JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 (*)

(Transfer of a company seat to a Member State other than the Member State of incorporation − Application for amendment of the entry regarding the company seat in the commercial register − Refusal − Appeal against a decision of a court entrusted with maintaining the commercial register − Article 234 EC − Reference for a preliminary ruling − Admissibility – Definition of 'court or tribunal' − Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' − Appeal against a decision making a reference for a preliminary ruling – Jurisdiction of appellate courts to order revocation of such a decision – Freedom of establishment − Articles 43 EC and 48 EC)

In Case C-210/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Szegedi Ítélőtábla (Hungary), made by decision of 20 April 2006, received at the Court on 5 May 2006, in the proceedings in the case of

Cartesio Oktató és Szolgáltató bt,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2007,

after considering the observations submitted on behalf of:

– CARTESIO Oktató és Szolgáltató bt, by G. Zettwitz and P. Metzinger, ügyvédek,

– the Hungarian Government, by J. Fazekas and P. Szabó, acting as Agents,

– the Czech Government, by T. Boček, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, A. Collins SC and N. Travers BL,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

– the Slovenian Government, by M. Remic, acting as Agent,

– the United Kingdom Government, by T. Harris, acting as Agent, and J. Stratford, Barrister,

– the Commission of the European Communities, by G. Braun and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 48 EC and 234 EC.

2 The reference was made in the context of proceedings brought by CARTESIO Oktató és Szolgáltató bt ('Cartesio'), a limited partnership established in Baja (Hungary), against the decision rejecting its application for registration in the commercial register of the transfer of its company seat to Italy.

National legal context

The law relating to civil procedure

3 Article 10(2) of Law No III of 1952 on civil procedure (a Polgári perrendtartásról szóló 1952. évi III. törvény: 'the Law on civil procedure') states:

'At second instance:

…

(b) appeals arising from cases dealt with by regional courts or courts of Budapest shall be heard by appeal courts.'

4 Article 155/A of the Law on civil procedure provides that:

'(1) The court may ask the Court of Justice of the European Communities for a preliminary ruling in accordance with the rules laid down in the Treaty establishing the European Community.

(2) The court shall make the reference for a preliminary ruling by order and shall stay the proceedings …

(3) An appeal may be brought against a decision to make a reference for a preliminary ruling. An appeal cannot be brought against a decision dismissing a request for a reference for a preliminary ruling.

…'

5 Under Article 233(1) of the Law on civil procedure:

'Save as otherwise provided, appeal proceedings may be brought against the decisions of courts of first instance …'

6 Article 233/A of that law provides that:

‘An appeal may be brought against orders made at second instance in respect of which a right of appeal exists under the rules applicable to proceedings at first instance …’

7 Article 249/A of the Law on civil procedure states that:

‘Appeal proceedings may also be brought against a decision made at second instance dismissing a request for a reference for a preliminary ruling (Article 155/A).’

8 Article 270 of the Law on civil procedure is worded as follows:

‘(1) Save as otherwise provided, the Legfelsőbb Bíróság [Supreme Court] shall hear appeals on points of law. The general rules shall apply mutatis mutandis.

(2) 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 before the Legfelsőbb Bíróság against final judgments and orders which bring proceedings an end, pleading infringement of the law.

…’

9 Article 271(1) of the Law on civil procedure provides that:

‘No appeal shall lie:

(a) against decisions which have become final at first instance, except in cases which are permitted by law;

(b) where one party has failed to exercise the right to bring an appeal and the court of second instance, hearing the appeal brought by the other party, confirms the decision at first instance;

…’

10 Under Article 273(3) of that law:

‘The institution of appeal proceedings shall not have suspensory effect but, where a party so requests, the Legfelsőbb Bíróság may exceptionally suspend enforcement of the judgment …’

Company law

11 Article 1(1) of Law No CXLIV of 1997 on commercial companies (a gazdasági társaságokról szóló 1997. évi CXLIV. törvény) provides that:

‘This Law shall govern the incorporation, organisation and functioning of commercial companies which have their seat in Hungary; the rights, duties and responsibilities of the founders and members (shareholders) of those companies; and the conversion, merger and demerger of commercial companies … and their liquidation.’

