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CROSS-BORDER CONVERSION OF COMPANIES: A COMPARATIVE ANALYSIS

Master thesis

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LIST OF ABBREVIATIONS

EU – European Union

TFEU – Treaty on the Functioning of the European Union

CJEU – Court of Justice of the European Union

ECJ – European Court of Justice

EC – European Commission

Ibid. – Ibidem

art. – Article

para – Paragraph

INTRODUCTION

Research problem. At present, companies of different forms and sizes through their branches or subsidiaries, cross borders within the European Union (hereafter referred to as EU) every day. Enterprises use corporate mobility to operate in the EU internal market. However, modern EU corporate law just slightly corresponds to the changes occurring in the European legal and economic area during the past years, and therefore it becomes an obstacle for companies to operate cross-border. Since the Treaty on the Functioning of the European Union (hereafter referred to as TFEU)[1] guarantees freedom of establishment, it should entail free movement of companies within the EU.

Having considered the literature and legal acts related to the topic of the master's thesis, it can be concluded that until recently there were significant obstacles in the conversion of a company in another Member State due to their establishment in affiliation with the national laws that define their incorporation and functioning. Insomuch as till lately, there was an absence of a unified mechanism for all companies that allows its cross-border relocation, the significant question on how to change the place of the company's registration, bypassing the option of its liquidation in one state and reopen in another had to be addressed. In light of the adoption of the new Directive as regards cross-border conversions, mergers and divisions[2], the important question arises: **are the legislative tools offered by the Directive sufficient enough to effectively solve the issue raised above?** The current thesis is intended at answering this question.

The relevance of the master thesis. "Currently, companies wishing to move their registered offices cross border need to rely on Member States' laws. Such laws, where they exist, are often incompatible or difficult to combine with each other. Moreover, more than half of the Member States do not provide any specific rules allowing for cross-border conversions. Small and medium-sized enterprises are in particular negatively impacted since often they lack resources to perform cross-border procedures through costly and complicated alternative methods".[3] Precisely current European Commission (hereafter referred to as EC) proposal had as its aim allowing corporations to converse the legal form they already have in one Member State into a close legal

[1] "Consolidated Version of the Treaty on the Functioning of the European Union", (2016) C 202/47, Official Journal of the European Union, accessed on 05/03/2020 https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_3&format=PDF.

[2] "Directive (EU) 2019/2121 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" (Text with EEA relevance) PE/84/2019/REV/1, accessed on 05/03/2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L2121.

[3] "Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross border conversions, mergers and divisions", COM(2018) 241 final, Brussels, *25/04/2018*, p. 3, accessed on *06/05/2019* http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0241/COM_COM(2018)0241_EN.pdf.

form in another one. New Directive[4], altogether, will contribute substantially to a more flexible and effective legal regime in cross-border conversions. Besides the Directive itself, the accessible case law needs to be analyzed from the position of whether it can provide an efficient solution to the situation of the possible drawback of legal certainty in this area.

The issue of cross-border conversion of companies is relevant since the number of barriers that corporations should overcome when changing their place of registration slows down corporate mobility and is one of the reasons why the implementation of the freedom of establishment in the EU cannot be fully ensured. During the current research, substantial attention will be made to the aforementioned problems of conversion the companies that are related to cross-border relocation.

Scientific novelty of the master thesis. The topic of cross-border conversion of companies was often raised by the EU legislators but was not ultimately refined until recently. Despite the fact that it was developed a Directive on the cross-border transfer of a company's registered office (14th Company Law Directive)[5] and proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions[6], judgments of the Court of Justice of the European Union (hereafter referred to as CJEU) were given, one codified act which would clear and completely cover all questions regarding the possibility of the cross-border relocation of the companies has not been developed and adopted right up until the end of 2019.

In general, the issue of cross-border conversion of companies was considered only through the merger procedure, which is an extremely expensive and time-consuming operation, or by the way of the creation of subsidiaries and branches in the other Member States. As such, the process of transferring a company to another state without using the abovementioned options, or liquidation of an enterprise in one Member State and reopening in another, was not provided. States chose rather to refer to the practice of the CJEU in addressing the matter under discussion, although it is not a legislative body, and its role is limited to interpretative.

The comprehensive analysis of accessible literature shows that the topic of cross-border conversion of companies is the subject matter of numerous researches in the field of the Company Law. The considered issue was emphasized by authors like Dubravka Akšamović[7], Lidija

[4] See footnote 2.
[5] "Cross-border transfer of company seats European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats" (2011/2046(INI)), accessed on 05/03/2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012IP0019.
[6] *Ibid.*, at 3.
[7] Dubravka Akšamović, "Transfer of Corporate Seat in EU: Recent Developments", *Athens Journal of Law*, Volume 5, Issue 4 (2019), accessed on 06/03/2020 https://www.athensjournals.gr/law/2019-5-4-4-Aksamovic.pdf.

Šimunović[8], Stephan Rammeloo[9], Florentina Camelia Stoica[10], Iryna Basova[11], Carsten Gerner-Beuerle[12], etc. Aside from that, the examination of the CJEU's judgments and the legislative practice of the Member States, which provide for cross-border seat transfer on the basis of national law, reveals that the way of coping with the matter in question varies from state to state or do not possible at all.

Bearing in mind that Directive[13] is just a recent replenishment to the related legal acts, the necessity for the additional research of the current problem seems to be useful.

The current master thesis is intended to streamline and align the provisions on the existing legal acts on the cross-border conversion of companies and to conduct a comparative analysis of such provisions within the EU.

Significance of the master thesis. For the EU legislators and the Member States, the practical significance of this thesis is, therefore, to take a comprehensive look at the problem related to the topic of this research and to draw the attention to the need for bringing their national laws in line with the adopted act that will allow the companies which want to change their place of registration to another Member State to perform it.

In regard to scholars and practitioners who work in the sphere, this study may provide accuracy in the legal rationale related to the topic of the thesis and in the possible application of unified provisions on transboundary conversion.

For companies themselves, these are legal assurances, predictability and certainty in regulating their ability to cross-border relocation within the territory of the EU.

Current research can also be useful for law students, especially in the field of a company law who wants to deepen their knowledge and investigate such a multi-level issue.

The aim of the master thesis – to identify and estimate the main issues connected with the cross-border conversion of companies, to conduct a comparative parse of existing provisions

[8] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", *EU and Comparative Law Issues and Challenges Series*, Issue 3 (2019), accessed on 06/03/2020 https://hrcak.srce.hr/ojs/index.php/eclic/article/download/9038/5121/.

[9] Stephan Rammeloo, "Cross-Border Company Mobility and the Proposal for a 14th EC Company Law Directive: 'Daily Mail' surmounted", *Editorial, Volume 6, Issue 2*, (1999) , accessed on 06/03/2020 https://journals.sagepub.com/doi/pdf/10.1177/1023263X9900600201.

[10] Florentina Camelia Stoica, "Recent developments regarding corporate mobility within EU's internal market", Bucharest Academy of Economic Studies, (2016), accessed on 06/03/2020 http://ssrn.com/abstract=2783809.

[11] Iryna Basova, "Cross-border Conversions in the European Union after the Polbud Case", *Nordic Journal of European Law*, 2018(1), accessed on 06/03/2020 https://journals.lub.lu.se/njel/article/download/18682/16938/.

[12] C. Gerner-Beuerle, F. Mucciarelli, E. Schuster, M. Siems, "Cross-border Reincorporations in the European Union: The Case for Comprehensive Harmonisation", Journal of Corporate Law Studies 1, (2017), accessed on 06/03/2020 https://eprints.soas.ac.uk/24379/1/gerner-beuerle-et-al-cross-border-reincorporations-in-the-european-union.pdf.

[13] *Ibid.*, at 2.

related to the topic of this work within the EU and, to assess the precedents, decisions on which are ruled by the CJEU, on the present issue.

The objectives of the master thesis. In the interest of achieving the main aim set by this master thesis, the following objectives must be fulfilled:

1) to comprehend the concept of the company's transfer across the border and track the history of its progression;

2) to formulate the main goals and advantages of the possibility of a cross-border conversion and detriment from the limitation of this opportunity;

3) to study and correlate the legislation of the Member States, which provide for cross-border seat transfer on the basis of national law;

4) to scrutinize and estimate the existing case law on cross-border change of company's registration.

Methods used in the master thesis. In order to reach the set goal and to perform the mentioned objectives, several certain methods were applied.

Data collection and data analysis. Collected data such as European company legislation, scientific articles and case law related to the topic of the research will be precisely analyzed, structure and examined.

Historical method. It helps to understand and duly expound the development of changes in legislation at the EU level as well as at the national level while analyzing legal acts, scholar's articles and case law on the selected theme.

Comparative method. Since one of the main destinations in writing of the current thesis is a comparative analysis of the legislation of the EU's Member States which provide for cross-border seat transfer on the basis of national law, the chosen method will be useful to collate different approaches, find common and divers peculiarities, techniques, and tendencies with regards to the aforementioned issue.

Logical method. In the presentation of the material, the formation of recommendations, proposals and developing some reasonable conclusions a logical method was used for a comprehensive analysis of the current problem.

Analytical method. For the purpose of establishing a connection between the causes and consequences of specific actions and taken rulings, the technique was applied at all phases of the research.

Linguistic method. Due to the fact that not all of the researched works have been set forth in English, a linguistic method allows to avoid misapprehension and to clarify the intentions of legislators during the analysis of the provided material on the topic of the transboundary relocation of companies.

The *forecasting method* consists in the assumption about the further stages of the development of the analyzed object.

The structure of the master thesis. It has been divided into two parts – general and special – that are parted into chapters and subchapters.

The first part of the master thesis mainly highlights the general statement on the 'cross-border conversion of companies' concept in company law. Ipso facto, the first chapter defines the very meaning of the discussed phenomena. Within its subchapters, the historical development of the cross-border conversion of companies, and main features towards it are considered. Afterward, in the second chapter, an examination of the newly adopted Directive[14] and, precisely, the procedure of the company's conversion to another Member State, are described. Such wise, each of the subchapters is devoted to a separate element.

The second part reveals the practical significance of the 'cross-border conversion of companies' concept application. In relation to that, in the first chapter, the legislation on the subject matter at the Member States which provide for cross-border seat transfer on the basis of national law is analyzed. Different approaches, common features, differences, and tendencies are examined. Hereinafter, the second chapter discloses the existing case law and its impact on the development of the referred phenomenon of the cross-boundary transfer of companies.

Statements to be defended.

1. The possibility to convert the company cross-border within the European Union is the fundamental right, provided by the means of the freedom of establishment that should be granted to all enterprises incorporated in the Member States, regardless of the types of businesses.

2. After the Member States bring their national laws in line with the Directive 2019/2121, the ones, which did not provide in their national legislation the regulations concerning the possibility of the cross-border seat transfer, will give the companies wishing to transfer themselves abroad the established procedure, legal assurances, predictability, and certainty in regulating their possibility to perform the stated operation. The ones, which provided for the discussed process, will simply enhance their national regulations and will be able to rely upon the same treatment for their companies in the other Member States.

[14] See footnote 2.

1. GENERAL STATEMENT ON THE 'CROSS-BORDER CONVERSION OF COMPANIES' CONCEPT

In the current conditions of integration and globalization, the number of companies wishing to transfer their registered or actual place of businesses to other Member States, that provides more favorable conditions for developing, is steadily growing.

The possibility of corporate mobility of companies within the EU is a key for their successful functioning at the internal market and one of the components of effective business activity. Therefore, it is important to unlock the potential of the internal market through overcoming barriers to cross-border trade, alleviating access to markets, escalating confidence and stimulating competition, while offering effective and balanced protection to stakeholders.

Today scientists consider that companies established under the law of a Member State may relocate their real seat to another Member State without changing the legal form if the State where the company was founded allows such possibility. Nevertheless, according to the scholars, it remains unclear if the EU law grants a right of the legal establishment, apart from the right of physical establishment, by letting companies transfer into a legal form of another Member State.[15]

These lead one to think about the real admissibility and assurance of cross-border conversion practice by the EU.

In order to understand better what transboundary transfer of companies is, as well as to analyze the concept and its main elements, the following part of the present research is established. The first chapter mainly defines the very meaning of the cross-border conversion of companies. This chapter is divided into two parts. Within the subchapters of the first part, the historical development of this phenomenon, and the main characteristics towards it, are considered. Subsequently, in the second part, peculiarities and novelties of the recently adopted Directive on cross-border conversions, mergers and divisions, as well as, the legal procedure of the company's conversion to another Member State itself, are described.

1.1. Meaning of the 'Cross-Border Conversion of Companies' Concept in Company Law

The conception of the free movement of companies on the internal market is not a novation. It is indicated in the TFEU[16]. Nevertheless, after the European Court of Justice (hereafter referred to as ECJ) decisions concerning corporate mobility and multiple EU Commission's

[15] Oliver Mörsdorf, "The legal mobility of companies within the European Union through cross-border conversion", *Common Market Law Review*, Volume 49, Issue 2 (2012) pp. 629 – 670, accessed on 07/03/2020.
[16] *Ibid.*, at 1.

endeavors to provide a systematic resolution on the issue of corporates' transition, cross-border mobility of companies remained an unresolved issue for decades.

Over the years, it was clearly seen that the EU addressed the issue of cross border activity ad hoc and unsystematically, leaving things for clarification to the ECJ. Under opinion of the academics, "The ECJ has been trying to fill up the mentioned legal gaps with its interpretations of freedom of establishment, which, in a broader sense represents a cross-border conversion. The ECJ judgments (such as *Cartesio*, *Vale*, and *Polbud*) has revived this matter and the lack of rules on cross-border conversions and the need for their regulation at the EU level. Even though the ECJ has recognized the right of the companies to convert abroad, the ECJ is not a legislative body and therefore not entitled to create rules on cross-border conversion. It is limited by its interpretational role".[17]

Returning to the notion, to date verbatim term 'cross-border conversion' precisely described in the Directive 2019/2121[18], article 86b(2) of which defines that " 'cross-border conversion' means an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality".[19] For many years, only certain variants of cross-border conversion were considered and used in the ECJ cases such as transfer of the place of registration, head office, cross-border relocation of the company, etc.

To sum up, the cross-border conversion of companies was not a fully apprehensible concept until lately. Regardless of the freedom of establishment provision at the TFEU[20], the legislators preferred to invoke to the CJEU in main while trying to create and adopt the unified legal act covering the given issue.

Before proceeding to further analysis, it is necessary to clarify the history of the development of the considering matter, as well as the peculiarities of the discussed concept.

1.1.1. Evolution of the 'Cross-border Conversion of Companies' Phenomena

One of the main aims for the founding of the European Union is the economic integration of the EU Member States by the creation of a single market for goods, works and services. To this

[17] See footnote 8, pp. 944 – 945.
[18] *Ibid.*, at 2.
[19] *Ibid.*, art. 86b.
[20] *Ibid.*, at 1.

end, four fundamental economic freedoms were enshrined in the TFEU[21] – free movement of goods, capital, persons and freedom to establish and provide services over borders.

The freedom of establishment includes the right to settle abroad for independent, profit-oriented activities, as well as the right to create companies for this goal in any EU Member State. Moreover, companies already established in one state are empowered to freely transfer their location to another state.[22]

The ability to transfer the location of a company from one state to another is inextricably connected with the idea of the single market. Companies should be able to choose a place with the most favorable economic, legal, social and other conditions for their business activities, and also transfer their location depending on changes in these conditions.

