

MOBILITY OF THE TRADING COMPANIES OPERATING IN THE TOURISM INDUSTRY

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Abstract

The trading companies operating in the tourism field, established on the territory of a European Union member state, benefit from the possibility of establishing, transferring their registered office on the territory of any other European Union member state. This aspect of the establishment right representing the base of the mobility principle of these legal entities – mobility imposed by the current necessities of the European economy - it is recently recognized by the practice of the Court of Justice of the European Communities.

Keywords: mobility, trading company, registered office, tourism.

JEL Classification: K23, L80, L83

I. INTRODUCTION

As in any other activity field, in the tourism industry as well, the trading companies represent the main players of this economic activity.

As regards their mobility, in this matter too, there is still the traditional conception according to which the connection between these legal entities and the states wherein they were established is so important that, in the absence hereof, the trading companies terminate their existence, cease to exist as a legal entity, even if they intended to establish another specific connection to another member state.

The conception is legally obsolete and inappropriate to the mobility necessities of those involved in the tourism market.

On the other hand, the legal frame in which the enterprises, including the ones in the tourism field, have to perform their activities within the Community, based essentially on the internal legislation, does not comply either with the requirements imposed by the creation of the Sole Market.

Certainly the tourism market is a market in which the trading companies should have the possibility of performing their specific activity on the territory of another state but that of the state wherein it was established, based on the establishment right and without national formalities that could excessively restrict or prevent the actual exercise of the establishment right.

The preoccupations with the adjustment of the European and national legal framework to the principles and objectives of the Sole Market were revealed particularly in the action Plan initiated in 2003 by the European Commission in the

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field of trading company law: “*Modernization of the trading company law and consolidation of the government of the enterprises in the European Union. A plan to advance*”¹, document wherein the mobility of the companies represents one of the six main preoccupations.

However, for a long period of time, in the absence of an express European regulation, the European Union and European economic area member states were either retained as to the interpretation mode of the establishment right recognized by art. 43 in the European Communities Institution Treaty (hereinafter referred to as the EC Treaty) or imposed restrictions intended to render the establishment right innocuous.

The basic principle of the mobility of the trading companies may not be restricted only to the possibility of extension of their activity on the territory of other European Union member states by the establishment of branches, subsidiaries, representative offices or agencies.

It also includes, by its nature, the right of the company to shift its registered office from a member state to another, as required by the business opportunities.

This aspect of the mobility principle of the companies is contemplated by this study, analyzed from the perspective of the European legislation, taking into account its importance, the new practice of the Court of Justice of the European Communities (hereinafter referred to as CEJ) and the current stage of the Romanian legislation.

II. Current base of the mobility of the trading companies existing in the tourism field

a). Creation of the communitarian law, the European Company (Societas Europaea) introduced by the (CEE) Regulation no. 2157/2001² and the European Group of Economic Interest (hereinafter referred to as GEIE) constituted within the meaning of Regulations no. 2137/85 and 2157/2001, benefit from the right – in principle, unrestricted – of transferring their registered office to another member state social, without their prior dissolution and liquidation being required.

These communitarian entities, to be automatically found in the Romanian law as well, meet, to a large extent, the requirements of the mobility principle.

¹ For details, see: Communication of the European Commission to the Council and the Parliament as of May 21st, 2003, entitled: “*Modernization of the trading company law and consolidation of the government of the enterprises in the European Union. A plan to advance*”, www.eur-lex.europa.eu.

² Council Regulation no. 2157/2001 as of October 8th, 2001 enforced in 2004, Published in the Official Journal L 294/1 as of October 10th, 2000, Regulation supplemented by Directive no. 2001/86/CE and of the Council as of October 8th, 2001, supplementing the SE Statute as regards the involvement of the workers, published in the Official Journal L 294/22 as of October 10th, 2001; with the subsequent amendments, latest amendment performed by Regulation no. 1791/2006 (adopted following Romania’s and Bulgaria’s accession to the EU in January 1st, 2007), published in the Official Journal L 363/December 20th, 2006.

In this respect, we exemplify herein below with one of the two entities: the European Company, regulated in our country by the Emergency Governmental Ordinance no. 52/April 21st, 2008³ and by the European Regulation no. 2157/2001 on the European Company Statute.