12 Under Article 11 of that law:

‘The articles of association (the instrument of incorporation, the statutes of the company) shall specify:

(a) the name and seat of the commercial company

…’

13 Article 1(1) of Law No CXLV of 1997 on the commercial register, company advertising and legal procedures in commercial registration matters (a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról szóló 1997. évi CXLV. Törvény; ‘the Law on the commercial register’) provides that:

‘A company is a commercial organisation … or other legal entity of a commercial nature … which, save where a law or government order provides otherwise, is incorporated through its registration in the commercial register for the purpose of carrying on a commercial activity for financial gain …’

14 Under Article 2(1) of that law:

‘The legal entities referred to in Article 1 may be entered in the commercial register only if their registration is possible or compulsory under [Hungarian] law.’

15 Article 11 of the Law on the commercial register provides that:

‘(1) The regional courts or the courts of Budapest, acting as commercial courts, shall register companies in the commercial registers which they are responsible for maintaining …

(2) … the courts within the jurisdiction of which a company has its seat shall have jurisdiction to register that company and to deal with any proceedings concerning such companies provided for by statute.

…’

16 Article 12(1) of that law provides that:

‘The information on companies referred to in this Law shall be entered in the commercial register. For all companies, the register shall specify:

...

(d) the company seat …’

17 Under Article 16(1) of the Law on the commercial register:

‘The seat … shall be the place where [the company’s] central administration is situated …’

18 Article 29(1) of that law provides that:

‘Save as otherwise provided, any application for registration of amendments to information registered in relation to companies must be presented to the commercial court within 30 days of the event giving rise to the amendment.’

19 Article 34(1) of the Law provides that:

‘Every transfer of a company seat to the jurisdiction of another court responsible for maintaining the commercial register must, by reason of the change entailed, be submitted to the court with jurisdiction

in respect of the former seat. After examining the applications for amendment of the information in the register prior to the change of company seat, the latter court shall endorse the transfer.'

Private international law

20 Article 18 of Decree-Law No 13 of 1979 on private international law rules (a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelet) provides that:

'(1) The legal capacity of a legal person, its commercial status, the rights derived from its personality and the legal relationships between its members shall be determined in accordance with its personal law.

(2) The personal law of a legal person shall be the law of the State in the territory of which it is registered.

(3) If a legal person has been lawfully registered in accordance with the laws of several States or if, under the rules applicable in the place where the seat designated in its articles of association is situated, registration is not required, its personal law shall be that applicable in the State of the seat.

(4) If a legal person has no seat designated in its articles of association or has seats in several States, and, in accordance with the law of one of those States, registration is not required, its personal law shall be the law of the State in which its central administration is situated.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Cartesio was formed on 20 May 2004 as a 'betéti társaság' (limited partnership) under Hungarian law. Its seat was established in Baja (Hungary). Cartesio was registered in the commercial register on 11 June 2004.

22 Cartesio has two partners both of whom are natural persons resident in Hungary and holding Hungarian nationality: a limited partner, whose only commitment is to invest capital, and an unlimited partner, with unlimited liability for the company's debts. Cartesio is active, inter alia, in the field of human resources, secretarial activities, translation, teaching and training.

23 On 11 November 2005, Cartesio filed an application with the Bács-Kiskun Megyei Bíróság (Regional Court, Bács-Kiskun), sitting as a cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's company seat in the commercial register.

24 By decision of 24 January 2006, that application was rejected on the ground that the Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law.

25 Cartesio lodged an appeal against that decision with the Szegedi Ítélőtábla (Regional Court of Appeal, Szeged).

26 Relying on the judgment in Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, Cartesio claimed before the Szegedi Ítélőtábla that, to the extent that Hungarian law draws a distinction between commercial companies according to the Member State in which they have their seat, that law is

contrary to Articles 43 EC and 48 EC. It follows from those articles that Hungarian law cannot require Hungarian companies to choose to establish their seat in Hungary.

27 Cartesio also maintained that the Szegedi Ítélőtábla was required to refer that question for a preliminary ruling, since it constitutes a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

28 The Szegedi Ítélőtábla points out that, under Hungarian law, proceedings before the courts responsible for maintaining the commercial register and before courts hearing appeals against decisions of the commercial register courts are not *inter partes*. It therefore wishes to know whether it may be classified as a 'court or tribunal' within the meaning of Article 234 EC.

29 Moreover, if the answer to this question is in the affirmative, the Szegedi Ítélőtábla is of the view that it is still unclear whether, for the purposes of the third paragraph of Article 234 EC, it should be classified as a court or tribunal against whose decisions there is no judicial remedy under national law.