Despite this, in practice, national law still continues to impede the transfer of companies from one Member State to another. Until now, companies were fully guaranteed only with the right to establish branches or subsidiaries in the other Member States, but not the right to move their own location, although attempts to provide companies with its possibility did not cease.

The first attempts to regulate the issue began from the early 70's. A few legislative acts that directly or indirectly addressed the problem of the relocation of corporate seats were created by the EU.[23]

> For example, in 1985 the European Parliament adopted Regulation No 2137/85 on European economic interest grouping,[24] than in 2001 in enacted Regulation No 2157/2001 on the Statute for European Company (commonly known as Societas Europea)[25] and lastly, in 2003 it enacted Regulation No 1435/2003 on the Statute for a European Cooperative Society.[26] Although all three mentioned regulations deal with some aspects of corporate mobility, none of those documents were really enacted with the purpose to resolve open issues that occur in practice with regard to the transfer of corporate seats or cross-border companies' migration.[27]

Despite the fact that the issue is originated numerous years ago, the first time it received wide disclosure and attracted attention was in 1988 after ECJ's decision on *Daily Mail*[28] and then

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[21] *Ibid.*, at 1.
[22] See mote at art. 49,54 of the TFEU.
[23] See footnote 7.
[24] "Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)", accessed on 09/03/2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985R2137.
[25] "Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)", accessed on 09/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R2157.
[26] "Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)", accessed on 09/03/2020, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32003R1435.
[27] See footnote 7.
[28] "The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. Case 81/87". European Court Reports 1988 -05483, accessed on 10/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0081.

in 1999 in *Centros*[29] case.

With the beginning of the new millennium, discussions on this topic have gained new momentum. To tackle it, the proposal for the 14th Company Law Directive, Directive on the cross-border transfer of company seats[30] was drawn up. The first draft proposal was made by the EC in 1997.[31]

Adoption of a Directive on cross-border transfer of the registered office of limited companies was already part of the Commission's Action Plan on Modernising Company Law[32] with the main aim of strengthening shareholders' rights, enhancing the protection for the employees and creditors, and escalate the efficiency and competitiveness of a business.[33]

In 2007 after public consultations during the several years, EC decided not to make any legal regulations and reserved the right to take follow up measures regarding the issue of cross-border transfers of the corporate seats, notwithstanding a clear EU Parliament position that such legislative tool is needed.[34] If it were adopted, the 14th Directive would handle most of the difficulties arising consequently of different Member States legislation and praxis in terms of the cross-border transfer of companies.[35] Albeit the Directive never entered into force, the document has its value. Foremost, it caused discussions regarding companies' mobility at the EU level. Besides, it provided the umbrella project on the dealt issue, on which the legislators could rely. Furthermore, as Stephan Rammeloo notes, it became clear that cross-border companies' transfer is no longer in the sole realm of national officials.[36]

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[29] "Centros Ltd and Erhvervs-og Selskabsstyrelsen, Case C 212/97", ECR, I-1459. Judgement of 9 March 1999, accessed on 10/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0212.

[30] *Ibid.*, at 5.

[31] "Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law", XV/D2/6002/97- EN REV. 2, (1997), accessed on 13/03/2020 https://www.lbs-europur.de/app/download/15355139096/14thCLDd-proposal+97.pdf?t=1508630237.

[32] Commission of the European Communities, "Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward", (2003), accessed on 13/03/2020 https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0284/COM_COM%282003%290284_EN.pdf.

[33] Gert-Jan Vossestein, "Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive", *Utrecht Law Review*, Volume 4, Issue 1, (2008), p. 54, accessed on 13/03/2020 https://www.researchgate.net/publication/26503781_Transfer_of_the_registered_office_The_European_Commission's_decision_not_to_submit_a_proposal_for_a_Directive/fulltext/0e605548f0c46d4f0ab10af9/Transfer-of-the-registered-office-The-European-Commissions-decision-not-to-submit-a-proposal-for-a-Directive.pdf.

[34] "European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive)", (2012), p. 10, accessed on 14/03/2020 http://publications.europa.eu/resource/cellar/d2958a7c-f703-46b6-8ee5-fff5f4814ef7.0001.02/DOC_1.

[35] "Member States legislation and practices with regard to the possibility of cross-border mergers, divisions or conversion significantly differ. Accordingly, specific national procedures in relation to cross-border transfers exist in Cyprus, Czech Republic, Denmark, Malta and Spain, while for example Member States that do not authorize the transfer of registered office are Croatia, Finland, Ireland, Lithuania, Romania and UK". See Ernst & Young, "Study on the Cross-border Operations" *Directorate-General Justice and Consumers*, (2018), accessed on 14/03/2020 https://ec.europa.eu/info/publications/ey-study-assessment-and-quantification-drivers-problems-and-impacts-related-cross-border-transfers-registered-offices-and-cross-border-divisions-companies_en.

[36] See footnote 9.

Approaching the issue from the other perspective, EC's efforts in the regulation of cross-border mergers can be emphasized. Back in 1978 came into force the Directive 78/855/EEC concerning mergers of public limited liability companies[37] but it did not touch on the issue of cross-border mergers. Therefore, a key component of the legislation that would allow the cross-border transfer of corporate seats via merger operations on the EU level was missing until 2005 when the EU Council and Parliament adopted Directive on Cross-border Mergers.[38] Though, as foreseen, Merger Directive did not provide sufficient legal solutions for all situations that arose in cross-border merger practices. Consequently, after numerous public consultations in relation to existing barriers to cross-border operations and over the needed modifications to the existing legislation, in the year 2017 EC submitted a proposal for amending the 2005 Merger Directive.[39] Dubravka Akšamović gave his comment that "besides changes with regard to regulation of merger procedure, this Directive also codified several earlier Directives as a part of Company Law Modernisation Package".[40]

Nonetheless, it did not succeed too, and EC presented a new proposal, which introduced wholly new rules concerning cross-border conversions of companies, to amend the given Directive in less than a year. The author of the article on the "Transfer of Corporate Seat in EU: Recent Developments" highlighted that "it is significant that new Proposal[41] came immediately after another ECJ's milestone decision in so called *Polbud* case[42] […] ".[43]

For the next years, the Proposal was a hot topic for the discussions.

It would allow companies that want to convert from one Member State to another, the ability to change their country of incorporation without losing their legal personality or having to re-negotiate their business contracts. Scholars emphasized that it would be especially benefitting for small companies that do not have enough financial resources to conduct a cross-border merger. The relying only on the national laws creates barriers, especially that more than half of the Member

[37] "Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies", accessed on 15/03/2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31978L0855.
[38] "Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies", accessed on 16/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005L0056.
[39] "Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law", accessed on 16/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1132.
[40] *Ibid.*, at 7.
[41] *Ibid.*, at 3.
[42] "Judgment of the Court (Grand Chamber) of 25 October 2017. Proceedings brought by Polbud - Wykonawstwo sp. z o.o. Request for a preliminary ruling from the Sąd Najwyższy", accessed on 17/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0106.
[43] See footnote 7.

States do not provide any specific rules allowing cross-border conversions.[44]

Ultimately, after a series of amendments and negotiations, the proposal was adopted, and, on January 1st, 2020 the Directive as regards cross-border conversions, mergers and divisions[45] entered into force. Member States are required to bring their national laws in line with the Directive by 31 January 2023.

To conclude, by analyzing the history of the concept, it is clearly can be seen that the cross-border conversion of companies was developing for many years. Many attempts have been made to resolve the matter, but it remained unsettled up until the end of the last year, as there was an absence of a unified mechanism to address the problems encountered on the way to transfer the company abroad.

1.1.2. Peculiarities of the Presented Concept

As both articles 49 and 54 of the TFEU[46] envisage, once a company has incorporated, transferred or opened a subsidiary in the host Member State, it must enjoy the same terms, conditions and advantages as available to the national enterprises.

During the company's life cycle, its needs might shift, and, as a result, the undertaking might consider transfer to another Member State in spite of how correct their pristine decision was. Experts suggested dividing the main reasons for desiring to convert the company into applicable company law, taxation, clients and economic environment, and judicial system.[47]

A change of the applicable company law is a direct result of the process of its transboundary transfer. It provides the change of the rules applied to the statutory issues of the enterprise. Therefore, the administration or shareholders may consider this operation as a way to bring a company to conditions and regulations of existence that are more favorable to them or to convert to a better-suited structure, offered by another state. Scholars additionally underline that the company may invoke the better protection of intellectual property in the host country.[48]

Taxation is one of the fundamental parts of the activities of any company, therefore it is so important to choose a favorable tax regime. As the implementation of the procedure of the

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[44] Evelyn Regner, Anthea McIntyre, "Cross-Border Conversion, Mergers and Divisions of Companies", *Legislative Train*, (2019), accessed on 17/03/2020 https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-cross-border-mobility-for-companies.

[45] *Ibid.*, at 2.

[46] See footnote 1.

[47] Schnittker Möllmann Partners, "Cross-Border Conversion", *SMP Transactions Briefing*, (2019), accessed on 17/03/2020 https://www.smp.law/EN/Briefing/Cross-Border_Conversion.php.

[48] Arsi Pavelts, Epp Kallaste, Janno Järve, Urmas Volens, "Regulation of Cross Border Movement of Companies", *Centar*, (2017), accessed on 18/03/2020 https://centar.ee/uus/wp-content/uploads/2017/03/Summary-by-research-questions.pdf.

cross-border conversion leading to the change of the applicable tax law, it can result in certain tax advantages. Nevertheless, the experts point that yet, in some jurisdictions, it also leads to exit taxation, which can bring a possibility of a high tax burden.[49]

Another reason for a company migration to another Member State may be a change of the strategy or a change of the territorial focus. If the target consumer of the company is changing, it required to gain access to a market where there is a need for its services. In accordance with the assessed literature, the adoption of the legal format of the desired jurisdiction and moving the headquarters closer to its potential customers can make the market entry easier and be important for its business relations.[50]

Regarding the judicial system, as the result of transferring the company's seat cross-border, the courts of the host Member State will become competent to regulate certain dispute issues. In consequence, a company may receive benefits from a more efficient and developed judicial system in another Member State.[51]

The analysis of the articles of the TFEU[52] on the freedom of establishment describes the general framework of this possibility provided to the companies within the EU. As stated by Paul Craig and Gráinne de Búrca, the freedom of establishment may be realized in a way of the primary establishment and the secondary one. The primary establishment involves the right of the partners to choose the place for their company's seat or to decide to transfer the company to another Member State. The secondary establishment embraces the right to initiate branches and subsidiaries in a host Member State.[53] To be covered by the scope of the TFEU[54], both primary and secondary establishment have to be set up within the EU Internal Market.

Besides, under Florentina Camelia Stoica's opinion, the freedom of establishment has economic grounds to which the companies may refer to only to perform a commercial activity. The TFEU[55] recognizes the right of establishment to such undertakings alone when the ones are nationals of one Member State and carry on their main or subsidiary businesses in another Member State.[56] To be national of one Member State, a company has to be established under the requirements provided by the national law of that State.

[49] *Ibid.*
[50] See footnote 47.
[51] *Ibid.*
[52] *Ibid.*, at 1.
[53] Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, Sixth Edition, (Oxford, The United Kingdom: Oxford University Press, 2015), p. 806, accessed on 18/03/2020.
[54] *Ibid.*, at 1.
[55] *Ibid.*
[56] See footnote 10, p. 3.

Over than that, the companies must have an actual connection with the economy of the host Member State by setting up their registered offices, central administrations or main places of businesses in that State.[57]

The author of the article "Recent developments regarding corporate mobility within EU's internal market" explaining that within the Internal Market, according to the way of defining the connecting element between a company and its governing law (*lex societatis*), two main theories connected to the nationality of a company exists – the 'real seat' and the 'incorporation'.[58] Even though both theories determine the same connecting element, that is the place where the company is incorporated, both of them offers different notions of headquarter.

The real seat theory defines the legislation governing a company based on the place where the central administration of the company locates, whereas the incorporation theory simply depends on a formal factor – the place where the registered office is located or where the formation procedure was finalized.[59] The incorporation theory does not allow the transfer of the registered office.

The majority of continental national legislation considers the company has the nationality of the State, where fundamental management decisions of the company are implemented.

Thus, the moving of the real head office of the company to another Member State identifies the change of its nationality, which basically means the inability of the cross-border mobility of the company, bearing in mind that the change of its nationality means the dissolution of the company and establishing a new one.[60]

In contrast, according to the national laws of some other jurisdictions, a company has the nationality of the state where the place of its registered office.

In this way, the incorporation theory recognizes the cross-border mobility of the company, which keeps its nationality no matter where the place of the head office is located.[61]

Nevertheless, due to the digitalizing[62] and under the influence of the case law, both theories had to be changed to comply with the principle of freedom of establishment by allowing corporate mobility. As stated in the European Added Value Assessment, some Member States

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[57] *Ibid.*
[58] *Ibid.*
[59] Corrado Malberti, "Cross-border mobility of companies: 'Real seat' vs 'incorporation'", *Euractive*, (2017), accessed on 19/03/2020 https://www.euractiv.com/section/economy-jobs/opinion/cross-border-mobility-of-companies-real-seat-vs-incorporation/.
[60] See footnote 10.
[61] *Ibid.*
[62] B. Grossfeld, "Loss of Distance: Global Corporate Actors and Global Corporate Governance - Internet v. Geography", *The International Lawyer*, vol.34, (2000), p. 963, accessed on 19/03/2020, https://scholar.smu.edu/cgi/viewcontent.cgi?article=2011&context=til.

allow cross-border transfers of a company's seat under certain circumstances by adjusting their national law for ensuring their competitive abilities in relation to companies.[63]

The alternatives, which provide vicarious mechanisms for cross-border mobility within the EU without the need for the company to be liquidated in the Member State of its origin, are offered by EU legislation on the European Company[64] and the European Cooperative Society[65]. Based on these tools, a company can convert into a European Company or European Cooperative Society and transfer its seat according to the procedure laid down in the Regulations on them. However, it involves a number of procedural steps, more time consuming, and high costs. Besides, as were stated at the European Parliament Briefing, the legal status of the European Company is only available to companies obeying the requirement of minimum endorsed capital and already functioning in more than one Member State.[66]

"The features of cross-border conversions may be defined as an accumulation of the following: a transfer of a company's seat that is a connecting factor in the host state; a reincorporation in the host state through a conversion […]; a change in the law which governs a company; a retention of legal personality; and the absence of liquidation".[67]

The key element of a cross-border conversion is the maintenance of legal personality, which means that it is no need in a liquidation procedure. Thereby, as it becomes understandable from the European Parliament resolution with recommendations to the Commission on the cross-border transfer of the registered office of a company, liabilities and contractual relations remain uninfluenced.[68]

The other feature for a company to be allowed to convert itself in another state, the transfer of its seat to that state that is a precondition for that process. However, it should be considered that there is no unified strategy for obtaining desired results. The Member States have their own rules, which are necessary for a company to obtain the status of a domestic company. Generally, according to some authors, a conversion implies the transfer of the registered office, however, in some jurisdictions, the transfer of the real seat is a postulate as well.[69]

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[63] B. Ballester, M. del Monte, "Directive on the cross-border transfer of a company's registered office (14th Company Law Directive)", *European Added Value Assessment*, EAVA no.3/2012, p. 15, accessed on 20/03/2020, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf.
[64] *Ibid.*, at 25.
[65] *Ibid.*, at 26.
[66] European Parliament Briefing, "Cross-border transfer of company seats", (2017), p. 2, accessed on 20/03/2020 https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf.
[67] See footnote 11, p. 65.
[68] "European Parliament resolution with recommendations to the Commission on the cross-border transfer of the registered office of a company" (2008/2196(INI)) of 10 March 2009, Recommendation 1, accessed on 21/03/2020 https://www.europarl.europa.eu/sides/getDoc.do?reference=A6-2009-0040&type=REPORT&language=EN&redirect.
[69] See footnote 12, pp. 4 – 5.

Concerning the absence of liquidation, an interesting thought was expressed by Federico Mucciarelli that if, prior to the cross-border conversion, this procedure is necessary, a company will lose its right to convert itself in the host Member State, because, after liquidation, the undertaking terminates its existence.[70] Such a case will contravene the nature of cross-border conversion. As it was mentioned in the judgment on the *Polbud* case, the requirement to liquidate the company before it can be erased from the register in the home state composes a restriction of the freedom of establishment since it is " […] liable to impede, if not prevent, the cross-border conversion of a company".[71]

National measures that limiting the freedom of establishment may be admissible only if they are justified. The TFEU declares that it is possible by virtue of public policy, public security or public health[72], or by overriding reasons in the public interests, including the protection of the interests of employees, creditors and minority shareholders, as the one could see from the judgment on the *Vale* case.[73] The restrictive measures may be justified by the protection of the interests of employees, creditors and minority shareholders, provided that they are " […] appropriate for securing the attainment of the objective of protecting the interests of creditors, minority shareholders and employees and does not go beyond what is necessary to achieve that objective".[74] Therein, a generic prohibition of cross-border conversions is excessive as not all cross-border transactions might threaten public interests protected in the Member States.[75] The Member States need to consider the actual risks that a cross-border conversion may induce and if it is possible to adopt less restrictive measures.[76]

Taking everything into account, the conclusion can be made, that for a long time, the procedure was almost unattainable, existing options were very limited and required significant economic infusion. The need for a consolidated codified act that will set up a standardized process was very substantial.

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[70] Federico M. Mucciarelli, "Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited", European Business Organization Law Review 9, (2008), pp. 297 – 298, accessed on 21/03/2020, https://www.researchgate.net/publication/40867814_Company_'Emigration'_and_EC_Freedom_of_Establishment_Daily_Mail_Revisited.
[71] *Ibid.*, at 42 para 51.
[72] See footnote 1, art. 52(1).
[73] "Judgment of the Court (Third Chamber) of 12 July 2012, VALE Építési kft., Case C-378/10", (para 39), accessed on 21/03/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0378.
[74] *Ibid.*, at 42 para 56.
[75] See footnote 73 para 40.
[76] *Ibid.*, at 42 para 58.

1.2. Reviewing the Newly Adopted Directive 2019/2121

Recently adopted Directive as regards cross-border conversions, mergers and divisions[77] amended Directive (EU) 2017/1132[78] and made the very modifications that were so much needed and desirable for the EU Company Law. It brought in important changes, the most crucial and significant for this research, are regarding the cross-border conversions.

Under the new regime, limited liability companies, to which Directive applies exclusively, would efficiently be able to move between EU Member States. It immediately raises a question regarding the scope of this Directive. It is not clear why the EU legislators have limited the range of businesses that will have the right to transfer their enterprise across the borders within the EU this way. After all, the TFEU[79], in its regulation on freedom of establishment, also covers other forms of companies. Likewise, the decision in the *Cartesio* case[80], where the subject of economic activity was a limited partnership, was not considered.

The procedure includes converting from a legal form in one Member State into the closest equivalent in another, transferring registered office in the process. Robert Boyle and Dominic Sedghi in their work reminding that the Directive does not apply to companies that are subject to insolvency or liquidation proceedings, crisis prevention measures, as well as to cross-border conversions of a company which object is a collectively invest capital provided by the public.[81]

Since this is a European directive, its provisions are not directly applicable and it is up to the Member States to implement the Directive into national law. The Member States must do so by 31 January 2023.

To this point, cross-border conversions could be achieved through different ways, alike cross-border mergers, subsidiaries or by setting up a holding company. However, the paper "New EU cross-border mergers, divisions and conversions regimes" pointed out that these methods did not maintain the continuity of the original undertaking or change the place of its registration.[82]

The Directive provides for a unified procedure for the three types of cross-border transactions, nevertheless, some specific procedural requirements have to be clarified by implementation domestic legislation, for what the Member States have thirty-six months.

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[77] See footnote 2.
[78] *Ibid.*, at 39.
[79] See footnote 1.
[80] "Judgment of the Court (Grand Chamber) of 16 December 2008, CARTESIO Oktató és Szolgáltató bt, Case C-210/06", ECR I-9641, accessed on 21/03/2020, http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0210&lang1=en&type=TXT&ancre=.
[81] Robert Boyle, Dominic Sedghi, "New EU cross-border mergers, divisions and conversions regimes", *Corporate Law Update*, Macfarlanes, (2019), accessed on 22/03/2020 https://www.macfarlanes.com/what-we-think/in-depth/2019/corporate-law-update-14-20-december-2019/.
[82] *Ibid.*

Considering this becomes clear that the procedures will require comprehensive consultations with related jurisdictions and review by the authorities involved.

The proceedings relevant for cross-border conversions involve almost the same actions and information prerequisites as in the case for cross-border mergers. Specifically, as it is envisaged in the text of the Directive, these are the publication of the draft terms of the considered process, issuance of a report of the administrative or management body for the shareholders and employees, issuance of an independent expert report, approval by the general meeting and obtaining of a certificate from a competent authority confirming compliance with legal obligations.[83]

The first step is preparing the draft terms for the cross-border transaction by the administrative or management board of the converting company. Scholars underline that it has been set a time frame of minimum six weeks prior to the general meeting in which a decision concerning the cross-border conversion is to be adopted when the draft terms should be provided to all involved members of the company electronically.[84] Provided time and form of the notification is aimed to make sure that the stakeholders had the possibility to reach out to such draft terms and managed to study them.

Besides, the draft terms should contain the security measures, such as guarantees or pledges, offered by the undertakings to their creditors. However, for those creditors, who are unsatisfied with suggested assurances, Directive provides the possibility to apply for more corresponding safeguards to the administrative or judicial authority within three months after the publication of the draft terms.[85]

Afterward, by the Directive, it is requisite to prepare a two-part report or two individual ones that will clarify and justify the legal and economic facets of the procedure of the cross-border conversion for members and employees.[86] For the members, it will consist of the consequences of the conversion for them, the explanation of the cash compensation, the share exchange ratio, and the measures available if they wish to dispute it. As for the employees, it will explain the outcomes of the cross-border conversion for their employment agreements, any substantial changes to the labor conditions or location of the company's place of business, and how it will affect the subsidiaries if any.[87] It is determined by the fact that the Labor Law is connected with the place of performance of work. Though, according to Johanna Storz, hinge upon the arrangements in the

[83] *Ibid.*, at 2.
[84] "More (and more unified) corporate restructuring options available in the EU!", *Deloitte*, (2019), accessed on 23/03/2020 https://www2.deloitte.com/nl/nl/pages/legal/articles/more-corporate-restructuring-options-available-eu.html.
[85] See footnote 2 art. 86j.
[86] *Ibid.*, at 2 art. 86e.
[87] See mote at art. 86 of the Directive 2019/2121.

targeted Member State, employee participation rights, following the cross-border operation, may increase.[88]

The report prepared for members can be waived by the agreement of all members. The one for employees has not required if all employees are part of the management or administrative board of the company and its subsidiaries.[89] The report also should be made available electronically to the parties concerned or their representatives at least six weeks prior to the general meeting.

Since the Directive does not provide the standardized forms for the required documentation in one common language, the problem of communication between the company wishing to move its seat cross-border and the competent authorities of the destination Member State, if they have different national languages, could appear.

To require the additional information in the draft terms concerning the relevant operation and, in the report of the administrative or management body of the company for its members and employees about the influence of the presented operation on these persons, runs counter to the existing rules relating to cross-border mergers. Yet, as scholars interpret, it gives the opportunity for shareholders and employees to present their remarks to the general meeting that taking the decision relating to the operation of the cross-border relocation of the company.[90]

The next stage is the inspection of the draft terms of the cross-border conversion and preparing a report by an independent expert who will also draw it up for the members. As explained at the article "More (and more unified) corporate restructuring options available in the EU!", the report should include the expert's opinion on evaluating the amount of compensation.[91] Nevertheless, if all the members will agree upon, the expert's report is not required. If required, it should be made available to the members at least one month prior to the general meeting.[92]

Following the expert report, the disclosure and publication in the register of the departure EU Member State happening. The legislative act provides that the information to be disclosed is the draft terms of the procedure of the cross-border conversion and notice informing the members, creditors and employees or their representatives, that they may submit their feedback on the draft terms at least five working days before the date of the general meeting.[93]

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[88] Johanna Storz, "EU Company Law Package: cross-border mobility for companies", *Pinsent Masons*, (2020), accessed on 23/03/2020 https://www.pinsentmasons.com/out-law/analysis/eu-company-law-package-cross-border-mobility.
[89] *Ibid.*
[90] Bonn Steichen & Partners, "Directive (EU) 2019-2121 on Cross-Border Conversions, Mergers and Demergers", *lexgo.lu*, (2020), accessed on 24/03/2020 https://www.lexgo.lu/en/papers/commercial-company-law/corporate-law/directive-eu-2019-2121-on-cross-border-conversions-mergers-and-demergers,134096.html.
[91] See footnote 84.
[92] *Ibid.*, at 2.
[93] *Ibid.*, at 2 art. 86g.

Member States can also require publishing of the financial statements reflecting the current fiscal situation of the company. If required, the administrative or management board should provide it no earlier than one month before the disclosure of that declaration together with the draft terms and notice. [94]

It is necessary to submit the additional information to the register of the departure EU Member State. As the legislators states, it must include information about the legal form, name, location of the company, details of the website where the draft terms and notice can be found, pointing at the arrangements for creditors, employees and members. [95]

Member states may demand to disclose expert's report and made it publicly available. The disclosure has a time frame as well and should take place not later than one month before the general meeting during which a resolution about the cross-border conversion of the company is to be adopted. Moreover, it may be required to publish it in the national gazette or via the central electronic platform.[96]

Exchange of the data and communication between company registrars in the Member States should be carried out solely via the pan European Business Register Interconnection System (BRIS).[97] This system created a more business-friendly environment, which provides transparency in the financial market. It gave the possibility to the public, whether it is a person, business or government, to get access to the trustworthy information on companies established within the Member States.

The decision on the cross-border conversion of the company is considering and may be adopted during the general meeting. The Directive gives a clear framework concerning the majority required for a resolution to enter a cross-border procedure. It should be not less than two-thirds or not more than ninety percent of the votes attaching to the shares represented at the general meeting.[98]

If shareholders vote against the approval of the common draft terms of the cross-border conversion, they should be notified about the acquired right to dispose of their shares for appropriate compensation together with their right to appeal to the court if they disagree with the ratio of the share exchange.[99]

Thereafter, the designated competent authority, within three months after receiving the documentation about the approval of the cross-border conversion by the general meeting, shall

[94] See footnote 2 art. 86j.
[95] *Ibid.*, at 84.
[96] *Ibid.*
[97] *Ibid.*, at 88.
[98] See footnote 2, art. 86h.
[99] *Ibid.*, at 90.

issue a pre-transaction certificate.[100] The certificate should verify that the cross-border operation complies with the applicable conditions and that all necessary procedures have been fulfilled. According to the scholars, the deadline may be prolonged by a maximum of three additional months in the case where further investigation is needed to assure that the transaction is not made for abusive or fraudulent reasons.[101] This describes the case when it is suspected that the operation of transferring a company to another Member State has been initiated only to avoid the responsibility for its non-legal actions in its home Member State, the subsequent investigation should reveal this.

In addition, the designated to issue a pre-transaction certificate competent authority, declaring that the company meets the provisions of national law on the establishment and registration of companies, has been defined. This certificate can only be released after the issuance of the pre-transaction certificate in the departure Member State.[102]

The converted undertaking should be registered in the destination Member State register. Notice on this action should be sent to the register of the departure Member State.[103] It is up to the laws of the destination Member State to determine when the cross-border conversion enters into force. Under the text of the Directive, it cannot be the date before the issue of the pre-transaction certificates.[104]

One of the controversial changes introduced by the new Directive is that control of the cross-border conversion by the authority of the company's country of origin is enlarged. Before, according to Segismundo Alvarez, Member States assigned a national authority that would monitor the proper execution of the procedures in the departure Member State. If the operation was executed properly, it would issue a certificate that would be evidence of compliance for the destination Member State.[105] Hence, the full powers of the authority of this State were limited to compliance verification of the establishment and registration of the new company under its national law.

Although this system remains, under the new Directive, the control of the Member State of origin will be outside of just formal compliance. It will include " […] the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies or compliance with specific sectoral requirements, including securing obligations arising from ongoing proceedings".[106] As the

[100] *Ibid.*, at 2.
[101] *Ibid.*, at 2 art. 86m.
[102] *Ibid.*
[103] See footnote 84.
[104] *Ibid.*, at 2.
[105] Segismundo Alvarez, "The cross border operations Directive: wider scope but more restrictions", *European Law Blog*, (2019), accessed on 24/03/2020 https://europeanlawblog.eu/2019/07/10/the-cross-border-operations-directive-wider-scope-but-more-restrictions/.
[106] See footnote 2 art. 86m.

author of the article "The cross border operations Directive: wider scope but more restrictions" states, this may lead to an elongate or suspension of the procedure since there will be a need for the authority to consult other national public officials to receive information about such requirements and proceedings. Relatively, the new Directive prolongs the duration for issuing the pre-transaction certificate from one to three months.[107]

When a cross-border operation is registered and takes effect, it cannot be declared null and void after. As stated by the Directive, Member states may only enforce sanctions in a case of serious abuses.[108]

"As a consequence of the cross-border conversion, the company resulting from the conversion (the 'converted company') should retain its legal personality, its assets, and liabilities, and all its rights and obligations, including any rights and obligations arising from contracts, acts or omissions. In particular, the converted company should respect any rights and obligations arising from contracts of employment or from employment relationships, including any collective agreements".[109]

Analyzing the text of the newly adopted Directive, it was noticed that it does not envisage the provision related to the opposition to the cross-border transfer of the company's seat on the basis of the of public interest as it is stating in the article 52(1) of the TFEU[110]. It could be a reasonable provision with the instructions on what is included in this term, and which Member States' national competent authority could be entitled to oppose the cross-border operation on such ground.

In summation, it would be the right conclusion, that the Directive set outs a rather uniform, comprehensive, and legitimate process for the operations of the cross-border conversion of companies. It simplifies and speeds up the procedure, by waiving reports for members and employees in certain circumstances, and reduces costs, incurred by companies.

The new provisions of the Directive aim, in particular, at coordinating the precautionary measures and safeguards to be provided, as well as the information to be disclosed to shareholders and third parties in order to make their protection equivalent at the EU level.

With the adoption of the new Directive, the situation became apparent on many matters, the action plan for enterprises that want to convert itself in another state is now clearly and explicitly stated, but controversial points still exist, e.g. very narrow scope of application that bound only to the limited liability companies, despite that in the TFEU provision on freedom of

[107] See footnote 105.
[108] *Ibid.*, at 2 art. 86t.
[109] *Ibid.*, at 2 (47).
[110] *Ibid.*, at 1.

establishment, the CJEU practice and in some Member States' legislation the types of businesses to which the regulations on cross-border seat transfer can apply much wider.

