

KOLIZNÍ PROBLEMATIKA PRÁVNICKÝCH OSOB V JUDIKATUŘE EVROPSKÉHO SOUDNÍHO DVORA

LEGAL PERSONS IN PRIVATE INTERNATIONAL LAW AND RELATED CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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Abstrakt

Tento příspěvek se zabývá nejnovější judikaturou Evropského soudního dvora k právnickým osobám. Rozhodnutí v oblasti svobody usazování měla velký dopad v oblasti obchodního práva, resp. volby osobního statutu obchodní společnosti. Autorka se zaměří na některé zajímavé aspekty těchto rozhodnutí. Zejména bude věnována pozornost fúzím a přesunu skutečného, resp. zapsaného sídla v nejnovějších rozhodnutích.

Klíčová slova

Svoboda usazování, judikatura, ESD, osobní statut, obchodní společnost

Abstract

This paper focuses on the latest case law of the European Court of Justice related to legal persons. Decisions on the freedom of establishment have had a great impact in the area of corporate law, or more precisely the choice of corporate statute. The author will outline several interesting issues related to those decisions. In particular, she will focus on decision related to cross-border mergers and transfer of the real and/or registered seat and the latest developments.

Key words

Freedom of establishment, case law, ECJ, corporate statute, company

National Framework

EC law does not regulate the determination of the corporate (or personal) statute¹ of legal persons as well as it does not determine the personal statute of a natural person. The member states are thus free to determine it under their own legal rules. In general, there are two main theories under which the corporate statute can be determined.

Under incorporation theory the personal statute of a company is determined by the laws of a country under which it was created. The company is usually registered with the register of commerce of that respective country too.² It is quite common that the headquarters or the central administration of such company lies within a different state than its registered seat. Under real seat theory the personal statute of a company is 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 and main activity. The states of real seat and registered seat may differ.³

Freedom of Establishment and Registered Seat of a Company

Free movement of persons is one of the four fundamental freedoms guaranteed by the EC Treaty (hereinafter, ECT) and the freedom of establishment falls within its scope. 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.⁴ Freedom of establishment includes the right to set up businesses and especially companies. Articles 45 and 46 of the ECT set forth the allowed restrictions to the freedom on the grounds of exercise of official authority, public policy, public security or public health.

Article 48 of the ECT sets a basic framework for the companies to exercise their right. Company means companies or firms constituted under civil or commercial law, including

¹ Corporate or personal statute of a company regulates its foundation or dissolution, internal affairs etc.

² This theory is used in Czech law (§§ 21 and 22 of the commercial code), the U.S., Great Britain, Ireland, Netherlands, Denmark, Croatia, Slovakia).

³ Real seat theory is used e. g. in France, Germany, Austria, Belgium, Poland, Hungary. Compare e. g. KUČERA, Z., *Mezinárodní právo soukromé*. Brno: Doplněk, 2001, p. 248-251. HODÁL, P., ALEXANDER, J. *Evropské právo obchodních společností*. Praha: Linde 2005, p. 48-50.

⁴ It enables secondary change of seat, primary change of seat entails founding of a corporation and transfer of the seat to another member state without being dissolved and reincorporated under the laws of another state.

cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making (article 48, paragraph 2 ECT). The 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.

If a company complies with the article 48 requirements it should have the possibility to do business and exercise its establishment right freely within the territory of EC. This principle however had been rejected by member state for a long time and was in fact “enforced” only by line of judgments of ECJ. The ECJ’s freedom of establishment judgments can be briefly reduced into the following main principles:

1. The home country of a company is allowed to set forth the conditions under which a company may transfer its real seat abroad (restrictions upon exit).⁵
2. The host country cannot refuse to register a branch of a validly constituted foreign company which is to be the real seat of that company (restrictions upon entry - secondary establishment).⁶
3. The host country cannot limit the transfer into its territory of the real seat of a validly constituted foreign company (restrictions upon entry - primary establishment).⁷
4. The host country cannot discriminate against a validly constituted foreign company registered in its territory by requiring it to comply with extra set of conditions as opposed to the domestic companies (discriminatory conditions upon entry).⁸

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For the time being it is not possible to transfer the registered seat freely.⁹ Transfer of registered seat is therefore allowed only for Societas Europaea formed under the EC law.

⁵ See ECJ decision from 27th September 1988, in *The Queen contre H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, C 81/87. [1988] ECR 05483. The terms “*home country, host country, outbound, inbound, incoming, outcoming, upon entry, upon exist*” are used both by ECJ in its judgments on freedom of establishment and also in general by commentators.

See also ECJ judgment from 10th July 1985 in *Segers*, C 79/85. Compare commentary: DASSESSE, M., *Obligation de reconnaissance des sociétés „boite aux lettres“: l’Arrêt Inspire Art*. *Revue Générale de fiscalité*, 2/2004, p. 5-11.

⁶ See ECJ decision from 9th March 1999, in *Centros Ltd vs Erhvervs-og Selskabsstyrelsen*, C-212/97. [1999] ECR I-01459. This freedom is not absolute and the decision discusses the possibility to restrict freedom of establishment in case of fraud and abuse based on objective circumstances.

⁷ See ECJ decision from 5th November 2002, in *Überseering BV vs Nordic Construction Company Baumanagement GmbH*, C-208/00. [2002] ECR I-09919. This decision confirmed the “victory” of incorporation theory.

⁸ See ECJ decision from 13th September 2003, in *Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd.*, C-167/01. [2003] ECR I-10155.

However, the latest developments in ECJ's case law show that this might not be the case very soon, as it will be discussed later with relation to the Cartesio case. The incorporation theory encourages so called „societas shopping“. The companies choose states and rules that offer them the best or most suitable conditions.¹⁰ It is and it will be common more and more often that a company will not have its real seat and will not exercise any activity in the state where it was incorporated.

Transfer of Seat by Merging with Foreign Corporation

According to one of the latest ECJ's decision¹¹ a freedom of establishment includes establishment by cross-border mergers. German court in this case refused to register merger¹² of a German and Luxembourg company into its commercial register because German law did not know cross-border mergers.¹³ Advocate general and the ECJ have come to the same conclusion holding that the right to 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*“.¹⁴ Cross-border mergers thus represent a special exercise of the freedom of establishment which has to be respected by the member states.¹⁵ Without taking into account the harmonization,¹⁶ it is necessary to point out the importance of cross-border merger case law. It is however important to keep on mind that articles 45 and 46 may limit the freedom. Fraudulent transfer of seat could fall under the respective restrictions allowed by those articles.¹⁷

⁹ This kind of transfer should be dealt with in the 14th company directive. See e.g. JOHNSON, M., Roll on the 14th Directive – Case Law Fails to Solve the Problems of Corporate Mobility Within the EU – again. Hertfordshire Law Journal, 2004, Vol. 2(2), p. 9-18.

¹⁰ See e.g. GELTER, M., The Structure of Regulatory Competition in European Corporate Law. The Journal of Corporate Law Studies, 2005, Vol. 5, Issue 2, p. 6 et seq.

¹¹ See ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805. For detailed commentary see BEHRENS, P., Case C-411/03, SEVIC Systems AG, [2006] 43 C.M.L.Rev. 1669.

¹² In this case merger involves the dissolution of a company without liquidation and transfer of all of its assets to SEVIC company without changing the legal name of the company.

¹³ ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805, par. 2. ECJ thus interpreted German law restrictively. If it was not so, we could conclude that in absence of express regulation by national law there is no ban to cross-border mergers. Compare: BEHRENS, P., Case C-411/03, SEVIC Systems AG, [2006] 43 C.M.L.Rev. 1669, 1673.

¹⁴ ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805, par. 18 with reference to par. 30 thereof.

¹⁵ Id., par. 19.

¹⁶ Directive 2005/56/ES from 26th October 2005, on cross-border mergers of corporations.

¹⁷ For related issues see e.g.: HICKMOTT, R., Views From Here – Tailored Migration. Legal week, 2007. Available at <http://www.legalweek.com> [quoted 19.3.2007].

