and General Trust*, paragraph 24.
41 — *Daily Mail and General Trust*, paragraph 19: 'It should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.'
42 — In fact, the Court's approach has come to resemble the approach of Advocate General Darmon in his Opinion in *Daily Mail and General Trust*.
43 — Case C-212/97 [1999] ECR I-1459.
44 — Case C-208/00 [2002] ECR I-9919.
45 — Case C-167/01 [2003] ECR I-10155.
46 — *Inspire Art*, cited in footnote 45, paragraph 98.

aspects such as primary as opposed to secondary establishment, and inbound versus outbound establishment. Not surprisingly, however, these efforts were never entirely convincing. [47] In particular, the distinction between situations in which a Member States prevents or dissuades companies that are constituted under its *own* company law from seeking establishment abroad, and situations in which the *host* Member State restricts the freedom of establishment, never fitted the Court's general analytical framework for Articles 43 and 48 EC. [48] Besides, that distinction departed from the Court's reasoning in *Daily Mail and General Trust* itself. [49] As Advocate General Tizzano rightly observed in his Opinion in *SEVIC Systems*: 'It is evident from [the] case-law that Article 43 EC does not merely prohibit a Member State from impeding or restricting the establishment of foreign operators in its territory, it also precludes it from hindering the establishment of national operators in another Member State. In other words, restrictions "on entering" or "on leaving" national territory are prohibited.' [50]

29. The problem, in my opinion, is that the statements cited above from *Daily Mail and General Trust* and *Inspire Art* do not represent the case-law and its underlying logic accurately. On the one hand, despite 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]'. [51] However, it also 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. [52] In particular, the right of establishment does not preclude Member States from being wary of 'letter box' or 'front' companies. [53] In my view, this represents a significant qualification of the rulings in *Centros* and *Inspire Art*, as

47 — For an overview and a critical assessment of theories that try to explain the differences between, on the one hand, *Daily Mail and General Trust* and, on the other, *Centros* and *Überseering*, see: Ringe, W.-G., 'No Freedom of Emigration for Companies?', 2005 *European Business Law Review* 621.

48 — See *Centros*, cited in footnote 43; *Überseering*, cited in footnote 44; *Inspire Art*, cited in footnote 45; Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 28; and *Hughes de Lasteyrie du Saillant,* cited in footnote 33, paragraph 42.

49 — *Daily Mail and General Trust*, cited in footnote 37, paragraph 16.

50 — Opinion of Advocate General Tizzano in *SEVIC Systems*, cited in footnote 7, at point 45. The Advocate General's views were confirmed by the Court in paragraphs 22 and 23 of its judgment.

51 — *Cadbury Schweppes*, cited in footnote 35, paragraph 37 (emphasis added). Note that the Court referred to paragraph 96 of the judgment in *Inspire Art*, but chose to use a slightly different wording ('purpose' instead of 'sole purpose').

52 — *Cadbury Schweppes*, cited in footnote 35, paragraphs 51 to 55.

53 — *Cadbury Schweppes*, cited in footnote 35, paragraph 68.

well as a reaffirmation of established case-law on the principle of abuse of Community law, [54] even though the Court continues to use the notion of abuse with considerable restraint — and rightly so. [55]

30. On the other hand, despite what the ruling in *Daily Mail and General Trust* seems to suggest, the Court does not, a priori, exclude particular segments of the laws of the Member States from the scope of the right of establishment. [56] Rather, the Court concentrates on the *effects* that national rules or practices may have on the freedom of establishment and assesses the conformity of those effects with the right of establishment as guaranteed by the Treaty. As regards national rules relating to the incorporation of companies, the Court's approach is inspired by two concerns. First, in the present state of Community law, Member States are free to choose whether they want to have a system of rules grounded in the real seat theory or in the incorporation theory, and indeed, various Member States have opted for profoundly different rules of incorporation. Second, the effective exercise of the freedom of establishment requires at least some degree of mutual recognition and coordination of these various systems of rules. The result of this approach is that the case-law typically respects national rules relating to companies regardless of whether they are based on the real seat theory or on the incorporation theory. However, at the same time, the effective exercise of the right of establishment implies that neither theory can be applied to its fullest logical extension — the best example to date perhaps being the case of *Überseering*. [57]

31. In sum, it is impossible, in my view, to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. Otherwise, Member States would have *carte blanche* to impose a 'death sentence' on a company constituted under its laws just because it had decided to exercise the freedom of establishment. Especially for small and medium-sized companies, an intra-Community transfer of operational headquarters may be a simple and effective

54 — See point 9 of the Opinion of Advocate General Darmon in *Daily Mail and General Trust*, cited in footnote 37, and the case-law cited there. I have discussed the principle prohibiting abuse of Community law in detail in my Opinion in Case C-255/02 *Halifax and Others* [2006] ECR I-1609. See also R. de la Feria, 'Prohibition of abuse of (Community) law: The creation of a new general principle of EC Law through tax', [2008] 45 CMLR 405-408.

