Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 19 October 2023[1]

Case C-276/22

Edil Work 2 S.r.l.,
S.T. S.r.l.
v
STE S.a.r.l.,
joined parties:
CM

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Freedom of establishment – Articles 49 and 54 TFEU – Scope – Cross-border activities – Carrying out business in a Member State other than that of incorporation – *Lex societatis* – Management and organisation of companies – Principal object – Applicable law)

1. An Italian company whose main asset was a castle located in Italy transferred its seat to Luxembourg. The company converted into a private limited liability company and was incorporated under Luxembourg law. Six years later, the company's shareholders appointed a sole director who in turn appointed a general agent. The general agent then transferred ownership of that castle to another company, S.T. S.r.l. ('ST'), which in turn sold it to the applicant in the main proceedings, Edil Work 2 S.r.l. ('Edil Work 2').

2. The dispute in the main proceedings concerns, in essence, the validity of those two transfers, which depends on the national law applicable to the conferral of the powers at issue. If Luxembourg law were applicable, those transfers would be valid under that law; conversely, if Italian law were to apply, those transfers would be invalid under a provision according to which a general mandate may be conferred only on the members of the company's board of directors.

3. It is in those circumstances that the Corte suprema di cassazione (Supreme Court of Cassation, Italy) has referred to the Court of justice for a preliminary ruling a question concerning, in essence, the compatibility with Articles 49 and 54 TFEU of the Italian legislation governing

[1] Original language: English.

private international law, which provides that a company having its registered office in another Member State of the European Union is subject to Italian law when it is either incorporated in Italy or its seat of the administration or the 'principal object' is located in Italy. [2]

I. Legal framework

4. Article 25 of the legge di diritto internazionale privato (legge 218/1995) [3] (Law on private international law No 218/1995, 'the Law 218/1995'), entitled 'Companies and other organisations', provides:

'1. Companies, associations, foundations and any other public or private entities, even if not associative in nature, shall be governed by the law of the State in whose territory the corresponding incorporation procedure was completed. However, Italian law shall apply if the seat of the administration is located in Italy, or if the principal object of such entities is located in Italy.

2. The following, in particular, shall be governed by the law regulating such entities: (a) legal form; (b) trading name or company name; (c) incorporation, transformation and dissolution; (d) capacity; (e) creation of company bodies and their powers and operating procedures; (f) representation of the entity; (g) procedures for acquiring and losing shareholder, associate or partner status, and rights and obligations inherent in that status; (h) liability for the obligations of the entity; and (i) consequences of breaches of the law or articles of association.

3. Transfers of the registered office to another State and mergers of entities with registered offices in different States shall have effect only if they are carried out in accordance with the laws of those States.'

5. Article 2381(2) of the Italian Civil Code states that, if the articles of association or the general meeting allow it, the board of directors may delegate its powers to an executive committee made up of some of its members, or to one or more of its members. The referring court notes that, according to that provision, a limited liability company's board of directors can confer its powers only to the members of its board of directors.

II. Facts

6. In 2004, an Italian limited liability company, having assets and business activities consisting solely of the immovable property complex in the vicinity of Rome (Italy), known as Castello di Tor Crescenza ('the Castle'), transferred its registered office to the Grand Duchy of Luxembourg, where it was incorporated and became STE, a private limited liability company. On 30 August 2010, an extraordinary meeting of shareholders of the company STE was held in Luxembourg, at which SB was appointed sole director (*gérante*). [4] On that occasion, SB appointed FF as STE's general agent (*mandataire général*) and granted him the power to perform, 'in the

[2] The term 'principal object' is not defined in the request for a preliminary ruling. However, the referring court explains that the court of appeal considered that, in the case of STE S.a.r.l. ('STE'), a Luxembourg private limited liability company, the 'principal object' is represented by a real estate complex, which is 'the sole and entire asset base' of the company.

[3] GURI No 128, of 3 June 1995.

[4] It appears from the Court file that, until 2010, STE was held 90% by STA s.r.l., a company solely held by FF. The remaining 10% of the shares were held by FF's wife, SB. In 2010, however, STA s.r.l. transferred 40% of the shares to SB.

Grand Duchy of Luxembourg and abroad, in the name and on behalf of the company, all necessary acts and operations, without exception or exclusion, but in all cases within the scope of the company's object'.

7. In 2012, FF transferred the Castle to the Italian company ST, which then transferred it to Edil Work 2, an Italian company controlled by FF.

8. In 2013, STE brought legal proceedings against ST and Edil Work 2 before the Tribunale di Roma (Rome District Court, Italy), requesting that the two deeds of transfer be declared null and void on the ground that the conferral of powers on FF was not valid. The Tribunale di Roma (Rome District Court) rejected the request, holding that FF's powers as agent had been validly conferred.

9. On appeal, the Corte d'appello di Roma (Rome Court of Appeal, Italy) upheld the request. It stated, first, that under Article 25(1) of Law 218/1995, Italian law applies, since the Castle – 'the sole and entire asset base' of the company – that is to say, the 'principal object', is located in Italy. That court then established that the conferral on a third party outside the company, such as FF, of unlimited powers of management conflicts with Article 2381(2) of the Civil Code, which establishes that the powers of a company's board of directors can be delegated only to members of that board. That court therefore declared that the conferral of powers on FF by the director of the company was null and void and decided, consequently, that the subsequent deeds transferring the Castle to the two defendant companies had no legal force.

