

**Anonymised version**

Translation

C-276/22 – 1

**Case C-276/22**

**Request for a preliminary ruling**

**Date lodged:**

22 April 2022

**Referring court:**

Corte suprema di cassazione (Supreme Court of Cassation, Italy)

**Date of the decision to refer:**

11 April 2022

**Appellant:**

Edil Work 2 S.r.l.

S.T. S.r.l.

**Cross-appellant:**

STE S.a.r.l.

[...]

**THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION)**

**SECONDA SEZIONE CIVILE (SECOND CIVIL DIVISION)**

[...] [*Composition of the court*]

makes the following

**INTERLOCUTORY ORDER**

in the appeal [...] brought by;

EDIL WORK 2 SRL [...], and S.T. SRL [...];

EN

- *appellants* -

v

STE SARL [...];

- *cross-appellant* -

v

CM;

- *respondent* -

against judgment No 8288/2018 of the CORTE D'APPELLO di ROMA (ROME COURT OF APPEAL, Italy), [...];

[...] [*standard wording*]

#### **Relevant facts and subject matter of the main proceedings**

- 1 In 2004 the limited liability company (società a responsabilità limitata (s.r.l.)) Agricola Torcrescenza, having assets and business activities consisting solely of the property complex known as Castello di Tor Crescenza in Rome, changed its company name to STA s.r.l. and transferred its registered office to the Grand Duchy of Luxembourg, where it changed its name to STE s.a.r.l.
- 2 An extraordinary meeting of shareholders of the company was held in Luxembourg in 2010, at which S.B. was appointed sole director (*gérante*). On that occasion, S.B. appointed F.F., a person unrelated to the company, as its general agent and granted that individual the power to perform ‘in the 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’.
- 3 In 2012 the agent F.F. transferred the Castello di Tor Crescenza to the Italian company ST s.r.l., which first, by a preliminary contract, undertook to sell it to M.M. and then transferred it to the Italian company Edil Work 2 s.r.l.
- 4 In 2013 STE s.a.r.l. brought legal proceedings against the companies ST s.r.l. and Edil Work 2 s.r.l. 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 conferment of powers on F.F. by the director of the plaintiff company had no legal force. The Rome District Court, which did not take a position on the applicable law, rejected the request, holding that F.F.’s powers as agent had been validly conferred.
- 5 The Rome Court of Appeal, ruling in second instance, upheld the request. The Court of Appeal first stated that Italian law applied, in that under Article 25 of the

legge di diritto internazionale privato (legge 218/1995) (the Law on Private International Law, Law No 218/1995) Italian law would apply if the company's 'principal object is located' in Italy. In the case of STE s.a.r.l. it is undeniable that the principal object of the company is located in Italy, as it is represented by the Castello di Tor Crescenza complex, 'the sole and entire asset base' of the company. The Court of Appeal then established that the conferment on a third party outside the company, such as F.F., of unlimited powers of management (in terms of geographical scope and content) conflicts with Article 2381(2) of the Civil Code (which establishes that the powers of a company's board of directors can only be delegated to members of that board). The Court of Appeal therefore declared that the conferment of powers on F.F. by the director of the company was null and void and, consequently, the two deeds transferring Castello di Tor Crescenza to the two defendant companies had no legal force.

- 6 Edil Work 2 s.r.l. and ST s.r.l. appealed that decision to this Court, firstly disputing whether the second part of the first paragraph of Article 25 of Law No 218/1995 was applicable, inasmuch as the appellate court failed to consider that the meaning and scope of the provision have been profoundly affected by European law, which requires that it be disapplied if its interpretation is incompatible with that law.
- 7 The opposing party STE s.a.r.l. contested the appeal, highlighting in particular the fact that, because the principal object of the company was located in Italy, the legal force of the powers conferred on F.F. and the validity of the subsequent transfers to the appellant companies should be examined under Italian law, without any interpretative interference from EU law.

#### **The relevant provisions of national law**

- 8 The relevant national provision is primarily Article 25 of Law No 218/1995 (Official Gazette of 3 June 1995, No 128). The article, entitled 'Companies and other organisations', establishes that;

'1. Companies, associations, foundations and any other public or private organisations, 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 registered office for administration is located in Italy, or if the principal object of such organisations is located in Italy.

2. The following, in particular, shall be governed by the law regulating such organisations: (a) legal form; (b) trading name or company name; (c) incorporation, transformation and dissolution; (d) capacity; (e) formation, powers and operating procedures of company bodies; (f) representation of the organisation; (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 organisation; and (i) consequences of breaches of the law or articles of association.

