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International corporate mobility: the CJEU allows companies to change nationality without effectively transferring their activity

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In a highly notable judgment issued on 25 October 2017 - Polbud[1], the Court of Justice of the European Union opens up the possibility for companies to submit to the law of another Member State by transferring their actual place of incorporation, whilst continuing their economic activity in the original Member State. The CJEU thus opens to companies the possibility to change their applicable corporate law provided that they comply with rules and formalities of the host Member State.

It can be beneficial for a company to transfer either its executive and effective operational seat ("the actual place of business"), or its place of incorporation which typically involves a change of nationality ("the registered office") to another country. There may be many reasons for such change, often associated with the quest of a more advantageous corporate law or tax system. Within the European Union, those transfers were not and partially are still not always permitted by the Member States and may have the – disastrous – consequence of a dissolution of the company or a change of its corporate form.

Under the auspices of the freedom of establishment, European law saw a steady increase in the possibilities for such transfers. On the one hand, European secondary legislation has been aiming for years at the harmonization of corporate law, in particular through provisions concerning mergers, demergers, change of legal form and international seat transfers. While it is true that cross border mergers are provided for by a directive only for corporations, Societas Europaea (SE) was created specifically with the notable feature of being able to transfer its registered office and establish itself in another Member State by a mere decision of its executive or administrative body. A directive on the transfer of registered office or the change of international incorporation has yet to see the light of day.

On the other hand, the Court of Justice of the European Union has relentlessly defended the principle of freedom of transfer and change of the seat amongst Member States by means transfers or mergers since 1988[2].

[1] Judgment of 25 October 2017, POLBUD, C-106/16, ECLI:EU:C:2017:804.

[2] Daily Mail (CJCE 27 Sept. 1988, aff. C-81/87), Centros (9 March 1999, aff. 212-97), Überseering (5 Nov. 2002,

The particularity of the *Polbud* judgment resides in the fact that the Court of Justice has recognised that the principle of freedom of establishment as reflected in the seat transfer within the European Union extends to cases in which the registered office – place of registration – is transferred to a new host Member State while the actual place of business of the company unequivocally remains in the State of origin.

1. The transfer of registered office without relocation of the actual place of business protected by the freedom of establishment

At the center of this judgment stands the Polish company *Polbud* which decided to transfer its registered office to Luxembourg, all the while maintaining its main activity as well as its actual place of business in Poland. Upon registration in the Luxembourg register as a Luxembourg company, *Polbud* asked to be removed from the Polish commercial register where it was still entered. This claim was rejected by the registration court, which subjected the removal from the register to the dissolution of the company through liquidation (which obviously involved administrative, tax and financial constraints).

As it had been referred to for a preliminary ruling, the CJEU examined the issue of conformity with the European law, and notably with the freedom of establishment[3], of the Polish provisions requesting the liquidation of the company transferred to Luxembourg prior to its removal from the registry.

According to the judgment of the CJEU, the company had validly transferred its registered office provided that the connecting factors requested by the host State were met and regardless of its actual place of business. The State of origin was not entitled to require the liquidation of the company since Polish domestic legislation allowed national companies to transform their legal form without prior liquidation. The substantive principle is not new, but the CJEU broadens significantly the freedom of establishment.

In comparison with its previous case law[4], the *Polbud* case offers the CJEU the possibility to address the situation of a transfer of seat with retention of legal personality which displays two innovative aspects:

- The CJEU had to rule in this case, unlike in many of its judgments in this subject matter, on restrictions imposed by the State of origin and not by the host State.

- The issue at hand was whether *Polbud* could rely on the freedom of establishment to oppose its liquidation, whilst it stated (initially at least) that it intended to keep its actual place of business in the State of origin.

In its decision in favor of *Polbud*'s mobility without any restriction regarding its actual place of business, the CJEU confirms its broad approach as to the scope of the freedom of establishment. The opening of the scope of this freedom thus also covers, according to the CJEU, the case of a company wishing solely to take advantage from another legal form, without changing actual seat.

2. Rejection of restrictions other than those of the host Member State

Any obstacle to the freedom of establishment that the Member State of origin wishes to set out shall be justified and proportionate to achieving a general interest objective. Unsurprisingly, the CJEU dismissed the alleged objective of

aff. C-208/00, Inspire Art (30 Sept. 2003, aff. C-167/01), SEVIC (13 Dec. 2005, aff. C-411/03), Cartesio (16 Dec. 2008, aff C-210/06) et VALE (12 July 2012, aff. C-378/10).

[3] Articles 49 and 54 of the Treaty on the Functioning of the European Union.

[4] In particular the *Cartesio* case of 16 December 2008, C-210/06, EU:C:2008:723.

protecting creditors, minority shareholders and employees, and considered that requiring liquidation prior to dissolution of the company was disproportionate since the host Member State allows for the continuity of the company. It is true that the interests of creditors, employees or minority shareholders could be jeopardised by the dissolution of the company. However, they could be protected by less restrictive measures than liquidation (e.g. a duty to publish or consult, or the mandatory provision of collaterals, etc.).

3. Risks and prospects for the corporate seat transfer within the European Union

In its *Polbud* judgment, the Court of Justice rejects any notion of abuse of rights in the use of the right of establishment for the purpose of benefiting from a more favorable legislation[5], despite of the often artificial nature of the dissociation between registered office and actual place of business. This highly favorable position will not fail to encourage "forum shopping". Due to the lack of harmonisation of national laws on the issue of connecting factors for determining the nationality of companies, the specifics of each given case should be checked prior to implementing any cross-border mobility.
The companies wishing to take advantage from this freedom will thus have to check thoroughly whether the host country envisaged allows for such an adoption of its legal system for companies that are keeping their actual place of business in the Member State of origin. In addition, attention should be paid to the fact that this "forum shopping" of corporate laws does not extend to other legal areas which provide for different connecting factors, as insolvency law or employment law…

For now, French law provides for the registered office as predominant criterion[6], supplemented with the additional criterion of exercising an actual business, mainly in order to avoid abuse. However, conversely, the actual place of business alone does not in principle require registration, so that the registered office in France could be moved to another host Member State without any impact on the actual business of the company in France.

Because of the difficulties linked to this conflict of connecting factors between Member States, impact studies on the draft 14th directive on cross-border transfers have recently been presented, without yet being able to persuade the European Commission to present a proposal for a Directive.
In the absence of a unified European regulation, it is certain that "competition" between national corporate legal systems, that wish to attract foreign companies' registered offices and promote their domestic law, will not fail to increase following the publication of this judgment.

[5] Judgment of 25 October 2017, POLBUD, C-106/16, ECLI:EU:C:2017:804, point 40 : « *the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse* ».

[6] Article 1837 of the French Civil Code or L. 210-3 of the Commercial Code.