10. Edil Work 2 and ST appealed that decision to the Corte suprema di cassazione (Supreme Court of Cassation), disputing the applicability of the second part of the first paragraph of Article 25(1) of Law 218/1995, inasmuch as the Corte d'appello di Roma (Rome Court of Appeal) failed to consider that the meaning and scope of the provision have been profoundly affected by EU law, which requires that national law be disapplied if its interpretation is incompatible with EU law.

11. The opposing party, STE, contested the appeal, arguing in particular that, because the principal object of the company is located in Italy, the legal force of the powers conferred on FF and the validity of the subsequent transfers to the appellant companies should be examined under Italian law, without any interpretative interference from EU law.

12. At the outset, the referring court observes that it is clear from Article 25(3) of Law 218/1995 that that provision allows the conversion of Italian companies into foreign companies by transferring their registered office to another Member State, provided that the transfer is valid both in the Member State of origin and in the Member State of destination. Moreover, that transfer does not entail, even after the company has been removed from the Italian register, the disappearance of its legal personality.

13. According to the referring court, the question arises as to whether the incorporation of STE, which maintained its principal place of business in Italy, as a Luxembourg company, means that the acts of management and organisation of that company are subject to the law of Luxembourg, under which the conferral of powers at issue would be valid. By contrast, if Italian law applied, the conferral of the powers at issue would be void.

14. With respect to the determination of the law applicable to the conferral of powers, the referring court notes that, under the first sentence of Article 25(1) of Law 218/1995, the general connecting factor is the place where the company has been incorporated. Accordingly, under that sentence, in the present case, the conferral of powers at issue should be governed by Luxembourg law. However, the second sentence of that provision introduces an exception to that rule, under which Italian law applies to companies that have their 'principal object' in Italy. Therefore, under that exception, the law applicable to the conferral of powers at issue would be Italian law, since the sole asset and thus the principal object of that company, namely the Castle, is situated in Italy. In the latter case, since Article 2381(2) of the Civil Code provides that the board of directors of a limited liability company [5] may delegate its powers only to members of that board, the conferral of those powers on a third party to the company, in this case FF, would be unlawful under Italian law.

15. In those circumstances, the referring court states that, first, since freedom of establishment under Article 49 TFEU includes the right of a company or firm formed in accordance with the law of a Member State to convert itself into a company of another Member State, provided that the conditions laid down by the law of that other Member State are satisfied and, in particular, that the connecting factor established by that other Member State is satisfied, the fact that only the registered office is transferred, and not the seat of the administration or the principal place of business, does not in itself preclude the applicability of that freedom.

16. Second, the referring court points out that the freedom of establishment enshrined in Article 49 TFEU includes not only the establishment, but also the management, of undertakings. Such activities must be carried out, in accordance with the second recital of Directive (EU) 2019/2121, [6] under the conditions laid down by the law of the Member State of establishment. In the present case, it is common ground that that Member State is Luxembourg.

17. Third, the referring court notes that Article 2507 of the Civil Code, which is in a chapter entitled 'Companies formed abroad', states that the provisions contained in that chapter must be interpreted in accordance with the principles of EU law.

18. The referring court states that, while the law of the Member State of conversion (in this case, Luxembourg) should govern the management and organisation of a company, in the present case, the company retains its centre of business in Italy. Such a fact may justify, according to the referring court, the application of Italian law to the conferral of powers at issue.

19. In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'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 [organisation] and management of the 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?'

[5] Both STA and STE are limited liability companies.

[6] Directive of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (OJ 2019 L 321, p. 1).

20. Written observations were submitted by Edil Work 2, STE, the Italian Government and the European Commission. Those parties also presented oral arguments at the hearing on 11 July 2023.

III. Assessment

A. Preliminary remarks

21. The referring court asks whether freedom of establishment precludes national legislation which allows a Member State in which a company was originally incorporated (in this case, Italy), to apply its national law to the acts of management and organisation of that company when that company, in the context of a cross-border conversion, has transferred its registered office to another Member State (in this case, Luxembourg), but has retained its principal object in the original Member State (Italy).

22. At the outset, I would recall that the Court may have to reformulate the question referred to it. The Court may also find it necessary to consider provisions of EU law other than those to which the national court referred in its question.[7] In the present case, in order to provide a useful answer to the order for reference, the scope of the question referred must be correctly defined.

1. Cross-border conversions as opposed to cross-border economic activities

23. It is essential, in my view, to disentangle two separate issues. The first concerns the restrictions imposed on companies when they carry out a cross-border conversion or a reincorporation in a different Member State.[8] That issue arises when Member States impose restrictions on the cross-border restructuring of companies and in the context of allowing the conversion of a company into a company governed by the law of another Member State – such cases have been referred to as 'emigration cases'.[9] By way of example, the Court had to rule on that issue in the *Daily Mail* case,[10] which concerned a United Kingdom company that wished to transfer its central administration from the United Kingdom (which was, at that time, a Member State) to the Netherlands without losing its status as a legal person or ceasing to be a company incorporated under United Kingdom law. The United Kingdom tax authorities refused permission for the transfer of the seat, which was necessary under the national law. The Court held that the rules relating to that transfer were determined by the national law in accordance with which the company had been incorporated.[11]

7 Judgments of 13 October 2016, *M. and S.* (C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited), and of 31 May 2018, *Zheng* (C-190/17, EU:C:2018:357, paragraph 27).

