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The personal law of companies and the freedom of establishment

I. Introduction

The impact of Community law on the national laws of the member states is a well known phenomenon in Europe. It is a question of practical and theoretical interest. As time goes on this impact is groving and community law is gaining influence in new areas of law. One of this new areas is private law which until recently had hardly been influenced by European law. Another such new area is the law of conflicts or as it is perhaps better known in continental legal systems private international law („PIL"). PIL has been a traditional branch of national law since the second half of the nineteenth century and it did not loose its national character during the twentieth century despite of the growing number of multilateral and bilateral treaties. What treaties could not make in more then hundred years, European law did in less then two decades. It leads to a step-by step unification of PIL-rules in the Member States. Today many aspects of international civil procedure are unified and so are certain areas of choice of law determining the applicable law of contracts and extracontractual obligations. Unification however does not make PIL necessairly more simple. When penetrating into the core of traditional national systems of private international law, European law shakes the well-balanced system of national choice of law rules. This may lead to difficulties first of all in the new Member States which had not been able to adapt their national PIL rules to European standards. And since those European standards are determined partly by other goals then the ones of traditional private international law, domestic courts have to face new problems. The above situation was well obserwed by the famous German professor of PIL Kurt Siehr some years ago. He emphasised that traditional PIL despite its rather complicated choice of law rules and procedural aspects, has always been a comfortable area for practitioners while national law could handle international cases according to its own principles but it loses its comfortable character as ever more parts are regulated by international treaties and by European law.[1] A growing number of PIL provisions of the Member States of the European Union are developing under the influece a supranational system of law: European law. The influence of European law is complex. There is a direct influence by secondary legislation (regulations and directives) and there is an indirect influence by primary law. In the following, I would like to focus on the influence of Community law on the conflicts rules regulating the nationality of companies.[2]

The conflicts rules determining the nationality of entities with legal personality has long been characterised by two different approaches. One of them was the traditional approach of continental law. According to this, the personal law of companies should be determined by the law of the seat of the company (*lex situs*). The other was the characteristic common law approach according to which the personal law of companies shold be determined by the place of incorporation (*lex originis*). Both solutions are used and applied in the Member States of the European Union. The traditional continental choice of law rule, the *lex situs* is followed e.g., by Germany, Austria, Greece, France, Belgium Luxemburg, Italy and Poland. The

[1] Kurt Siehr: Internationales Privatrecht in der Europäischen Union, in:Rozprawy Prawnicze Ksiega Pamiatkowa Profesora Maximiliana Pazdana. (Essays in honor of professor Maksymilian Pazdan) Zakamycze Kraków 2005. 593.p.

[2] In the Hungarian legal literature see Lajos Vékás: Uniós alapvető szabadságok és közösségi nemzetközi kollíziós jog in: Európai Jog 2005/1 3-16 pp.

