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TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

In

Case C-210/06

CARTESIO Oktató és Szolgáltató Betéti Társaság

WRITTEN OBSERVATIONS OF IRELAND

Pursuant to the second paragraph of Article 23 of the Protocol on the Statute of the Court of Justice, Ireland, represented by David J. O'Hagan, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8 acting as Agent, with an address for service at the Embassy of Ireland, 28 Route d'Arlon, Luxembourg, assisted by Anthony M. Collins S.C. and Noel J. Travers B.L. of the Bar of Ireland, and by Jonathan Buttimore B.L. of the Office of the Attorney General, submits the following written observations to the Court of Justice on the questions referred for preliminary ruling pursuant to Article 234 EC by the *Szegedi Ítélőtábla* (Court of Appeal, Szeged), Hungary, by order of that Honourable Court of 20th April 2006, received at the registry of the Court of Justice on 5th May 2006.

I — Legal and factual context

Background

1. This preliminary reference arises out of an appeal by CARTESIO Oktató és Szolgáltató Betéti Társaság (hereinafter "Cartesio"), a limited partnership without legal personality constituted in accordance with Hungarian Law CXLIV of 1997 on commercial companies (hereinafter "the Gt") and entered on the commercial register on 11th June 2001, against a decision of the Regional Court, Bács-Kiskun, sitting as a commercial court (*cégbíróság*, hereinafter "the commercial court") to reject Cartesio's application of 11th November 2005 to amend its registration in the local commercial register so as to record the following address as its new registered head office: "*21013 Gallarte (Italy), Via Roma No 16*". Cartesio's registered office is currently located in Hungary. Cartesio's subscribed capital is HUF 100,000, which has been paid up in full by its two partners: one of whom (its general partner) has unlimited liability in respect of the partnership's debts, while the other has limited liability.

2. The commercial court held that Hungarian law governed Cartesio' status, irrespective as to whether that was grounded upon its place of incorporation or the location of its registered office. In the absence of any rule of Hungarian law facilitating the transfer of its registered office abroad while retaining its character as a company governed by Hungarian law, the application required that Cartesio be first be wound up in Hungary and then reconstituted under the law of Italy. Accordingly the commercial court refused Cartesio's application.

3. Cartesio appealed to the *Szegedi Ítélőtábla* (Court of Appeal, Szeged, hereinafter "the national court"), asserting that the commercial court's

decision was incompatible with Articles 43 EC and 48 EC. It submitted that Article 48 EC merely requires a company seeking to exercise the right of establishment to be situated in a Member State and that it is not required to maintain its registered office in the Member State where it is constituted. As a matter of Hungarian law, the nationality of companies constituted thereunder remains that of the place of their incorporation and is unaffected by the transfer of its registered office. The difficulty arises from Articles 1(1) and 2(1) of Law CXLV of 1997 on the commercial register, company advertising and legal procedures in commercial matters (hereinafter "the Ctv"), which provides that only those companies that maintain their registered offices in Hungary fall within the scope of the Gt. A Hungarian company that does not have its registered office in Hungary falls outside the scope of the Gt and therefore cannot even have information relating to it registered in Hungary. Relying upon *SEVIC*,[1] Cartesio contends that by requiring Hungarian companies to maintain Hungary as their domicile, the relevant provisions of Hungarian law are incompatible with Articles 43 EC and 48 EC. It also submits that the national court is a court of a Member State against whose decisions there is no judicial remedy, with the result that it was obliged to make this reference for a preliminary ruling to the Court of Justice.

View of the national court

4. The national court referred three questions concerning the application of Article 234 EC and a three-part question concerning the interpretation of Articles 43 EC and 48 EC to the Court of Justice by way of a reference for preliminary ruling.

(i) Article 234

[1] Case C-411/03 *SEVIC* [2005] ECR I-10805.

5. The national court considers it necessary to seek confirmation from the Court of Justice that an appellate court hearing an appeal in *ex parte* proceedings from a decision of a lower court exercising a commercial registry function is a "*court or tribunal*" for the purposes of Article 234 EC.