55 — The abuse of rights principle has been described as 'a drug which at first appears to be innocuous, but may be followed by very disagreeable after effects' (Gutteridge, H.C., 'Abuse of Rights', 5 *Cambridge Law Journal*, 22, 44, 1933-1935). It would appear wise, therefore, to apply it with great caution.

56 — 'There is no nucleus of sovereignty that Member States can invoke as such against the Community' (Lenaerts, K., 'Constitutionalism and the many faces of federalism', 38 *American Journal of Comparative law* [1990], p. 205 et seq., p. 220). See, for instance: Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29, and Case C-524/04 *Test Claimants in the Thin Cap Group litigation* [2007] ECR I-2107, paragraph 25 (in the field of taxation); Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25 (in the field of foreign security policy); and C-438/05 *Viking Line* [2008] ECR I-10779, paragraph 40 (in the field of social policy). To the extent that these areas fall within their competence, Member States must none the less exercise that competence consistently with Community law.

57 — Cited in footnote 44. That case concerned German provisions according to which only parties with legal capacity could bring legal proceedings, whereas — in strict conformity with the 'Sitztheorie' — companies were considered to have legal capacity only if they had their actual centre of administration in Germany. According to paragraph 93 of the Court's ruling, the denial of the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office is 'tantamount to an outright negation of the freedom of establishment' that cannot be justified on grounds relating to the general interest.

form of taking up genuine economic activities in another Member State without having to face the costs and the administrative burdens inherent in first having to wind up the company in its country of origin and then having to resurrect it completely in the Member State of destination. Moreover, as the Commission rightly emphasised, the process of winding up a company in one Member State and then reconstituting it under the law of another Member State can take considerable time, during which the company at issue may be prevented from operating altogether.

32. Consequently, even though the restriction on the right to freedom of establishment at issue in the present case arises directly from national rules on the incorporation and functioning of companies, the question has to be asked whether they can be justified on grounds of general public interest, [58] such as the prevention of abuse or fraudulent conduct, [59] or the protection of the interests of, for instance, creditors, minority shareholders, employees or the tax authorities. [60]

33. In the light of these interests, 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. [61] 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. [62]

34. However, that is not the situation here. The rules currently under consideration completely deny the possibility for a company constituted under Hungarian law to transfer its operational headquarters to another Member State. Hungarian law, as applied by the commercial court, does not merely set conditions for such a transfer, but instead requires that the company be dissolved. Especially since the Hungarian Government has not put forward any grounds of justification, it is difficult to see how such 'an outright negation of the freedom of establishment' [63] could be necessary for reasons of public interest. [64]

58 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; *CaixaBank France*, cited in footnote 37, paragraph 11; Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 28.

59 — *Cadbury Schweppes*, cited in footnote 35, paragraphs 51 to 55.

60 — *Überseering*, cited in footnote 44, paragraph 92; *SEVIC Systems*, cited in footnote 7, paragraph 28.

61 — See, by analogy, Article 8 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

62 — As is the case, for instance, under the system established by Regulation No 2157/2001.

63 — *Überseering*, cited in footnote 44, paragraph 93.

64 — See also *SEVIC Systems*, cited in footnote 7, paragraphs 29 and 30.

35. Therefore, I suggest that the Court give the following reply to the fourth question referred by the national court: 'Articles 43 EC and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State.'

## III — Conclusion

36. In the light of the foregoing observations, I propose that the Court should give the following answer to the questions referred by the Szegedi Ítélőtábla:

(1) In a situation such as the one at issue in the present proceedings, an appeal court may refer questions for a preliminary ruling to the Court of Justice in proceedings on appeal against a decision from a lower court, notwithstanding the fact that neither the proceedings before the lower court nor the appeal proceedings are *inter partes*.

(2) The fact that an appeal against a decision of a national court or tribunal is limited to points of law and lacks automatic suspensory effect does not imply that that court or tribunal is under the obligation referred to in the third paragraph of Article 234 EC.

(3) Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for a preliminary ruling.

(4) 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.