Netherlands, Denmark, England, Ireland, Spain, Portugal and Hungary on the other hand favour of the law of the country of incorporation. The above mentioned division does not characterise European countries only, it is a world wide phenomenon. Neither of the two systems is perfect, neither is consistent in itself. The incorporation theory fails when no incorporation is required by a certain legal system. It does not give a perfect solution either when a company is registered in more then one country. The theory of the seat may also be doubtful value in cases when a company has more then one seat in different countries. Neither of the two theories can handle cases when the place of incorporation or the place of the seat is not identical with the place where the economic activities of a company can be located. In order to avoid the above mentioned discrepancy the notion of the „seat" has different meanings. As Hungarian legal literature correctly states, the company seat is first and foremost a concept of national company law which may serve as a formalistic contact adress (formalistic or statutory seat) and may designate the place where the company's business is concentrated (substantive or real seat). The substantive (real) seat and the formalistic (statutory) seat may, but do not have to coincide, unless the law imposes such a requirement.[3]
Though the functions and purposes of substantive company law and PIL rules are different, they both use the above distinctions as far as the seat of a company is concerned.
As we shall see later, it might lead to difficulties, if national company law and PIL-rules use different approaches when determining the scpoe of application of national company law rules and the personal law of companies.
One might wonder why does Hungary – a country with a traditional continental legal system – follow the traditional common law principle of the incorporation. The incorporation rule is not an old choice of law rule of the Hungarian PIL. The traditional Hungarian choice of law rule was the lex situs which had been developed by the practice of the Supreme Court of the Hungarian Kingdom - the Curia - at the beginning of the twentieth century. This approach was strongly supported by the theory between the two World Wars. István Szászy one of the most important theoreticians of Hungarian PIL of the twentieth century wrote in 1938: „The seat can not be fictititous since the legal person cannot put its centre of administration into a country to which it does not have an important and legally relevant link."[4] This standpoint was in harmony with the provision of Section 211 of the Hungarian Act of Commerce 1875, according to which foreign companies had to proove that they had been legally established and commercially active in their countries of the registered seat in order to be registered in Hungary.[5] The proof of a real commercial activity in the country of the registered seat served as a guarantee and helped to avoid the registration of foreign letterbox companies in Hungary.
All this is legal history. The present situation is different. Hungarian PIL gave up the traditional continental rule of the *lex situs* in 1979 when the Hungarian PIL Code (Law Decree 1979. 13.) entered into force. The radical change of the Code was explained in its reasoning of the 1979 Act with the consistency of the incorporation theory with the provisions of Hungarian substantive law and the solutions adopted in „that of the rest of European socialist countries". In Section 18 (2) the Code provides: „The personal law of a legal person is the law of the country on whose territory the legal person is incorporated." Subsection (3) of the same Section states: „If a legal person is incorporated in the territories of more countries, or if the law of the seat declared in the statutes of the legal person does not demand incorporation, the personal law of the legal person is the law of the seat declared in the

[3] Veronika Korom and Peter Metzinger: Freedom of Establishment for Companies: The European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06 ECFR 2009, 1-36.pp. on p. 12.
[4] István Szászy: Magyar Nemzetközi Magánjog. Budapest 1938. 228.p.
[5] István Szászy Op. cit. supra note

statutes."[6] The *lex situs* is only a secondary choice of law rule applied in cases when incorporation does not create a certain link to a country. It applies to companies not incorporated at all, or incorporated in more countries at the same time.
As I have already pointed out, and as the provisions of the Hungarian Code quoted above suggest, neither of the two regimes are satisfactory. They have to be combined and completed by a third choice of law rule, the centre of administration („real seat") to be applied in cases when the company cannot be located in any country by using one of the two traditional choice of law principles. In such situations Section 18. subsection (4) provides the following: „ If a legal person has no seat declared in the statutes, or has more seats, and has not been incorporated according to the law of any of the respective states, the personal law of the legal person is the law of the state on whose territory the central adminstration of he of the legal person takes place."

II. Private international law versus Community law

A relatively new question is the compatibility of the traditional national choice of law rules with community law. Companies do have a right to the freedom of establishment according Art. 48 EC. The multilateral treaty signed on February 2. 1968 on the mutual recognition of companies established under the law of another member state did not enter into force because the Netherlands did not ratify it. The contents of the right to the freedom of establishment had to be cleared by the decisions of the ECJ. The decision of the ECJ in *Daily Mail*[7] did not solve the problem. More then ten years after *Daily Mail* the debate flared up again after *Centros*[8] and *Überseering*[9]. The echo was Europe-wide but the reaction of the theory was especially strong in German legal literature and it had certain consequences in court practice too. The Germans tried to defend their traditional choice of law rule, the lex situs. Some of the proposed solutions and theoretical constructions like the Überlagerungstheorie by Sandrock[10], or the qualification of pseudo-foreign companies as Offene Handelsgesellschaften (OHG) or Gesellschaften bürgerlichen Rechts (GbR) proved to be provisional attempts[11] only in the light of the later decisions of the ECJ.
I do not want to go into the details of the above mentioned theoretical debate. It is well known and was analysed by many authors in Hungarian legal literature both from the point of view of European law and private international law.[12] I would like to raise some new aspects of the problem in Hungarian PIL. It seemed to be communis opinio at least until the recent decision of the ECJ in the *Cartesio* case C-210/06, that the traditional choice of law rule, the *lex situs* is not in conformity with European law[13] since it requires a company to dissolve itself when