8 That category includes the restrictions imposed on companies incorporated under the law of a Member State that seek to subject themselves to another Member State's law without going through the process of liquidation in their original jurisdiction. See, most recently, judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804). See also Soegaard, G., 'Cross-border Transfer and Change of *Lex Societatis* After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country', *European Company Law*, vol. 15, issue 1, 2018, pp. 21 to 24.

9 See Mucciarelli, F.M., *European Business Organization Law Review*, vol. 9, pp. 267 to 303.

10 Judgment of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456).

11 Ibid, paragraphs 19 to 23.

24. The second issue concerns the restrictions imposed on companies that are incorporated in one Member State but seek to carry out economic activities in another Member State.[12] For instance, in *Überseering*,[13] the Court was asked to determine whether the Member State to which a company had transferred its central administration (Germany) had the right to decide the legal capacity of the company, which was incorporated in the Netherlands. In other words, the issue was whether a host Member State was allowed to refuse to recognise a foreign company's legal capacity when that entity had moved its central place of management to that host State. Moreover, in *Inspire Art*,[14] the Court was asked to give a ruling in respect of Netherlands legislation concerning foreign companies conducting their economic activity in that Member State. The case concerned a company that was formed in accordance with the laws in the United Kingdom. The company had subsequently opened a branch in the Netherlands and conducted its main economic activity there. The company requested the registration of its Netherlands branch office at the commercial registry in the Netherlands, upon which that registry wanted to impose certain rules on the company. The Court ruled that a number of requirements set out in the Netherlands legislation were contrary to the principle of freedom of movement. The Court clearly distinguished those two cases from the *Daily Mail* case, which dealt with the ability of the State of incorporation to restrict a company's move to another Member State.[15]

25. In the present case, STE, an Italian company, has already validly transferred its seat to Luxembourg by converting itself into a company incorporated under Luxembourg law and ceasing to exist in Italy. That company is not seeking to establish itself in Italy, but is merely exercising an economic activity in that Member State. Therefore, it is essential to note that, contrary to the submissions of STE and the Italian Government, the present case does not concern whether there are restrictions on the cross-border conversion of companies, but rather whether there are restrictions imposed on a Luxembourg undertaking pursuing an economic activity in Italy.

26. In that respect, first, it follows from the Court file and was confirmed at the hearing that STE, initially registered in Italy, was converted into a company registered under Luxembourg law in 2004, *without any restriction* imposed on it by either Italy or Luxembourg. In other words, after its incorporation in Luxembourg, it seems that the conversion of that company was accepted by the laws of both the destination country (Luxembourg) and the departure country (Italy). Second, it appears that, from 2004 (the year when the conversion took place) to 2010, the company was active in Italy, without either of the authorities opposing to the conversion. In particular, it was confirmed by the parties at the hearing that, during that period of six years, the Italian authorities did not seek to apply Italian company law on the acts of the company. Third, Article 25(1) of Law 218/1995 applies in an indiscriminate manner to both companies initially incorporated in another Member State and to companies that have been subject to a conversion. The conflict of law rules set out in that provision do not deal with cross-border conversion issues and the effects thereof. Thus, in my view, the same question would arise in a situation in which a company initially registered in Luxembourg has its principal object in Italy, that is to say, had STE always been a Luxembourg company, which owned the Castle.

[12] See, for example, judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraphs 53 to 55), in which the Court stated that the exercise of the freedom of establishment entails the freedom to take on workers in the host Member State, the freedom to determine the nature and the extent of the economic activity to be carried out in the host Member State and thus the freedom to scale down that activity or give up its activity and establishment.

[13] Judgment of 5 November 2002 (C-208/00, EU:C:2002:632).

[14] Judgment of 30 September 2003 (C-167/01, EU:C:2003:512).

[15] See paragraphs 66 to 73 of the judgment in *Überseering* and paragraphs 102 and 103 of the judgment in *Inspire Art*.

27. It follows that, for the purposes of the present proceedings, the question as to whether the Italian legislation at issue restricts the transfer and/or conversion of a company to another Member State is not relevant and does not have to be dealt with. The crux of the present case is whether the application of Italian law – via the 'principal object' as the connecting factor – to the acts of management and organisation of a company established in another Member State (other than that of incorporation) constitutes a restriction on the exercise of a fundamental freedom. Therefore, for the purposes of the analysis in the present Opinion, the Member State of origin is Luxembourg and the Member State where the company at issue carries out its economic activity is Italy.

