



***THE TRANSFER OF A COMPANY  
SEAT TO A DIFFERENT MEMBER STATE  
IN THE LIGHT OF THE RECENT  
„POLBUD“ DECISION***

PROF. HRVOJE MARKOVINOVIĆ; ASST. PROF. ANTUN BILIĆ

# Freedom of establishment

- ▶ Art. 49 TFEU “...restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.”
- ▶ Art. 54 TFEU “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.”
- ▶ What is the freedom of establishment?
- ▶ An “actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period” (Factortame II). Is this all?
- ▶ Does this mean that companies are free to change their seat from one MS to another?

# The seat of a company

- ▶ Connection of a company with a certain territory, certain MS
- ▶ A place where a company is registered (registered seat); a place determined by company's articles of association; a place from which a company is managed; a place in which a company performs at least a part of its economic activity (real seat)
- ▶ Different seats can, but they do not have to coincide.
- ▶ MS of incorporation is free to determine that its company has to have a certain type of connection to its territory.
- ▶ MS will almost certainly require that the registered seat is recorded by its registration authority. The identity of the company depends on such registration.
- ▶ MS may or may not require that the real seat of a company is in its territory

# Is the transfer of the company seat covered by the freedom of establishment

- ▶ Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions
- ▶ Case law of CJEU
- ▶ Departure MS in which the company is incorporated can require certain real connection with its territory (Daily Mail, Cartesio)
- ▶ This does not mean that the departure MS could prevent the company from additionally pursuing its actual economic activity in another MS
- ▶ Destination MS cannot prevent the company from pursuing its economic activity in its territory even the company was incorporated in another MS exclusively in order to circumvent the rules on incorporation of the destination MS (Centros, Überseering, Inspire Art)

# Is the transfer of the company seat covered by the freedom of establishment

- ▶ Destination MS has to allow the company from another MS to analogously rely on the rules on national mergers (SEVIC)
- ▶ As long as the transfer is accompanied by an actual pursuit of economic activities, the destination MS has to allow the company from another MS to analogously rely on the rules on domestic conversions (Vale)

# Key question

- ▶ Can a company rely on the national rules on conversion in order to transfer its registered seat to a destination MS, without transferring any economic activity?
- ▶ Especially since the freedom of establishment is defined as the freedom to pursue an actual economic activity.

# Polbud

- ▶ Judgement of 25 October 2017, Polbud – Wykonawstwo sp. z o.o.
- ▶ The transfer of a registered seat of a Polish company, Polbud, to Luxembourg. Polbud did not intend to transfer its head office or to conduct any economic activity in Luxembourg.
- ▶ The departure Member State, Poland, restricted the transfer by requiring mandatory liquidation of Polbud.
- ▶ The Court concluded that such transfer was covered by the freedom of establishment.
- ▶ The Court found that Poland was not authorized to restrict that freedom by requiring liquidation of the company, since mandatory liquidation goes beyond what is necessary to protect the minority shareholders creditors and employees.

# Broadening of the freedom of establishment?

- ▶ Criticism, the Opinion of AG Kokott
- ▶ The transfer of a purely registered seat is not a transfer of “an actual economic activity”
- ▶ Danger of letterbox companies
- ▶ Race to the bottom between Member States as to the protection of creditors, minority shareholders and employees
- ▶ Enabling of tax evasion as demonstrated by recent scandals of Panama Papers and Paradise Papers

# No

- ▶ The freedom of establishment encompasses not only the right to initiate economic activity but also the right to perform an economic activity
- ▶ In fact Polbud exercised its freedom to perform an actual economic activity.
- ▶ Polbud's freedom of establishment did not consist in transferring of its registered seat to Luxembourg but in performing an actual economic activity in an MS (Poland) different from the MS of its registration (Luxembourg).
- ▶ Identical to Centros - the transferring company exercised its right to perform its activities in a MS different from the MS of incorporation.

# Is the freedom of establishment limited to the pursuit of an actual economic activity?

- ▶ This is, without a doubt the purpose of Art. 49 TFEU
- ▶ However, MS are free to choose the legal form through which an economic activity may be performed - agencies, branches, subsidiaries, undertakings, companies and firms.
- ▶ MS do not have to require that those forms are indeed used for performing of an actual economic activity. If this is the case, in order to avoid discrimination (Art. 18 TFEU), those forms have to be available under the same conditions to all EU nationals and companies.
- ▶ Art. 49 (2) TFEU: “freedom of establishment shall include the right ... to set up and manage undertakings, in particular companies or firms ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected...”.
- ▶ Freedom of establishment encompasses both the freedom of economic activity and the freedom of legal form

# Protection of the departure MS, its creditors, minority shareholders and workers

- ▶ Is there a need to protect the departure MS from letterbox companies, forum shopping, race to the bottom, tax fraud, abuse?
- ▶ However, how to determine the economic activity in the moment of applying for an establishment? Vicious circle.
- ▶ Moreover, it is possible to “shop” for the most favourable legal system even by performing a negligible amount of an economic activity
- ▶ A company can easily have a “real connection” with so many legal systems that the very reason for requiring a real connection is lost.

# Conclusion

- ▶ Polbud does not broaden the notion of the freedom of establishment
- ▶ First, the company Polbud exercised its freedom to perform an economic activity in an MS different from the MS of its incorporation
- ▶ Second, the freedom of establishment encompasses not only the freedom of economic activity but also the freedom of legal form.
- ▶ Is CJEU's decision perfect? It did not sufficiently explain why mandatory liquidation goes beyond what is necessary to protect the minority shareholders creditors and employees.