Distinguishing the Cases

Based on the above mentioned case law, it is possible to distinguish several kinds of cases related to freedom of establishment.¹⁸ There is a general line of case law complemented with the special case law line. The special line relates in particular to specific tax problems. The cases may also be differentiated based on whether it is the home country or host country that restricts the freedom of establishment. Since *Daily Mail* decision there have been very few decisions concerning the restrictions upon exit. Most of those cases are again direct taxation cases. After *Daily Mail* there has been a similar case only in 2003 in the matter of *Lasteyrie du Saillant* which concerned the tax restrictions upon exit of a natural person.¹⁹ ECJ held that French tax regulation limits the freedom of establishment because it discriminates the persons leaving France to establish themselves in another member state as opposed to those who stay in France. *Daily Mail* and *Lasteyrie du Saillant* then left the door open for issues related to exit of a legal person. One of the most important “gap-filling” decisions in this area is the *Marks and Spencer* case.

Marks and Spencer (2005)²⁰

British laws make it possible for the groups to set off losses and profits incurred by their UK resident subsidiaries.²¹ British courts however refused to apply the same regulation to the

See also the opinion of the advocate general Maduro in *Cartesio* case C-210/06, nyr, delivered on 22 May 2008, par. 28 et seq.

¹⁹ ECJ decision from 13th March 2003 in *Hughes de Lasteyrie du Saillant vs Ministère de l'Économie, des Finances et de l'Industrie* C-9/02, Recueil, s. I-2409, par. 45.

²⁰ See Kingston, S. A Light in the Darkness: Recent Developments in the ECJ's Direct Tax Jurisprudence. 44 CMLR 1321, 2007. The author cites the following decisions related to freedom of establishment and direct taxes as to date of her article: *Case C-436/00, X & Y*, [2002] ECR I-10829; *Case C-324/00, Lankhorst-Hohorst*, [2002] ECR I-11779; *Case C-168/01, Bosal*, [2003] ECR I-9409; *Case C-9/02, De Lasteyrie de Saillant*, [2004] ECR I-2409; *Case C-268/03, De Baeck*, [2004] ECR I-5961; *Case C-446/03, Marks & Spencer*, [2005] ECR I-10837; *Case C-494/03, Senior Engineering Investments*, [2006] ECR I-525; *Case C-253/03, CLT-UFA*, [2006] ECR I-1831; *Case C-471/04, Keller*, [2006] ECR I-2107; *Case C-346/04, Conijn*, [2006] ECR I-6137; *Case C-470/04, N*, [2006] ECR I-7409; *Case C-196/04, Cadbury Schweppes*, [2006] ECR I-7995; *Case C-345/05, Commission v. Portugal*; *Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation*, judgment of 12 Dec. 2006, nyr; *Case C-446/04, Test Claimants in the Franked Investment Income (FII) Group Litigation*, judgment of 12 Dec. 2006, nyr; *Case C-170/05, Denavit*, judgment of 14 Dec. 2006, nyr; *Case C-104/06, Commission v. Sweden*, note 12 supra; *Case C-329/05, Meindl*, judgment of 25 Jan. 2007, nyr; *Case C-150/04, Commission v. Denmark*, note 12 supra; *Thin Cap Test Claimants*; *Case C-383/05, Talotta*, judgment of 22 March 2007, nyr; *Case C-347/04, Rewe*, judgment of 29 March 2007, nyr. The list of relevant case is also available on the websites of ECJ in *Repertoire de la jurisprudence* (in French only).

²¹ *Marks and Spencer*, opinion, par. 9.

foreign subsidiaries which did not have any seat or economic activity within the Great Britain. Advocate general classified this restriction as restriction upon exit, i. e. the restriction discriminating against corporations which have subsidiaries in other member states than Great Britain.²² By this case the ECJ departed from the general freedom of establishment case line to a special tax related regime.²³ This shift has been confirmed in other ECJ decisions later on.²⁴ Consequently, it is possible to make difference between the national restrictions that are discriminatory, and restrictions which result from the mutual relations between the member states but which cannot be considered as limiting the freedom of establishment.²⁵