2. The subject matter of the main proceedings

28. The main proceedings concern the validity of the conferral of powers on a third party who is not a member of the board of directors and the validity of the deeds of transfer of a real estate complex. For the purposes of defining the subject matter of the question referred, it is important to distinguish between the conferral of powers and the transfer of the real estate complex. In my opinion, in the present case, it is important to distinguish between, on the one hand, the issue of the *lex societatis* applicable to the acts of the company and, on the other hand, the limitation placed on the transfer of immovable property by a Member State. While the first issue falls under the freedom of establishment, the second may fall within the scope of the free movement of capital enshrined in Article 63 TFEU. In order to determine the applicable fundamental freedom, one must first determine the purpose of the legislation,[16] and take into account the circumstances of the case.

29. It is true that the Corte d'appello di Roma (Rome Court of Appeal) held, in the main proceedings, that 'the sole and entire asset base' of the company, thus the principal object of the company, is located in Italy and, on that ground, applied the relevant Italian law. Consequently, it appears to have based its reasoning for applying Italian law on the location of the principal asset of the company and thus on the property right of an immovable object. In particular, that court essentially held that the conferral of powers and the two deeds transferring the Castle were covered by the *lex rei sitae* rule and, thus, those deeds have no legal force under Italian law.

30. Nonetheless, I should point out that the main proceedings deal with the validity of the conferral of powers on a third party who is not a member of the board. Such validity does not appear to be, prima facie, an issue concerning an *in rem* right in immovable property.[17] As submitted by the Commission at the hearing before the Court, the validity of a conferral, by the director, of powers on a third party is a matter of management and organisation of a company, which therefore is covered by the *lex societatis* that links the company to a specific legal

[16] In order to determine whether a national measure falls within the scope of a fundamental freedom, it is clear from now well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, in particular, judgments of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 26; of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 90; and of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 31).

[17] With respect to the distinction between the company law issues and the *in rem* rights in immovable property issues, see, for example Article 1(2)(f) and Article 4(1)(c) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) ('the Rome I Regulation'). In my view, by extending the application of the *lex rei sitae* rule to the conferral of powers, although the two deeds were created subsequently to that conferral, the Corte d'appello di Roma (Rome Court of Appeal) seems to have merged the conferral of powers and the deeds and applied in essence the *lex rei sitae* rule to both of them. It, thus, gave preference to that rule over the rule to be applied to the conferral of powers. It is for the referring court to determine whether, under national law, the mere existence of a deed in respect of immovable property, such as the Castle, is sufficient for the conferral of powers to be regarded as assimilated to the rights in rem in immovable property. In that respect, I should highlight that, while the first transfer seems to contain a cross-border element where the Rome I Regulation might apply, the second transfer appears to be a 'purely internal' transaction. Thus, the referring court should verify whether the two transfers are to be classified and analysed together.

system.[18] Such a conclusion is supported by the wording of Article 25(2) of Law 218/1995, which lists the subject matter to which the *lex societatis* will apply, such as the 'creation of company bodies and their powers and operating procedures' and the 'representation of the entity'. The purpose of the national legislation is, therefore, the application of Italian law to the abovementioned measures carried out by foreign companies, which means it falls under the freedom of establishment enshrined in Article 49 TFEU.

31. Since the subject matter of the main proceedings is the issue of identifying the *lex societatis* applicable to a company established in another Member State, the question put before the Court by the referring court should be examined in the light of freedom of establishment, as defined in Article 49 TFEU, which includes the right for EU nationals to set up and manage undertakings under the conditions laid down for the nationals of the Member State concerned and entails, in accordance with Article 54 TFEU, the right for EU companies or firms to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency.[19] Where an operator intends actually to pursue its economic activity by means of a stable arrangement and for an indefinite period, its situation must be examined in the light of freedom of establishment, as defined in Article 49 TFEU.[20]

32. Consequently, regarding the conferral of powers on a third party who is not a member of the board of directors, I propose examining the national legislation at issue in the light of that freedom.

33. With respect to the transfer of immovable property, if the Court were to analyse the legislation in light of the free movement of capital, it should be established that it is common ground that the acts relating to the transfer of real estate properties traditionally fall under the law where the property is located. Therefore, it appears plausible, prima facie, that the mere fact of applying that law does not constitute by itself a restriction on the free movement of capital.

3. Interim conclusion

34. In the light of the foregoing, I propose that the question referred should be reformulated with a focus on the conferral of powers on a third party who is not a member of the board of directors. Indeed, the rule applicable to the conferral of the powers is separate from, and precedes, the issue of the validity of the transfers that come within the category of the *in rem* rights created by an immovable object. Accordingly, the question should be reformulated so as to be seeking to determine whether the freedom of establishment enshrined in Article 49 TFEU must be interpreted as precluding legislation of a Member State which prescribes the application of its national law to an act of management and organisation, such as a conferral of powers, of a company incorporated under the law of another Member State, but whose principal object is in its territory.

[18] The areas that fall typically under the *lex societatis* include the formation and dissolution of the company, the corporate name, legal capacity, capital structure, rights and obligations of members, and internal management matters. See European Commission, Directorate-General for Justice and Consumers, Schuster, E., Gerner-Beuerle, C., Siems, M., and Mucciarelli, F., *Study on the law applicable to companies – Final report*, Publications Office, 2016, p. 16, available at https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1/language-en. See Opinion of Advocate General Saugmandsgaard Øe in *Verein für Konsumenteninformation* (C-272/18, EU:C:2019:679), with respect to the exclusion and definition of the *lex societatis* within the meaning of Article 1(2)(f) of the Rome I Regulation.

