

## COMPARATIVE COMMERCIAL LAW FROM THE PERSPECTIVE OF FOREIGN DIRECT PROPERTY: BRANCHES AND SUBSIDIARIES

F.A. POPESCU

### Felix-Angel Popescu

*Doctoral School of Economic Sciences, University of Oradea, Universităţii Street, No. 1, Oradea, Romania*

E-mail [felixangelpopescu@gmail.com](mailto:felixangelpopescu@gmail.com)

### ABSTRACT:

*Through the type of foreign direct ownership (branches or subsidiaries), companies seek to adapt their own products and services to the needs of various customers. Some companies can be successful both nationally and internationally, others may encounter difficulties at the international level or from a legal and financial point of view. However, the liberalization of economic markets is not an easy goal, but on the contrary it is a non-uniform long-term process, which will advance according to the economic evolutions of both the global economic powers and the developing or underdeveloped states.*

**KEYWORDS:** *foreign, direct, property, branches, subsidiaries.*

### INTRODUCTION

The current economic conditions determine economic agents to constantly adapt to the market economy. It is not necessarily about the economic situation of Romania or Germany, which are the subject of the commercial law comparison in this article. Globally, products and services are sold and bought, which inevitably leads to an obvious need to mobilize capital and investment, therefore, there is a growing trend to evolve in terms of turnover, from the local level, which offers a certain certainty and security to a transnational level, unknown, full of opportunities, but also of dangers.

In general, marketing, advertising, promotion, have a great impact on the way in which a small or medium enterprise or even a large corporation is viewed, analyzed and appreciated internationally. Usually, in a democratic society, the world is open to the new, to the different, which means that the consumer's needs are constantly adapting to changes in the economic environment that directly affect him or her. From this it can be deduced that there is enough space for both small traders and giant producers, the only thing to keep in mind is to avoid oversaturation of the market. Beyond these moral barriers, there are usually the legal regulations of each state regarding the rights and obligations of foreigners for the establishment of subsidiaries, branches, etc. to expand their activity in the host country.

Companies can choose to grow in new areas through a branch, subsidiary or representative office, depending on several factors. If the area develops continuously, the parent company can open the local branch, and in many cases the former representative office becomes a shareholder in the current branch. Unlike the subsidiary, the branch is an independent<sup>1</sup> company, with its own headquarters, under the control of the parent company.

---

<sup>1</sup> Botezatu A., 2010, "Sub ce formă se pot extinde companiile", [Online] <http://www.startups.ro/tutoriale/sub-ce-forma-se-pot-extinde-companiile>

## 1. ROMANIAN LAW REGARDING FOREIGN DIRECT PROPERTY

According to the Romanian legislation, at the establishment, the constitutive act of the parent company must include the secondary offices (subsidiaries, agencies, representatives or other units without legal personality)<sup>2</sup> or the conditions for their subsequent establishment. Foreign companies can set up branches, subsidiaries, agencies and offices in Romania. In addition, foreign companies can be present through "representation or dependent agent"<sup>3</sup>. Legal personality represents "the capacity of a subject of law to be the holder of rights and obligations having in this sense an independent organization and its own patrimony"<sup>4</sup>.

### I.1. The branch

The branch operates "independently and autonomously"<sup>5</sup>, having its own registered office and being established for an unlimited period. The branch has its own legal personality since its establishment. Thus, the branch is economically dependent on the parent company.

The branch has its own patrimony, delimited in the whole patrimony of the parent company and concludes contracts with third parties in its own name and on its own account, being also the holder of one or more own bank accounts. The branch is obliged to register at the Trade Register Office in the place where it has its headquarters. The branch has a well-defined purpose and object of activity and not necessarily identical to those of the parent company, but the establishment, modification and termination of its activity are established by the parent company. From a fiscal point of view, the branch is treated as a distinct person under Romanian law, and the management is its own, distinct from that of the parent company. In a broad sense, the company that has become a branch has advantages given by the brand, as well as the whole set of procedures and work systems that the parent company has perfected and proved its advantages in use.

### I.2. The subsidiary

Unlike the branch, the subsidiary does not have a distinct legal entity, being part of the organic structure of the parent company and being dependent<sup>6</sup> on it from an economic point of view. The subsidiary is a subunit equipped by the parent company with goods, so as to carry out an activity that falls within the object of activity of the parent company.

