FREEDOM OF ESTABLISHMENT AFTER CARTESIO

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Abstrakt v rodném jazyce
Příspěvek analyzuje stanovisko generálního advokáta ve věci Cartesio. Zabývá se zejména případnými důsledky rozhodnutí na možnost přesunu skutečného sídla obchodní společnosti ze státu, který určuje osobní statut společnosti na základě teorie skutečného sídla. Stanovisko je hodnoceno ve světle existující judikatury ESD ke svobodě usazování obchodních společností, zejména s ohledem na problematické otázky přesunu daňového sídla a principu zákazu zneužití komunitárního práva.

Klíčová slova v rodném jazyce
Cartesio, svoboda usazování, ESD, zapsané sídlo, teorie skutečného sídla, inkorporační teorie.

Abstract
The article analyzes the opinion of Advocate General in Cartesio case. It focuses on possible impacts of the ECJ´s decision in relation to the transfer of real seat of a company from the real seat theory country. The opinion is analyzed in the light of the existing case law of the ECJ on freedom of establishment of companies with emphasis on issues related to transfer of tax domicile and prohibition of abuse of EC law.

Key words
Cartesio, freedom of establishment, ECJ, registered seat, real seat theory, incorporation theory.

1. INTRODUCTION

Once again, European Court of Justice (hereinafter, the ECJ) is going to issue a long awaited decision on freedom of establishment of companies which is supposed to change and move forward the status quo and to have possible implications on member states´ private international law rules. In May 2008 advocate general Maduro delivered his opinion in the Cartesio case.[1] The purpose of this article is to analyze Maduro´s opinion and outline its supposed impact, legal consequences and problematic issues.

Cartesio is a Hungarian limited partnership which has two partners having Hungarian nationality and residing in Hungary. The partners decided to move the operational headquarters of Cartesio to Italy which was refused by the commercial court. The court held that under Hungarian law it is not possible to transfer the operational headquarters to another member state while retaining the legal status of a company governed by Hungarian law.[2] In

[1] Opinion of advocate general Maduro delivered on 22 May 2008 in Cartesio, C-210/06, nyr, (hereinafter, Cartesio).

[2] Cartesio, paras. 2 - 3.

other words[3] *"Cartesio would first have to be dissolved in Hungary and then reconstituted under Italian law."*[4]

In following proceedings the Court of Appeal referred to the ECJ among others these questions:

(a) If a company, constituted in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?

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

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

May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union, are incompatible with Community law?[5]

Based on the facts of the case, Hungary appears to be a real seat theory country.[6] Personal statute of a company is therefore determined by the laws of a country in which it has its real seat. Real seat usually corresponds to the place where the company has its central administration (resp. head office) and main activity. States of real seat and registered seat may hypothetically differ but under Hungarian law this is not possible.[7]

In his opinion the advocate general analyses whether the present case falls under the scope of articles 43 and 48 of the EC Treaty[8] (hereinafter, the ECT), whether the national measures constitute restrictions to freedom of establishment and whether such restrictions can be justified.

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[3] Cartesio, para. 3.

[4] Cartesio, para. 3.

[5] Cartesio, para. 8.

[6] Cartesio, para. 23.

[7] Cartesio, paras. 22 – 23.

[8] Article 43 bans the member states from limiting the freedom of establishment, setting up an agency, branch or subsidiary of one member state in the territory of another member state. Freedom of establishment includes the right to set up businesses and especially companies. Under conditions of article 48 companies have to be formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community.

2. CARTESIO AND THE SCOPE OF ARTICLES 43 AND 48 OF THE ECT

It has been previously held by the ECJ that articles 43 and 48 of the ECT have direct effect.[9] Only a purely national situation is excluded from the scope of articles 43 and 48.[10] Article 293 of the ECT no longer represents the sole basis for recognition of companies either.[11]

National measures that prevent companies from moving their registered or real seat to another member state limit in fact their freedom of establishment guaranteed by articles 43 and 48 of the ECT. Such measures may effectively discourage companies from moving abroad, thus making the exercise of the freedom of establishment less attractive.[12] Also, the measures have to be regarded as discriminatory because they treat purely national situations (i. e. transfer of seat within a member state) more favorably than cross-border situations.[13] Consequently, such national measures constitute a restriction to freedom of establishment.[14]

Had Cartesio wished to move its seat within Hungary, it would have had to fulfill only formal conditions for entry into register of commerce. However, in case of cross-border transfer of its seat Hungarian law imposes a dissolution which implies a long and expensive procedure.[15] Maduro thus concludes that such differential treatment is discriminatory and represents a restriction to freedom of establishment.[16]

Cartesio case is also very interesting because it deals with a pure "exit restriction" situation and primary establishment (i. e. situation where company moves its registered office, central administration or principal place of business abroad) for the first time after the decision in Daily Mail in 1988.