[19] See, in particular, judgment of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 17 and the case-law cited).

[20] See, in particular, judgments of 29 September 2011, *Commission* v *Austria* (C-387/10, EU:C:2011:625, paragraph 22), and of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraphs 148 to 150).

B. Infringement of the freedom of establishment

1. The discrimination approach as opposed to the restriction approach

35. It must be recalled that, in accordance with Article 54 TFEU, companies formed in accordance with the law of a Member State and having their registered office, central management or principal place of business within the European Union are to be treated, for the purposes of the rules of the FEU Treaty on freedom of establishment, in the same way as natural persons who are nationals of Member States. [21]

36. In the area of company law, since the judgment in *Überseering*, [22] Member States have been required to recognise companies validly formed under the legislation of another Member State, even without a material connection with that other State. Once validly formed, that entity is deemed to be able to exercise the freedom of establishment within the European Union.

37. Under the second paragraph of Article 49 TFEU, read in conjunction with Article 54 TFEU, the freedom of establishment for the companies referred to in that latter article includes, inter alia, the right to set up and manage those companies under the conditions laid down, by the legislation of the Member State where such establishment is effected, for its own companies. [23] Such freedom covers all stages of development of those entities, including from their initial foothold in the market of a Member State to the actual pursuit of an activity. [24] To accept that a Member State may freely apply different treatment solely because the registered office of a company is situated in another Member State would deprive Article 49 TFEU of its substance. Therefore, freedom of establishment is designed to guarantee the benefit of national treatment in the host Member State, by prohibiting all discrimination on the basis of the place where the registered office of a company is situated. [25]

38. It is important to emphasise that freedom of establishment prohibits not only direct and indirect discrimination (the discrimination approach) under which foreign companies are treated 'less well' than national companies, [26] but also national measures that are non-discriminatory but hinder market access (the restriction approach). In that regard, the Court has held that national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms constitute a restriction to that freedom. [27] Pushed to its logical conclusion, that approach removes, at least in theory, the need for any comparison or identification of disadvantageous treatment with respect to an analogous situation.

[21] See, in particular, judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 25).

[22] Judgment of 5 November 2002 (C-208/00, EU:C:2002:632).

[23] Judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 33).

[24] See Opinion of Advocate General Hogan in *VAS Shipping* (C-71/20, EU:C:2021:474, point 63).

[25] See, to that effect, judgment of 25 February 2021, *Novo Banco* (C-712/19, EU:C:2021:137, paragraph 21 and the case-law cited).

[26] As explained in the Opinion of Advocate General Bobek in *Hornbach-Baumarkt* (C-382/16, EU:C:2017:974, point 29), 'under the *discrimination approach*, in order for a national measure to be found contrary to the freedom of establishment, comparable situations must be treated differently to the disadvantage of companies exercising the freedom of establishment'.

[27] Judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 37). See also, judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 56). In the most recent case-law, the formulation used by the Court covers measures which *prohibit, impede or render less attractive the exercise of freedom of establishment* (judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 54 and the case-law cited).

2. Real seat theory and incorporation theory

39. With respect to the recognition of a company under the rules of private international law, there are essentially two different theories, the real seat theory [28] and the incorporation theory. [29] The Court has ruled that the location of the registered office, central administration or principal place of business of the companies or firms referred to in Article 54 TFEU may serve as the connecting factor with the legal system of a particular Member State. [30] In other words, under that provision, those three connecting factors are all on an equal footing. [31] It follows that the Member States are free to choose which connecting factor they apply and the applicable conflict of law rules. Therefore, the approach and rules of national private international law are liable to differ significantly from Member State to Member State. [32]

40. In the same vein, given that Article 54 TFEU places the registered office, central administration, and principal place of business on an equal footing, the Court has held that, in the absence of a uniform EU law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. [33]

41. In the present case, it should be noted that the question referred concerns a company which is *already* formed in accordance with the law of a Member State and which adopted acts of management and organisation relating to an asset located in another Member State. Such a situation seems to fall, in principle, within the ambit of the first sentence of Article 25(1) of Law 218/1995, which provides that the company incorporated in another State is governed by the law of that State. However, the second sentence of Article 25(1) of Law 218/1995 extends the scope of the application of Italian law to a company that has its 'seat of the administration' or its 'principal object' in Italy. Therefore, that sentence adds two additional conflict of law rules essentially based on the real seat of a company and on the principal object of that company. Consequently, based on the explanation provided by the referring court, while the incorporation theory seems to be the general rule, the application of Italian law also extends to companies having their seat of the administration and the principal object in that State.

42. In sum, the first sentence of Article 25(1) of Law 218/1995 applies the criterion of incorporation, thus confirming the applicability of Luxembourg law in the present case. However, the application of the second sentence of that provision leads to the application by the Italian authorities of Italian law to the conferral of powers at issue. To my knowledge, the Court has not yet ruled on a case that deals with the conformity with EU law of a national measure that imposes the cumulative application of multiple conflict of law rules.