2. PRACTICAL SIGNIFICANCE OF THE 'CROSS-BORDER CONVERSION OF COMPANIES' CONCEPT APPLICATION

The following part, on a large scale, is designated to the examination of the procedures for conducting the cross-border transfers of the registered office at the national levels, and to the analysis of the real cases, when the company wanted to transfer its registered office cross-border. Notwithstanding, the following consideration of CJEU's rulings will show how debatable the concept is, that even the EU authority could not come to the common treatment in this respect.

The succeeding analysis is important in order to provide a solid overview of how cross-border transfers of the registered office are currently conducted within the European Union and to what extent the stakeholders of such companies are protected in those seat transfers.

With a view to understand better the practical implementation of the cross-border transfer of companies' seats, to draw the comparative analysis, as well as to analyze its interpretation, the following part of the present research is established.

The second chapter mainly highlighting the practical application of the concept of the cross-border conversion of companies. Within its subchapters, the Member State's attitude towards the regulation of this phenomenon and its national procedures, as well as the CJEU's fundamental precedents concerning it, are considered.

2.1. Comparative Analysis of the Member States' Legislation on the Presented Concept

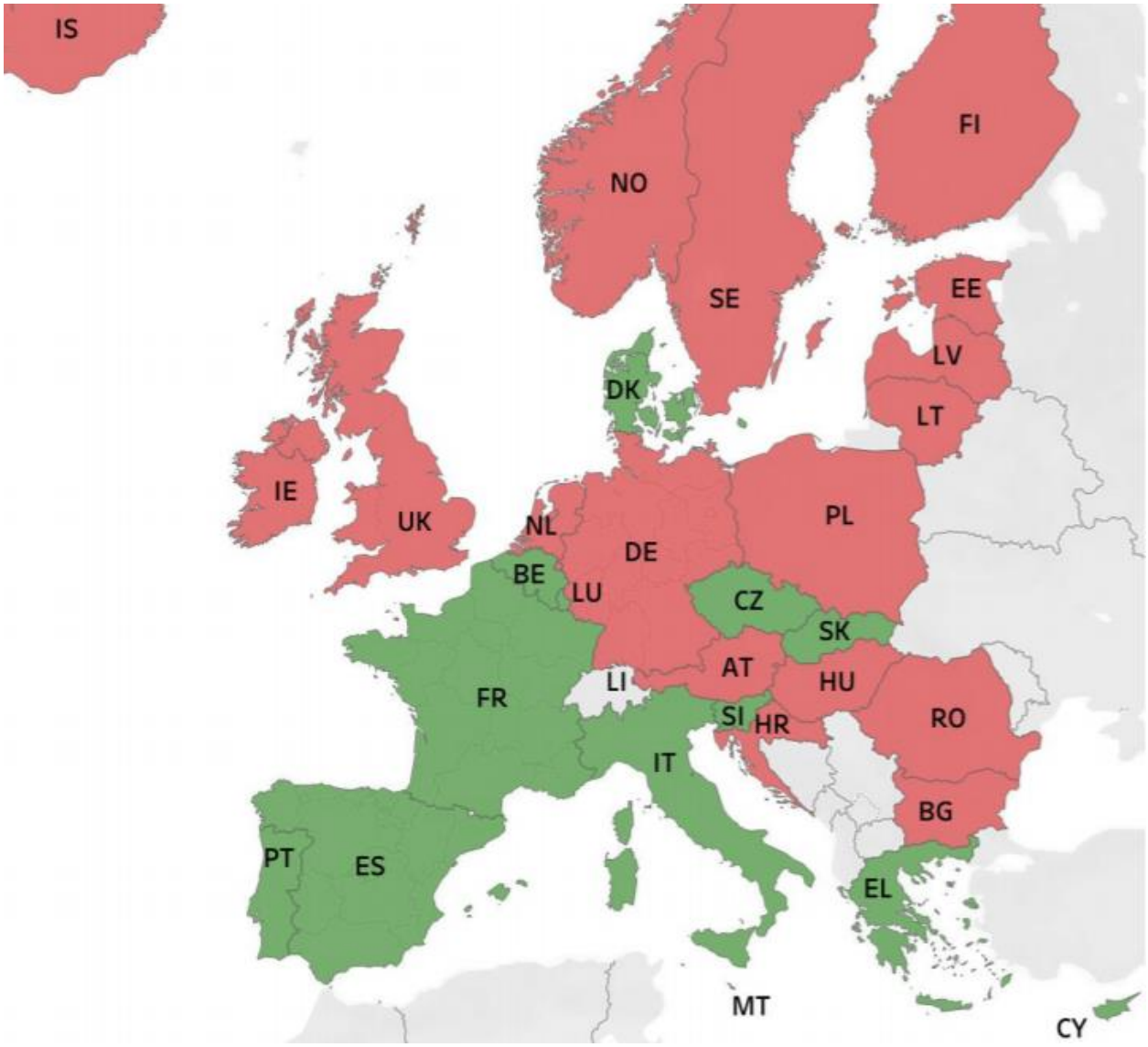
The freedom of movement for companies is required by the international economy, but national legislators often resist integration due to a lack of confidence in foreign companies and doubts about their compliance with national standards. The reason for such distrust lies in the difference between the corporate law of the Member States and the assumption that foreign corporate law protects the interests of the company's creditors, employees or participants worse.

Over the past years, many Member States have adopted legislation to assist cross-border transfers of corporate seats and make it easier whilst other Member States do not provide for specific provisions on the cross-border transfer of a company's registered office (see Scheme 1).

So far, while Member States have not yet brought their national laws in line with the newest EC's Directive[111], they rely on their national legislation, the provisions of which should be considered.

[111] *Ibid.,* at 2.

Scheme 1. Overview of the EU Member States, which provide for cross-border seat transfer on the basis of national law (green) and the EU Member States that do not allow cross-border seat transfers (red)



Source: "Cross-border Corporate Mobility in the EU" Empirical Findings 2019 (vol. II) [112]

" […] Overall, countries do not regulate the transfer of the central administration of a company, but rather the transfer of the registered office".[113] That means that if the transfer of the registered office is possible, specific procedural requirements have to be fulfilled. In states that

[112] Scheme 1. Overview of the EU Member States, which provide for cross-border seat transfer on the basis of national law (green) and the EU Member States that do not allow cross-border seat transfers (red) – extract from Thomas Biermeyer, Marcus Meyer, "Cross-border Corporate Mobility in the EU" Empirical Findings 2019 (VOL. II), *Maastricht University*, (2019), p. 5, accessed on 25/03/2020 https://poseidon01.ssrn.com/delivery.php?ID=592098125026006083115083107074125025031062030036027094096098115077110112023126124022002118044037105004117021030002028116113113026048010030044101014071014089064021103034086015093093072067102084027115117097000125005119098003067111022098015068104031069025&EXT=pdf.

[113] Thomas Biermeyer, "Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (WLP, 2015), p. 3, accessed on 25/03/2020 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105&download=yes.

follow the incorporation theory, the registered office identifies the applicable law and, therefore, a transfer of this seat leads to an alteration in the applicable law, and thus might require regulation.[114]

2.1.1. Member States Following the 'Incorporation' Theory

The main idea of the incorporation theory is that a company created in one Member State should be recognized by the other states even if its actual location is situated outside the state of incorporation.[115] Therefore, when transferring the actual location, the company should not be afraid of the loss of legal capacity. This provides companies with sufficient mobility, which has been the goal of incorporation theory from the very beginning.

Reviewing the Member States, which do provide for the cross-border seat transfer, and apply the 'incorporation' theory, consideration worth starting with **the Kingdom of Belgium**.

According to the new Belgian Code on Companies and Associations[116], lately, it was decided to change the real seat theory into the statutory seat theory. This principle has a direct impact on the nationality of the company and the applicable law.[117]

Following the case law of the ECJ on corporate mobility, the real seat theory came to pressurize as the principle on the freedom of establishment always applies to companies set up within the EU Member States, regardless of the attachment to the place where their economic activity takes place.[118] Consequently, non-domestic companies must be dealt with in the same way and benefit the same rights as domestic companies, with the result that all companies incorporated in the EU Member States must be able to immigrate to another EU Member State.

The implementation of the statutory seat theory implies that only the company's country of residence designated in its articles of association determines the nationality of a company.[119] This allows undertakings to evolve their business abroad while saving its legal personality and operating of the bodies, irrespective of the economical bond between the non-domestic company and the host state.

The adoption of the new theory has direct consequences for the applicable law, which governs all aspects of company legislation. Nonetheless, there is no impact on other legal fields

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[114] *Ibid.*
[115] *Ibid.*, at 59.
[116] Code des sociétés et des associations, (Code of companies and associations), (2019), accessed on 25/03/2020 https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2019032309&table_name=loi.
[117] Laura Dermine, Peter Suykens, Ann-Sophie Haghedooren, "From the real seat theory to the statutory seat theory: important implications for your company", *EY Law*, (2019), accessed on 25/03/2020 https://www.eylaw.be/2019/12/17/from-the-real-seat-theory-to-the-statutory-seat-theory-important-implications-for-your-company/.
[118] *Ibid.*
[119] *Ibid.*

such as tax law, insolvency law, and labor law, which have their own connecting factors. The Belgian accounting law is no longer relevant to companies that have their registered office abroad, whereas developing their economic activities in Belgium. Notwithstanding, foreign companies with a branch in Belgium are still in need to draft yearly accounts pursuant to the law of the country under which the company is established. Albeit there is no duty to publish these yearly statements, undertakings have to file them to the National Bank of Belgium.[120]

The following matters may take place and influence the nationality of a company in the Benelux[121]. First of all, companies with their real seat in Belgium, but incorporated under Dutch law, had a dual nationality until the end of April 2019 in light of the fact that The Netherlands complies with the statutory seat principle and Belgium the real seat doctrine.[122] Despite, the change from the real seat theory to the statutory seat theory, changed the situation. These companies were deprived the Belgian nationality. According to the article "From the real seat theory to the statutory seat theory: important implications for your company", if the undertaking wishes to reobtain the Belgian nationality, it should either move the statutory seat to Belgium by applying the cross-border conversion procedure in Belgium and the Netherlands or deregister the company with the commercial court and open a branch in Belgium.[123]

The second scenario is, as Luxembourg applies the real seat doctrine, companies with their statutory seat in Luxembourg and their real seat in Belgium previously had the Belgian nationality.[124] With the change to the statutory seat doctrine, these undertakings have lost their Belgian nationality as well but obtained the Luxembourg nationality alternatively. That happened due to the fact that Luxemburg complies with the real seat theory but recognizes the statutory seat as an alternative connecting element to acquire the nationality of Luxembourg. As Laura Dermine, Peter Suykens and Ann-Sophie Haghedooren highlight, this change of nationality can be adjusted in the same way as in the first scenario. In case the Member State does not accept the statutory seat doctrine as an alternative connecting factor, the Belgian company would become stateless.[125]

In the third variant, until 2019, companies with their real seat in Luxembourg and their statutory seat in Belgium possessed the Luxembourg nationality. Currently, such companies

[120] *Ibid.*
[121] Benelux is a politico-economic union and formal international intergovernmental cooperation of three neighboring states in Western Europe: Belgium, the Netherlands, and Luxembourg. "Traité instituant l'Union Economique Benelux", ("Treaty establishing the Benelux Economic Union"), (1958), accessed on 26/03/2020 https://www.perseus-web.fr/nar6/uploads/trt-beu.pdf.
[122] See footnote 117.
[123] *Ibid.*
[124] *Ibid.*
[125] See footnote 117.

acquired dual nationality. Consequently, these companies must obey the law of both countries, which is longer and more expensive.[126]

With the adoption of a new Belgian Code on Companies and Associations[127], the legislator ultimately implemented a specific procedure for the cross-border conversion of companies with a view to guarantee the continuity of the company's legal personality and to stimulate the emigration and immigration according to the principle of freedom of establishment.[128] The procedure of the cross-border conversion can also be applied outside the European Union, as long as the host state approves it.

When a Belgian company wants to transfer itself to another Member State, its legal form needs to be adjusted to the foreign law requirements. Such an enterprise, as the article "Restructurings under the new Belgian Code on Companies and Associations" notes, should prepare a report, indicating the reasons and the consequences of the conversion. Then, the independent auditor preparing its report on the financial statements of the given company. Later, an extraordinary shareholders' meeting is gathering in front of a Belgian notary to decide on a transfer operation. When the company will be registered in a foreign register, it will be erased from the Crossroads Bank of Enterprises.[129]

When a foreign undertaking wants to convert itself to Belgium, its legal form is also needed to be adjusted to the Belgian law requirements. According to the scholars, as the first thing to do, the company in the process of the conversion has to demonstrate to the Belgian notary that the legal requirements for the transfer have been executed by a legal act provided by the law and to present latter financial statements. On the ground of these deeds, the Belgian notary will amend the provisions of the statute of the company, if needed to conform it to the Belgian law standards. The undertaking converting itself to Belgium has to be registered with the Crossroads Bank for Enterprises.[130]

Considering the given procedure, it could be concluded that the current Belgium legislation is properly managed for the operation of the cross-border conversion of companies. The provisions of the Belgian Code on Companies and Associations comply with the text of the newly adopted Directive 2019/2121.[131] There are some differences in the envisaged by the Belgium legislation procedure for the transboundary transfer, but the reason behind this is that the procedure is sharpened for use exclusively in Belgium, taking into account its specifics. Thus, not many

[126] *Ibid.*
[127] See footnote 116.
[128] *Ibid.*, at 117.
[129] Osborne Clarke, "Restructurings under the new Belgian Code on Companies and Associations", (2018), accessed on 26/03/2020 https://www.osborneclarke.com/insights/restructurings-new-belgian-code-companies-associations/.
[130] *Ibid.*
[131] See footnote 2.

legislative amendments separate Belgium from bringing its national legislation in line with the abovementioned Directive as regards cross-border conversions, mergers and divisions.

The next country for the analysis is **the Republic of Cyprus**. In Cyprus, the transfer of the registered office is regulated by the Cyprus Companies Law[132]. The company seat transfer must be approved by a special resolution of the shareholders, which needs to be submitted to the commercial register.[133]

Furthermore, at least two directors of the company, empowered by the board of directors or by the sole director, if the board of directors consists of a single director, have to submit a statement to the registry on such information: "the name of the company, under which it wishes to be registered in the approved country or jurisdiction; the place of the proposed registration of the company and the name and address of the competent authority in the approved country or jurisdiction; the date on which it is proposed to establish the head office of the company in the particular approved country or jurisdiction".[134]

Moreover, the subsequent provisions also have to be executed before the registrar will give his consent. Primary, the registrar has to receive specific documents, including:

– the special shareholder decision authorizing the seat transfer;

– interim statements;

– a declaration confirming the solvency of the company, which states that the directors are not informed of any conditions that could influence in a negative way to the solvency of the undertaking within three years;

– if the company pursues activities in Cyprus that require a license, a document has to be submitted showing the competent authority's approval;

– if the company has listed shares, a document showing the consent of the Cyprus Stock Exchange Commission.[135]

Besides, the company should pay all fees and complete all the procedures as regards the company's business under Cypriot law.[136]

Separately from these submissions to the registry, the company is needed to publish a notice of the special resolution on the transfer of the registered office in two daily gazettes. The evidence that this obligation has been fulfilled must be filed with the registrar. In the duration of

[132] "The Companies Law", (English translation and consolidation), cap. 113, section 354, (2011), accessed on 26/03/2020 http://www.olc.gov.cy/olc/olc.nsf/EC0C1AB1891A727AC22584820022984A/$file/The%20Companies%20Law.pdf.
[133] *Ibid.*, at 113
[134] See footnote 132, sect. 354K.
[135] *Ibid.*, at sect. 354L.
[136] See footnote 132, sect. 354L(e).

three months of the publication of the notice, creditors can oppose the seat transfer. A court then still can permit the transfer on the basis of special conditions.[137]

The final phase, due to the experts, is characterized by the fact, that if the registrar is gratified with the application and the supporting documentation, it shall issue a certificate stating that the foreign company is temporarily registered as a continuing legal entity in Cyprus.[138] The registrar can only gratify the temporary certificate to give the company needed time to finish their business in the home state and to receive the deed verified that given company is no more registered in this Member State. The article "Re-Domicilation of Companies to Cyprus" provides that within a period of six months after the issuing of the temporarily certificate, the foreign undertaking should submit to the registrar fair documentation attesting that the company is no longer registered in the state where it has been originally set up. Then, if the Cypriot registrar is satisfied, it will issue the Certificate of Continuation, proving that the company has been registered in Cyprus as a continuing company in accordance with the provisions of the Cyprus Company Law.[139] Besides, the registration of a foreign company in Cyprus can and will be considered as void and illegal if it is done with the purpose to prejudice the continuation as a legal entity of the said company.[140]

The Cypriot legislation made a significant effort to regulate the procedure of the cross-border conversion of companies. Its provisions do not go against the Directive 2019/2121[141], however, the Cypriot lawyers think that three years period will not be enough for the Republic of Cyprus not only to transfer the Directive in their national law but also to amend the bureaucratic process in order to apply to cross-border conversions.[142]

The following state for the consideration – **The Czech Republic**. On 1 January 2012, the Amendment to the Act on Transformations[143] came into force. In addendum to the major changes connected to all types of transformations, the Amendment also introduced seat transfer within the EU out of and into the Czech Republic.