30 It states in that regard that although, according to Hungarian law, its decisions on appeal are final and enforceable, they may nevertheless be the subject of an extraordinary appeal – an appeal on a point of law – before the Legfelsőbb Bíróság.

31 However, as the purpose of an appeal on a point of law is to ensure the consistency of case-law, the possibility of bringing such an appeal is limited, in particular by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law.

32 The Szegedi Ítélőtábla further notes that, in Hungarian academic legal writing and case-law, questions have been raised as to the compatibility with Article 234 EC of the provisions laid down in Articles 155/A and 249/A of the Law on civil procedure concerning appeals against decisions by which a question is referred to the Court of Justice for a preliminary ruling.

33 In that regard, the Szegedi Ítélőtábla points out that those provisions might result in an appellate court preventing a court which has decided to make a reference to the Court from doing so, even though an interpretation by the Court of a provision of Community law is needed to resolve the dispute in the main proceedings.

34 As regards the merits of the case before it, the Szegedi Ítélőtábla, referring to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, notes that the freedom of establishment laid down in Articles 43 EC and 48 EC does not include the right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, should the competent authorities object to this.

35 However, according to the Szegedi Ítélőtábla, this principle may have been further refined in the later case-law of the Court.

36 In that regard, the Szegedi Ítélőtábla points out that, according to the case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment constitute a restriction on that freedom, and it refers in that regard, inter alia, to Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 11 and 12).

37 The Szegedi Ítélőtábla moreover points out that, in *SEVIC Systems*, the Court ruled that Articles 43 EC

and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

38 Moreover, it is settled case-law of the Court that national laws cannot differentiate between companies according to the nationality of the person seeking their registration in the commercial register.

39 Lastly, the Szegedi Ítélőtábla states that Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) lay down, for the forms of Community undertaking which they introduce, more flexible and less costly provisions which enable those undertakings to transfer their seat or establishment from one Member State to another without first going into liquidation.

40 In those circumstances, on the view that resolution of the dispute before it depended on the interpretation of Community law, the Szegedi Ítélőtábla decided to stay proceedings and to refer the following questions to the Court 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 [of a company] 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 a “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, [incorporated] 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, are incompatible with Community law?

[(d)] 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?'

The application to have the oral procedure reopened

41 By document lodged at the Registry of the Court of Justice on 9 September 2008, Ireland requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure, with regard to the fourth question referred for a preliminary ruling.

42 In support of its request, Ireland states that, contrary to the view adopted by the Advocate General in his Opinion, the fourth question in the order for reference should not be understood as relating to the transfer of the seat, defined by Hungarian law as the place where the company has its central administration, and thus the real seat (*siège réel*) of the company.

43 According to Ireland, it follows from the English translation of the order for reference that that question concerns the transfer of the registered office (*siège statutaire*).

44 Thus, Ireland claims essentially that one of the factual premisses on which the Advocate General's analysis is based is incorrect.

45 Ireland is, moreover, of the view that, if the Court relies on the same premiss, it should reopen the oral procedure in order to give the interested parties an opportunity to submit observations on the basis of that premiss.

46 It is clear from the case-law that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-284/06 *Burda* [2008] ECR I-0000, paragraph 37 and the case-law cited).

47 In that regard, it should be pointed out, first, that it is apparent from the order for reference as a whole that the fourth question relates not to the transfer of the registered office of the company concerned in the main proceedings but to the transfer of its 'real seat'.

48 As stated in the order for reference, it follows from the Hungarian legislation on company registration that, for the purposes of applying that legislation, a company's seat is defined as the place where it has its central administration.

49 Moreover, the referring court placed the case before it in the context of the situation at issue in *Daily Mail and General Trust*, which it describes as relating to a company, incorporated in accordance with the legislation of a Member State and registered therein, wishing to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality

and nationality of origin, where the competent authorities object to this. More specifically, the referring court asks whether the principle laid down in that judgment – that Articles 43 EC and 48 EC do not confer on companies the right to transfer their central administration in such a way, whilst retaining their legal personality as conferred on them in the State under whose laws they were incorporated – has been further refined in the later case-law of the Court.

50 Secondly, the interested parties, including Ireland, were expressly requested by the Court to focus their pleadings on the premiss that the issue raised in the main proceedings related to the transfer to another Member State of the real seat of the company concerned, in other words, of the place where it has its administrative seat.