[28] According to the real seat theory, the law of the State where the company has its central administration and real seat should determine the applicable law.

[29] The incorporation theory, on the other hand, refers to the law where the company was incorporated.

[30] See, to that effect, judgment 13 July 2023, *Xella Magyarország* (C-106/22, EU:C:2023:568, paragraph 45 and the case-law cited).

[31] Judgments of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456, paragraphs 19 to 21), and of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 34).

[32] See 2016 Study cited at footnote 18. For the differences between national company laws, see Andenas, M., and Wooldridge, F., *European Comparative Company Law*, Cambridge University Press, 2010.

[33] See, to that effect, judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 109 and 110).

43. In that respect, as mentioned above,[34] in the absence of uniform rules at EU level, the determination of connecting factors is left to national autonomy. Therefore, it may seem prima facie that freedom of establishment should not preclude a national legislation that imposes the cumulative application of multiple conflict of law rules. However, when examining the *effect* of the national measure at issue, it becomes clear that it hinders and renders less attractive the exercise of the freedom of establishment enshrined in Article 49 TFEU.

3. Restriction approach in the present case

44. In the present case, in so far as STE was incorporated under Luxembourg law, with its registered office in that Member State, the acts of management and organisation of that company were subject to Luxembourg law. That situation falls, prima facie, under the conflict rule set out in the first sentence of Article 25(1) of Law 218/1995.

45. However, by requiring a company incorporated in Luxembourg to adopt management and organisational measures that are consistent with Italian law, the second sentence of Article 25(1) of Law 218/1995 effectively imposes on that company the obligation to comply with the company law of two different States *in a cumulative manner*. By definition, it is impossible to compare this situation to the conditions under which Italian companies operate. Indeed, those companies are already subject to Italian law and, since the 'principal object' criterion chosen by the Italian legislature intrinsically applies only to cross-border situations, it is irrelevant to those companies. Hence, it is impossible – or would be tautological, at least – to claim that the Italian measure at issue constitutes unequal treatment of the foreign companies concerned and that this different treatment disadvantages foreign companies compared with domestic companies. Consequently, I take the view that the rules governing the applicable company law make no distinction according to a company's seat or 'origin' and that, with respect to the 'principal object' criterion, national and foreign companies cannot be compared. It follows that the discrimination approach should be, in my opinion, disregarded in the present case.

46. The question therefore arises whether the application of the rule set out in the second sentence of Article 25(1) of Law 218/1995 hinders or makes less attractive the exercise of the freedom of establishment.[35]

47. In my opinion, the answer should be that it does. The *cumulative* application of the company law of the Member State of origin and of Italian law, the latter because the 'principal object' of the company is located in Italy, means that the corporate bodies might have to comply with the requirements imposed by the legislation of the Member State of origin and that of the Member State in which the 'principal object' is located at the same time. In theory, such a general double burden could make it less attractive for a company established in the Member State of origin (in the present case, Luxembourg) to carry out activities in relation to immovable property located in Italy, thereby hindering the exercise of freedom of establishment.

48. However, in the present case, it is not STE, that is to say the company that has exercised its freedom of establishment, that seeks to rely on freedom of establishment. Rather, it is the two beneficiaries of the transfers carried out by STE – ST and Edil Work 2 – that are seeking to rely on that freedom. Consequently, taking into account the specific circumstances of the case, I take the view that the fact of applying the company laws of two Member States in a cumulative manner

[34] Points 39 and 40 above.

[35] See point 38 above.

creates legal uncertainty for the contracting party of a company seeking to rely on two sets of national laws in order to invalidate the powers granted by its director and to protect that company's interests. Indeed, in conjunction with the principle of legal certainty,[36] when entering a legal relationship, such as a contract, a party must be able to know which national law applies to the company in question. In that respect, the application of the second sentence of Article 25(1) of Law 218/1995 to the conferral of powers at issue for the purposes of invalidating the two subsequent transfers leads to legal uncertainty for the beneficiaries, since STE was validly incorporated under Luxembourg law and allegedly complied with that country's company law. Prior to STE's legal action, by which it essentially invokes the application of Italian law – despite having transferred itself to Luxembourg and converted itself into a Luxembourg company – there was nothing to indicate that, in addition to being subject to Luxembourg law, that company was also subject to Italian company law, including its protective measures. STE claims such benefit and invokes the application of Italian law retroactively to the conferral at issue, which would thus lead to legal uncertainty for the beneficiaries as regards those transferrals.

49. It is obvious that such cherry-picking of the applicable law and overlapping of two sets of national laws may cause significant uncertainty and financial burden for the contracting parties of the company that seeks to rely on the applicability of the company law of two States. If the person who exercises his or her freedom of establishment is able to retroactively undo the legal relationships created under the effect of that freedom, such revocation would seriously undermine the effectiveness of the freedom of establishment.

50. Moreover, the retroactive application of Italian law to an act adopted under company law such as the conferral of powers at issue appears to be triggered by another connecting factor, that being the rights *in rem* in immovable property. The extension of the concept of 'principal object' to acts that precede acts relating to *in rem* rights in immovable property, without any further explanation as to why and how, may infringe the principles of legal clarity and, consequently, of legal certainty for the contracting parties.