The subsidiary is registered at the Trade Register, has its own articles of incorporation, does not need to have a minimum capital and has an appointed administrator. The subsidiary is subject to the national law of the foreign company that established it and is identified by reference to the registered office of the latter. From a legal point of view, the subsidiary must be treated as a "simple dismemberment, exogenous from a territorial point of view, of the parent company"<sup>7</sup>, and in case of dissolution of the parent company, the subsidiary is also dissolved. The subsidiary concludes contracts with third parties at the expense of the founding owner, so that "it cannot have its own creditors or debtors"<sup>8</sup>. The subsidiary can participate as a party in contracts, because, although it does not have its own legal personality, it has "a legal personality of the founding company"<sup>9</sup>. Thus, a legal act concluded by the subsidiary is "a legal act of the founding company"<sup>10</sup>.

---

<sup>2</sup> Romanian Law no. 31 / 16.11.1990 regarding commercial companies + subsequent modifications and completions, [Online] [http://www.onrc.ro/documente/legislatie/LEGE\\_Nr\\_31.pdf](http://www.onrc.ro/documente/legislatie/LEGE_Nr_31.pdf)

<sup>3</sup> Botezatu A., *Op. Cit.*

<sup>4</sup> *Ibidem.*

<sup>5</sup> FIDEXPERT, 2009, *Studiu: Cadrul legal pentru înființarea unei entități juridice în România*, București, p. 6, <https://www.yumpu.com/ro/document/read/20546145/studiu>

<sup>6</sup> *Ibidem.*, p. 7.

<sup>7</sup> Botezatu A., *Op. Cit.*

<sup>8</sup> Ardeleanu-Popa C., 2010, *Drept Comercial*, Universitatea din Oradea.

<sup>9</sup> *Ibidem.*

<sup>10</sup> *Ibidem.*

## **II. GERMAN LAW REGARDING FOREIGN DIRECT PROPERTY**

### **II.1. Legal or association forms in German law**

In Germany, a foreign natural or legal person can choose a suitable form depending on the type of economic activity. According to the German legislation in force regarding the legal or association form, there are two main criteria: "association of persons, in which the associated persons have priority and in which the responsibility belongs to the person; capital association, in which not the persons but the capital is a priority, but in which the liability may be limited to the company's capital"<sup>11</sup>. The name "foreigners"<sup>12</sup> is held by all those who do not have German citizenship, and the economic activity of foreigners in Germany differs between certain categories: citizens of EU member states, citizens of non-EU states, citizens of non-European states, and so on.

The various notions of branch, subsidiary, representative office, etc. are governed by various laws and regulations on commercial law, foreign trade law or the law of taxes and duties. From the perspective of German commercial law, there are "subsidiaries, branches or offices of their own or without this attribute"<sup>13</sup>, and from the perspective of tax law, these are all called working points. German commercial law does not know the notion of representations.

### **II.2. Forms of participation in market economic activity in Germany for foreigners**

In the context of the right of residence (establishment), for a "foreigner", regardless of whether it is a natural or legal person, there are 4 possibilities to become active in the German market economy: "hiring a commercial agent in Germany; the opening of a contact office with a fixed address, which does not meet the conditions of an independent subsidiary - it is called a branch in this case; establishment of an independent subsidiary - like the branch, the subsidiary does not have a distinct legal personality; the foreigner's participation in a German legal form or association, either by setting up a company with German legal personality or acquiring shares, or by setting up or acquiring shares in an enterprise in the form of a partnership in Germany"<sup>14</sup>.

The establishment of a branch or subsidiary is done by registration by the management of the branch in the Trade Register of the area where this branch is established. In addition to registration in the German Trade Register, foreign investors have the obligation to register with German financial bodies and social insurance: "pension, sickness insurance, disability care services, unemployment insurance, accident insurance"<sup>15</sup>. No permission is required for the economic activities of foreigners in Germany carried out by them from abroad, "only if their stay in Germany is not required"<sup>16</sup>.

International contracts and general related issues are also linked to the activity of branches and subsidiaries. German contract law is linked to the principle of abstraction, which divides a civil transaction into two parts: "an obligatory transaction (Who owes? To whom? What? When?) and a real transaction (the procedure for making transfers)"<sup>17</sup>. If the contracting parties come from different legal systems, the system of law governing the contract or an applicable interstate convention<sup>18</sup> must be agreed upon.

