
Mihai Daniel ȘANDRU
Faculty of International Business and Economics
Dimitrie Cantemir Christian University
Senior Researcher - Center for European Legal Studies,
Institute for Legal Research “Andrei Radulescu”,
Romanian Academy
E-mail: mihaisandru@gmail.com

ABSTRACT
Freedom of establishment of companies in the European Union is an area in a full process of evolution, marked in particular by decisions rendered by the Court of Justice of the European Union (hereinafter “CJEU”). The present paper determines recent developments in the freedom of establishment of companies, it focuses on the analysis of the opinion of the Advocate General (hereinafter “AG”) in the VALE case (pending) and it establishes direct connections with the Romanian case-law relevant for the case subject to analysis. The conclusions emphasize the problems likely to arise in case ECJ would adhere to the opinion of the AG.

KEY WORDS
European Court of Justice, VALE case, freedom of establishment of companies, Romanian case-law

JEL CODES
K22

1. Introduction
Freedom of establishment of companies in the European Union is part of the general framework of the freedom of movement “Free movement of persons, services and capital” [Title IV, Part three of the Treaty on the Functioning of the European Union (hereinafter “TFEU”)]. The regulation currently in force, i.e. Article 49 TFEU (“restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited”), has not changed since 1957 when these rules were first established, however it could fairly be stated that it has not yet produced its full effects. The present paper analyses the most recent European developments of the company mobility, starting with the principle established by the ECJ in the Daily Mail case (paragraph 19) according to which the States are the only ones capable of determining the rules concerning the registration of companies:

“...In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.” (Emphasis added).

Without mentioning the whole body of case-law of the ECJ (available in a book that I have published in 2011), it must be underlined that in the unseen competition between the EU institutions, the Court of Justice has had a fundamental role in the definition of content (a recent
example is Winner Wetten case) or boundaries of the freedom of establishment in relation to national law (for example the Cartesio case). The Court of Justice has set out, through its judgments, especially as a result of the Überseering case, proposals of amending the legislation by the European Commission, proposals that focused on the seat of the European company (hereinafter “SE”).

2. Recent developments in the field of the freedom of establishment of companies in the European Union

The freedom of establishment of companies started actually with the Centros case, C-212/97, whose subject-matter was the mobility of companies, from the perspective of establishing subsidiaries of a certain company in a state other than the one in which the company acquired legal personality. It continued with Überseering, Inspire Art, SEVIC Systems. In this succession of cases in the area of the freedom of establishment, the most close case [compared to VALE] seems to be Cartesio, C-210/10, even though the legal circumstances are different. In the preliminary reference, the referring court had primarily requested whether Articles 43 and 48 TEC must be interpreted as opposing the regulation of a Member State that prohibits a company incorporated under the domestic law of that Member State to transfer its seat to another Member State by still preserving its status of company subject to the domestic law of the Member State under which it was incorporated. Cartesio merely wished to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable (paragraph 119). The ECJ stated that “as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation”. [Emphasis added]

3. The analysis of the Opinion of the Advocate General Niilo Jääskinen of 15 December 2011

The previously mentioned ECJ case law, together with the rules of European law – in particular those regarding the European company [Council Regulation (EC) No 2157/2001] - define the legal framework of the preliminary reference in the VALE case based on the issue of “the cross-border transfer of a company incorporated under the Italian law in Hungary, by transferring its registered seat, fact that involves the removal of the company from the Italian Trade Register, the change of the applicable law and its reconstruction as company under the Hungarian law that claims to be the universal successor of the Italian company in question.” (Paragraph 1 of the conclusions).

As compared to the current situation of the EU law that includes no rules regarding the cross-border reconstruction of a company from a Member State or the international transfer of such a company, AG Niilo Jääskinen, in its Opinion that was put forward on 15 December 2011, preserves the ECI concept from the Daily Mail case, i.e. the Member States have the sole competence in the area of company incorporation.

In what concerns the issue of admissibility of the preliminary reference, the AG states something that would deserve a separate analysis, which is also important in the context of this article, i.e.: “Despite the inconsistencies encountered in the judgment that decided the referral
regarding the peculiarities of the Italian law (...)” [emphasis added]. This statement requires the national judge to have exceptional knowledge of comparative law in relation to the preliminary references in the field of freedom of establishment as a result of the fact that sometimes the connecting factors of a company may relate to several Member States. The national judge faces difficulties even when it comes to knowing the relevant regulations of another (single) Member State, because for him the legislation of the third state represents a foreign law and there is no procedure that would directly imply a cooperation between national courts and the authorities of other Member States in identifying the legislation that is relevant to a particular case. On the other hand, the national judge would have to address the Court of Justice a preliminary reference that would concern, at least partially, the interpretation of the law of another Member State. In the VALE case, the ECJ has taken all the necessary steps in order to gather all the elements of the file by asking from the Italian government details about the applicable rules of law. This practice is not unusual and it is permitted under the Statute of ECJ, being used frequently. However, for the future, there must be contemplated a mechanism that would not put the national judge in the position of not being able to make preliminary references as a result of his lack of knowledge in the area of comparative law. The dictum “jura novit curia” does not apply to the national judge in relation to the rules of law of another Member State as a consequence of the fact that they represent a foreign law.

In fact, “on the other hand, VALE Construzioni no longer exists under the Italian law and the transfer allowed by the Italian legislation cannot be made since the company no longer exists. Nonetheless, the issue arises as to who owns the assets of the company, in particular the paid capital for the registration in Hungary, and who is liable for the obligations of the company in relation to third parties” (paragraph 44)”. The references of AG Jääskinen to his predecessors (AG Darmon and AG La Pergola, at paragraph 47) and the fundamental economic concept of the right of establishment are substantiating this approach. We can add to these concepts the issue regarding the role of the associates’ will, their intention to apply the principle of freedom of establishment (par. 48). However, relevant for the case as a whole are the national rules of law, on the one hand, and the lack of a strictly determined content of the principle of freedom of establishment, on the other. This context is supplemented by the well known principle of ECJ’s activism that was mentioned in the analysed opinion (paragraph 58): “However, despite the various legal difficulties related to company law, domestic tax law and also to private international law, the Court has the task of providing an impetus in the development of the Union law in the corporate sector through its judgments of principle that open the way to cross-border mobility for companies.” This is expressly stated by promoting the considerations of AG Verica Trstenjak from her Opinion of 30 June 2009 in the Audiolux case, C-101/08: „As a Community institution within the meaning of Article 7(1) EC, the Court also forms part of that institutional balance. This fact implies that in its capacity as a Community judicial body which has the right under the first paragraph of Article 220 EC to ensure, within its jurisdiction, that in the interpretation and application of this Treaty the law is observed, it respects the rule-making powers of the Council and of the Parliament. This necessarily presupposes that it leaves to the Community legislature the task of rule-making in the field of company law conferred on it by the treaties and, as before, observes the necessary self-restraint in developing general principles of Community law which might possibly run counter to the legislature’s aims. The Court may have recourse to general principles in order to find solutions, which are appropriate having regard to the aims of the Treaty, to the
problems of interpretation on which it is required to decide. However, it may not assume the role of the Community legislature if a gap in the law can be filled by the Community legislature.” (paragraph 107, emphasis added).

In essence, AG Jääskinen shows in his opinion that “the cross-border reconstruction of a company” is possible within the framework of the freedom of establishment principle. This solution is purely circumstantial and it does not restrict the rights of the states to formulate exceptions and specific regulations, for instance: “in the event of a cross-border reconstruction of a company, that company is required to prove in its application for registration, by trustworthy means and based on authenticated supporting documents the fact that the company incorporated in the other Member State shall be deemed to be its rightful predecessor. The fact that the company seeks registration of its rightful predecessor in the trade register from the host Member State is not by itself a valid reason for rejecting its application for registration in the trade register” (paragraph 80, emphasis added). This particular solution raises questions of legislative technique because right after the completion of the lawmaking process specific for the Member States, there would be a need for a EU directive with the role of harmonizing the national legislation. Finally, the fact that Member States do not enact rules of law in this respect (probably the most common situation), their national courts might face difficulties regarding the criteria, limitations and conditions required for such transfers. Lastly, the trade register (or its equivalent in a specific country) from the Member States would have to come up with a precise critical formula that, however, has to be based on rules of law. If the national courts would be able to rule pursuant to EU law, the trade register will have to enforce those decisions in a manner that should be without prejudice to the third parties of the company that applies for such a seat transfer.

4. Possible effects of the VALE case, C-378/10, on the practice of the Romanian courts

The Romanian case law is very abundant on this matter and, having the benefit of the same regulations as the Italian law invoked in Hungary, another Italian company requested pursuant to the principle of freedom of establishment of companies the “cross-border reconstruction of a company”. The Italian company’s request was rejected irrevocably by Timisoara Court of Appeal. The reasoning of the Romanian court is reproduced in extenso below:

“According to Romanian law, the possibility of a company to change its registered office in a different Member State by acquiring the nationality of the Member State in which the company wishes to incorporate is expressly governed only in relation to the European company (SE) and by Title VII^1, art. 270^2a of Law no 31 of 1990 as amended.

The European companies having the registered office in Romania are subject to the provisions of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company, Title VII^1 of Law no 31 of 1990 as amended, but also to those regarding the companies limited by shares, as long as they are compatible with the rules of the Community law.

The rules that govern the European company also do not apply to the seat transfer of the limited-liability companies incorporated under the domestic law of the Member States because of the fact that Law no 31/1990 does not encompass any provisions in this regard.

The appellant SC F.F. SRL was not able to prove the meeting of the requirements specified by the Romanian legislation for the registration of companies.

In the case of companies, the Community law acknowledges only a subsidiary right of establishment because Article 43 (currently Article 49 TFEU) and Article 48 (currently Article 54
TFEU) of the Treaty of Rome provided only for the right of the companies established in accordance with the law of a Member State to set-up agencies, branches or subsidiaries within the Community, without restrictions or discrimination in relation to companies incorporated under the law of the state in which they intend to change their registered seat.

Thus, in the absence of the agreement provided for by the provisions of Article 293 of the same Treaty, the companies cannot benefit of any Community rule that would provide an actual right of transfer from a state to another as a consequence of the fact that their existence is acknowledged only under the national law that governs their creation and functioning in a manner that is not harmonized.

The appellant illegally claimed to have met the conditions specified in Article 43 (currently Article 49 TFEU) et seq. of the Treaty of Rome and that the transfer of the registered office of S.C. F.F. SRL is possible.”

As to the reasoning of the Romanian court we can make the following comments. Firstly, the judgment was made prior to the repealing of Article 293 TEC, this aspect is very important in the context in which the Member States were under the obligation of diligence in achieving cooperation in this matter. [The text of Art. 293 TEC: Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;
- the abolition of double taxation within the Community;
- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries;
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.] Article 293 was repealed because it was never applied and, as it was stated in a Romanian judicial decision “in the circumstances of the complexity of the undertaking of harmonizing the diverging opinions on private international law” this cooperation is very difficult to put into practice (it was demonstrated that in over 50 years the provision in question has never produced significant legal effects in that respect). This observation may lead to the validation of the argument regarding the applicable rules of law listed by the court - the domestic law on companies and the regulation on the Statute for a European company. As for the application of Article 49 and 53 TFEU, the national court should draft a preliminary reference, similar in substance to the one from Hungary.

5. Conclusions

In the event that ECJ will concur with the Opinion of AG Jääskinen, the judgement will become mandatory, so that there will be no means of appeal against the claims settled prior to the date of the ECJ’s judgment, not even by extraordinary judicial remedies. However, account must be taken of paragraph 59 of the Judgment in Case C-2/06, Kempter: “It follows from that settled case-law that the Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law as interpreted subsequently by the Court to be made to the competent administrative authority within a reasonable period.” [Emphasis added]. This judgment
is liable raise the issue of qualification of the entries in the trade register which were challenged by a mean of appeal, thus being settled irrevocably. With regard to the entries of the trade register against which no appeal has been made, it is possible to apply the Kempfer case law provided that the conditions required by the reasonable period are met.

The legal ground for such an action is lacking in the Romanian legislation and an action based solely on the principles of the EU law would not be possible. The revision in the field of administrative litigation (regulated by Article 21(2) of the Law no 544/2004) was repealed by Law no 299/2011.

The issues brought into discussion by the Opinion of AG Jääskinen are real: in paragraph 29 it is underlined that “the fact that legislative harmonization in this particular area within the European Union is far from being achieved” is highly known. The essence of the ECJ’s judgment does not consist in the validation of such a right, but especially in the actual method of its enforcement – taking into account the two aspects that relate to the trade register, i.e. jurisdictional and (for several countries) administrative.

If ECJ would rule on the matter of the existence of the right of “cross-border reconstruction of a company”, this right will have to become part of, at least under the administrative aspect, the legal system of the Member States. Taking into account that the Member States would not be able to uniformly settle this regulation, the European Union would acquire the power of tabling a proposal of a Directive, the eventual judgment of ECJ. In doing so, the Commission has the possibility of making a proposal and the legislator of the EU (i.e. the EU Council and the European Parliament) would have to adopt such a rule provided that the principle of subsidiarity is observed. Thus, it would be granted a power which would have its origin in the ECJ’s judgment. A longer path of harmonization in the matter, post-VALE, would consist in separate national legislation followed by the intervention of the Commission with the aim of unifying those national legislations.

References
ECJ case law
10. VALE- C-378/10, pending.

National (Romanian) Case law