The big advantage of the establishment of such a European company is represented by the simplification of the structure of enterprises performing their activity throughout Europe, without constituting countless subsidiaries subject to different national regulations⁴.

According to the (CEE) Regulation no. 2157/2001, the communitarian enterprise form, regulated thereby may transfer its registered office to another member state without its prior liquidation, having thus access to all the manifestation forms of the mobility principle of the companies.

Nevertheless, the amendments of the European and national legal frameworks introduced by the European Company Statute, do not result and cannot result, at his moment, in a revolution in the field of the mobility of the trading companies existing in the European area, considering the fact that the European Company *does not benefit from the advantage of the European nationality⁵ and the principle of its mobility is affected by the opposition right available to the public authorities in the host member state, opposition based on public interest grounds⁶, in case of intention of shifting the registered office to another member state.*

b). The access to all the manifestation forms of the trading companies, related in the case of the European Company, is not to be found in the case of the “classical” and majority trading company too, regulated by the national and European laws so that their only legal grounds their registered office to another member state is set out by art.43 and art.48 in the EC Treaty.

According to the provisions of art. 43 in the EC Treaty, the restrictions concerning the establishment freedom of the nationals of a member state on the territory of another member state. This interdiction envisages as well the restrictions concerning the establishment of agencies, branches or subsidiaries by the national of a member state on the territory of another member state.

³ Emergency Governmental Ordinance no. 52/21.04.2008 amending and supplementing Law no. 31/1990 on trading companies and supplementing Law no. 26/1990 on the Trade Register, published in the Official Journal Part I no.33 as of April 30th, 2008.

⁴ F.Blanquet, “Pourquoi creer une societe europeenne?”, in: La societe europeenne, Dalloz, Paris, 2003, p.5; Jacques Beguin, Michel Menjucq – G.Bourdeaux, A.Couret, B.Le Bars, D.Mainguy, H.Ruiz Fabri, J.-M.Sorel, C.Seraglini, Droit du commerce international, Litec, LexisNexis, Paris, 2005, p.200-p.214.

⁵ V.J.Beguin, “Le rattachement de la societe europeenne”, in: La societe europeenne, Dalloz, Paris, 2003, p.31 and the following.

⁶ The grounds of the opposition right was criticized being considered much to general and generator of legal insecurity; in this respect; Report: “Societas Europaea pour une citoyennete europeenne de l’entreprise” as of March 19th,2007, presented by Noelle Lenoir and collectively elaborated by Ronan Guerlot, Mirko Hayat, Erwan le Meur, Marii-Laure Combet, Marc Guillaume, Reinhard Dammann, Nichel Menjucq, published on the website of the Ministry of Justice in France: www.justice.gouv.fr.

On the other hand, the freedom of establishment supposes the access to independent activities and to their exercise, as well as the establishment and the management of the enterprises, in general and in particular of the companies within the meaning of article 48 in the EC Treaty ⁷, within the terms defined for its own nationals by the legislation of the country of establishment.

In the current stage of the communitarian law, there is not uniform definition given to the trading company law that may benefit from the establishment right in reference to the criterion of a sole connection determining the national law applicable to a trading company.

But, in the majority of the European Union and European Economic Area member states, the registered office of a trading company is the connection point sufficiently characteristic to determine affiliation thereof to a certain state, its nationality.

In this issue, the EC Treaty placed on the same position, as a specific connection, the registered office, central administration and the main place of performance of the activity of a company.

c). As a manifestation form of the principle of mobility of the trading companies, the possibility of transfer of the registered office of a company to a member state different from the state wherein it was established, within the meaning of the establishment right, was contemplated by a recent Resolution of the European Court of Justice: Resolution of CEJ as of December 16th, 2008, Case C-210/06, OJC -165/July 15th m 2006 –Cartesio case.

The resolution of CEJ was passed following the petition of issuance of a preliminary resolution concerning the interpretation of art. 43 and art. 48 in the EC Treaty, petition formulated within an action /appeal filed by Cartesio Oktaties Szolgaltato bt trading company (hereinafter referred to as “Cartesio”), company seated in Baja (Hungary) against the resolution of rejection of its application of recording in the company register of the note concerning the transfer of its registered office in Italy.