6. The national court also expresses uncertainty as to whether it is "*a court or tribunal of a Member State against whose decisions there is no judicial remedy*" for the purpose of the third paragraph of Article 234 EC. In particular it wishes to know whether the existence of what it describes as an extraordinary appeal on a point of law against its judgments would justify a reconsideration of the criteria enunciated by the Court of Justice in *Lyckeskog*.[2]

7. Arising from the general right of appeal in Hungarian law against decisions of lower courts to make preliminary references to the Court of Justice pursuant to Article 234 EC, including the fact that its own decisions may be the subject of an appeal to the *Legfelsőbb Bíroság* (Supreme Court) on a point of law only, wherein the appellate court may amend the order, render the request for a preliminary ruling inoperative and order the court that made the order for reference to resume the proceedings that have been suspended, the national court asks whether such a right of appeal is compatible with Community law, notwithstanding the *Rheinmühlen-Düsseldorf* line of case-law.[3] This flows from the fact that a successful appeal against an order to refer would prevent a court from making a reference for preliminary ruling even where it considers that an interpretation of Community law is necessary to determine the dispute before it.

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[2] Case C-99/00 *Lyckeskog* [2002] ECR I-4839.

[3] Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33 and Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139.

(ii) Articles 43 & 48

8. The national court refers initially to the judgment of the Court of Justice in *Daily Mail*, which held that companies, as creatures of the law, exist only by virtue of the national laws governing their constitution and functioning. Specifically, it notes that the Court held that Articles 43 EC and 48 EC do not confer on a company constituted under the law of a Member State and registered there a right to transfer its central administration to another Member State while retaining its legal personality and nationality in the first Member State. It queries whether subsequent case-law, in particular *SEVIC*, which requires Member States not to differentiate between companies according to the State in which the persons registering them are nationals, requires a reconsideration of the approach in *Daily Mail*. It refers also to "*new forms of companies that can operate in accordance with Community law*", such as the European Company, which are permitted to transfer registered offices and establishments from one Member State to another without having to go into liquidation. However, as Cartesio is not such a company, the issue is whether Hungarian rules that do not facilitate the transfer of the registered office of a Hungarian company to another Member State are restrictive of the freedom of establishment and, if so, whether they may be justified and regarded as being proportionate.

(iii) Questions referred

9. Consequently, the national court referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 234 EC:

> "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 of the Treaty of Rome, where neither the action*

before the commercial court nor the appeal procedure is inter parties*?*

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 of the Treaty of Rome, must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 of the Treaty of Rome, 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 national law, confers a right to bring an appeal against an order for a preliminary reference, 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 of the Treaty of Rome - 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 registered office to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?*

B. May a Hungarian company request transfer of its registered office to another Member State of the European Union relying directly on Community law (Articles 43 and 48 of the Treaty of Rome)? If the answer is affirmative, may the transfer of the registered office 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 and 48 of the Treaty of Rome be interpreted as meaning that a national rules or national practices [sic] which differentiate between commercial companies with respect to the exercise of their rights,

according to the Member State in which their registered office is situated, is incompatible with Community law?

May Articles 43 and 48 of the Treaty of Rome be interpreted as meaning that, in accordance with those articles, a national rules or practices [sic] which prevent a Hungarian company from transferring its registered office to another Member State of the European Union, is incompatible with Community law?"

II — Legal Submissions

Article 234

10. Ireland submits that the **first question** is uncontroversial. It follows clearly from the *Job Centre (1)* line of case-law that proceedings for registration in, or for the amendment of an existing registration on, a commercial register, even where national law requires that they be brought before what is clearly a court within the relevant domestic legal system, constitute the exercise of administrative authority. The national court in such circumstances is required to exercise a function that falls to be regarded, for the purpose of Community law, as non-judicial, it not being called upon "*to give judgment in proceedings intended to lead to a decision of a judicial nature*".[4] As a consequence the Court of Justice has no jurisdiction to rule on questions referred out of such proceedings.[5] However an appeal against such a decision at second instance is a procedure of a judicial nature for the purposes of Article 234 EC, notwithstanding that the procedure remains *ex parte*.[6]

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[4] Case C-111/94 *Job Centre* (1) [1995] ECR I-3361, paragraph 9.
[5] Case C-111/94 *Job Centre* (1) [1995] ECR I-3361, paragraphs 9 to 12; Case C-55/96 *Job Centre* (2) [1997] ECR I-7119, paragraph 7.
[6] Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 7. See also Case C-411/03 *SEVIC* [2005] ECR I-10805.

11. It is unclear whether the national court accepted Cartesio's submission that it was "*a court or tribunal of a Member State against whose decisions there is no judicial remedy*" for the purpose of the third paragraph of Article 234 EC and referred the **second question** for preliminary ruling on that basis. Notwithstanding certain deficiencies in the text of the second question, given that the national court appears to have serious doubts as to whether the possibility of an appeal on a point of law against its otherwise final and immediately enforceable judgments relieves it of the obligation to make a reference for preliminary ruling contained in the third paragraph of Article 234 EC, Ireland suggests that the answer to this question may be of assistance to the national court and that it would therefore be appropriate that it receive an answer from the Court of Justice.[7]

12. The Order for Reference appears to indicate that under Article 270(2) of the Law III of 1952 on Civil Procedure (hereinafter "the Pp"), parties affected by a decision may, in respect of that part of the decision which refers to them, bring an appeal against final judgments and orders of second instance courts before the *Legfelsőbb Bíroság* on a point of law only. This right to appeal does not appear to be subject to the leave or permission of any court.

13. On the basis that any issue bearing upon the validity or interpretation of Community law is capable of constituting a "*point of law*" for the purposes of Article 270(2) of the Pp, Ireland submits that the national court is not "*a court or tribunal of a Member State against whose decisions there is no judicial remedy*" for the purpose of the third paragraph of Article 234 EC.

[7] A similar approach appears to have been adopted in Case C-99/00 *Lyckeskog* [2002] ECR I-4839, discussed in greater detail below.

14. This approach finds support in the recent judgment of this Honourable Court in *Lyckeskog*, where the issue arose as to whether national courts are "*final*" for the purposes of the third paragraph of Article 234 EC if the exercise of the right to appeal is conditional upon obtaining leave from the appellant tribunal. Recalling that the particular purpose of the third paragraph of Article 234 EC is to prevent a body of national case-law not in accordance with the rules of Community law from coming into existence in any Member State,[8] the Court concluded that:

> "*Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.*" [9]

15. On this basis, the Court of Justice ruled that since under the Swedish system parties had a right to appeal to the Supreme Court from judgments of a second instance court, albeit circumscribed by the requirement to obtain leave from the appellate court, the second instance court could not be regarded as delivering a decision against which there was no judicial remedy.

16. Ireland therefore submits that, where leave to appeal is not a requirement of bringing an appeal and any issue bearing upon the validity or interpretation of Community law is capable of constituting a "*point of law*" for the purposes of Article 270(2) of the Pp, the national court does not constitute a court against whose decisions there is no judicial remedy, within the meaning of Article 234 EC.

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[8] Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1978] ECR, paragraph. 5 and Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 25.
[9] Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paragraph 16.

17. Ireland submits that a clear issue of admissibility arises as regards the **third question** in circumstances where no appeal on a point of law having been brought against the order seeking a reference for preliminary ruling, it is difficult to see how any answer thereto could be of assistance to the national court. It is well established that this Honourable Court will not answer a question that is hypothetical in the context of the subject-matter of the main proceedings, even if it raises an important issue of principle, in the instant case the extent to which the *Rheinmühlen-Düsseldorf* line of case-law still governs appeals against orders of reference for preliminary ruling made by national courts other than those governed by the third paragraph of Article 234 EC.[10]

18. In the premises, Ireland submits that the third question be dismissed as inadmissible.

Articles 43 EC & 48 EC

19. It may first be observed that the national court has described Cartesio as being a partnership without legal personality. It might therefore be queried whether question 4, which is predicated on Cartesio being "*a company or firm formed in accordance with the law of a Member State*" for the purpose of Article 48 EC and, thus, to be assimilated to a national of a Member State for the purpose of Article 43 EC, is relevant, *i.e. whether Articles 43 EC and 48 EC* are applicable. Nevertheless, the order for reference also describes the partnership as being limited and the national court states clearly in its own analysis (see the penultimate paragraph of the order for reference) that one of its partners enjoys limited liability (see paragraph 1

[10] *E.g.*, Case C-83/91 *Meilicke* [1992] ECR I-4871; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783; Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, paragraph 39.

above). It would therefore seem appropriate, since it is for the national court alone (save in the most exceptional of circumstances) to determine what questions of Community law arise and are necessary for it in order to decide the dispute before it in the main proceedings, for the Court of Justice to assume that an entity like Cartesio may be regarded as being a legal person for the purposes of Article 48 EC.