---

<sup>11</sup> Fazakas K., *Înființarea unei societăți sau a unei sucursale în Germania*, București, 2010, p. 1.

<sup>12</sup> *Ibidem*.

<sup>13</sup> German Commercial Code in the revised version published in the Bundesgesetzblatt (BGBl., Federal Law Gazette), Book One, as amended by Article 11 of the Act of 18 July 2017, [Online] [http://www.gesetze-im-internet.de/englisch\\_hgb/englisch\\_hgb.html#p0018](http://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0018)

<sup>14</sup> Fazakas K., *Op. Cit.*, pp. 15-19.

<sup>15</sup> *Ibidem.*, pp. 32-33.

<sup>16</sup> *Ibidem.*, p. 33.

<sup>17</sup> *Ibidem.*, p. 41.

<sup>18</sup> *Ibidem.*, p. 42.

## CONCLUSIONS

The way of entering the international market and the forms of foreign direct ownership are, in principle, similar in structure, status and form of organization, but they may differ in legal personality and depend largely on the legislation and regulations of the host country. In order to increase costs, but also associated risks, the main stages of internationalization could be: "collaborations / customers / import contracts (with one or more companies to distribute the exporter's products), the sale of the license (for sale and / or manufacturing), joint venture (investing in a local actor to help it grow), representation, direct investment"<sup>19</sup>.

It is up to the foreign investor to choose the desired market, depending on its economic objectives and strategies and it is recommended to always seek the advice of a lawyer or a consultant on commercial law. Given that ignorance of the law does not excuse anyone, even the most prepared investor will face smaller or bigger problems when it comes to accessing a foreign economic market. In most cases, the protectionist policy of a state can impose a series of restrictions or limitations on foreigners eager to start their economic activity.

At EU level, the free movement of people, goods, capital and investment has led to a broad process of reconciling and aligning Member States' legislation with European rules, so that EU entrepreneurs have easier<sup>20</sup> access to European economic markets. However, legislative barriers exist and will exist from state to state.

On one side, small and medium-sized enterprises seek to expand first at the national regional level and only later to think of a strategy to penetrate the international market. This largely depends on the conditions related to the development at local, regional, national and international level and of course on the entrepreneurial culture and risk management of each entrepreneur.

On the other side, bigger companies, organizations or corporations are looking to continuously expand new branches, subsidiaries, representative offices, etc. It largely depends on the transnational economic evolution of the company. What is certain is that there will always be variables and unknowns, insufficiently explored economic markets and untapped opportunities at the level of expectations.

## REFERENCES

- [1] ARDELEANU-POPA, Carmen, 2010, *Drept Comercial*, Universitatea din Oradea, Facultatea de Științe Economice, 100 p.
- [2] BOTEZATU, Alina, 2010, "Sub ce formă se pot extinde companiile", [Online] <http://www.startups.ro/tutoriale/sub-ce-forma-se-pot-extinde-companiile>
- [3] FAZAKAS, Karin, 2010, *Înființarea unei societăți sau a unei sucursale în Germania*, București, 50 p., <https://www.yumpu.com/ro/document/read/5086285/infiintarea-unei-societati-sau-a-unei-sucursale-in-germania>
- [4] FIDEXPERT, 2009, *Studiu: Cadrul legal pentru înființarea unei entități juridice în România*, București, 16 p., [Online] <https://www.yumpu.com/ro/document/read/20546145/studiu>
- [5] Romanian Law no. 31/1990 regarding the commercial companies + subsequent modifications and completions, [Online] [http://www.onrc.ro/documente/legislatie/LEGE\\_Nr\\_31.pdf](http://www.onrc.ro/documente/legislatie/LEGE_Nr_31.pdf)
- [6] German Commercial Code in the revised version published in the Bundesgesetzblatt (BGBl., Federal Law Gazette), Book One, as amended by Article 11 of the Act of 18 July 2017, [Online] [http://www.gesetze-im-internet.de/englisch\\_hgb/englisch\\_hgb.html#p0018](http://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0018)
- [7] [https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index\\_en.htm](https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm)

---

<sup>19</sup> Botezatu A., *Op. Cit.*

<sup>20</sup> [https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index\\_en.htm](https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm)