The Edil Work 2-Case: Refinement or Redefinition of EU Company Law?

1. INTRODUCTION

The late 1980s could be considered as a turbulent period. The opening of the border between Hungary and Austria in the summer of 1989 could be seen as one of the first steps in the fall of the iron curtain, which was continued by bringing down the Berlin Wall on 9 November 1989.

Not only the borders between the western and eastern part of the European continent were challenged at the time, but also the borders within the Member States of the European Community, at least from a company law perspective. Approximately one year prior to the above-mentioned important changes in the European geopolitical history, the Court of Justice of the EC (CJEC) rendered its decision in the Daily Mail-case.[1] In the Daily Mail case, the CJEC ordered that the UK, at that time a Member State of the European Community, was allowed to prevent the transfer of the head office of a company governed by the laws of England and Wales from the United Kingdom to the Netherlands, despite the fact that both jurisdictions were adhering to the incorporation theory. Daily Mail sought to invoke the freedom of establishment – at that time laid down in Articles 52 and 58 EEC Treaty – in opposition to the prevention of seat transfer,[2] without success.

In the decades after the Daily Mail-case, many developments in the field of EU company law have taken place. Without trying to be exhaustive, it is worth mentioning the steps that have been taken by the EU legislator by, for example, introducing proposals for the SE Regulation[3] and the SE Directive,[4] the SCE Regulation[5] and the various directives on national and cross-border restructuring and cross-border mobility of companies.[6] At the same time, the CJEU gave its decisions on various topics, such as (1) the recognition of companies governed by the laws of other Member States,[7] (2) cross-border merger[8] and (3) cross-border transfers of seat and cross-border conversions.[9]

2. THE EDIL WORK 2-CASE

2.1. Facts

In 2024, the story continues with the Edil Work 2-case.[10] The facts were as follows: Agricola Torcrescenza S.r.l. was the owner of a castle in the vicinity of Rome, Italy. The castle was the sole asset of the company and conducting the management over this property was its only activity. In the year 2004, the company transferred its seat to Luxembourg and changed its name into STE S.à r.l. In fact, the company was cross-border converted from an Italian company into a Luxembourg company. This cross-border conversion occurred prior to the landmark-decisions in the Cartesio-case, the Vale-case and the Polbud-case and was based on both the laws of Italy[11] and Luxembourg.[12]

1 Case 81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, 27 Sep. 1988, ECLI:EU:C:1988:456.
2 *Ibid.*, consideration 25.
3 Council Regulation (EC) No 2157/2001 of 8 Oct. 2001 on the Statute for a European company (SE), OJ L 294, 10 Nov. 2001, at 1–21.
4 Council Directive 2001/86/EC of 8 Oct. 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10 Nov. 2001, at 22–32.
5 Council Regulation (EC) No 1435/2003 of 22 Jul. 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18 Aug. 2003, at 1–24.
6 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 Jun. 2017 relating to certain aspects of company law, OJ L 169, 30 Jun. 2017, at 46–127 (as amended from time to time).
7 Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 9 Mar. 1999, ECLI:EU:C:1999:126, Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, 5 Nov. 2002, ECLI:EU:C:2002:632, Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 30 Sep. 2003, ECLI:EU:C:2003:512.
8 Case C-411/03, *SEVIC Systems AG*, 13 Dec. 2005, ECLI:EU:C:2005:762. *See also* S. M. Bartman, *10 Years Cross-Border Mergers Directive: Some Observations About EU Border Protection and Minority Exit Rights*, 14(6) Eur. Co. L. 214–216 (2017), doi: 10.54648/EUCL2017032.
9 Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, 16 Dec. 2008, ECLI:EU:C:2008:723, Case C-378/10, *VALE Építési kft.*, 12 Jul. 2012, ECLI:EU:C:2012:440, Case C-106/16, *Polbud – Wykonawstwo sp. z o.o.*, 25 Oct. 2017, ECLI:EU:C:2017:804.
10 Case C-276/22, *Edil Work 2 S.r.l. and S.T. S.r.l v. STE S.a.r.l.*, 25 Apr. 2024, ECLI:EU:C:2024:348.
11 Article 25(3) of Law No 218/1995 (Italy).
12 At the time of the cross-border conversion (2004), cross-border conversions were not regulated in the laws of Luxembourg, but were based on unwritten law.

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Years after the cross-border conversion, the extraordinary general meeting of shareholders of STE S.à r.l., adopted a resolution to appoint a proxyholder. The proxyholder, acting as proxyholder of the Luxembourg company, sold the Italian castle to a third party, Edil Work 2 S.r.l., following its contribution to two other group companies that were part of the same group of companies.

2.2. Italian and Luxembourg Law

Both the Italian and the Luxembourg company laws were, in my view, ahead of their time in 2004. Each jurisdiction permitted the transfer of seat of a company to another (EU member) state, resulting in a change of applicable law to that company. Realize this was twenty years ago, before the landmark decisions of the CJEU on cross-border conversions.

It is noteworthy that, under Italian law, Italian company law applies if (1) the seat of the administration of the company is located in Italy or (2) if the principal object of an entity is located in Italy. The latter element was very important in the Edil Work 2-case.

2.3 Procedures in Italy and Preliminary Question

In 2013, STE S.à r.l., the Luxembourg company, sought to annul the contribution agreements through which the castle was contributed by STE S.à r.l. to ST S.r.l. and subsequently to Edil Work 2 S.r.l. In that framework, STE S.à r.l. invoked the abovementioned Italian legal provisions, being that Italian company law is applicable if the seat of the administration is located in Italy, or if the principle object of an entity is located in Italy. Additionally, STE S.à r.l. invoked another rule of Italian law, stipulating that powers of the board of directors may only be delegated to an executive committee consisting of one or more members of the board of directors. Given that the main asset/principle object of STE S.à r.l. was located in Italy, the appointment of a proxyholder would not be compliant with Italian law if it were applicable.