51. Lastly, for the sake of completeness, I should add that since Article 49 TFEU has direct effect,[37] the crucial factor in the main proceedings is whether the substantive content of the freedom of establishment enshrined in that provision extends sufficiently far so that the contract – and, therefore, the contracting party in the main proceedings – is also protected by that provision. In that respect, I would argue that the prohibition, provided for in Article 49 TFEU, on imposing restrictions on freedom of establishment can be invoked by the persons exercising their freedom of establishment by carrying out activities in another Member State, but also by their contracting parties, especially when there are the cross-border elements, like in the present case where STE, a Luxembourg company, conferred powers on its general agent, who in turn transferred the company's main asset to ST, an Italian company, and where those transactions have been challenged under Italian law.[38] Therefore, from the substantive law perspective, the individual right of ST (and, indirectly, of Edil Work 2) is covered by the abovementioned prohibition. I should add that when STE exercised its freedom of establishment, it created a

[36] The Court has held that the principle of legal certainty, the corollary of which is the protection of the principle of legitimate expectations, requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them (judgment of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, paragraph 44 and the case-law cited).

[37] Judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42).

[38] In any case, I should note that, as recalled by Advocate General Kokott in her Opinion in *Philips Electronics* (C-18/11, EU:C:2012:222, point 83, and the case-law cited in footnote 52), the Court has stated on several occasions in connection with various fundamental freedoms that persons other than those who enjoy the fundamental freedom directly may also benefit from the freedom if that freedom cannot otherwise be fully effective.

situation that was covered by the scope of that freedom. The subsequent transactions, such as the conferral of powers and the transfer of the Castle, were governed by the freedom of establishment. Therefore, if a third person establishes a link with the situation created under that freedom, he or she should be able to invoke Article 49 TFEU. [39]

52. It follows that the application of Italian law, pursuant to Article 25(1) of Law 218/1995, in conjunction with Article 2381(2) of the Civil Code, to the conferral of powers at issue constitutes, in my opinion, a restriction to the exercise of freedom of establishment contrary to Article 49 TFEU.

C. Justification

53. National measures that restrict the freedom of establishment may be justified and shown to be proportionate. The Court has repeatedly held that it is possible for non-discriminatory national measures that hinder or make less attractive the exercise of freedom of establishment to be justified on the grounds of an overriding 'public interest'. [40] Such measures must be appropriate to the objective pursued and must not go beyond what is necessary to attain the objective sought. [41]

54. At the outset, it should be noted that the referring court does not specify the reasons justifying the restriction on freedom of establishment caused by the application of Italian law to the acts of management and organisation of a company validly formed under the law of another Member State but carrying on its economic activities and having its principal object in Italy. Nor is such information apparent from the wording of Article 25(1) of Law 218/1995 or Article 2381(2) of the Civil Code.

55. However, in its written submission, the Italian Government considers that reasons relating to the protection of shareholders, creditors, employees and third parties require the conferral of the powers in question to be subject to Italian law. I should note that, at the hearing, that government's arguments focused on the protection of shareholders rather than on the protection of the interests of the other third parties, which was not essentially invoked. In addition, the Italian Government submits that the application of Italian law is necessary in so far as STE's establishment in Luxembourg does not correspond to the exercise of an economic activity in that Member State and thus constitutes an abusive practice. According to that government, EU law does not permit the creation of wholly artificial company arrangements, which do not reflect economic reality. Taking into account those two main arguments, I shall analyse the protection of shareholders and the alleged abusive practice.

[39] By way of example, in judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 59), the Court accepted that a person who was not the subject of discrimination – an infringement of a subjective right – was able to bring an action on the grounds of discrimination on behalf of 'other inhabitants of the district in which [that person] carrie[d] on [their] business'. It could be thus argued that the person who has a direct link with the situation at issue should be able to defend his or her rights.

[40] See, to that effect, judgment of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 52 and the case-law cited).

[41] Judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 52).

1. Protection of shareholders

56. I should note that the Court has already accepted that the protection of the interests of minority shareholders may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.[42] The Court has recognised the need to protect 'minority shareholders'. However, in certain very specific situations, when the Member State has imposed restrictions that seek to protect *all* shareholders regardless of their participation in the company, I do not rule out the possibility that the objective of protecting shareholders (generally) may constitute such a justification.[43]

57. Nonetheless, Article 25(1) of Law 218/1995 in no way specifies the reasons of public interest that led the Italian legislature to adopt that provision. It is, therefore, difficult to determine the objectives which that measure seeks to achieve and, consequently, to determine whether it actually pursues that objective. In particular, it appears prima facie that the Italian legislation – in particular Article 2381(2) of the Civil Code, which precludes the conferral of powers on a third party who is not a member of the board of the company – aims to protect the interests of those members and the exclusive management position conferred on the directors, thus regulating only the relationship between members of the board and directors. Therefore, it is not clear whether the measure at issue was adopted with the intention of ensuring the protection of shareholders. However, it is for the referring court to undertake such an assessment.