“This instrument was introduced into Czech law on the basis of the *Cartesio* case[144], where the ECJ deduced the possibility of seat transfer within the EU. Such an initiative on the part

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[137] See footnote 132, sect. 354M.
[138] "Re-Domicilation of Companies to Cyprus", *Chryssafinis & Polyviou*, (2015), accessed on 27/03/2020 http://www.cplaw.com.cy/publications/re-domicilation-of-companies-to-cyprus.
[139] *Ibid.*
[140] *Ibid.*
[141] See footnote 2.
[142] "Directive(EU) 2019/2121 came into force on 1st of January 2020", *Pyrgou Vakis*, (2020), accessed on 27/03/2020 https://www.pyrgouvakis.com/index.php/en/latest-news/246-directive-eu-2019-2121-came-into-force-on-1st-of-january-2020.
[143] "Zákon o přeměnách obchodních společností a družstev", ("Act on the transformation of companies and cooperatives"), (last amended on 2016), accessed on 27/03/2020 https://www.epi.sk/zzcr/2008-125.
[144] See footnote 80.

of the Czech legislator is surprising, considering that it often has difficulties with mandatory transposition of directives".[145]

As regards outbound transfers of the registered office, the Act states that a limited liability company or cooperative can transfer its seat to another EU Member State without liquidation and creating a new legal entity. After the transfer of the seat, the inner affairs and the legal form of the company will yet be governed by Czech law unless otherwise provided.[146] Nonetheless, the Act stipulates that the undertaking moving its registered office may convert it into the legal form of another Member State if this is not forbidden by the laws of that other state.[147]

If the company is under the observation of an administrative authority or the National bank, the conversion of the registered office possible only with the grant of the supervising authority.[148] Moreover, seat transfers are not possible if the company is subject to liquidation or insolvency proceedings.[149]

For completing the outbound transfer procedure, the company needs to perform several steps.

Firstly, the management or administrative body of the company is required to prepare a seat transfer proposal, which should contain basic information, in the form of a notary act.[150] Besides, the proposal should disclose data about the outcomes of such a transfer on employee rights, the rights of shareholders, creditors, and other authorized persons. Also, the schedule of the transfer and information on the law applicable to the company's internal affairs after the cross-border transfer of the registered office should be mentioned.[151]

Next, the proposal has to be submitted to the corresponding commercial register one month prior to the General Meeting on which the decision on the cross-border transfer of the registered office has to be made.[152] At the same time, the company has to publish a notification of this submission along with a note on the rights of creditors in the Czech Commercial Bulletin.[153] As an alternative, the company can also publish the proposal and the creditor notification on the company's website free of charge. In this case, the company is required to place the documents online not later than one month prior to the General Meeting and has to forsake it there for a further two months.[154]

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[145] Miroslav Pokorný, Helena Chadimová, "Czech Republic: New Ways of Cross-Border Transfer of Company Seat", *Schoenherr*, (2013), accessed on 27/03/2020 http://roadmap2013.schoenherr.eu/new-ways-for-cross-border-transfer/.
[146] See footnote 143, § 384f (1).
[147] *Ibid.*
[148] See footnote 143, § 384h.
[149] *Ibid.*, § 384j.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*, at 113.
[153] *Ibid.*
[154] *Ibid.*

After that, it is required that the administrative or management organ of the company prepare a written report explaining certain aspects of the transfer.[155] The Act sets certain minimum requirements for the content. According to Thomas Biermeyer, the report has to contain information on expert assessment and the consequences of the transfer for the shareholders. The report also has to address the position of creditors after the transfer, especially in terms of the capacity to recover their claims and the potential impact on employees.[156] The management report has to be made available at the registered office of the company at least one month before the General Meeting unless the report is made available on the website of the company.[157]

Depending on the type of company, the Act stipulates different approval procedures for the transfer of the registered office.

For private limited liability companies, a cross-border transfer of the registered office has to be approved by a minimum of three-quarters of the shareholders' votes, present at the General Meeting. The decision by the shareholders has to take the form of a notarial act to which the proposal is affixed as an annex.[158]

For public limited liability companies, the cross-border transfer requires a three-quarter majority of the shareholders to be present at the General Meeting. If various classes of shares exist, consent by a three-quarters majority vote of the shareholders of each type of shares is needful. The decision of the General Meeting is required to take the form of a notarial act to which the transfer proposal is attached as an annex.[159]

The shareholders at the General Meeting also have to approve the financial statements prepare as of the date of the performance of the cross-border transfer of the registered office.[160]

After the shareholders' approbation and before the company can transfer its registered office to another state, a notary has to examine whether all the legal requirements have been fulfilled and issue a transfer certificate.[161]

The company can be registered in the commercial register of the host state only after the transfer certificate has been issued. Besides, registration can only take place 30 days after approval by the General Meeting.[162]

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[155] See footnote 113.
[156] *Ibid.*
[157] See footnote 143, § 26(4).
[158] See footnote 113.
[159] *Ibid.*
[160] See footnote 143, § 365.
[161] See footnote 143, § 384l.
[162] *Ibid.*, § 384n.

A second certificate is issued for the removal of the company from the Czech commercial register. The notary can only issue the certificate if the deed showing registration in the other state, not older than 6 months.[163]

The transfer of seats into the Czech Republic is subject to several conditions. The transfer must be possible under the law of the state in which the undertaking resides at the moment. The foreign legal entity must also change its legal form into the one under Czech law, and the internal legal relations of the company must be covered by Czech law. Besides, it is required that the company not be a subject of liquidation or insolvency proceedings.[164]

Even though the text of the provisions concerning the cross-border transfer of seat in the Czech Republic is very similar to the provisions of the newly adopted Directive[165], the meaningful difference concerns the scope of application. As it was already mentioned, the Directive 2019/2121 applies exclusively to the limited liability companies, when the legislative act of the Czech Republic applies to the cooperatives as well. Thus, despite the exceptional scope of the Directive, after the transmission of its provisions, the Czech Republic will continue to apply the legal regulations to the cooperatives likewise.

To continue the research, the cross-border transfer of seats of **the Kingdom of Denmark** will be assessed. Denmark presented legislation on the transfer of the registered office in 2014. It is based on the Cross-Border Merger Directive[166] and on bringing the Danish legislation in line with the case law on *Cartesio*[167] and *Vale*[168].

According to the Danish Company Act[169], the management board of the company has to prepare and undersign a transfer proposal that contains the information on the company form, the name, and the location of its registered office; the draft statutes of the company after the transfer of the registered office; the proposed schedule for the transfer, including the impact on accounting; the rights of shareholders; special advantages granted to the board members; the potential impact on the employees.[170]

The management board of the company has to prepare a written statement in which the transfer proposal is to interpret and justified. The statement must take into account the consequences of the transfer for the company's shareholders, creditors, and employees.[171] Four

[163] *Ibid.*, § 384m.
[164] See footnote 145.
[165] See footnote 2.
[166] *Ibid.*, at 38.
[167] *Ibid.*, at 80.
[168] See footnote 73.
[169] "Danish Act on Public and Private Limited Companies (the Danish Companies Act)", (2010), accessed on 28/03/2020 https://danishbusinessauthority.dk/sites/default/files/danish_companies_act.pdf.
[170] *Ibid.*, § 318b.
[171] *Ibid.*, § 318c.

weeks before the decision on the cross-border transfer, employees or their representatives must be allowed to examine this statement.[172]

A couple of independent experts have to prepare an evaluation of whether the creditors are fairly secured after the transfer of the registered office compared to the situation before the operation. Though, the shareholders can decide not to create such a report.[173]

During four weeks after the management board's signature of the proposal, the Danish Economy and Business Office must have received a copy of this transfer proposal. If the time limit has not followed, it will not be published, which means that the transfer of the registered office cannot be conduct.[174]

The statement of the independent experts also has to be submitted to the Danish authority, which will publish both of the documents in its online system. If the creditors have a right to file claims, the authority will include this in their promulgation.[175]

Four weeks after the Danish authority has published the transfer proposal, it can be decided to execute the cross-border seat transfer. The seat transfer has to be carried out in line with the transfer proposal, or, if it is not, the proposal is considered to be null and void.[176]

The decision to execute the cross-border transfer of the registered office has to be taken by a two-thirds majority.[177]

The competent authority has to confirm that all the needed actions and formalities for the procedure of the seat transfer are fulfilled and promptly issue a certificate. The Danish authority will register the operation right after it has received a notice from the authorized authority of the host Member State that the company has been registered there.[178]

The creditors can file a claim within four weeks of the publication of the seat transfer proposal if the independent experts find in their report that the creditors' position is not fairly secured, or creditors whose claims originate from before the publication of the seat transfer proposal.[179]

Shareholders of the company who is going to transfer its seat can request ransom of their shares within four weeks after the General Meeting.[180]

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[172] *Ibid.*, § 318g.
[173] *Ibid.*, § 318d.
[174] See footnote 113.
[175] *Ibid.*
[176] *Ibid.*
[177] See footnote 169, § 106.
[178] *Ibid.*, § 318m.
[179] *Ibid.*, § 318e.
[180] *Ibid.*, § 318k.

As for the employees' rights, under Danish law, a cross-border seat transfer can only take place if their rights will be protected in the host Member State.[181]

Danish legislation provides that a company established in another Member State can perform a cross-border transfer of the registered office to Denmark if the competent authority from the home State of the company issues a certificate confirming that all actions and formalities imposed by the company law of Denmark have been fulfilled. The Danish authority will then register the company and inform the foreign competent authority about the registration.[182]

A cross-border transfer of the registered office to Denmark shall take effect on the day the Commercial Agency registers it.[183]

Denmark has its well-established rules in regard to the cross-border conversion, the point and the legal procedure of which complies with the text of the Directive 2019/2121[184], therefore, it would not be burdensome to bring their legislation in line with the newly adopted Directive.

As regards such Member State as **the Italian Republic**, their law provides no specific regulation on the cross-border transfer of company seats, but the possibility to perform it exists.

As claimed in the Italian Civil Code[185], it is necessary to have a qualified majority supporting a transfer of the registered office at the shareholder meeting. Besides, shareholders who did not participate in the decision making, have a right to withdraw. [186] Law 218/1995[187] provides that the transfer of a company registered office to another State is efficient solely if implemented in accordance with the laws of the interested States. The company will be erased from the registry once the company has successfully performed the conversion as provided in the law of the host Member State.[188]

The peculiarity of the Italian Law is that under the aforementioned legal act if the undertaking only transfers its registered office to a different Member State, the company remains a subject to Italian law.[189]

To carry out a prosperous transfer of the registered office to Italy, the incoming company should respect Italian substantial and procedural rules. A number of requirements have to be

[181] *Ibid.*, § 318o.
[182] *Ibid.*, § 318n.
[183] See footnote 113.
[184] See footnote 2.
[185] "Codice civile" (Regio Decreto 16 marzo 1942, n. 262), ("Civil Code"), accessed on 28/03/2020 https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile.
[186] See footnote 113.
[187] "Legge 31 maggio 1995, n. 218 (L31/05/1995 n. 218) Riforma del sistema italiano di diritto internazionale private", (Law "On the Reform of the Italian system of international private law"), accessed on 28/03/2020 https://www.esteri.it/mae/doc/l218_1995.pdf.
[188] See footnote 113.
[189] *Ibid.*, at 186, art. 25 (1).

fulfilled. In accordance with the legislation's provisions, a resolution has to be filed with the public notary.[190]

The resolution has to comprise an approval that the registered office, the central administration, and the effective place of management have been transferred to Italy; that the company has adopted the legal form of a company, provided by Italian Law; that the statute has been amended in conformity with Italian law; and, that any other resolution has been approved, that is necessary to obey with Italian corporate law. The notary, for its part, must send this resolution to the commercial registry for registration.[191]

For the Italian Republic, which does not have specific codified regulations on the cross-border of the company seats, the adoption of the new Directive[192] has a substantial impact. Even though there is a possibility to transfer the company's seat abroad, the bringing of the Directives provisions into the Italian legislation will be valuable, as it will give the necessary security and reliability to the companies itself.

In **the Republic of Malta**, the Continuation of Companies Regulations 2002 Part II[193] regulates the transfer procedure for Maltese companies that seek to emigrate to a different country through a transfer of the registered office. The concentrate of the Maltese legislation is the authorization by the Maltese commercial register to do so.[194]

A company, registered in Malta may be entitled to be registered as being continued outside Malta when it is registered under the Act; the laws of a destination country allow such continuation; and, it receives the consent of the registrar.[195]

In such a case, the undertaking may apply to the competent authority of the chosen state of destination, to have the company continue under the legislation of that other jurisdiction.[196]

A Maltese company looking for continuation beyond Malta shall make a request to the registrar using the method and format preassigned by the registrar and be accompanied by a declaration of two directors of the company or by the sole director holding the position for the time. The request should comprise the name of the company and, if varied, the name under which registration in the destined country is being attained; the place of alleged registration of the

[190] *Ibid.*, art. 25 (3).
[191] See footnote 113.
[192] See footnote 2.
[193] "Subsidiary legislation 386.05: Continuation of Companies Regulation", (2002), accessed on 29/03/2020, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10494.
[194] See footnote 113.
[195] "Continuation of Companies into and out of Malta", *GVZH Advocates*, accessed on 29/03/2020 https://www.gvzh.com.mt/malta-law/company-corporate-finance/incorporation-maltese-companies-other-commercial-partnerships/limited-liabilities-companies/continuation-companies/.
[196] *Ibid.*

undertaking and the name and address of the competent authority in that jurisdiction; and, the date on which it is suggested to transfer the seat to the state of destination.[197]

Under the Company Act[198], the registrar shall not give an agreement to a company requesting to transfer its seat to another state unless the registrar is satisfied that all the conditions have been fulfilled.[199] For the next requirement, it is needed that no proceedings for dissolution, insolvency, or similar, have been initiated by or against the company in Malta. Any holder of a pledge of shares should give the permit to the planned continuation of the company into another jurisdiction in writing. In addition, the company in the time of such an application is required not to be in breach of any of its duties or obligations.[200]

After three months from the date of publication in the Government Gazette of notice related to the exceptional resolution of the shareholders in regards to continuance outside of Malta, the registrar shall not give his consent for the continuation of a company in another state.[201]

During this period of three months, any creditor who had debt, prior to the publication of the notice, may retort to such continuation by order of invocation and, if the worthwhile reason why not to allow the cross-border transfer would be performed.[202]

Once the competent authority in the destination jurisdiction issues a deed of continuation, the company shall immediately bring a copy of such act to the registrar and the undertaking will be estimated as of such that is ceased to be a company incorporated in Malta from the date when its continuation in the other state takes effect, and the registrar shall exclude the name of the company off the register.[203]

The registrar is beholden to keep a register of all companies that received his consent to register as being continued in another Member state.[204]

As a general requirement in Maltese law, to effect a cross-border seat transfer to Malta, the legislation of the country of origin has to permit such operation.