(i) Principal submission: the non-applicability of Articles 43 EC and 48 EC

20. By **Questions 4A and 4B** the national court wishes to know, primarily, if a request by company formed in accordance with laws of one Member State to transfer its registered office to another Member State falls within the scope of application of Community law, in particular, whether a party making such a request may rely upon Articles 43 EC and 48 EC, or must await the adoption of harmonising measures by way of Community legislation. Although Ireland is not opposed to legislation facilitating the transfer of registered offices within the Community, it submits, in the absence of harmonised Community rules, that the Treaty provisions on freedom of establishment do not govern such requests.

21. Ireland considers that the fundamental principle enunciated in *Daily Mail* remains good law. In *Daily Mail* the Court was asked to consider whether the right of establishment guaranteed by the Treaty encompassed the transfer by a company of its central management and control from its Member State of origin, the United Kingdom, to the Netherlands while retaining its registered office and place of incorporation, *i.e.* its legal domicile, in the United Kingdom. United Kingdom law provided that a United Kingdom registered company seeking to effect such a transfer had to seek the prior consent of its tax authorities.

22. The Court of Justice observed in *Daily Mail* that, "*unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law*", which therefore "*exist only by virtue of the varying national legislation which determines their incorporation and functioning*" (paragraph 19). Noting that the United Kingdom was one of a limited number of Member States which conditionally permitted companies to transfer their central administration to other countries, and that "*[t]he Treaty had taken account of that variety in national legislation*", it held that "*[i]n defining, in Article [48], the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company*" (paragraph 21). It found there were no relevant Community legislative or other provisions dealing with these differences. Consequently, it held that (paragraph 23):

> "*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.*"

23. On this reasoning, Articles 43 EC and 48 EC do not confer on companies a right to transfer their central management and control from their Member State of incorporation to another Member State. By parity of reasoning, notably from the Court's express reference at paragraph 21 of its judgement to the various connecting factors cited in Article 48 EC as being "*on the same footing*", Articles 43 EC and 48 EC do not require that Member State permit such companies to transfer their registered office. Indeed, since it is generally accepted that establishment within the meaning of the Treaty involves two factors — physical location and the

exercise of an economic activity on a durable basis — it is difficult to accept that the mere transfer of a registered office satisfies both of those requirements.

24. Consequently, Ireland submits that Community law, as it stands at present, does not regulate the question whether a legal person incorporated in accordance with the laws of a Member State and with its registered office in that Member State should be permitted to transfer that registered office to another Member State. It follows that Articles 43 EC and 48 EC may not be relied upon to support such a request.

25. The national court queries whether later case-law and in particular *SEVIC*, which requires that the laws of Member States cannot differentiate between companies according to the State in which the persons which register them are nationals, call for the *Daily Mail* approach to be re-considered. The national court also asks whether the advent, *inter alia*, of the European Company or SE,[11] which is permitted to transfer registered offices and establishments from one Member State to another without going into liquidation, would justify a broader interpretation of the scope of Articles 43 EC and 48 EC.

26. Under the *Centros* line of case-law, confirmed in *Inspire Art*, the right of establishment extends to guaranteeing the right to set up companies or firms in one Member State for the purpose of avoiding company law rules of another Member State where the new legal person carries out, *via* a branch, all or virtually all of its activities.[12] In *Centros* the Court held in effect that the refusal of the Danish authorities to register the establishment of a branch by a United Kingdom registered company in

[11] See Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001, L 294, p. 1.
[12] See Case C-212/97 *Centros* [1999] ECR I-1459 and Case C-146/01 *Inspire Art* [2003] ECR I-10155.

that Member State because it failed to comply with the host State's rules on minimum capital infringed Article 43 EC, notwithstanding that the Danish authorities took the view that the "*real seat*" of the company was in Denmark where the shareholders resided and where there was evidence it carried out all of its business activities. The Court held that "*[t]he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty*" (paragraph 27).