The central question arose as to whether these Italian legal provisions contradicted the freedom of establishment as laid down in Article 49 of the Treaty on the Functioning of the European Union (TFEU), which is also applicable to companies (Article 54 TFEU). To get the answer to this question, the Italian Supreme Court of Cassation asked the following preliminary question to the CJEU:

> *Do Articles 49 and 54 [TFEU] preclude a situation where a Member State in which a (limited liability) company was originally incorporated applies to that company the provisions of national law relating to the operation and management of [that] company where the company, having transferred its registered office and reincorporated the company under the laws of the Member State of destination, maintains its principal place of business in the Member State of origin and the management act in question has a decisive effect on the company's activities?*

2.4. Observations

In the Edil Work 2-case, the cross-border conversion of Agricola Torcrescenza S.r.l. into STE S.à r.l. itself was not in dispute, as both the laws of Italy and Luxembourg accommodated such cross-border conversions. Instead, the focus was on the application of Italian company law to a company governed by the laws of another EU Member State (i.e., Luxembourg).

In my view, the Edil Work 2-case builds upon the existing case law of the CJEU in Überseering, Inspire Art and Polbud. From the Überseering-case, we learned that the mutual recognition of companies governed by the laws of another EU Member State is safeguarded by the freedom of establishment[13] and from the Inspire Art-case we learned that an EU Member State may not impose provisions of its own legislation to companies that exist under the laws of another EU Member State. If an EU Member State is nevertheless doing that, this constitutes a breach of the freedom of establishment.[14]

Consistent with prior rulings and the Polbud-case, the CJEU affirmed that 'the freedom of establishment for companies or firms (…) includes, inter alia, the right to *set up* and *manage* those companies or firms *under the conditions laid down, by the legislation of the Member State where such establishment is effected, for its own companies or firms*' (italics by ERR).[15] Moreover, the court determined that EU Member States may use the location of the registered office, the central administration or principal place of business to determine the connection with the legal system of a particular EU Member State in the same way as does nationality in the case of a natural person.[16] The definition of the connecting factor falls within the powers of each EU Member State.

With respect to STE S.à r.l. in the case at hand, the CJEU concluded that the activities of STE S.à r.l. were covered by the freedom of establishment.[17] Furthermore, the CJEU considered that it should be assessed whether the application of the national laws of an EU Member State to a company governed by the laws of another EU Member State constitutes a restriction on the freedom of establishment.[18] In this regard, the CJEU reiterated its considerations of the Polbud-case: '*All measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom*'.[19] When an EU Member State imposes its own rules to companies governed by the laws of another EU Member State, such companies face dual

13 Case C-208/00, *supra* n. 7, consideration 82.
14 Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, consideration 143.
15 Case C-276/22, *supra* n. 10, consideration 24, Case C-106/16, *Polbud-Wykonawstwo sp. z o.o.*, consideration 33. *See also* C. Gerner-Beuerle, F. M. Mucciarelli, E-P. Schuster, *The Law Applicable to Companies in Europe: Study and Possible Reform*, 14(4) Eur. Co. L. 148–149 (2017), doi: 10.54648/EUCL2017023.
16 Case C-276/22, *supra* n. 10, consideration 25, Case C-208/00, *supra* n. 7, consideration 57.
17 Case C-276/22, *supra* n. 10, consideration 28.
18 *Ibid.*, consideration 29.
19 *Ibid.*, consideration 30.

compliance burdens,[20] complicating management and thus constituting a restriction on the freedom of establishment.[21]

Is it as simple as it seems? Of course not. The freedom of establishment may be restricted, albeit only when justified by overriding public interest reasons. Such restrictions must be appropriate for achieving the intended objective and cannot exceed what is necessary to attain that objective.[22] In the case of Edil Work 2 S.r.l., the Italian government justified that Italian law was essential to safeguarding the interests of shareholders, creditors, staff and third parties. Nevertheless, the CJEU ruled that the relevant legal provision did not expressly protect these interests; its general nature exceeded what was necessary to achieve the goal of safeguarding stakeholder interests.[23]

3. CONCLUSIONS

The Edil Work 2-case of the CJEU: refinement or redefinition of EU Company Law? In my view, it is more a *refinement*, rather than a *redefinition*. Key takeaways of the Edil Work 2-case are that the location of the registered office, the central administration or principal place of business are equal within the EU and that EU Member States have the freedom of require which connecting factor will be used to determine the law applicable to a company.

Moreover, we learned that an EU Member State may not impose its own rules to a company governed by the laws of another EU Member State. This would be a restriction on the freedom of establishment, which is not allowed. This was already clear after the Inspire Art-case, but has been confirmed in the Edil Work 2-case. Furthermore, it has become clear that also in this case restrictions on the freedom of establishment are permissible, inter alia for protecting the interests of shareholders, creditors, staff and third parties and the public interest. However, this should then follow from the law itself.

Regrettably, we currently find ourselves in an era where threats of war seem to be getting larger and larger. Politicians may feel compelled to impose restrictions on the freedom of establishment to safeguard critical societal interests, particularly in sectors like energy and communications. While such measures may be permissible, they could contradict the established freedom of establishment. Let us hope that the geopolitical landscape improves and such temporary restrictions become unnecessary and that freedom and freedom of establishment will continue to be in force.

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20 *Ibid.*, consideration 31.
21 *Ibid.*, consideration 32.
22 *Ibid.*, consideration 36.
23 *Ibid.*, considerations 42, 43.