The Maltese registrar has to be provided with specific documents such as a resolution enabling the company to be registered as continuing in Malta; a copy of the adjusted statute of the company which has to involve all the needful corrections as a means to comply with Maltese Law; a certificate of good standing, issued by the competent authority in which it was registered, sustaining that the company is in furtherance with the registration requirements of the country of

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[197] *Ibid.*
[198] "Companies Act Cap. 386", (1996), accessed on 29/03/2020 http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8853.
[199] See footnote 195.
[200] *Ibid.*
[201] *Ibid.*
[202] See footnote 195.
[203] *Ibid.*
[204] See footnote 195.

establishing; and, a declaration that the undertaking will be registered as continuing in Malta. This abovementioned declaration has to be signed by two directors of the company looking for to conduct the transfer, or by two persons entitled by the administration of the undertaking.[205] In addition, a declaration of the company's solvency, confirmed by the authorized person, that they were not aware of any conditions which could have a negative impact on the solvency of the company in the next twelve months; a list of the directors and the secretary of the foreign company; any other material that the registrar may require, should be provided.[206]

If the company that aspires to perform the transfer of the registered office conducts a business which would need a licensed in Malta, and the company is licensed or authorized by a competent authority in its home country, confirmation that the undertaking can be registered as continuing to perform the activity in Malta has to be presented to the Maltese registrar.[207]

When the documents specified before have been delivered to the registrar, considering that they comply with the requirements, the registrar will verify that the undertaking is provisionally registered for all legal purposes as continuing in Malta and will provide a Provisional Certificate of Continuation.[208]

Within six months after the date when the Provisional Certificate of Continuation was issued, the company has to submit documentary evidence to the commercial registrar that it has halted its registration in its former home country. Failure to lend this proof gives the registrar the power to delete the company from the register and inform the competent authority of the home country of the undertaking, or to grant an additional period of three months before erasing the name from the register.[209]

Once the company provides the Maltese commercial registry with the evidence that it has been deleted from the register in its home country, the registrar will grant the company a Certificate of Continuation.[210]

Malta follows a similar approach with the one presented at the new Directive 2019/2121[211]. The difference is that Malta describes the given operation as the continuation outside the state, but the procedural requirements correspond to the EU legal act. Although, several amendments will be required.

[205] *Ibid.*, at 193, part 1.
[206] *Ibid.*
[207] *Ibid.*, part 1, sect. 5(1)(a).
[208] *Ibid.*, sect. 6.
[209] *Ibid.*, sect. 8.
[210] *Ibid.*, part 1, sect. 9.
[211] See footnote 2.

The Slovak Republic, in its legislation, slightly provides that the transfer of the registered office of a non-resident legal entity to the state as well of a Slovak undertaking to abroad is possible based on the EU law or international treaties.[212]

It is stated, that an alien legal entity, incorporated to conduct business may transfer its registered office from abroad to Slovakia if so provided by the law of the European Communities, or this is permissible under international treaties binding for the Slovak Republic, which were proclaimed as required by the law. The same applies to the transfer of the registered office of a Slovak undertaking abroad.[213]

A foreign company should comply with Slovak law, convert into a type of Slovak company, and fulfill the requirements for the incorporation of this company form.[214]

The company limited by shares established under the legal system of one of the Member States will convert into the company limited by shares regulated by the Slovak law in the process of conversion by providing the documents in the form of a notarial deed on a legal act.[215]

An enterprise is free to opt for any stipulated legal form of a company as it is allowed for the domestic companies.[216]

The transfer of the registered office is deemed to be effective from the day on which it is entered into the Companies Register.[217]

The inner legal relations of the company shall keep being governed by the law of the state under which the entity was initially established, even after the transfer of its registered office to Slovakia. The same principle shall adjust the liability of the undertaking's partners, members, or shareholders with respect to third parties, while such liability shall not be lower than the one determined for the same corporate form by the Slovak law.[218]

The Commercial Code ensures a stable chronological order of firstly registering the company in the host state and only then erasing the company from the home state's Commercial Register. It is advantageous for the protection of the continuity of the undertaking, and, the protection of creditors. The aforementioned has been confirmed by rather meager precedents in the case law of the Slovak courts.[219]

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[212] "Commercial Code", Act 513/1991, chapter 2, accessed on 30/03/2020 https://is.muni.cz/el/1422/jaro2013/SOC038/um/Obchodny_zakonnik_513_1991_v_anglickom_jazyku.pdf.
[213] *Ibid.*, part 4, sect. 26(1).
[214] Carsten Gerner-Beuerle, Federico M. Mucciarelli, Edmund-Philipp Schuster, Mathias M. Siems, "Study on the Law Applicable to Companies", Final Report, (2016), accessed on 30/03/2020 http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/study-on-the-law-applicable-to-companies.pdf.
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*, at 212, part 4, sect. 26(2).
[218] *Ibid.*, part 4, sect. 26(3).
[219] See footnote 214.

Slovakia's situation is similar to the situation in Italy. Notwithstanding, the state is not directly providing the provisions in its legislation in relation to the cross-border seat transfer, it gives such a possibility based on the law of the EU and international treaties. Taking this into account, it can be concluded that the bringing of the Slovak legislation in line with the Directive[220] will play an important role in the companies' life cycle and stakeholders' protection.

Despite the absence of any statutory rule or domestic case law in respect to the cross-border transfer of the seats, most academic scholars and lawyers of **the Republic of Slovenia** maintains that reincorporation should be allowed as a consequence of the *Cartesio*[221] and *Vale*[222] rulings and the rules on conversion should be applied by analogy.[223]

The substantive rules in the Companies Act[224] do not govern the real seat theory, at least not in the form that would prevent companies to transfer their real seats abroad. The fundamental provisions of it are concordant with the theory of incorporation and do not contain a substantial deflection from it. Thus, the Slovene regulation is generally in accordance with the decisions of the Court of Justice of the EU on the right of establishment.[225]

Companies should be allowed to freely transfer their headquarters cross-border if some other location is entered into the register, as the legislation states that the place of business may be designated as the place where the company carries on its business, the place where its business is mainly conducted, or the place where the management of the company operates.[226] It is believed that such a place of business can be transferred abroad.[227]

As one can see, the Slovene legislation does not provide any legal regulation concerning the possibility of the cross-border seat transfer despite the fact, that legal scholars pointed out this operation as potentially possible and needed to be applied by the analogy of the ECJ's rulings. The impact of the newly adopted Directive[228] will be significant as the determined rules for the procedure of the cross-border conversion of companies was so needed in Slovenia. Yet, it will take

[220] See footnote 2.
[221] *Ibid.*, at 80.
[222] See footnote 73.
[223] *Ibid.*, at 214.
[224] "Zakon o Gospodarskih Družbah", ("Companies Act"), (2016), accessed on 30/03/2020 http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4291.
[225] Petra Weingerl, "Razprava o Dopustnosti Čezmejnega Prenosa Dejanskega Sedeža Družbe", ("An Essay on the Cross - border Transfer of a Company's Real Seat"), P*ravnik*, (2017), pp. 97 – 100, accessed on 31/03/2020 https://poseidon01.ssrn.com/delivery.php?ID=719105092024097117119101017080011180380690810830390911210921240900871060980660290661230291190220591210270200780920840900890710170780600770290720980760810041250731130850420320050760100851070900030200310860720980290230761240981231070010790030130851240078&EXT=pdf.
[226] *Ibid.*, at 224, art. 30.
[227] *Ibid.*, at 225.
[228] See footnote 2.

a lot of amendments to make to bring the Slovene legislation in line with the provisions of the Directive 2019/2121.

To sum up, it can be stated that examined Member States, which refers to the 'incorporation' doctrine, in main have in their legislation the established set of rules in regard to the cross-border seat transfer. Given national regulations can be considered as complying with the text of the Directive as regards cross-border conversions, mergers and divisions[229] since they are following the same approach in regulation the procedure. Nonetheless, the question remains regarding the time-consuming bureaucracy coming out from the need of bringing the national laws in line with the text of the Directive.

2.1.2. Member States Following the 'Real Seat' Theory

Under the real seat theory, the company laws applicable to a legal entity are those of the jurisdiction where the fundamental management decisions of the company are implemented.[230]

Reviewing the Member States, which do provide for the cross-border seat transfer, and apply the 'real seat' theory, **the French Republic** will be considered. Under the well-defined procedure and following certain conditions, the commercial courts recognize the legitimacy of transfers of cross-border registered offices with the retention of legal personality for when France is the departure country and when it is the host country.[231] In the latter case, a document sustaining that foreign law authorizes the transformation of a foreign company into a French company must be submitted to the French Registrar. This document may be a legal provision of the domestic law of the country of departure if it exists or, more frequently, a legal opinion issued by a notary or lawyer from the departure country.[232]

The decision to transfer the seat has to be adopted unanimously at the shareholder meeting, and the transfer has to be published in concordance with the requirements of French law.[233] According to the French Commercial Code[234], a decision accepted with a two-thirds majority is sufficient if France has concluded a Treaty with a different Member State on the

[229] See footnote 2.
[230] See footnote 59.
[231] Benoît Provost, Vincent Desbenoit, "Transfers of Cross-Border Registered Offices. How the Market Developed a Practice Allowing such Transfers Within (or Even Outside) the European Union", *CMS Francis Lefebvre*, (2018), accessed on 01/04/2020 https://cms.law/en/fra/publication/transfers-of-cross-border-registered-offices.
[232] *Ibid.*
[233] *Ibid.*, at 113.
[234] "Commercial code", as of 1st July 2013, Translation: Martha Fillastre, Amma Kyeremeh, Miriam Watchorn, accessed on 01/04/2020 https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_commerce_part_L_EN_20130701.

discussed matter.[235] Some further procedural steps have to be fulfilled at the French registry to obtain the transfer.[236]

The first is the innings of the proposal of the transfer to the French commercial registry. In this regard, it is required several documents, such as a copy of the deed showing a unanimous decision of all shareholders to transfer, certified by the legal representative; the specific signed form in original and two copies, one has to be submitted to the commercial register, and the other has to be given to the Business Formalities Centre; an original power of the legal representative if the form was not signed by him or her; a statement of the emergence of the amendment notice in a gazette; two original examples of a request addressed to the judge conducting the observation at the commercial register asking for the permission to keep on with the seat transfer of the company to a different state, and to erase the company from the register, retaining the legal entity; and, a regulation including the expenses on the request and the transfer itself.[237]

Inbound transfers of the registered office in France are not regulated, which means that they are considered to be possible. In connection to that, several documents have to be filed with the French commercial registry, such as a certificate that the legislation of the company's home Member State permits the transfer of the registered office of the company while keeping its legal personality; a certified copy of the shareholders' unanimous decision to the operation of the transfer and turning the company into one governed by French law; a document certifying that the formal requirements have been properly performed in the home Member State; and, an original copy of the registration of the company in the public register of the home Member State.[238]

France in its national legislation established a well-defined procedure for the cross-border transfer of the real seat. The mentioned provisions are in compliance with the regulations enshrined in the newly adopted Directive[239]. Despite, due to French legislation's specifics, to bring their laws in line with the EU's legal act, a number of severe amendments will be needed.

For further analysis, the provisions of the legislation on the subject matter, **the Hellenic Republic** (known also as Greece), will be examined. Greek national law does not clearly adjust cross-border transfers of the registered office to another country, but it can be carried out therefrom of Law 2190/1920.[240]

For different company types, different majority requirements exist.

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[235] *Ibid.*, art. L. 225-97.
[236] See footnote 113.
[237] *Ibid.*
[238] Greffe du Tribunal de Commerce de Paris, "Transfert à Paris du siège social d'une société étrangère", (Registry of the Paris Commercial Court, "Transfer to Paris of the headquarters of a foreign company"), accessed on 02/04/2020 https://www.greffe-tc-paris.fr/procedure_sheet_download/transfertfrancesteetrangere.
[239] See footnote 2.
[240] Νόμος 2190/1920 "Περί Ανωνύμων Εταιρειών", (Law "On Societes Anonymes"), (1920), accessed on 02/04/2020 https://www.lawspot.gr/nomikes-plirofories/nomothesia/nomos-2190-1920.

For *sociétés anonyms* (public limited companies), approval at the General Meeting is necessary. The meeting should have a quorum of two-thirds, and a two-thirds majority must pass the vote.[241] For Greek limited liability companies, a unanimous decision has to be taken.[242] For private limited liability companies, a cross-border transfer of the registered office can only occur within the European Union and can only be conducted if the other Member State concedes the company and the continuance of its legal entity. A unanimous decision of all the parties is necessary in this case.[243]

The procedure to implement the decision on the cross-border transfer of a company seat for private companies is clear. The first thing is the directors' report explaining consequences to members, creditors and employees. Then, it is the directors' statement and a financial report registered in the General Commercial Registry for at least 2 months prior to the decision on the cross-border transfer. The General Commercial Register can reject the application for the cross-border seat transfer on the grounds of public interest.[244]

Under Greek legislation, no specific provisions dealing with inbound transfers of the registered office exist[245] except that the articles of association should be amended in compliance with the Greek company law.[246]

Greek law does not provide the special provisions on the cross-border seat transfer, although the refers to it can be found in other legal acts. Such law provides the possibility of state to reject the application for the cross-border mobility on the grounds of public interest. As was mentioned while examining the Directive 2019/2121[247], in its text such provision is absent. Therefore, when Greece will bring its laws in line with the text of the Directive, the scope of States' interfere will reduce.

When it comes to **the Portuguese Republic**, the cross-border seat transfers to and from the country have been possible since 1986.[248] The law applicable to Portuguese companies is determined by the central administration of the undertaking. Thus, theoretically, Portugal regulates the transfer of the central administration in cross-border seat transfers.[249]

For a Portuguese company to transfer its seat to a different state, the condition is that the legislation of the host country will allow such an operation. Furthermore, the resolution to transfer

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[241] *Ibid.*, art. 49a(29) para 3, and (31) para 2.
[242] *Ibid.*, art. 38, para. 3.
[243] *Ibid.*, art. 34, para. 2.
[244] See footnote 214.
[245] See footnote 113.
[246] *Ibid.*, at 214.
[247] See footnote 2.
[248] "Código das Sociedades Comerciais", Decreto Lei nº 262/86, ("Commercial Companies Law"), (1986), accessed on 03/04/2020 https://dre.pt/web/guest/pesquisa/-/search/220107/details/normal?l=1.
[249] See footnote 113.

the seat has to be adopted by three-quarters of the shareholders of the company. Shareholders that did not vote in favor of the seat transfer have a right to withdraw from the company by giving notice to the company of this decision within sixty days after the publication of the shareholders' decision.[250]

Portuguese law provides that companies from other countries can transfer their effective seat to Portugal if the law of the home Member States allows it, and if the company's statute is adjusted to comply with the Portuguese legislation. The adjusted statute has to be submitted for public registration by the undertaking.[251]

There is no obligation on the Commercial Register Officials to notify or communicate the foreign register that the company has been reincorporated and registered in Portugal as a Portuguese Company.[252]

Notwithstanding Portugal does have provisions in its legislation, which concern the cross-border seat transfer, there is a need for its modernization. For this goal, the implementation in the legislation the Directive as regards cross-border conversions, mergers and divisions[253] seems like an effective solution. Undoubtedly, this procedure will require a lot of amendments to the existing legal regulations.