Transfer of Registered Seat

In one Italian case a corporation with its registered seat in Rome moved this registered seat to Luxembourg. The *Corte di Cassazione* held that by this the company moved both its registered and administration seat to Luxembourg where it was founded again under Luxembourg laws. Under Italian law it is not important whether company moves its registered seat abroad. It does not change the country of its origin.²⁶ The transfer of registered seat is allowed²⁷ if it is in compliance with both the laws of home and host country. The transfer on itself cannot be the reason for dissolution of a company. Naturally, if the company keeps its Italian “nationality” it is a bit difficult as it regard the enforcement of Italian law abroad.²⁸ Luxembourg law sets forth a condition of change of nationality after reincorporation, but the transfer itself is no reason for the dissolution of a company. Nevertheless, the court dissolved the company based on the fact that it lost its Italian nationality after it was reincorporated in Luxembourg.²⁹ As the transfer or registered seat has not yet been clearly classified as falling under the freedom of establishment by the ECJ, it is only possible to enforce it in the states which allow such a transfer. It seems, however, that the decision in *Cartesio* case could bring the long awaited shift in the approach.

²² Id., par. 53.

²³ Kingston, op. cit. sub. 20, p. 1337.

²⁷ See for example decisions in *Test Claimants and Denkavit* as cited above.

²⁵ Kingston, S. A Light in the Darkness: Recent Developments in the ECJ’s Direct Tax Jurisprudence. 44 CMLR 1321, 1359 (2007).

²⁶ For more details see MUCCIARELLI, F.M., The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: An Important Decision from Italy, (2005) ECFR, Issue 4, p. 520.

²⁷ Id., p. 521. Author refers to art. 2437 of the Italian *codice civile*. Compare generally the impossibility of transfer of the registered seat and 14th directive.

²⁸ Id., p. 521.

²⁹ Id., p. 523.

Cartesio Case³⁰ – Daily Mail Overruled?

In the brand new opinion delivered by advocate general Maduro, it is argued that a development in case law over the past decades have made it possible to depart from the original conclusions once made in Daily Mail case.³¹ Maduro describes the methods used to distinguish between the cases as described above.³² He points out that “*these efforts were never entirely convincing.*”³³

The problems in this case have their roots in the facts of the case itself. It concerns the transfer of registered seat from Hungary to Italy, Hungary being the real seat theory state. In other words, the transfer of the seat is in fact a transfer of the real seat (thus an issue previously regulated by ECJ case law) which in this particular case happens to be the registered seat at the same time. It is also interesting to note that the “court language” speaks of “operational headquarters” in the text and also in its conclusion. One might argue that there is a space for discussion concerning the transfer of the registered seat which is not the operational headquarters in the incorporation theory states.

Of all the previous decisions, the Sevic case is the one where ECJ holds that both inbound and outbound cases are subject to the same treatment under article 43 of ECT.³⁴ This approach seems to be followed by Cartesio. Nevertheless, freedom of establishment is not absolute and there are still possibilities for restrictions if it is justified by general public interest (e.g. prevention of abuse or fraudulent conduct, protection of interests of creditors, minority shareholders, employees or tax authorities).³⁵ The limits may also be specified by secondary law.³⁶

Conclusion

Questions remain with the opinion in the Cartesio case in hands. It is clear that a complete negation of the right to free establishment is not allowed. Even if confirmed by the ECJ, it is

³⁰ Cartesio C-210/06, nyr, Opinion of advocate general Maduro delivered on 22 May 2008 (hereinafter, Cartesio).

³¹ Cartesio, par. 27.

³² Cartesio, par. 28.

³³ Cartesio, par. 28.

³⁴ Cartesio, par. 28, referring to Sevic case in footnote no. 50.

³⁵ Cartesio, par. 32.

³⁶ Cartesio, par. 33 referring to regulation on the statute of European Company.

still unclear what the scope of restrictions allowed under articles 45 and 46 is. Is this the way where the case law is going in decisions on freedom of establishment as such like it is in the tax related matters? Having in mind the works on the 14th directive (transfer or registered seat) it is possible that the final situation will be quite similar to the relation between Sevic decision and the 10th directive on cross-border mergers. In any case the decision in Cartesio will have a huge impact on the national approaches to the incorporation or real seat theory.

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