51 Although Ireland nevertheless focused in its pleadings on the premiss that the issue in the case before the referring court concerned the transfer of a company's registered office, it also set out its position – albeit briefly – on the basis that that issue concerned the transfer of the company's real seat, a position which, moreover, it set out again in its request that the oral procedure be reopened.

52 Against that background, the Court, having heard the Advocate General, considers that it has all the evidence necessary to enable it to reply to the questions referred and that the present case does not thereby fall to be decided on the basis of an argument which has not been debated between the parties.

53 Accordingly, it is not necessary to order that the oral procedure be reopened.

The questions referred for a preliminary ruling

The first question

54 By this question, the Court is essentially asked whether a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration by the referring court of the appeal against that decision takes place in the context of *inter partes* proceedings.

55 In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a 'court or tribunal' for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 12 and the case-law cited).

56 With regard to the *inter partes* nature of the proceedings before the national court, Article 234 EC does not make reference to the Court subject to those proceedings being *inter partes*. None the less, it follows from that article that a national court may make a reference to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see to that effect, inter alia, Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 13 and the case-law cited).

57 Thus, where a court responsible for maintaining a register makes an administrative decision without

being required to resolve a legal dispute, it cannot be regarded as exercising a judicial function. Such is the case, for example, where it decides an application for registration of a company in proceedings which do not have as their object the annulment of a measure which allegedly adversely affects the applicant (see to that effect, inter alia, *Lutz and Others*, paragraph 14 and the case-law cited).

58 In contrast, a court hearing an appeal which has been brought against a decision of a lower court responsible for maintaining a register, rejecting such an application, and which seeks the setting-aside of that decision, which allegedly adversely affects the rights of the applicant, is called upon to give judgment in a dispute and is exercising a judicial function.

59 Accordingly, in such a case, the appellate court must, in principle, be regarded as a court or tribunal within the meaning of Article 234 EC, with jurisdiction to refer a question to the Court for a preliminary ruling (see for similar situations, inter alia, Case C-300/01 *Salzmann* [2003] ECR I-4899; *SEVIC Systems*; and Case C-117/06 *Möllendorf and Others* [2007] ECR I-8361).

60 It is apparent from the court file that, in the main proceedings, the referring court is sitting in an appellate capacity in an action for the setting-aside of a decision by which a lower court, responsible for maintaining the commercial register, rejected an application by a company for registration of the transfer of its seat, requiring the amendment of an entry in that register.

61 Accordingly, in the main proceedings, the referring court is hearing a dispute and is exercising a judicial function, regardless of the fact that the proceedings before that court are not *inter partes*.

62 Consequently, in the light of the case-law cited in paragraphs 55 and 56 above, the referring court must be regarded as a court or tribunal for the purposes of Article 234 EC.

63 In the light of the foregoing, the answer to the first question must be that a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *interpartes* proceedings.

The second question

64 By this question, the Court is essentially being asked whether a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, falls to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

Admissibility

65 The Commission of the European Communities contends that this question is inadmissible as it is manifestly irrelevant to the resolution of the dispute in the main proceedings, since the order for reference has already been submitted to the Court, rendering any examination of whether there is an obligation to make a reference devoid of interest.

66 That objection must be rejected.

67 According to settled case-law, there is a presumption of relevance in favour of questions on the

interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate. The Court declines to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited).

68 As stated in paragraph 27 above, Cartesio claimed before the referring court that that court was required to make a reference to the Court for a preliminary ruling, since it fell to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

69 As the referring court had doubts concerning that plea, it decided to refer a question on that issue to the Court for a preliminary ruling.

70 It would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice, and contrary also to the requirements of procedural economy, to require a national court first to seek a preliminary ruling on the sole question whether that court is one of those referred to in the third paragraph of Article 234 EC, before, where appropriate, having to formulate – subsequently and by a second reference for a preliminary ruling – the questions concerning the provisions of Community law relating to the substance of the dispute before it.

71 Moreover, the Court has already replied to a question relating to the characteristics of national courts in the light of the third paragraph of Article 234 EC in a context offering certain similarities with that of the present reference for a preliminary ruling, without the admissibility of that question being disputed (Case C-99/00 *Lyckeskog* [2002] ECR I-4839).

72 In those circumstances, it does not appear – at least not prima facie – that the interpretation of Community law sought is unrelated to the actual facts of the main action or to its purpose.