The Kingdom of Spain, in its turn, regulating the cross-border transfer of seats by Law on Structural Modifications of Commercial Companies.[254] This legislation initially implemented the Cross-Border Merger Directive[255] into Spanish law but, then, extended to other reorganizational forms such as transfer of the registered office. It covers Spanish commercial companies that are not the subjects to the liquidation or insolvency proceedings.[256]

To perform a cross-border transfer of the registered office, the directors of the company have to prepare and sign a transfer proposal and an expository report, to file them at the commercial register and publish it in the official gazette of that registry. The transfer proposal must contain certain details, such as the name and the registered office of the company, as well as, the registration number in the Commercial Registry; new proposed registered office; the articles of a statute which will govern the business after the transfer, inclusive the new name if needed; the

[250] *Ibid.*, at 248, para 4 – 5.
[251] *Ibid.*
[252] See footnote 214.
[253] *Ibid.*, at 2.
[254] Law 3/2009, of 3 April, "On Structural Modifications Of Commercial Companies", (2009), accessed on 04/04/2020 https://www.global-regulation.com/translation/spain/1443560/law-3-2009%252c-of-3-april%252c-on-structural-modifications-of-commercial-companies.html.
[255] See footnote 38.
[256] *Ibid.*, at 254, sect. 93, para 2.

time frames provided for the transfer; and, the rights provided for the protection of the shareholders, creditors, and employees.[257]

A copy of the transfer proposal has to be deposited at the commercial register. The registrar must then inform the commercial center for the instantaneous publication of the act in the Official Journal of the commercial registry on the date of deposit.[258] The publication for the shareholders' meeting cannot be deposited prior to this. The declaration in the Official Journal must state the name, the company form, the address of the company, the date of its entry to the commercial register, the conditions for shareholders and creditors to the realization of their rights, and the address at which more information can be reached free of charge.[259]

The explanatory report has to comprise the legal and economic outcomes of the transfer as well as the consequences for shareholders, creditors, and employees. [260]

The proposal to transfer the registered office has to be approved by the shareholders at the General Meeting.[261] The plea has to be published in the official journal of the commercial register and in the extensively distributed gazette in the region where the company has its seat. The publication has to be done at least two months before the date of the general meeting.[262] The plea has to comprise the information on the location of operating and the estimated registered office; the rights of shareholders and creditors to review the transfer proposal and the explicative report at the registered office of the company; and, information on the rights for shareholders to withdraw and for creditors to argue the transfer, as well how these rights can be realized.[263]

In public limited liability companies, shareholders of at least 50% of the subscribed capital with voting rights are required to be present themselves or be represented at the general meeting in the first call. At the second call, 25% is sufficient enough. Internal regulations can designate a larger majority.[264] The decision to transfer the registered office has to be taken by a two-thirds majority of the share capital present. For limited liability companies, a two-thirds majority is required.[265]

The decision approving the transfer of the registered office has to be certified and notarized. Having expected whether all legal conditions have been executed, the commercial registrar will issue a certificate.[266] The transfer will take effect on the date when the undertaking

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[257] *Ibid.*, sect. 95, para 2.
[258] *Ibid.*, sect. 95, para 3.
[259] *Ibid.*
[260] See footnote 113.
[261] See footnote 254, sect. 97.
[262] *Ibid.*, sect. 100.
[263] *Ibid.*
[264] "Corporate Enterprises Act", (2012), sect. 195, accessed on 04/04/2020 https://law.au.dk/fileadmin/Jura/dokumenter/Corporate_Enterprises_Act__28Ley_de_Sociedades_de_Capital_29.pdf.
[265] *Ibid.*, sect. 199.
[266] See footnote 254, sect. 101.

will be registered in the host Member State.[267] The company will be erased from the Spanish registry once the registration in the host Member State will be published.[268]

Creditors have a right to argue against the cross-border transfer of the registered office until they will be granted with a guarantee, if their asserts were submitted before the date that the transfer proposal was published, and if their claims are not sufficiently assured after the transfer.[269] If the company transfers its registered office without providing a safeguard, the objection will be recorded. If the creditor has not submitted a claim within six months after the cross-border transfer, it will be deleted.[270]

Shareholders who have voted against the proposal have a right to withdraw from the company within one month period from the publication of the transfer in the official journal of the commercial registry.[271] If the shareholder and the company cannot agree on the worth of the shares, or on the individual conducting the assessment, an account auditor, who must be different to the company's auditor, will be appointed by a member of the commercial register where the company has its registered address.[272] If the shares were traded on an official secondary market, the worth will be the average trading price for the last quarter. As soon as the company has obtained the shares, the retraction of the share capital will be stated in a public act. This deed will specify the shares, the identity of the affected shareholder, the ground for the reduction, the date of compensation, and the final amount of share capital after the reduction.[273] If the share capital does not comply with the minimum capital requirements in the state, to which the seat transfer is held, the transfer cannot take place.[274]

Spanish law differentiates between companies from another EU Member State that seek to transfer their registered office to Spain and companies from non-EU states.

For companies from the EU zone, Spanish law determines that a seat transfer will have no effect on the legal personality of the establishment.[275]

Companies from a non-EU state will only be able to maintain their legal personality if the law from their home state permits it. Furthermore, the company must prepare a report from an independent expert sustaining that the net worth covers the capital requirements under Spanish law.[276]

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[267] *Ibid.*, sect. 102.
[268] *Ibid.*, sect. 103.
[269] *Ibid.*, sect. 100; *Ibid.*, at 264, sect. 44.
[270] *Ibid.*
[271] See footnote 264, art. 353 – 357.
[272] *Ibid.*
[273] *Ibid.*, art. 359.
[274] See footnote 113.
[275] *Ibid.*, at 254, sect. 94.
[276] *Ibid.*

A company that seeks to transfer its registered office to Spain needs to adapt its inner regulations and transform it into one of the company law forms allowed under Spanish law. The company has to provide the registrar with documents presenting that it has successfully completed the transfer process from its home Member State. This can be done by a public act of a resolution or by a certificate issued by the registrar from the home Member State.[277]

According to Spanish doctrine, the company cannot be registered in Spain as long as it is registered in its home Member State. Therefore, it has to be temporarily erased from the register there.[278]

Considering all the abovementioned Member States, Spain legislation on the cross-border seat transfer complies with the text of the Directive[279] the most. The legal procedure provided by the laws of Spain includes almost the same steps as the EU's legal act. According to this, it can be deduced that Spain will require to make the least amount of amendments to bring its national law in line with the provisions of the Directive.

Several aforementioned Member States have special codified regulations that allow the undertakings established in the other Member State to transfer its registered seat to another country by fulfilling several requirements. It can be argued that the Member States are free to implement their protection mechanisms regarding creditors, shareholders, and employees, not violating their fundamental freedoms.

By way of conclusion, it can be noticed that despite the number of the decisions of the CJEU and EC's efforts to come to common provisions on the discussed matter, Member States still adhere to a multiplicity of strategies relating to the cross-border conversions of companies, compartmentalizing from complete suppression to precise and comprehensive regulations of these proceedings.

[277] "Royal Decree 1784 / 1996, Of 19 July, Which Approves The Regulation Of The Commercial Register", art. 309, accessed on 04/04/2020 https://www.global-regulation.com/translation/spain/1459823/royal-decree-1784---1996%252c-of-19-july%252c-which-approves-the-regulation-of-the-commercial-register.html; *Ibid.*, at 254, art.94(1).
[278] See footnote 113.
[279] *Ibid.*, at 2.

2.2. Court of Justice of the European Union's Case Law Examination

During the existence and development of EU Corporate Law, the CJEU has ruled on a number of cases, which in one way or another, concerned the cross-border activity of companies. Nonetheless, the fact that many impediments and barriers to cross-border mobility have been removed by ECJ namely, remains indisputable.

The latest outcome of such rulings is that a company set up in a Member State must be recognized in the other Member States autonomous of the connecting factors used. The state of establishing, though, maintains the right to choose the corresponding connecting factor.[280]

Decisions of the CJEU concerning the cross-border activity of companies have reduced the scope of the theory of residency but have not led to its definitive overcoming. Given theory was unreservedly confirmed in the decision on *Daily Mail*[281] in 1988.

The Daily Mail, a British investment holding company, intended to move its headquarters from the United Kingdom to the Netherlands in order to avoid paying significant taxes in the United Kingdom. The latter refused such a transfer. From the point of view of private international law, this case presents no problems in either the United Kingdom or the Netherlands, since both countries adhere to incorporation theory.

The ECJ has ruled that Articles 49 and 54 of the TFEU[282] do not apply in this case because the countries' legislation is quite different. The Court based its judgment on a general supposition as regards the relationship between an undertaking and its state of establishment. More particularly, it was claimed that " […] unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning".[283]

According to the Court's decision, the companies cannot relocate their headquarters to another Member State, while remaining companies of their country of origin. Thus, the national rules prohibiting entities from leaving their country of origin were given priority over freedom of establishment provisions. It can lead to the assumption that only those companies whose legal capacity is recognized by the national law of the Member States can move freely.

Notwithstanding, *Daily Mail* reveals several obscurities. This ruling only concerned the outbound transfer of a company's tax residence, not outbound reincorporation, which is impossible out of the United Kingdom. Besides, the ECJ also accented that freedom of establishment forbids

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[280] Aleksandrs Fillers, "Free Movement of Companies After the Polbud Case", *European Business Organization Law Review*, (2020), accessed on 05/04/2020 https://doi.org/10.1007/s40804-020-00178-9.
[281] *Ibid.*, at 28.
[282] *Ibid.*, at 1.
[283] See footnote 28, [19].

the Member State of origin from obstructing the establishment in another Member State of a company incorporated under its legislation.[284]

Doubts about this position arose after the ruling on the *Centros* case.[285] The *Centros* case concerned two Danish nationals who had registered their company in the United Kingdom and wanted to open a branch in Denmark. The Danish authorities, who considered that such actions were motivated solely by the desire to bypass the requirements of the Danish legislation on the contribution of the minimum share capital when incorporating a limited liability company and this is the circumvention of laws, refused in the registration of the branch.[286]

At *Centros* case, as well at the *Daily Mail*[287], both states followed the incorporation theory.

The Court held that the refusal to register a branch of a company formed under the laws of the Member States was contrary to the TFEU and that the legal structure (a company in the United Kingdom and a branch in Denmark) could not in itself constitute an abuse of the right of establishment.[288] The fact that the company does not carry out any activities at the place of registration and carries it all out in the state where the branch is located is also does not consist of abuse and does not give this state the right not to apply the provision on freedom of establishment.[289] "The requirements set by Denmark did not pass the proportionality and necessity test".[290]

It can be concluded that the possibility provided by Centros case paved the way and prompted many individuals residing in the Member States with high legal and substantive requirements for setting up an enterprise, to establish the companies in the Member States with lower requirements and, at the same time, doing business in the State of origin.

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[284] Carsten Gerner-Beuerle, Frederico M. Mucciarelli, Edmund-Philipp Schuster, Mathias Siems, "Cross-border reincorporations in the European Union: The case for comprehensive harmonization", *Journal of Corporate Law Studies*, ISSN 1473-5970, (2017), accessed on 06/04/2020 http://eprints.lse.ac.uk/84041/1/Cross-border%20reincorporations_Final.pdf.

[285] See footnote 29.

[286] Pellé Philippe, "Companies crossing borders within Europe", *Utrecht Law Review*, Volume 4, Issue 1 (March), (2008), pp. 9 – 10, accessed on 06/04/2020 https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.56/.

[287] See footnote 28.

[288] *Ibid.*, at 286.

[289] *Ibid.*, at 28.

[290] " […] national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the TFEU must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it". See "Judgment Of The Court from 30 November 1995 In Case C-55/94, [1995] ECR I-4197 Reinhard Gebhard and Consiglio dell'Ordine degli Avvocati e Procuratori di Milano", paragraph 37, accessed on 07/04/2020 https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Judgments/Court_of_Justice/EN_ECJ_19951130_55-94_CELEX_61994CJ0055_EN_TXT.pdf.

The next was the decision on the *Überseering* case[291] in 2002. In the present case, the Dutch company, all of whose shares were acquired by German nationals, was refused a claim in a German court. The reason for the refusal was that, as a result of such an acquisition, the company had moved its actual location to Germany and, according to the settled theory, has no legal capacity, and therefore could not act as a plaintiff in the court.

By its decision on the *Überseering* case, the ECJ confirmed its position in the *Centros*[292] case. It was noted that a State's failure to recognize a company created under the laws of another Member State is incompatible with the freedom of movement of companies. The legal capacity of a company moving across borders must be governed by the law of the Member State in which it was established. Non-recognition of a foreign company should not be justified by the need to protect its stakeholders or creditors, or for other purposes.

Such findings of the ECJ contradicts the position expressed in the *Daily Mail*[293] case. However, the Court emphasized that where the Member State in which the company was established allows it to move abroad with preservation of its legal capacity, the receiving State is obliged to recognize such a company. In this respect, the '*Daily Mail*' doctrine continued to exist since the Member States could impose any restrictions on their companies.[294]

Thus, the *Überseering* decision is a kind of compromise between the two former seemingly irreconcilable decisions of the ECJ. In cases of transfer from abroad, the '*Centros*' formula applies, which prohibits restrictions on the freedom of establishment, in cases of moving abroad, the formula '*Daily Mail*' applies, according to which, the restrictions on the freedom of establishment are permissible.

The following decision, devoted to the issue of the cross-border conversion of the companies, was the decision in the case of *Inspire Art*[295], made in 2003. A Dutch incorporated the company Inspire Art Ltd under the laws of England and Wales and claimed the registration of the company's Dutch branch at the commercial register in the Netherlands. The registry insisted that to the company should be applied specific Dutch rules for foreign entities registered in the Netherlands. As a result, Inspire Art Ltd would have been obliged to employ a company name

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[291] "Judgment of the Court of 5 November 2002, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00", ECR I-9919, accessed on 08/04/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0208.

[292] See footnote 29.

[293] See footnote 28.

[294] Дубовицкая Е. А., *Европейское корпоративное право*, 2-е изд., перераб. и доп., (Москва, Россия: Волтерс Клувер, 2008). (Elena Dubovitskaya, *European Corporate Law*, Edition 2, Revised and added, (Moscow, Russia: Wolters Kluwer, 2008), p. 37, accessed on 08/04/2020.