27. At issue in *Inspire Art* was a Dutch law which applied Netherlands company-law rules on minimum capital and directors' liabilities to foreign companies carrying out all, or virtually all, of their activities in the Netherlands. In their submissions to the Court several Member States referred to *Daily Mail* and submitted that it recognised that Articles 43 EC and 48 EC do not affect the powers of Member States to determine the relevant factor connecting a company to a given national legal order *e.g.* the place where it carries out its activities, its incorporation and/or its registration. The Court construed the Member States' submission as arguing "*that the Member States retain the right to take action against brass-plate companies, that classification being in the circumstances of the case inferred from the lack of any real connection with the State of formation*" (paragraph 102). It drew a clear distinction with the *Daily Mail*-type of case: whereas it "*concerned relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation*", *Inspire Art* raised the question "*whether the legislation of the State where a company actually carries on its activities applies to that company when it was formed under the law of another Member State*" (paragraph 103). The Court concluded that the

provisions of the Netherlands law under consideration "*constituted a restriction on freedom of establishment as guaranteed by Articles 43 EC and 48 EC*" (paragraph 104).

28. Ireland submits that the *Centros/Inspire Art* case-law does not undermine the applicability of the principles enunciated in *Daily Mail* to a request such as that at issue in the proceedings before the national court, by which a company incorporated in one Member State seeks to transfer its registered office to another Member State while retaining its legal personality in its State of incorporation. In other words, *Daily Mail* continues to apply where a company seeks to invoke Article 43 EC in the jurisdiction of its incorporation and thus its domicile so as, in effect, to challenge measures by which those authorities seek to control its right to "*emigrate*" while retaining its legal form as a company incorporated in its state of origin.[13] The regulation of such transfers remains a matter for national law until and unless appropriate harmonising rules are adopted at a Community level.[14]

29. Nor does Ireland consider that the recent judgment in *SEVIC* calls for a re-appraisal of this assessment. At issue in that case was the refusal by the competent German authorities — Amtsgericht (Local Court) Neuwied — on the basis of Paragraph 1(1) of the Umwandlungsgesetz (national law on transforming companies, 'the UmwG'), which refers only to the merger of companies established in Germany, to accept an application from SEVIC, a German company, for registration in the national commercial

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[13] Description used in Steiner, Woods & Twigg-Flesner, *EU Law* (Oxford, 9th ed., 2006), p.465.

[14] The Commission circulated draft informal proposals within the framework of the Company Law Experts Group pursuant to its 2003 Action Plan on Future Priorities on Company law/corporate Governance, for a "Directive of the European Parliament and of the Council on the Cross Border Transfer of the Registered Office of a Limited Company", *i.e.* a draft Fourteenth Company Directive, in May 2004. See the working draft published on 25th May 2004 for the CLEG meeting of 3rd June 2004 (MARKT/CLEG/14/2004-EN), discussed further at paragraph 40, below. Following a consultation process with the Member States, Ireland understands that the Commission intends to publish a formal proposal for a Fourteenth Company Directive towards the end of 2006.

register of the merger between itself and a Luxembourg company, Security Vision, on the ground that the UmwG provides only for mergers between companies established in Germany. SEVIC appealed to the Landgericht (Regional Court) Koblenz, which asked the Court of Justice whether Articles 43 EC and 48 EC preclude a refusal of the registration in such a register of the merger by dissolution without liquidation of one company and the transfer of the whole of its assets to another company where one of the two companies is established in a second Member State, whereas such registration is possible, on compliance with certain conditions, where the companies participating in the merger are both established in the territory of that Member State.

30. Of particular interest for these proceedings was the submission by the Netherlands that the dissolution of a company directly affects its formation and functioning, which the Court had acknowledged in *Daily Mail* fell outside the scope of Community law and was governed, in the same way as nationality in relation to natural persons, exclusively by national legal systems. This submission was expressly rejected by Advocate General Tizzano (as he then was).[15] He stated that it was predicated on "*an inverted logic in the sense that it concludes that a consequence of the merger, namely the dissolution of the incorporated company, is the reason why that company is unable (even before it is dissolved!) to carry out the merger and therefore the justification for the prohibition on registration which precisely precludes this operation*" (Opinion, paragraph 25). He further observed that "*throughout the stage preceding the merger and up to the registration thereof both companies exist and operate as legal persons entirely capable of negotiating and entering into the merger contract*", and that "*[i]t is only when the merger is completed, and in particular when this act is registered, that one of the two persons ceases to exist*" [but that] "*until such time that is not the case because if the*

[15] Opinion of AG Tizzano of 7th July 2005, paragraph 23.

operation has not been completed the company which was to have been incorporated would continue to exist as an autonomous legal person" (Opinion, paragraph 26). The national provision therefore directly affected legal entities in full possession of their legal capacity and barred them from benefiting from freedom of establishment

31. The Court endorsed the view of the Advocate General. It held that "*the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators*" (paragraph 18). Cross-border merger operations "*like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States [and] constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC*" (paragraph 19).