58. Assuming that the public interest pursued is indeed the protection of shareholders, I should point out that the application of the second sentence of Article 25(1) of Law 218/1995, in conjunction with Article 2381(2) of the Civil Code, may go beyond what is necessary to protect that interest. That is because it entails, as the present case demonstrates, the application of Italian law to an act of management and of organisation of a company that was validly formed under the law of another Member State but that carries on its economic activities in Italy, without taking account whether the interests of shareholders are already protected by the company law of that Member State. In other words, the second sentence of Article 25(1) of Law 218/1995 applies in an indiscriminate manner to *all* companies located in *all* Member States and to *all* acts, without taking into account whether the interests of the shareholders are *already* sufficiently protected in another Member State by other less restrictive measures, such as, for example, a requirement for the members of the board to be notified of the sale of the company's real estate and the possibility for that board to revoke that sale.

59. In those circumstances, I doubt whether the restriction resulting from the application of those Italian law provisions complies with the principle of proportionality. First, the second sentence of Article 25(1) of Law 218/1995 goes beyond what is necessary because it applies without distinction to all cases of a general mandate conferred on a third party outside the company. Second, there are less intrusive alternative measures, such as verifying whether the protected interests have already been sufficiently taken into account in the legislation of the State of incorporation – which might be the case in the case in the main proceedings, especially since the associates of the company were or could have been aware of the existence of the conferral of powers and the acts in question that followed.

[42] See, to that effect, judgments of 5 November 2002, *Überseering* (C-208/00, EU:C:2002:632, paragraph 92), and of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 54).

[43] The intention to protect minority shareholders generally relates to the issue of resolution of internal disputes within companies, such as disputes between shareholders or between shareholders and directors or between the company and its directors (see Opinion of Advocate General Wathelet in *Dědouch and Others*, C-560/16, EU:C:2017:872, point 21). However, such protection may be needed with respect to all shareholders.

2. Abusive practice

60. At the outset, it should be stated that, according to the case-law, the fact that a person chooses to set up a company in the Member State whose company law appears to him or her to be the least onerous or most appropriate for his or her own economic purposes and, therefore, to pursue his or her economic activities in another Member State, falls within the legitimate exercise of freedom of establishment. [44] According to the Court, 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. [45] That being said, the right of establishment does not preclude Member States from being wary of 'letter box' or 'front' companies. [46] It follows from the Court's case-law that Member States are able to take any appropriate measure to prevent or penalise fraud, and that might constitute a justification to a restriction. [47] In particular, Member States may take measures to prevent 'wholly artificial arrangements, which do not reflect economic reality' and which are aimed at circumventing national legislation. [48] More recently, in the judgment in *Polbud – Wykonawstwo*, [49] the Court reminded its well-established case-law whereby there shall be no general presumption of fraud or abuse. [50]

61. In the present case, the general application of Italian law, as a way of combating abuse, to *all* company law acts of *all* companies from *all* other Member States, when the company's 'principal object' is in Italy, amounts to establishing a general presumption of fraud or abuse. For the measure at issue to be proportional, it should detail the nature of acts that may be considered fraudulent and the nature of the companies that are specifically targeted. Moreover, such a restriction should be backed up by credible data and explained in a proper manner. Therefore, I propose that the Court holds that the very general wording of the second sentence of Article 25(1) of Law 218/1995, which makes no distinction between the different concrete situations that may arise, leads rather to the conclusion that this provision does not respect the principle of proportionality.

62. Furthermore, I would point out that, according to settled case-law, a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade national legislation by having recourse to the possibilities offered by the Treaty. [51] However, in the main proceedings, it appears that the possible classification of STE's conduct as 'abuse' is immaterial to answering the question referred, since Italy seems to have acquiesced to STE being incorporated in Luxembourg.

44 Judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 27).

45 Ibid. See also judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 96).

46 See, Opinion of Advocate General Poiares Maduro in *Cartesio* (C-210/06, EU:C:2008:294, point 29) referring to judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 68).

47 See, to that effect, judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 61).

48 See, to that effect, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 51 to 55).

49 Judgment of 25 October 2017 (C-106/16, EU:C:2017:804, paragraphs 63 and 64).

50 The Court relied on a previous case-law whereby the mere fact that a company transfers its place of management to another Member State cannot create a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, judgments of 26 September 2000, *Commission* v *Belgium*, C-478/98, EU:C:2000:497, paragraph 45; of 4 March 2004, *Commission* v *France*, C-334/02, EU:C:2004:129, paragraph 27; and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 50).

51 See, to that effect, judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 39).

63. In the light of the information available to the Court, I take the view that the alleged restriction of freedom of establishment arising from the application of Italian law to foreign companies that have their 'principal object' in Italy would not be justified. Therefore, the question referred for a preliminary ruling should be answered in the affirmative.

IV. Conclusion

64. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

The freedom of establishment enshrined in Article 49 TFEU must be interpreted as precluding legislation of a Member State which prescribes the retroactive application of its national law to an act of management and organisation, such as a conferral of powers, of a company incorporated under the law of another Member State, because that company's principal object is in the former Member State's territory, for the purposes of invalidating the transfers of immovable property carried out subsequently to that act.