73 Accordingly, the presumption of relevance in favour of references for a preliminary ruling is not, as regards the present question, rebutted by the objection put forward by the Commission (see, inter alia, *van der Weerd and Others*, paragraphs 22 and 23).

74 It follows that the second question is admissible.

Substance

75 The issue raised by this question is thus whether the referring court falls to be classified as ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’, within the meaning of the third paragraph of Article 234 EC. It is clear from the order for reference that this question is raised in view of the fact, referred to in paragraphs 30 and 31 above, that, although Hungarian law provides that decisions delivered on appeal by the referring court may be the subject of an extraordinary appeal – in other words, an appeal on a point of law before the Legfelsőbb Bíróság, the purpose of which is to ensure the consistency of the case-law – the possibilities of bringing such an appeal are limited, in particular, by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law, and in view of the fact, also pointed out in the order for

reference, that under Hungarian law an appeal on a point of law does not, in principle, have the effect of suspending enforcement of the decision delivered on appeal.

76 The Court has already held 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 the third paragraph of Article 234 EC. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy (*Lyckeskog*, paragraph 16).

77 That is true a fortiori in the case of a procedural system such as that under which the case before the referring court must be decided, since that system makes no provision for a preliminary declaration by the supreme court that the appeal is admissible and, instead, merely imposes restrictions with regard, in particular, to the nature of the pleas which may be raised before such a court, which must allege a breach of law.

78 In common with the lack of suspensory effect of appeals on a point of law before the Legfelsőbb Bíróság, such restrictions do not have the effect of depriving the parties in a case before a court whose decisions are amenable to an appeal on a point of law of the possibility of exercising effectively their right to appeal the decision handed down by that court in a dispute such as that in the main proceedings. It does not follow, therefore, from those restrictions or from the lack of suspensory effect that that court falls to be classified as a court handing down a decision against which there is no judicial remedy.

79 In the light of the foregoing, the answer to the second question must be that a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

The third question

Admissibility

80 Ireland argues that this question is hypothetical, hence inadmissible, since no appeal on a point of law has been brought against the order for reference and, in consequence, an answer to that question would be of no use to the referring court.

81 The Commission also asks the Court to declare that it is not appropriate to give a reply to the third question because, given that the order for reference has the authority of *res judicata* and has reached the Court, that question is hypothetical.

82 Those objections cannot be upheld.

83 As was pointed out in paragraph 67 above, the presumption of relevance enjoyed by references for a preliminary ruling may, in certain circumstances, be rebutted, in particular where the Court holds that the problem is hypothetical.

84 Ireland and the Commission maintain that the problem raised by this question – the possible incompatibility with the second paragraph of Article 234 EC of national rules governing appeals against a decision making a reference to the Court – is hypothetical, since, in fact, the order for reference has not been appealed against and now has the authority of *res judicata*.

85 However, neither that decision nor the file sent to the Court permits the inference that there has been no appeal against that decision or that there can no longer be any appeal against it.

86 In the light of the settled case-law cited in paragraph 67 above, since, in such a situation of uncertainty, responsibility for defining and verifying the factual and legislative context in which the question referred arises lies with the national court, the presumption of relevance which this question enjoys has not been rebutted.

87 It follows that the third question is admissible.

Substance

88 Article 234 EC gives national courts the right – and, where appropriate, imposes on them the obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC. It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part (Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3).

89 It is also clear from the case-law of the Court that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law. Nevertheless, in the interests of clarity and legal certainty, the Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139, paragraph 3).

90 Moreover, the Court has already held that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41).

91 The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Kempter*, paragraph 42).

92 It is clear from the order for reference that, under Hungarian law, a separate appeal may be brought against a decision making a reference to the Court for a preliminary ruling, although the main proceedings remain pending in their entirety before the referring court, proceedings being stayed until the Court gives a ruling. The appellate court thus seised has, under Hungarian law, power to vary that decision, to set aside the reference for a preliminary ruling and to order the first court to resume the domestic law proceedings.

93 As is clear from the case-law cited in paragraphs 88 and 89 above, concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot

limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

94 It should be pointed out, moreover, that the Court has already held that, in a situation where a case is pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court (Case 146/73 *Rheinmühlen-Düsseldorf*).

95 Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

96 In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

97 It follows that, in a situation such as that in the case before the referring court, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.

98 In the light of the foregoing, the answer to the third question must be that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

The fourth question

99 By its fourth question, the referring court essentially asks whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

100 It is clear from the order for reference that Cartesio – a company which was incorporated in accordance with Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary – transferred its seat to Italy but wished to retain its status as a company governed by Hungarian law.

101 Under the Hungarian Law on the commercial register, the seat of a company governed by Hungarian law is to be the place where its central administration is situated.

102 The referring court states that the application filed by Cartesio for amendment of the entry in the commercial register regarding its company seat was rejected by the court responsible for maintaining that register on the ground that, under Hungarian law, a company incorporated in Hungary may not transfer its seat, as defined by the Law on the commercial register, abroad while continuing to be subject to Hungarian law as the law governing its articles of association.

103 Such a transfer would require, first, that the company cease to exist and, then, that the company reincorporate itself in compliance with the law of the country where it wishes to establish its new seat.

104 In that regard, the Court observed in paragraph 19 of *Daily Mail and General Trust* that companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning.

105 In paragraph 20 of *Daily Mail and General Trust*, the Court stated that the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real seat (*siège réel*) – that is to say, the central administration of the company – should be situated in their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails under company law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them make that right subject to certain restrictions, and the legal consequences of a transfer vary from one Member State to another.

106 The Court added, in paragraph 21 of *Daily Mail and General Trust*, that the EEC Treaty had taken account of that variety in national legislation. In defining, in Article 58 of that Treaty (later Article 58 of the EC Treaty, now Article 48 EC), the companies which enjoy the right of establishment, the EEC Treaty placed on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company.

107 In Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 70, the Court, whilst confirming those dicta, inferred from them that the question whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated. The Court concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.

108 It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether ― and, if so, how ― the registered office (*siège statutaire*) or real seat (*siège réel*) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions (see, to that effect, *Daily Mail and General Trust*, paragraphs 21 to 23, and *Überseering*, paragraph 69).

109 Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

110 Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

111 Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.

112 In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

113 Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC (see to that effect, inter alia, *CaixaBank France*, paragraphs 11 and 17).

114 It should also be noted that, following the judgments in *Daily Mail and General Trust* and *Überseering*, the developments in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC, respectively, as pursued by means of legislation and agreements, have not as yet addressed the differences, referred to in those judgments, between the legislation of the various Member States and, accordingly, have not yet eradicated those differences.

115 The Commission maintains, however, that the absence of Community legislation in this field – noted by the Court in paragraph 23 of *Daily Mail and General Trust* – was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, 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), as well as by the Hungarian legislation adopted subsequent to those regulations.

116 The Commission argues that those rules may – and should – be applied mutatis mutandis to the cross-border transfer of the real seat of a company incorporated under the law of a Member State.

117 In that regard, it should be noted that although those regulations, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.

118 That is clear, for example, in the case of a European company, from Articles 7 to 9(1)(c)(ii) of Regulation No 2157/2001.

119 As it is, in the case before the referring court, Cartesio merely wishes to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable.

120 Accordingly, the application mutatis mutandis of the Community legislation to which the Commission refers – even if it were to govern the cross-border transfer of the seat of a company governed by the law of a Member State – cannot in any event lead to the predicted result in circumstances such as those of the case before the referring court.

121 Further, as regards the implications of *SEVIC Systems* for the principle established in *Daily Mail and General Trust* and *Überseering*, it should be pointed out that those judgments do not relate to the same problem and that, consequently, *SEVIC Systems* cannot be said to have qualified the scope of *Daily Mail and General Trust* or *Überseering*.

122 The case which gave rise to the judgment in *SEVIC Systems* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross-border merger, which is a situation fundamentally different from the circumstances at issue in the case which gave rise to the judgment in *Daily Mail and General Trust*, but similar to the situations considered in other judgments of the Court (see Case C-212/97 *Centros* [1999] ECR I-1459; *Überseering*; and Case C-167/01 *InspireArt* [2003] ECR I-10155).

123 In such situations, the issue which must first be decided is not the question, referred to in paragraph 109 above, whether the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated but, rather, the question whether or not that company – which, it is common ground, is a company governed by the law of a Member State – is faced with a restriction in the exercise of its right of establishment in another Member State.

124 In the light of all the foregoing, the answer to the fourth question must be that, as Community law now stands, 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.

Costs

125 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.**

2. **A court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.**

3. **Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.**

4. **As Community law now stands, 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.**

[Signatures]

---

* Language of the case: Hungarian.