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[6] The motives, he text and the reasons were published in English in 1982 by the Ministry of Justice: The Statutes of the People's Republic of Hungary Law-Decree No. 13 of 1979 on Private International Law with a commentary by prof Ferenc Mádl
[7] Case 81/87 The Queen v. H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC, ECR (1988) 5483.p.
[8] Case 212/97 Centros Ltd. And Erhvers-og Selskabstyrelsen ECR (1999) I-1459.p.
[9] C-208/00 Überseering BV v. Nordic Construction Baumanagement GmbH (NCC) ECR (2002) I-9919.p.
[10] Otto Sandrock: Centros: Ein Etappensieg für die Üerlagerungstheorie. BB 54 (1999) 1337-1345 pp.
[11] It is stated by Wulf Henning Roth with some regret: Internationales Gesellschaftsrecht nach Überseering IPRax 2003/2 117.p.
[12] See Lajos Vékás Op. cit supra note; Péter Metzinger: A de facto külföldi irányítású társaságok székhelye és honossága az európai jog tükrében (de lege lata és delege ferenda). Európai Jog 2006/3 17-26 pp; Miklós Király: A Daily Mailtől az Inspire Artig - az Eurpai Bíróság ítéleteinek hatása a társasági jog értékválasztásaira. In: Egység és sokféleség. Az Európai Unió jogának hatása a kultúrára Budapest, 2007. 207.pp.
[13] This is the opinion e.g. of some German authors, like Gerald Spindler und Olaf Berner: Der Gläubigerschutz im Gesellschaftsrecht nach Inspire Art. RIW 2004/1 7.p.; Peter Behrens: Gemeinschaftsrechtliche Grenzen der Anwendung inländischen Gesellschaftsrechts auf Auslandsgesellschaften nach Inspire Art. IPRax2004/1 25.p.

changing its seat to be recognised as a company in the country of its new seat. The solution of the Hungarian PIL – the incorporation rule – seemed to be theoretically in conformity with European law. E.g. a company established under Dutch law and incorporated in the Netherlands has to be recognised as a Dutch company when it transfers its seat to Hungary and a Hungarian company can transfer its seat to Italy without dissolving itself under Hungarian law. As we shall see the practice is different. If the theory is correct, the modification of Hungarian PIL rules determining the personal law of companies by giving up the traditional *lex situs* and turning to the place of incorporation was a step in favour of the free movement of companies. The codificators of the Hungarian PIL Code in the sixties and seventies could hardly forsee, that the country shall become a member of the EU but by they instinctively made a good decision. It does not often happen in Hungarian history.
Before *Cartesio* one might have expected, that the decisions of the ECJ do have some broader consequences for PIL. And not only PIL seemed to be affected, but also the provisions of substantive law: the Company Act and the Firms Act. A good example is the history of *Cartesio*. In this case reference was made by a Hungarian apellate court for a preliminary ruling concerning – inter alia - the compatibility of Hungarian company law, firm-regulations and PIL with the principle of the freedom of establishment in European law. Even prior to the decision of the ECJ on 16. December 2008 in *Cartesio*, seemed to be clear that Hungarian company and firm law was – at least untl its modification in 2007.[14] – not compatible with the place of incorporation rule of the Hungarian PIL and this caused problems in legal practice. I shall come back to the *Cartesio* case later. In the following I would like to focus on some aspects on PIL which had not been discussed so far in Hungarian legal literature. It should be emphasised that the problems in connection with movement of companies have arisen not only in situations when the country which the company intended to leave and the country where it intended to continue its activities had different choice of law rules, but also in cases when both countries folloved the incorporation theory. This was the situation in *Daily Mail*, *Centros* and *Inspire Art*.[15] All countries playing a role in those cases (England, Holland and Denmark) follow the theory of incorporation. As I mentioned above Hungarian PIL rules are theoretically compatible with European law. That's why the problem had not been discussed here as profoundly as in Germany, where some academics tried to prove, that the traditional seat theory was not contrary to the freedom of establishment and European law did not require a change of the traditional German PIL rule.[16] I wold like to put the question differently: Does the fact that Hungarian PIL follows the incorporation rule mean that the quoted decisions of the ECJ do not affect Hungarian PIL at all? We can hardly answer in the affirmative. A simple yes would simplify the problem, and not only because the Hungarian Court misunderstood the meaning of the relavant provision of the Code. The provisions of Section 18 on the personal law of companies should not be taken isolated but should be interpreted in the context of the provisions of the General Part of the Code. As a consequence I would like to analyse some aspects of the application of general provisions of Hungarian PIL.