In Daily Mail ECJ refused to recognize any right under EC law to a company of transfer of its seat (central administration) abroad if its home state restricts such transfer.[17] However, in all the later cases which concerned secondary establishment (i. e. situation where company sets

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[9] Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), C-208/00, [2000] ECR p. I-9919, para. 93 (hereinafter, Überseering); SEVIC Systems AG, C- 411/03, [2005] ECR p. I-10805, para. 18.

[10] In such cases the member states may exercise a so called "reversed discrimination" and treat their own nationals less favorably then nationals of other member states. See Ringe, W. G., No Freedom of Emigration for Companies? 16 EBLR (2005) p. 633.

[11] Überseering, para. 55. See also Ringe, W. G., No Freedom of Emigration for Companies? 16 EBLR (2005) 633; Vaccaro, E., Transfer of Seat and Freedom of Establishment in European Company law, 16 EBLR (2005) 1352.

[12] Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg, C-293/06, para. 28 (nyr).

[13] Cartesio, para. 25.

[14] Caixa Bank France, C-442/02, [2004] ECR I-08961, para. 11 ; Opinion of the Advocate General in SEVIC Systems AG, C- 411/03, [2005] ECR p. I-10805, para. 44 (hereinafter, SEVIC)**;** Opinion of the Advocate General Mischo in Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie, C-9/02, [2004] ECR I-2409, para. 26 (hereinafter, de Lasteyrie du Saillant).

[15] Cartesio, para. 31 ; see also Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007) 1707, p. 38 ; Bernardeau, L., Droit communautaire d'établissement et transfert du siège des sociétés, Gazette du Palais, Recueil, Juillet-Aout 2003, p. 2102.

[16] Cartesio, para. 25.

[17] The Queen c/ H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, Affaire 81/87, [1988] ECR 05483, para. 24 (hereinafter, Daily Mail).

up a branch, subsidiary or similar abroad) ECJ changed its approach and recognized this right. Maduro also points out that efforts to distinguish rights to primary and secondary establishment have never been *"entirely convincing"*[18]. This conclusion may be supported by the fact that although the cases Centros and Überseering were legally treated as situations of secondary establishment, they were in fact transfers or real seats (central administrations) and therefore "disguised" primary establishment situations.

Similarly, there should be no difference between restrictions upon exit and upon entry. Case law on freedom of establishment recognizes both[19] even though the majority of cases deals with the restrictions upon entry imposed by the host member state.[20] Daily Mail ruling does not, according to Maduro, correspond any longer to the current state of EC law. He supports this argument by citing ECJ´s well-known cases on freedom of establishment. [21] Additionally, there has also been a progressive harmonization of European company law, notably in the field of cross-border mergers and supra-national companies.[22] It can be moreover argued that all four freedoms are two-folded[23] and, effectively, in order for a company or a national of a member state to enjoy a freedom of establishment in a host member state, it is necessary that the home member state could not prevent its companies or nationals from leaving.[24] Therefore there is no justification for distinguishing between exit and entry restrictions.[25]

3. JUSTIFICATION OF RESTRICTIONS TO FREEDOM OF ESTABLISHMENT

As long as a national measure is considered a restriction incompatible with EC law, it can only be justified on limited grounds. Case law based justifications may be those of a general

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[18] Cartesio, para. 28.

[19] Daily Mail, para. 16 ; Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), C-264/96, [1998] ECR I-04695, para. 21; de Lasteyrie du Saillant, para. 42 ; SEVIC, paras. 23 and 24 ; Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes), C-446/03, [2005] ECR I-10837, para. 31; see also Mucciarelli, F. M., Companies' Emigration and EC Freedom of Establishment. p. 25 available at : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078407 [26. 10. 2008].

[20] Cartesio, para. 28.

[21] Daily Mail, para. 25. Cartesio, para. 27 ; opinion of the Advocate General Ruiz-Jarabo Colomer in Überseering, paras. 28 to 30.

[22] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[23] For free movement of goods see articles 28 and 29 of the ECT ; for free movement of services, article 49 ECT and Alpine Investments BV v Minister van Financiën, C-384/93, [1995] ECR I-1141 ; for free movement of workers Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda, C-419/92, [1994] I-505 and IKA, C-443/93, [1994] ECR I-04033. See also Ringe, W. G., No Freedom of Emigration for Companies? 16 EBLR (2005) 633, 635-640.

[24] Ringe, W. G., No Freedom of Emigration for Companies? 16 EBLR (2005) 633, 624 and 632.