The petition formulated by Cartesio before the relevant District Court in Hungary had two distinct requests: registration of the transfer of the registered office to Italy and the maintenance of the Hungarian nationality of the company also after the transfer of the registered office to Italy.

This petition was rejected by the Hungarian Lower Court, on the grounds that the Hungarian law does not allow to a company established in Hungary to transfer its registered office abroad, continuing at the same time to be subject to the Hungarian

⁷ “The companies established in compliance with the legislation of a member state and having their registered office, central administration or main place of activity performance within the Community are assimilated, in the application of this subsection, to the natural persons that are nationals of the member states. Companies mean the companies established in compliance with the provisions of the civil or commercial legislation, including the cooperative companies and other public or private law legal entities, except for the non-profit ones.” – art. 48 EC Treaty.

legislation in terms of personal law, regulating the organic statute of the company (company establishment, operation, amendment, dissolution and liquidation).

Cartesio submitted an appeal against this resolution, invoking the breach of the provisions of art.43 and art.48 in the EC Treaty, requesting the formulation and sending to CEJ of a preliminary question on this aspect.

And this whereas CEJ has previously passed the Resolution as of September 27th, 1988, Daily Mail and General Trust (81/87, Rec., p.5483) whereby it had been decided that the freedom of establishment set out in articles 43 and 48 in the EC Treaty does not suppose that a company established within the meaning of the legislation of a member state and registered in that state should be entitled to transfer its central administration and, consequently, the main place of activity performance to another member state, maintaining at the same time the legal status and origin nationality, when the relevant authorities fail to recognize this right.

In other words, according to this resolution of CEJ, a company established within the terms of a national legal order exists only within the terms of the national legislation determining the establishment and operation thereof.

In the Cartesio case, CEJ established the imperative of the distinction between the issue of transfer of the registered office of the company to another member state without the amendment of the law governing its organic statute and the issue of the transfer of the registered office of the company established within the meaning of the law of a member state to another member state with the amendment of the law governing its organic statute.

Consistent with its practice, CEJ reiterated the fact that, each member state is entitled not to allow to a company governed by its law to maintain this stature in the case in which the company intends to transfer its registered office to another member state, as the specific connection based on which the company ha been governed by its legislation disappears.

On the other hand, the European Court of Justice establishes that, to the extent to which a member state to which a company wishes to transfer its registered office allows it, the forbiddance of its turning into a company subject to the national law of another member state and the imposition of the dissolution and liquidation of the company by the member state wherein the company was established, represents a restriction on the freedom of establishment of a company, restriction forbidden within the meaning of art.43 in the EC Treaty.

Additionally, the European Court of Justice reckoned that, the principles and provisions applicable to GEIE and to the European Company may be applicable, *mutatis mutandis*, also to the trans-frontier transfer of the registered office of the trading companies al constituted within the meaning of the national law of a member state.

Thus, the resolution of the European Court of Justice in the Cartesio case, awaited with high interest by the European business community, dependents the jurisprudential grounds, the interpretative argument binding to the national Courts of Law, provided

under art.43 and art.48 in the EC Treaty, in support of the non-restricted mobility of the trading companies within European Community.

III. Conclusions

We may say that, in the current stage of the evolution of the European jurisprudential doctrine, even in the absence of express legal regulations, any trading companies established within the meaning of the legislation of a member state, including the companies operating in the tourism field, may transfer its registered office to another member state, without its actual dissolution and liquidation being required, without loss of its legal status, if the legislation of the state to which the company intends to transfer its registered office allows it to turn into a national company.

Consequently, the company loses the nationality of the member state wherein it was established and will receive the nationality of the member state to which it transfers its registered office, state whose legislation becomes the law applicable to the organic statute of the trading company.

And this because, by means of the Resolution passed by CEJ in Cartesio Case, the jurisprudential recognition of the most important form the materialization of the mobility of the trading companies is obtained, namely the possibility of transfer of their registered office from a member state to another, right consecrated by art.43 in the EC Treaty.

Consequently, the trading companies operating in the tourism field having their registered office in Romania, will be able to transfer their registered office (without dissolution and liquidation) in any member state wherein its turning into a form of company regulated by the law of the member state to which the company is going to transfer its registered office.