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

- 9 Another relevant national provision is Article 2507 of the Civil Code, which begins the chapter devoted to ‘Companies incorporated abroad’, according to which ‘the provisions laid down in the chapter shall be interpreted and applied in accordance with the principles of the law of the European Communities’.

**The relevant provisions of European Union law:**

- 10 With regard to Union law, the provisions laying down freedom of establishment are relevant, in particular Articles 49 and 54 TFEU.

- 11 Article 49 TFEU provides:

‘1. Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

2. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

- 12 Article 54 TFEU states:

‘1. Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

2. “Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.’

**The relevant rulings from the Court of Justice of the European Union**

- 13 There is extensive Court of Justice case-law on the subject of freedom of establishment of companies.

- 14 The following are of particular note, in so far as they are relevant to the present question referred:
- the judgment of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456)
  - the judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126);
  - the judgment of 5 November 2002, *Überseering* (C-208/00, EU:C:2002:632);
  - the judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512);
  - the judgment of 13 December 2005, *SEVIC Systems* (C-411/03, EU:C:2005:762);
  - the judgment of 12 September 2006, *Cadbury Schweppes* (C-196/04, EU:C:2006:544);
  - the judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723);
  - the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785);
  - the judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440);
  - the judgment of 25 October 2017, *Polbud* (C-106/16, EU:C:2017:804).
- 15 Among the judgments cited, the *Polbud* judgment is of particular significance for the case at hand. In the case brought before the Court of Justice of the European Union, a Polish company – which had decided to transfer only its registered office to Luxembourg in order to make Luxembourg law applicable, without losing its legal personality – had its request for removal from the commercial register refused, on the ground that it had failed to provide documentation on its liquidation. The Sąd Najwyższy (Supreme Court, Poland), to which *Polbud* appealed after its request for removal from the commercial register was refused twice, first referred a question to the Court of Justice as to whether freedom of establishment was applicable to the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, with a view to that company being converted to a company under the law of that other Member State, when there is no change of location of the real head office of that company.
- 16 The Court of Justice held that a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the test applied by the second Member State in order to determine the connection of a company to its national legal order, falls within the scope of freedom of

establishment, even though that company conducts its main, if not entire, business in the first Member State (see paragraphs 34, 38 and 44 of the Polbud judgment).

### **Brief illustration of the grounds for referral**

- 17 This case deals with a capital company (a limited liability company) which, originally incorporated under Italian law, removed itself from the commercial register and, having been transformed into a company under Luxembourg law, transferred its registered office to Luxembourg, while maintaining its principal place of business in Italy.
- 18 The factual and legal context is different from that on which the Polbud judgment turns. In the present case, as in the Polbud case, we are dealing with a company that has decided to transfer its registered office to Luxembourg, while keeping its principal place of business in its Member State of origin.
- 19 [...] [*Aspect not deemed relevant by the referring court*]
- 20 Italian law permits the conversion of Italian companies into foreign companies: Article 25(3) of the Law on Private International Law (paragraph 8 above) in fact states that ‘transfers of the registered office to another State and mergers of organisations with registered offices in different States shall have effect only if they are carried out in accordance with the laws of those States’. The provision, therefore, recognises the transfer of the registered office, provided that the transfer is valid not only in the jurisdiction of destination, but in all the jurisdictions involved. According to Italian case-law, the transfer does not entail a loss of the company’s legal personality following removal of the company from the Italian commercial register [...] [*national case-law*].
- 21 The question the case raises is that of the law applicable to the company once it has transferred its registered office to a Member State of the EU but has maintained its principal place of business in its Member State of origin.
- 22 Specifically, there is a dispute as to whether the conferment on a third party by the company director of powers to manage the company should be examined on the basis of the law of the State of establishment, where the current registered office is located, or that of the State of origin, where the company’s principal place of business has remained.
- 23 [...] [*reference to paragraphs 5 and 8*]
- 24 The first part of Article 25(1) identifies the place where the process of a company’s incorporation was completed as the connecting factor for determining the law applicable to that company, thus opting for the criterion of incorporation. The second paragraph then specifies the aspects that are to be included within the scope of the provision by means of a list (paragraph 8 above) that is considered not exhaustive but merely illustrative, with the consequence that all matters relating to the creation, characteristics, organisational structure and internal and

external operation of the company are subject to the law of the place where it is incorporated.