III. The renvoi and the freedom of establishment

When focusing on some fundamental questions of the relationship and interactions of PIL and community law in connection with the free movement of companies Vékás has mentioned among others the problem of renvoi. He said thet the complicated question of the

[14] Act 2006. No V. on the registration of firms modified the former Act 1997. No. CXLV. The Cartesio case had been decided before the modification entered into force on 1-st September 2007.
[15] C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. ECR (2003) I-10155.p.
[16] Carl Baudenbacher- Dirk Buschle: Niederlassungsfreiheit für EWR-Gesellschaften nach Überseering IPRax 2004/1 26.p.

compatibility of the PIL rules with European law can be more complex when the role of renvoi in the different legal systems of Member States is taken into consideration.[17] Considering the two different approaches in the determination of the personal law of companies, one of the preconditions of renvoi is fulfilled: Since the Member States are practically divided into two groups in this respect, there is a real chance for reference back to the law of the forum or reference to a third law. The solutions, in reality, do not depend only on the different facts but also on the different approach to renvoi in the PIL of Member States. The handling of renvoi in Hungarian law is rather unique. The somewhat misleading main rule does not permit renvoi at all. The first sentence of section 4. provides: "If according to this Law Decree foreign law shall be applied, the substantive rules of the foreign law directly resolving the issue in dispute shall apply." The second sentence of the same Section however permits the application of Hungarian law when the foreign choice of law rule points to Hungarian law: „If however, in a question at issue the foreign law refers to Hungarian law the latter shall apply." As we know renvoi can be helpful in restoring the international harmony of decisions when countries using different choice of law rules have a different attitude towards renvoi. This is the case in questions of the personal status of natural persons where the principles of domicile and nationality are applied. The total renvoi helps in treating the natural persons the same way as their own national law does.[18] So, e.g. the personal law of a Danish citizen domiciled in Hungary shall be judged in Hungary and in Denmark according to Danish law: In Hungary because Danish PIL rules refer back to Hungarian law and in Denmark because Danish courts follow the domicile principle and Danish PIL does not apply renvoi at all. This result cannot be reached in situations when the Danish citizen is domiciled in a third country because Hungarian PIL does not accept the reference to a third law. This rule should be altered in order to achieve the international harmony of decisions. As in the case of natural persons an international harmony of decisions could be achieved in connection with the status of companies and other legal entities. Thus Hungarian courts can apply the *lex situs* of a company in cases when it determines the personal law of a company which had been established in a country following the law of the seat principle and transfered its real seat to Hungary. Accordingly the personal law of the company shall be the Hungarian law though Hungarian PIL follows the incorporation principle. The situation is different in the *lex situs* countries, which can apply the law of the place of incorporation when accepting the renvoi. The free movement of companies could be attained, up to a certain degree, through applying the renvoi in *lex situs* countries and not applying it in *lex originis* (incorporation) countries. That would mean the total exclusion of renvoi in Hungarian law which would also make an end to the „Heimwärtsstreben" in this respect.

IV. Fraudulent connection

Foreign letterbox companies (*Briefkastengesellschaften*) are companies whose personal law is the law of a foreign country where they are incorporated and their seat is in that foreign country too, but their whole economic acitivity is connecting them to inland. These companies are in fact not foreign companies and they could be treated as inland companies which have created an artificial link to the country of their incorporation. Creating an artificial link or simulating a link to a foreign law in order to evade the application of the otherwise applicable law is a phenomenon well known by PIL. The attitude of PIL to the fraudulent conection depends on the *lex fori*. Some of the countries (like France) treat it more severly, others (like

[17] Lajos Vékás Op. cit supra note 4. p.
[18] That's why László Réczei argued for a restricted acceptance of the reference back in Hungarian law in personal law, though he was against renvoi in general. László Réczei: A visszautalás Jogtudományi Közlöny 1970/4. 151-160.pp.

Germany) less severe and there are laws – like English or American law – which tolerate and do not sanction such behaviour. Foreign letterbox companies are companies which can be regarded as textbook examples illustrating the fraudulent connection.
Hungarian PIL does not tolerate fraudulent connection. Section 8 (1) of the Code provides the following: ”A foreign law emanating from a foreign element produced by the parties artificially or by simulation with the intention to circumvent the law otherwise applicable sall not apply.” According to subsection 2 such a connection should have no effect at all and the law otherwise applicable should apply. It means that foreign letterbox companies should be treated like Hungarian companies and their personal law should be Hungarian law.
In *Centros* and *Inspire Art* like situations one might discovere an intention to evade internal law by a fraudulent connection to a foreign law. A Hungarian forum could sanction this behaviour by not giving effect to the artifically-created foreign link and could treat those companies as Hungarian companies applying the provisions of section 8 of the Code. In such cases it is irrelevant whether the conflicts rules of the country to which the foreign link had been created and the conflicts rules of the forum are different. A good example is the *Centros* case where both countries – England, the country where the company was incorporated and had its statutory seat and Denmark, where the registration of a branch office of the company was denied by Danish authorities, followed the incorporation rule. The Danish authorities denied the registration of a branch of *Centros* on the grounds that it had never even intended to be economically active in England and the only aim of establishing the company in England was to avoid less favourable Danish company law requirements. Since Denmark is also an incorporation country, the *Centros* case has no effect at all on the connecting factor of the seat.
The traditional Hungarian attitude towards fraudulent connection would hinder the freedom of establishment and might be contrary to community law in cases when a foreign letterbox company is artificially linked to a Member State of the Community. This also applies for EEA countries by virtue of Article 34. of the EEA Treaty.[19] It means for example that companies incorporated in Lichtenstein – a paradise for pseudo foreign companies – having no real link whatsoever to Lichtenstein can enjoy the freedom of establishment and can freely transfer their seat into any Member Sate without risking the suspicion of the evasion of the domestic law of the Menber State in question. One must come to the conclusion that the evasion of law – a classical institution of PIL – can not be applied in relation to EEA countries in the future.

V. Ordre Public

Just like evasion of law, *ordre public* (public policy) is also effected by Community law in the same context. A Member State could hardly refuse the registration of a branch or a subsidiary of a foreign letterbox company by invoking public policy. The freedom of establishment can be restricted on public policy grounds by virtue of Art. 46 of the EC Treaty. That kind of public policy is not identical with the traditional public policy of the conflict of laws. This view, emphasised by Vékás in Hungarian legal literature is correct.[20] Fundamental freedoms guaranteed by primary law can be restricted only in exceptional cases when it is required for protecting the public interest. The restrictions shall be proportional and non-discriminatory. The protection of creditors is an important goal of eminent public interest but one can hardly use it as an argument in order to restrict freedom of establishment.[21]
Another question is whether the provisions of Hungarian company law could prevent a foreign company transferring its real seat to Hungary without being dissolved first and re-

[19] See the analysys of Baudenbacher-Buschle op. cit supra note 29.p.
[20] Lajos Vékás Op. cit supra note 7.p.
[21] This view is shared by Advocate Genral Maduro in his opinion in the Cartesio Case.(Opinion 32.)

established according to Hungarian company law. Until recently there was a discrepancy between Hungarian PIL and Hungarian company law in this respect. A domestic law can require its application against conflicts rules in international cases only, when the provisions of the domestic law are internationally mandatory. Such a mandatory character can not be imputed to Hungarian company law. This was the conclusion of the Hungarian Supreme Court in one of its recent decisions in a domestic case.[22] Though one might have serious doubts as to whether the so-called positive ordre public can be revoked in internal cases, it seems quite clear, that Hungarian company law provisions can not be applied as internationally mandatory provisions against the applicable law and cannot serve as a tool in order to restrict the freedom of establishment.

VI. Qualification (Characterization)

According to Section 3. (1) of the Hungarian 1979 PIL-Code a Hungarian forum shall apply the *lex fori* when legal qualification of the facts or legal relationships have to be judged in order to determine the applicable law. One of the important steps of qualification is the precise identification of the legally relevant facts in connection with the application of a certain choice of law rule. The range of the choice of law rule determining the personal law of companies is drawn by Section 18. of the Hungarian Code. Section 18. provides, that the relevant substantive questions determined by the personal law of legal persons are their legal capacity, their economic character, their personal rights and the legal relations of its members. The Code uses the term legal persons. This might cause trouble when the personal law of companies not having a legal personality according Hungarian company law has to be determined. The Code has a special rule for the determination of the economic quality of private persons who carry out economic activity [Section 14 (1)]. When determining the personal law of companies not having legal personality the application of Section 18. seems to be the proper solution. This solution is being followed in the case *Cartesio* referred to above. *Cartesio* is a „*betéti társaság*" (limited partnership) established under Hungarian law. Though a „*betéti társaság*" is not a legal person under Hungarian company law, there was no doubt about the application of Section 18. There are situations however when the forum has the possibility of qualifying certain questions connected to company law as questions not belonging to company law and, as a consequence, not falling under Section 18. The result of such a qualification may be the application of a law not identical with the law applicable under the company law statute.
Such juggling with the institution of qualification is a well known phenomenon in PIL. There are certain legal institutions which migt be sensitive in this respect. In German literature banktruptcy is an example for different qualification.[23] There was a tendency in German PIL of the separate independent qualification of banktruptcy. Many situations formerly belonging to the „grey zone" of bankruptcy law and company law qualified as an institution of company law are qualified nowadays as independent from company law as being part of bankrupcy law. As a consequence the *lex fori* is applied under Art. 4. of the Insolvency Regulation and not the law of the seat applicable under the company law statute. Some German authors expressed serious doubts whether this method could be helpful in avoiding the consequences of an unjust restriction of the right to freedom of establishment under the lex fori.[24] When company law claims are not qualified as company law issues and are judged not under the company law statute but under the *lex fori* this does not mean that the application of the *lex*

[22] Legfelsőbb Bíróság Gf.VI. 30848/1997/8. BH 1997. 489.
[23] Peter Mankowski: Entwicklungen im internationalen Privat- und Prozessrecht 2004/2005. (Part I.) RIW 2005/7. 468.p.
[24] Gerald Spindler-Olaf Berner op. cit Supra note

fori could lead to unnecessary restriction of the right to freedom of establishment. One can only hope that all this will not lead to a „race to the bottom" effect in the sphere of company law.[25]

VII. The *Cartesio* case. A missed possibility for the ECJ to overrule its Daily Mail decision

In the *Cartesio* case one of the questions was the compatibility of the provisions of Hungarian company law with Community law. The case differs from *Centros* and *Überseering* because it concerned the provisions of a country which the company intended to leave. In this respect the *Cartesio* case is a paralell of *Daily Mail*. The question was not the compatibility of the choice of law rule of Hungarian PIL determining the personal law of companies but rather the compatibility of Hungarian company law and the regulation of firm-proceedings with that of Hungarian PIL.
The facts of the case are the following: Cartesio, a *„betéti társaság"* (limited partnership) constituted in accordance with Hungarian law has its registered seat in Baja (Bács-Kiskun county). It has two partners who are resident in Hungary and have Hungarian nationality. According to Hungarian law one of the partners is a limited partner, who is obliged to contribute a stipulated amount of capital and is liable only for that amount. The other partner is a general partner, who is liable of all debts of the limited pertnership. On 11 November 2005, Cartesio submitted an application to the Bács-Kiskun County Court („*Megyei Bíróság*") sitting as a commercial court to amend ist registration in the local commercial register so as to record the adress 21013 Gallarate (Italy), Via Roma No.16 as its new company seat. The court however rejected the application. It held that Hungarian law did not offer companies the possibility of transferring their real seat (registered office) to another Member State while retaining their legal status as a company governed by Hungarian law. Therefore, in order to change its real seat, Cartesio first would have to be dissolved in Hungary and then reconstituted under Italian law. The reasoning of the court is remarkable. The court found that both, Hungarian and Italian law follow the law of the seat principle. It drew the attention of the applicant to the possibility of establishing a branch of the company in Italy while keeping its Hungarian nationality. The applicant did not share this view of the court. It empasised that Hungarian law followed the principle of incorporation and in consequence, companies registered in Hungary could freely transfer their real seat to another country whithout being forced to change their personal status. The court found in its ruling, that it was irrelevant, whether the seat-principle or the incorporation principle was followed by Hungarian PIL because both principles would lead to the application of Hungarian law. The court found that the problem could not be solved under the relevant provisions of Hungarian law and that there was no possibility of trasferring of the real seat while keeping the Hungarian nationality of the company under the subsisting Hungarian legal provisions.[26] In its appeal to the Szeged Regional Court of Appeal (*„Ítélőtábla"*) Cartesio argued, that the transfer of the real seat was in harmony with the provisions of Hungarian PIL. The main problem, according to Cartesio, was that although the nationality of the company was not influenced by the transfer of the real seat, Hungarian company law applied only to companies having their real *and* statutory seat in Hungary. Accordingly, a Hungarian company applying for the transfer of its seat abroad did not fall under Hungarian Company law and so it can not apply for further registration in the Hungarian company-register. Consequently the transfer of the real seat was not blocked by

[25] To the „race to the bottom" effect see Miklós Király Op. cit Supra note.207-208.pp.
[26] This view was shared by one of the judges of the Supreme court too. Ursula Vezekényi: A közösségi jog jelenléte a magyar társasági jogban in: Gyakorló jogászként az Európai Unióban HVG-Orac Budapest 2004. 202.pp.

the choice of law provisions of Hungarian PIL but by the substantive and procedural provisions of Hungarian companies and firms. In order to clerify the questions raised, the applicant proposed that the appellate court seek a preliminary ruling from the ECJ in order to detrmine whether the Hungarian law was compatible with the right to freedom of establishment constituted by EC law. The Szegedi Regional Court of Appeal referred four questions to the ECJ for a preliminary ruling. Here I would like deal with the fourth question only as relevant of he problem dealt with in this paper. The fourth question – consists of three parts:

a) If a company, constituted 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 d ifferentiate between commercial companies with respect to excercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law? May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance whith 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?

In the preliminary proceedings the Hungarian government argued that the case fell outside the scope of Articles 43 EC and 48 EC. Ireland, Poland, Slovenia and the United Kingdom took the same view. On the other hand, Cartesio, the Comission and the Dutch government submitted that there has been a restriction on the right of establishment and that, accordingly Articles 43 EC and 48 EC applied.