[25] See similarly: Mucciarelli F. M., « Companies' Emigration and EC Freedom of Establishment », p. 25, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078407> [26. 10. 2008]; Garcia-Riestra, M., The Transfer of Seat of the European Company v. Free Establishment Case-law, 2004 EBLR p. 1297, Case C-167/01, Kamer van Koophandel voor Amsterdam v. Inspire Art Ltd, judgement of 30 September 2003, (2004) 41 CMLR, p. 1139.

public interest, such as the prevention of abuse or fraudulent conduct, or protection of the interests of creditors, minority shareholders, employees or the tax authorities.[26]

The concept of abuse of right has also developed in ECJ´s case law. In Centros and Inspire Art the ECJ ruled that the companies did not abuse EC law despite the fact that they obviously took advantage of the less stringent company law provisions of another member state over their home state rules. It could not be per se regarded as an abuse.[27] However, in later tax cases, ECJ *"significantly qualified"*[28] the concept of abuse of rights. It held in Halifax case that *„it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage…the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."* [29] EC law prohibits only *"wholly artificial agreements which do not reflect economic reality and which are aimed at circumventing national legislation"*[30] Since Cartesio actually seeks to pursue *"economic activity through a fixed establishment in another member state for an indefinite period"*[31] such a transfer cannot be regarded as abuse of EC law.

Nevertheless, it is still possible to explain this change in the ECJ´s reasoning on the facts of the cases. In Centros and Inspire Art companies simply exercised their right under EC law which allowed them to benefit from more favorable legislation in another member state. Both of the cases dealt with the situation of restrictions upon entry imposed by a host member state and both companies moved out (by setting up a branch) from an incorporation theory home state. Under incorporation theory a registered office of a company may in fact be a simple letter box while all the company´s activity is exercised via a branch established in another state. Under real seat theory however, transfer of company´s center of gravity out of the country (even if just by setting up a branch) implies the change of applicable law.

Similarly, all the later cases implied transfer of a tax domicile. Since tax law is an area remaining in the competence of member states,[32] ECJ´s decisions suggests a more restrictive approach when reconciling the freedom of establishment and member states´ tax authority over the subjects established in their territory. Consequently, in case of transfer of tax domicile, member states are allowed to impose restrictions upon exit justified for example on the grounds of fiscal cohesion or preventing tax avoidance.[33] Such measures however, cannot go beyond what is necessary in order to attain the objective pursued.[34]

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[26] Cartesio, para. 32.

[27] Cartesio, para. 29.

[28] Cartesio, para. 29.

[29] Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, C-255/02, [2006] ECR I-01609, para. 75.

[30] Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, C-196/04, [2006] ECR I-7995, para. 55.

[31] Cartesio, para. 25.

[32] Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others [2001] ECR I-1727, para. 37.

[33] Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes), C-446/03, [2005] ECR I-10837, para. 43.

[34] For examples of national measures that were justified but went beyond what is necessary see e.g.: N v Inspecteur van de Belastingdienst Oost/kantoor Almelo, C-470/04, [2006] ECR I-07409, para. 54 and opinion of

Despite being free to determine nationality of its companies, member states cannot have and absolute freedom over the "life and death" of a company without taking into account EC law and freedom of establishment.[35] Requiring dissolution of a company is an "outright negation of the freedom of establishment" especially where the member state did not present any justifications necessary for reasons of public interest.[36] However, member states may still impose conditions for the transfer. Maduro concludes that a loss of nationality (i. e. change of personal statute) may be consequence and justified requirement in case where member state can no longer exercise effective control over the company.[37] The limits may also be specified by secondary EC law.[38] It seems that Maduro opts for a reasonable decision. ECJ restricts itself from encroaching drastically upon member states´ freedom to choose incorporation or real seat theory. It is therefore legitimate for the real seat theory states to require change of company´s nationality where such company decides to move its real seat out of the country. It cannot however impose dissolution, this being a disproportionate burden and restriction upon exit.

The problems in this case is that Cartesio´s "operational headquarters" happens to be both its registered office and real seat. One might argue that there is a space for discussion concerning the transfer of the registered seat (which is not the operational headquarters) out of the real seat country into the incorporation theory states. Such a scenario is nevertheless quite a hypothetical one given the requirement of exercise of stable and genuine economic activity which cannot amount to exercise of real seat functions based on the content given to the concept by particular national law. Transfer of registered office out of the incorporation theory states is currently possible only via conversion into a European Company, European Cooperative Society or a via cross-border merger.[39] Nevertheless, the possibility of primary establishment by means of cross-border merger supports the opinion that requirement of dissolution upon leaving the country constitutes a disproportionate restriction to freedom of establishment.

4. CONCLUSION

Decision in Cartesio case will hopefully brings further clarification of the scope of freedom of establishment in real seat country scenario. It is argued that a complete negation of the right to free establishment is prohibited under EC law. However, where such a transfer entails a change of applicable law under the law of home member state, the latter may effectively deprive its companies of nationality, especially in cases where such state can no longer exercise control over those companies. Even thought Cartesio brings new developments, the project of the directive on transfer of registered seat should not be abandoned despite presenting a politically sensitive issue.

Advocate General Mischo in Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie, C-9/02, [2004] ECR I-2409, para. 64.

[35] Cartesio, para. 31.

[36] Cartesio, para. 34.

[37] Cartesio, para. 33.

[38] Cartesio, para. 33 referring to regulation on the statute of European Company no. 2157/2001.

[39] Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007) 1707, p. 7. Interestingly, American companies are allowed to move their registered offices between the U.S. states only via cross-border mergers. Id. 24.

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