- 25 The second part of the first paragraph of Article 25, however, establishes a corrective to the criterion of incorporation and extends the Italian law to cover companies that, although incorporated in another State, have their ‘registered office for administration’ or their ‘principal object’ located in Italy.
- 26 The corrective criterion represented by the main object of the company’s activity was held to be applicable in the present case by the appellate court, which thus examined the conferment of powers on F.F. by the company director under Italian company law and its application by case-law.
- 27 It should be noted that the powers were conferred on F.F. during an extraordinary meeting of shareholders of STE s.a.r.l., which was held in Luxembourg. On the basis of those powers, F.F. transferred the property complex constituting the company’s principal place of business, this time by means of a process taking place in Italy (the transfer was completed in the course of a meeting of shareholders of the Italian company S.T. s.r.l.).
- 28 The compatibility of the second part of the abovementioned Article 25(1) with the freedom of establishment of companies was contested by the appellant companies in the case brought before this Court.
- 29 The Court believes the following factors should be considered in examining this question.
- 30 The freedom of establishment has been interpreted by the Court of Justice of the European Union (see the judgments cited above in paragraph 14) as encompassing the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State, provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter Member State to determine the connection of a company or firm with its national legal order is satisfied.
- 31 In the absence of harmonisation of Union law, defining the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 of the TFEU, within the competence of each Member State. Article 54 of the TFEU places the connecting factors of the registered office, the central administration and the principal place of business of a company or firm on an equal footing (see recital 3 of Directive (EU) 2019/2121 of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ 2019 L 231).
- 32 As clarified in the case-law of the Court of Justice (see the Polbud judgment, paragraph 44), therefore, the fact that only the registered office, and not the central

administration or principal place of business, is transferred does not as such exclude the applicability of the freedom of establishment under Article 49 TFEU.

- 33 The question is therefore whether freedom of establishment means that a company which has maintained its principal place of business in its State of origin is subject to the law of the State of destination not only in terms of its incorporation but also in relation to its management, not only internally but also externally, since the present relates to the conferment of management powers on a third party outside the company, which has had a decisive effect on its activity.
- 34 On this point, it should be noted that paragraph 2 of Article 49 TFEU speaks of freedom of establishment in relation to setting up and managing undertakings, and that recital 2 of the abovementioned Directive (EU) 2019/2121 of 27 November 2019 states that freedom of establishment means that the right not only to form but also to manage such companies or firms must meet the conditions laid down by the legislation of the Member State of establishment. Article 1 of Directive (EU) 2019/2121 refers to conversion into ‘limited liability companies governed by the law of another Member State’ (it should be noted that this directive has not yet been implemented by the Italian legislature and a bill delegating authority to the Government is pending in Parliament).
- 35 It should also be borne in mind with regard to Italian law that in 2003, with the reform of company law by decreto legislativo 6/2003 (Legislative Decree No 6/2003), Article 2507 of the Civil Code was inserted at the beginning of the chapter devoted to companies incorporated abroad (paragraph 9 above). According to that article, the provisions of the chapter must not only be interpreted but also applied on the basis of the principles of Community law. [...] *[references to the relevant doctrine]*
- 36 To summarise, there are indications in European law that the law of the State of destination, applicable to a company that has transferred its registered office to that State, dictates the provisions relating to the operation and management of that company. However, in the view of the Court, the fact that in the present case we are dealing with an act of management by a company that affects the company’s activity, which is located in Italy, the State of origin where the company has retained its legal personality, leaves room for doubt as to whether the act of management in question should be examined in the light of the law and of the judicial interpretation of the Italian rather than the Luxembourg legal system.
- 37 Despite the fact that the case-law of the Court of Justice on the freedom of establishment of companies is now extensive, the Court therefore considers it necessary to submit the question of interpretation of the right of establishment of companies that has arisen in the present case to the European Court, considering in particular that the question has been raised before the Court of Cassation, whose decisions are not – other than in exceptional cases – subject to appeal.

### **Question referred to the Court of Justice for a preliminary ruling**

- 38 In conclusion, it is necessary to ask the Court of Justice for a preliminary ruling, under Article 267 of the Treaty on the Functioning of the European Union, on the following question:

‘Do Articles 49 and 54 of the Treaty on the Functioning of the European Union 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 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?’

- 39 [...]

[...] *[standard wording]*

Rome, [...] 11 January 2022.

[...]

WORKING DOCUMENT