32. It does not follow, implicitly or otherwise, that the Court re-considered its *Daily Mail* case-law. Rather, the Court did not accept the submission that the relevant provision of the UmwG was, like in *Daily Mail*, a measure directly connected to relations between a company and the Member State under the laws of which it had been incorporated, *i.e.* directly related to its domicile. The Court was clearly satisfied that such merger operations "*constitute[ ] an effective means of transforming companies in that it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the*

dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter" (paragraph 21). By differentiating between the internal and cross-border nature of the merger, a provision such as the UmwG is "*likely to deter the exercise of the freedom of establishment laid down by the Treaty*" (paragraph 22). In so doing, it affects companies both entering and leaving the German market in that it affects decisions by German undertakings to establish themselves or expand their presence in other Member States, whilst also preventing a means of access to the German market for non-German undertakings. Furthermore, as Advocate General Tizzano observed, "*the merger in question could be seen not only as a case of primary establishment but also as a case of secondary establishment, since the takeover of a company established in another Member State (in this case the Luxembourg company) does not prevent the incorporating company (in this case the German company) from being in a situation, precisely as a consequence of the merger, of operating on a stable basis in the Member State in which the incorporated company was established, and thus in a Member State other than its own, with the result that it forms there an establishment, albeit a secondary one*" (Opinion, paragraph 35).

33. Contrariwise to the position in SEVIC, the request at issue before the national court does not involve any effort by Cartesio to integrate itself into the economic life of any Member State other than Hungary, its Member State of origin. Nothing in the order for reference suggests that Cartesio has any intention substantively to exercise free movement rights in Italy or in any other Member State and/or of how, even if Cartesio was minded to do so, why this requires the transfer of its registered office to Italy rather than, for example, the opening of a branch in Italy or the creation of an Italian subsidiary, both of which would be governed by Articles 43 EC and

48 EC.[16] Indeed, it may also be asked whether a desire by a legal person to register a new location for its registered office in another Member State establishes a connection with Community law in circumstances where all of the relevant elements, apart from the proposed change, are located in a single Member State and there is no evidence that Cartesio in fact intends to exercise any rights conferred by the freedom of establishment.[17]

34. Turning to **Question 4C**, this case does not appear to relate to national rules or practices which differentiate between commercial companies with respect to the exercise of their rights on the basis of the location of their registered office. The combined effect of Articles 1(1) and 2(1) of the Gt, as interpreted by the commercial court, is that a Hungarian company must maintain its registered office in Hungary to enable the said court to address requests regarding its entry in the commercial register. A request such as that made by Cartesio cannot be compared with that of a Hungarian company which simply wishes to have recorded a change of address within Hungary of its registered office: the former directly calls into question the domicile of such a legal person while the latter raises an administrative issue with no effect whatsoever on its domicile. A request from a non-Hungarian company to record a Hungarian registered office on the Hungarian register, although mentioned by the commercial court, is clearly academic as far as the main proceedings are concerned. It is also clearly distinguishable as, in the absence of harmonised Community rules, it is difficult to conceive of the basis upon which the commercial court could deal with such a request unless the governing law of the company in question permits it to transfer its registered office to Hungary. In the proceedings before the national court a request such as that at issue arises only if Hungarian law permits the requested transfer, as it would be

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[16] Certain agreed conditions governing the operation of such a branch are already prescribed in the Eleventh Council Directive 89/666 of 21 December 1989 [1989] O.J. L395/36.
[17] See Case 180/83 *Moser* [1984] ECR 2539. See also, *e.g.*, Case C-299/95 *Kremzow* [1997] ECR I-2629.

then, presumably, that Cartesio would be in a position to apply to the competent Italian authorities for registration of "*21013 Gallarte, Via Roma No 16*" as its new registered office.