Maduro AG expressed the view in his Opinion that the case fell within the scope of the EC rules on the right to establishment. National rules that allowed a company to transfer its real seat only within the national territory amounted to discrimination against the excercise of the freedom of establishment. In those circumstances the Treaty rules on the right of establishment clearly applied. When analysing the case law of the ECJ since Daily Mail, he stressed his view that the ECJ's approach had become more refined and rejected the argument that rules of national company law should fall outside the scope of the Treaty provisions on the right to establishment. He expressed his opinion that 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. The result of this approach was that ECJ case law typically respected national rules relating to companies regardless 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 to establishment implied that neither theory could be applied to its fullest logical extension. Maduro AG concluded that Member States did not enjoy an absolute freedom to determine the „life and death" of companies constituted under their domestic law, irrespective of the consequences for te freedom of establishment. He found that the restriction of the freedom of establishment could not be justified in the present case neither on grounds of general public interest neither on grounds of the prevention of abuse of fraudulent conduct or even on grounds of the protection of creditors, minority shareholders, employees or tax authorities.

The Advocate General proposed that the ECJ should give the following answer to question 4 referred by the Szeged regional Court of Appeal:
„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"
It is probable that, partly as a consequence of the Cartesio case Hungary has amended its firm law while the case was pending before the ECJ. From September 1-st 2007 on companies have been free to transfer their centre of administration (real seat) into another Member State and only have to keep their statutory seat in Hungary so that they can remain under the regime of Hungarian company law. That means that Cartesio could move its real seat to Italy under present Hungarian law.[27]

The ECJ delivered its judgement on 16. December, 2008. All commentators of the decision agree, that the Court – while following AG Maduro' Opinion, regarding the first, second and third question – has taken a different position in the fourth question concerning the freedom of establishment. The Court held, that Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.[28] I do not want to analyse the judgement since it has been done by severeal Studies all over Europe.[29] My conclusions are concerning only the PIL regimes of the Member States and their compatibility with the freedom of establishment. It had been suggested by several authors, based on the earlier decisions of the ECJ that the *lex situs* may not be in conformity with EC law. The Cartesio case has shown, that the problem is more complex and can not be restricted to the concurrence of conlficts rules only. The cross border seat transfer can not be guaranteed by the *lex originis*, the incorporation rule in itself, it has to be harmonised with substantive company law provisions. On the other hand the *lex situs* does not preclude companies transferring their seat into another Member State if substantive law differentiates between the real seat and the statutory seat, allowing the transfer of the real seat whithout loosing the original *lex personae* under the registered seat of the company. The above solution has been done by Hungary[30] – a lex originis state, and Germany[31] – a lex situs state – with the same effect. The conclusion is that – since the ECJ did not solve the problem - national lawmakers of the Member States are able to guarantee the cross border real seat transfer by modifying national company law provisions, even without creating a unified regime of conflicts rules determining the nationality of Companies in the EU.

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[27] A critque of the Opinion of Advocate General Maduro is written by Péter Metzinger: A társaságok és a szabad letelepedés (A Cartesio ügyben közzétett főtanácsnoki vélemény kritikája). Európai Jog 2008/4 21-26 pp. He criticises the following sentence of the opinion:"Hungarian company law, so it would appear, is grounded in the 'real seat' theory…" He argues, that company law cannot be grounded in any such theories, since these are of PIL nature. On the other hand he says thet the answer on the 4-th questionis correct.

[28] Case C-210/ 06 Cartesio para. 124.

[29] See the referencees by Korom and Metzinger op. cit. In Hungarian literature see Péter Metzinger: A társaságok szabad letelepedése a Cartesio ügy után: Hogyan tovább nemzetközi székhelyáthelyezés? In: Európai Jog 2009/2. 9-15.p. In the same Volume see: Judit Fazekas: Quo vadis Cartesio? Gondolatok a székhelyáthelyezésről és a letelepedési szabadságról az Európai Bíróság Cartesio döntése nyomán. In that article Mrs. Fazekas – who represented the Hungarian Government in the procedings before the ECJ - welcomes the decision of the Court in the fourth question „since it has in essence confirmed the point of wiev of the Hungarian Government".

[30] See supra note 14.

[31] See the „Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) – referred to by Korom and Metzinger op. cit. 35.p.