(II) Alternative submission: the necessity and proportionality of any restriction

35. In the event the Court disagrees with the above analysis and considers that national legislation that precludes the amendment of the commercial register in Hungary so as to record addresses in other Member States as being the registered offices of Hungarian companies falls, in principle, within the material scope of Articles 43 EC and 48 EC, Ireland asks whether that may be a restriction on the freedom of establishment. For the reasons already set out in paragraph 33 above, it is, in Ireland's view, doubtful whether a prohibition on the right of a company incorporated in accordance with the laws of one Member State to transfer its registered office to another Member State constitutes a restriction on the right of such a company to exercise the right of establishment in the second Member State since it does not affect its right to set up branches, agencies or subsidiaries in the latter State. Ireland therefore submits that a prohibition such as that at issue in the proceedings before the national court is not a restriction on the right of establishment of legal persons within the meaning of Articles 43 EC and 48 EC.

36. If the Court of Justice nonetheless considers that the prohibition at issue constitutes such a restriction, Ireland offers the following analysis strictly in the alternative and by way of submissions in respect of the national court's alternative second subquestion in **Question 4B**. In such circumstances, it would be necessary to consider whether there would be any basis upon which a refusal to permit the transfer to another Member State of the location of the registered office of a company that otherwise remains fully

constituted in accordance with the law of the Member State of origin could be justified.

37. As a matter of principle, Ireland submits that it is essential that the competent authorities of the Member State where a legal person is incorporated retain the right to exercise supervisory control over any request by the legal person to move the location of its registered office to another Member State. Legal persons cannot simply be equated with natural persons who may readily move to another Member State. They are creatures of statute, *i.e.* of the law of their place of incorporation. They cannot, it is submitted, continue to exist without maintaining some appropriate link with that law. This is because the latter imposes a series of restrictions upon them in order to ensure that the natural persons responsible for and/or controlling the activities of the legal person do not abuse the separate legal personality of the latter to the detriment, in particular, of minority shareholders, creditors and other relevant stakeholders. Were the Court to recognise, in effect, that such companies or firms had an entitlement to move their registered office at will around the differing Member States of the European Union, it would become very difficult, if not almost impossible, for the competent authorities of the Member State of origin — where such companies or firms remain incorporated and who would therefore remain responsible for ensuring compliance by them with their corporate obligations — to exercise effective control over them. How, for instance, could such authorities insist that the legal person in question file annual returns and how could they seek to prosecute it for an infringement of company-law rules of the Member State of its own legal domicile? Such important matters would all become problematic if such competent authorities were not entitled to insist on adequate safeguards before approving any transfer abroad of the legal person's registered office.

38. In Ireland's respectful submission, the Court should take account of the significant risks that the recognition of a largely unrestricted right for legal persons to move their registered office from the Member State of their legal domicile would entail. In Ireland's view, the competent authorities of the Member State of the legal person's domicile should be entitled to insist that their prior approval be obtained before a transfer such as that proposed in the main proceedings may occur. They should also be entitled to insist on adequate safeguards being put in place by the legal person so as to ensure that the said authorities can continue to exercise effective supervisory and regulatory control over it.

39. The national court refers to certain new forms of company that can operate in accordance with Community law. Of especial relevance in this respect is Regulation (EC) No 2157/2001 on the Statute for a European company (SE).[18] Regulation 2157/2001 provides for the formation of companies within the territory of the Community in the form of a European public limited-liability company (Societas Europaea or SE). These companies may, upon following a specified procedure pursuant to Article 8 thereof, transfer their registered office to another Member State. Article 8(2) to (12) of Regulation 2157/2001 contains detailed rules and safeguards for this purpose.

40. It is also hardly without significance that in May 2004 the Commission tabled the abovementioned draft informal proposal for what may eventually become a Fourteenth Company Directive on the cross border transfer of the registered office of a limited company.[19] The informal proposal envisaged a transfer procedure that would comprise two

[18] OJ 2001 L 294, p. 1. See also Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ 2003, L 207, p. 1. It is of particular importance to point out that regulations were adopted on the legal basis of Article 308 EC, which indicates the Council's view at least that the adoption of such measures went beyond the scope of ordinary internal market legislation.

[19] Cited in footnote 14 above.

elements; a transfer procedure applicable in both the "*home Member State*" and the "*host Member State*". It expressly stipulated, *inter alia*, that the home Member State shall require the company intending to migrate to publish its intention at least three months before the general meeting which must consider the proposal:

> "*(a) the form, name and registered office of the company as well as those envisaged for the company in the host Member State;*
> *(b) the register in which the documents and particulars referred to in Article 3(2) of Council Directive 68/151/EEC have been entered in respect of the company and the entry number in that register;*
> *(c) an indication of the arrangements whereby creditors and minority shareholders of the company may exercise their rights and the address at which full information on those arrangements can be obtained free of charge.*"

The said Member State could, having regard to the cross-border nature of the transfer, take appropriate measures to ensure protection of:

> "*(a) minority shareholders opposed to the transfer, in particular to allow them to withdraw;*
> *(b) creditors whose claims were incurred before publication of the company's removal from the home Member State's register;*
> *(c) holders of debentures in the company which decides the transfer;*
> *(d) holders of securities or interests other than shares to which special rights are attached in the company deciding to transfer its registered office.*"

Various documents would have to be presented "*within three months of their having been issued*" to the competent authorities of the host member State, which documents were intended to "*take the place of the instrument of incorporation*" there. The formal transfer would, however, only take place "*on the date of registration in the host Member State*".

41. Ireland submits that to ensure adequate protection of rights such as those of minority shareholders, creditors and other relevant stakeholders,

measures such as those indicated in the informal proposal of May 2004 should be viewed as justified and proportionate. Pending the eventual adoption of a proposed draft Fourteenth Directive, it would be appropriate for the Court to have regard to the types of mandatory provisions it should permit Member States to continue to apply so as to protect the rights of minority shareholders and creditors and to ensure adequate regulatory control over companies transferring their registered offices to other Member States, by analogy with Article 8 of Regulation 2157/2001. As for the latter, it will be imperative to ensure that there exists an effective means of enforcing the mandatory company-law provisions of the law of the Member State of origin following the transfer to the second Member State. In Ireland's view, a requirement to obtain the prior authorisation of the competent authorities of the State of origin is essential, since it enables the authorities of a Member State to insist on the safeguards necessary to ensure adequate protection for minority shareholders, creditors and other relevant stakeholders.

42. It will be a matter for the national court, in the first instance, to decide what, if any, safeguards it should direct the commercial court to apply so as to ensure that rights such as the rights of minority shareholders and creditors are not jeopardised by a transfer request such as that made by Cartesio.

III — Response to Questions Referred

43. In the light of the foregoing, Ireland respectfully submits that the questions referred by the *Szegedi Ítélőtábla* (Hungary) be answered as follows:

1) A court of second instance which has to give a decision on an appeal against a decision at first instance of a commercial court in

proceedings to amend a registration appearing on a commercial register is entitled to make a reference for a preliminary ruling under Article 234 EC, notwithstanding that neither the action before the commercial court nor the appeal procedure is *inter parties*;

2) A court of second instance such as that described above is not "*a court or tribunal of a Member State against whose decisions there is no judicial remedy*" for the purpose of the third paragraph of Article 234 EC, where its decisions are subject to appeal on a point of law to the national supreme court and any issue bearing upon the validity or interpretation of Community law is capable of constituting such a point of law;

3) In the present state of Community law, Articles 43 EC and 48 EC do not apply to a request by a company incorporated in accordance with the laws of its Member State of origin to transfer its registered office from the territory of that Member State to that of another Member State;

4) If necessary, if Articles 43 EC and 48 EC apply, in principle, to such transfer requests and a refusal to accept such a request may constitute a restriction on the freedom of establishment, in facilitating same, Member States may take all appropriate and proportionate measures necessary to ensure adequate protection of the rights of minority shareholders and creditors, and other relevant stakeholders, likely to be affected by such transfers, as well as those necessary to ensure adequate regulatory control over such companies following the transfer of their registered offices to the second Member State.

Dublin, the 14th day of September 2006

[redacted]

David J. O'Hagan,
Chief State Solicitor,
Agent of Ireland

I certify that this
is a true copy of the
original

[redacted]

for the Chief State Solicitor
Osmond House
Little Ship Street
Dublin 8
Ireland

Noel J. Travers,
Barrister-at-Law

Anthony M. Collins,
Senior Counsel

The Written Observations herein are submitted on behalf of Ireland this 14th day of September 2006 by David J. O'Hagan, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, Ireland, acting as Agent with an address for the service of documents at the Embassy of Ireland of Ireland, 28 route d'Arlon, Luxembourg.