[295] "Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, Case C-167/01", ECR I-10155, accessed on 09/04/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0167.

specifying its foreign origin and comply with the minimum rules of capitalization for Dutch limited liability companies.[296]

The ECJ in its judgment one more time confirmed its decision on *Centros*[297]. Thereby, according to Werner Ebke, the decision on the *Inspire Art* case became another step forward, thanks to which the ECJ clearly prohibited the Member States from treating companies operating solely within its territory while being incorporated in another Member State differently.[298]

The desire of the ECJ to provide national companies with the full freedom of movement was reflected in the *SEVIC*[299] decision. In it, the Court recognized the application of Articles 49 and 54 of the TFEU[300] in the merger of companies from different Member States, i.e. in a transnational merger. In the *SEVIC* case addressed the issue of the interdiction of the cross-border merger by the Member State of one of the participating companies. The ECJ has emphasized the importance of mergers as a procedure of corporate restructuring and as the implementation of the freedom of establishment, stating that mergers are an effective way of transforming companies. Under Thomas Papadopoulos opinion, such a merger within one operation allows certain activities to be carried out in new forms and without interruption, thereby reducing the complexities, material and time costs associated with other forms of company consolidation.[301]

In *Cadbury Schweppes* case[302] in 2006, the company challenged the United Kingdom controlled alien undertaking legislation, providing that where the United Kingdom's company establishes affiliates in low tax zones, such company was taxed on the subsidiary's income as well as its own.[303] What is important, in *Cadbury Schweppes*, the court stated that looking for beneficial tax treatment in the other Member States than the Member State of original establishment does not per se compose an overuse of the freedom of establishment.[304] This also overlaps with the judgment on the *Centros*[305] case.

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[296] *Ibid.*
[297] *Ibid.*, at 29.
[298] Werner F. Ebke, "The European conflict-of-corporate-laws revolution: «Überseering», «Inspire Art» and beyond", *European Business Law Review*, (2005), Volume 16, Issue 1, pp. 9 – 54, accessed on 10/04/2020, https://www.jstor.org/stable/40708225?read-now=1&seq=1#page_scan_tab_contents.
[299] "Judgment of the Court (Grand Chamber) of 13 December 2005. Request for a preliminary ruling from Landgericht Koblenz. Case C-411/03 SEVIC Systems", ECR I-10805, accessed on 10/04/2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0411.
[300] *Ibid.*, at 1.
[301] Thomas Papadopoulos, "EU REGULATORY APPROACHES TO CROSS-BORDER MERGERS: EXERCISING THE RIGHT OF ESTABLISHMENT", European Law Review, Issue 1 (2011), p. 6, accessed on 10/04/2020 http://ssrn.com/abstract=1775824.
[302] "Judgment of 12 September 2006, Cadbury Schweppes plc, Case C-196/04", accessed on 11/04/2020, http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0196&lang1=en&type=TXT&ancre=.
[303] Robertas Čiočys, "Freedom Of Establishment After Cartesio: Absence Of Ec Incorporation Doctrine And Implications Thereof", ISSN 1392–1274, (2010), accessed on 11/04/2020 http://www.zurnalai.vu.lt/teise/article/download/231/181/.
[304] *Ibid.*, at 302, para 36 – 38.
[305] *Ibid.*, at 29.

The court indicated that the notion of freedom of establishment is foremost directed to assure that the host Member State does not discriminate affiliates or branches of companies of the other Member States. Nevertheless, the ECJ stated that freedom of establishments likewise forbids the Member State of origin from obstructing the incorporation of its enterprises in the other Member States[306] and that the tax legislation actually hindered to the concept of the freedom of establishment.

In the *Cadbury Schweppes* judgment, the court indicated that the controlled foreign companies' legislation can comprise only completely artificial mechanisms, but it is in opposition to the freedom of establishment for this legislation to catch foreign undertakings de facto conducting economic activity.[307]

In 2008, the ECJ ruled in *Cartesio*'s case[308] concerning the transfer of the company's head office. Cartesio was a Hungarian limited liability company with central administration and headquarter in Hungary. The company has applied for a change of information about itself in the Hungarian register, indicating the transfer of the central administration to Italy. The application was rejected on the ground that the transfer was not possible as the company's activities remain subject to Hungarian law. In accordance with the legal scholars, pursuant to the Hungarian substantive rules that were effective when Cartesio attempted to transfer its seat cross-border, a company's headquarter could not be separated from its registered office, and, as the result, Cartesio was also induced to be removed from the Hungarian register even though it did not aspire to change the applicable company law.[309]

The question arose before the Court was whether Articles 49 and 54 of the TFEU prevented the Member States from forbidding their companies from moving their location abroad while remaining governed by their own country. The ECJ answer was negative. The arguments in the *Daily Mail*[310] case were confirmed, and, therefore, the Court concluded that the answer on the question might be contained only in the application of the domestic law, in the absence of European corporate law.

The Advocate General Maduro adhered to a different position.[311] He drew the conclusion that the fact that the Hungarian law does not permit the cross-border transfer of the real seat, goes against articles 49 and 54 of the TFEU.[312] His judgment was based on the opinion of Advocate

[306] *Ibid.*, at 302 para 42.
[307] *Ibid.*, para 65 – 75.
[308] *Ibid.*, at 80.
[309] *Ibid.*, at 284.
[310] See footnote 28.
[311] Opinion of Mr Advocate General Poiares Maduro delivered on 22 May 2008 on the case CARTESIO Oktató és Szolgáltató bt., accessed on 12/04/2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CC0210.
[312] See footnote 1.

General Tizzano in the *SEVIC* case[313], who considered that allowing to transfer headquarters only within the state treats cross-border transfers less favorably.[314]

In the context of the cross-border activity of companies and the location transfer, the ECJ decision means that the Member State still has the right not to allow the company to move its head office abroad when the company intends to maintain its legal status under the legislation of that Member State. Therefore, as is described in the article of Petra Vargova, the Member State may continue to require the dissolution and liquidation of the company before moving its head office. However, Member States shall not prevent a company from becoming the one governed by the law of another Member State, provided that it is authorized under the law of the latter.[315]

In 2011, the ECJ reached a decision in the *National Grid Indus* case.[316] This case concerned the movement of the real seat of a company established according to Dutch legislation to the United Kingdom. In a view of a fact that both Member States supported the incorporation doctrine and the Dutch legislation stayed the applicable legislation of incorporation, the movement to the United Kingdom should not have consist of a problem.

In the ruling on the *National Grid Indus* case, the similarity can be outlined with the one on the *Daily Mail* case[317] when the ECJ decided that the legislation of the Member State of origin defines the requirements of lawful establishment and the continued existence of the undertaking. The tax authority inspector concluded that the fiscal conditions can be inflicted in case of a seat transfer. As a result, it was considered that the company was not able to refer to the right of freedom of establishment concerning these fiscal claims.[318]

In contrast to the *Daily Mail*[319] case, the ECJ in the *National Grid Indus* case applied article 49 of the TFEU instead of article 54 of the TFEU[320]. The court turned down the opinion of the tax authority inspector and decided that even though the Member State of origin is allowed to define the operating conditions of an enterprise, it is not allowed to impede the appeal of a converting company on the basis of the article 49 of the TFEU[321]. The transfer of the real seat has

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[313] See footnote 299.
[314] Opinion Of Advocate General Tizzano delivered on 2 October 2003 on the SEVIC CASE C-418/01, accessed on 12/04/2020 http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48679&doclang=EN.
[315] Petra Vargova, "The Cross-Border Transfer of a Company's Registered Office Within the European Union", Central European University [LL.M. Short Thesis], Budapest, (2010), pp. 21 – 22, accessed on 13/04/2020 http://www.etd.ceu.hu/2010/vargova_petra.pdf.
[316] "Judgment of the Court (Grand Chamber) of 29 November 2011. National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam", Case C-371/10, accessed on 13/04/2020, http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0371&lang1=en&type=TXT&ancre=.
[317] *Ibid.*, at 28.
[318] Rumiko C.A.J.U. Mommersteeg, "Freedom of Establishment and Seat Transfer "Corporate mobility within Europe"", Master Thesis International Business Law, *Tilburg University*, (2014), accessed on 14/04/2020 http://arno.uvt.nl/show.cgi?fid=133939.
[319] See footnote 28.
[320] *Ibid.*, at 1.
[321] *Ibid.*

had no consequences for its position as an undertaking incorporated under Dutch law. Hence, it could remain to exist by dint of the national legislation, and it did not influence its ability to appeal to the right of freedom of establishment.[322] Since it could prevent the seat transfers to the United Kingdom, the infliction of the exit taxes considered to create an incommensurable limitation of the freedom of establishment.[323] National Grid Indus should have been proposed the choice between an instant payment of the tax amount and adjourned payment including interest. Notably, the latter option of the deferred payment caused a resistance, by virtue of the estimated risk of failure to recover the tax, which will only increase over time. According to the court, that issue could be solved by the measures such as, for example, bank guarantee.[324]

On July 12, 2012, CJEU ruled on the interpretation of the freedom of establishment and cross-border activity of companies in the *Vale* case.[325] The case concerned the transboundary transformation of a company governed by Italian law into a company governed by Hungarian law. This case brought new perspectives for companies seeking to relocate their businesses to another EU country.

Italian company Vale Construzioni S.r.l. wished to move its place of business to Hungary. The company aimed to terminate its business in Italy and sought to become a Hungarian limited liability company (Vale Építési Kft) while maintaining its legal entity status. The Commercial Register in Rome has deleted the entered information about Vale Construzioni Srl. However, the Hungarian courts rejected Vale's request to be registered with the Hungarian Commercial Register, saying that such an operation could not be considered as conversion under Hungarian law since national company transformation laws apply only to internal transitions. Vale disagreed with the decision and appealed to the Hungarian Supreme Court. In its turn, the Hungarian Supreme Court has filed a preliminary ruling from the ECJ to determine whether Hungarian corporate law that prevents companies from the other Member States from becoming Hungarian companies compatible with the principle of freedom of establishment.

In the *Vale* case, Advocate General Jääskinen brought up an interesting point. He stated that a transformation of a company into the one of the same type in the host state could not be considered as a cross-border conversion, but rather as a cross-border reincorporation.[326] Nevertheless, the CJEU disagreed and applied the term of the cross-border conversion, which seemed to be more appropriate.

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[322] See footnote 316, § 32.
[323] *Ibid.*, at 318.
[324] See footnote 316, § 73 – 74.
[325] *Ibid.*, at 73.
[326] Opinion of Mr Advocate General Jääskinen delivered on 15 December 2011 on a case VALE Építési kft., paras 33 – 34, accessed on 15/04/2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CC0378.

The ECJ had concluded that national legislation that allows national companies to transform into another organizational form but does not allow such transformations to companies governed by the laws of other Member States is indeed subject to Articles 49 and 54 of the TFEU[327].

In addition, the ECJ in paragraph 41 of its decision held that " […] Articles 49 TFEU[328] and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company".[329] In other words, a host Member State has no right to refuse a company from another Member State in its desire to become a company of that host Member State if the laws of that Member State provide for a conversion procedure.

The *Polbud* case[330] was the final step in establishing the possibility of cross-border transformation of companies in the European Union. On 25 October 2017, in the case of *Polbud*, CJEU decided that cross-border conversion of companies should be allowed within the freedom of establishment even if the transformed company does not carry on any economic activity in the territory of the host Member State.

According to the circumstances of the case, in September 2011, the shareholders of Polbud Limited Liability Company, established under Polish law, decided to move the company's registered office from Poland to Luxembourg. As Jan Von Hein noted, the resolution did not refer to the transfer of either the headquarters or the place of real economic activity at the same time. Based on the resolution, the registry court in Poland opened the liquidation procedure. In May 2013, following the decision of the shareholders' meeting, the Polbud head office was relocated to Luxembourg, the company was renamed as Consoil Geotechnik and its legal form was changed to a private limited liability company under the law of Luxembourg.[331] Afterward, Polbud submitted the request to the Polish court for exclusion from the commercial register. The application was rejected because, according to the court, the company did not provide evidence of the successful completion of the liquidation procedure. Polbud appealed against this decision, arguing that the liquidation was unnecessary, as the company continued to exist as a legal entity registered under the law of Luxembourg.[332]

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[327] *Ibid.*, at 1.
[328] See footnote 1.
[329] *Ibid.*, at 73.
[330] See footnote 42.
[331] Jan Von Hein, "Freedom of establishment after Polbud: Free transfer of the registered office", *Conflict of Laws. net Views and News in Private International Law*, (2017), accessed on 15/04/2020 https://conflictoflaws.net/2017/freedom-of-establishment-after-polbud-free-transfer-of-the-registered-office/.
[332] *Ibid.*, at 42.

First, the ECJ emphasized that freedom of establishment extends to the transfer of a registered office of a company from one Member State to another, even if no real economic activity is foreseen in that host Member State. Secondly, the ECJ has ruled out the application of national legislation to companies that require mandatory liquidation if the company requires removal from the commercial register for the purpose of external migration. The ECJ has ruled that, by requiring the liquidation of Polbud, Polish law could interfere, if not prevent, the cross-border conversion of the company.

The court underlined the negative effects of liquidation. These included " […] the completion of current business, recovery of debts owed to the company, performance of its obligations and sale of its assets, satisfaction or securing of its creditors, submission of a financial statement on the conduct of that process and indication of where the books and documents of the company in liquidation are to be deposited".[333] These consequences were enough to conclude that the liquidation of the company was liable to impede and possibly even to prevent the cross-border conversion of the company.[334] Thus, this legislation is a restriction on freedom of establishment.

Furthermore, the CJEU extended the area of application of the principle of equivalence, already addressed at the *Vale*[335] decision, to the Member State of origin by stating that " […] the imposition, with respect to such a cross-border conversion, of conditions that are more restrictive than those that apply to the conversion of a company within that Member State itself"[336] is not acceptable.[337]

In her opinion on the *Polbud* case, Advocate General Kokott made a clear position, emphasizing the need for the actual establishment of a company for the application of Articles 49 and 54 of the TFEU[338]. This criterion is sufficiently met if the company intends to have an actual establishment in the sense of pursuing at least nominal economic activity in the host Member State. She concludes that freedom of establishment gives the subjects of economic activity the right to choose their place of economic activity but does not give the right to choose the legislation that will apply to them.[339] However, as aforementioned, the CJEU disagreed with this view and looked at the situation from a different angle.

The impact of the *Polbud* judgment on the EU's internal market has been solid. The CJEU has created legal certainty in a field that is particularly important for the functioning of the EU

[333] *Ibid.*, at 42 para 50.
[334] *Ibid.*, para 51.
[335] See footnote 73.
[336] *Ibid.*, at 42, paragraph 43.
[337] See footnote 331.
[338] *Ibid.*, at 1.
[339] Opinion of Advocate General Kokott delivered on 4 May 2017 (1) (I) on a Case C-106/16 Polbud — Wykonawstwo sp. Z o.o., in liquidation, accessed on 15/04/2020 http://curia.europa.eu/juris/document/document.jsf?text=&docid=190333&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2356505.

internal market. In its *Cartesio*[340] judgment, the Court generally allowed for the cross-border conversion of the companies, but it had little effect on the economic relations between the Member States. Thus, it should be generally accepted that the transition of a company from one Member State to another requires a genuine economic connection with the host Member State. In the case of *Polbud*, the ECJ stated that a Member State's regulatory powers end when a company becomes subject to the law of another Member State. It is for the host Member State to determine the legal and economic conditions that the company must fulfill to execute the transition.

In the judgment on the *Polbud* case, the Court stated that EU law extends freedom of establishment to all companies established under the law of a Member State and having its registered office, central administration or main place of business within a Member State of the European Union. This freedom includes, in particular, the right of such a company to transform itself into the one governed by the law of another Member State. In the case of *Polbud*, as Olga Kalinina mentioned, the freedom of establishment grants to the given company the right to transform itself into a company registered under the law of Luxembourg, provided that the conditions for its transformation, set out in this law, are met, and in particular that the requirement adopted by Luxembourg to determine the company's connection with its national rule of law, is satisfied.[341]

The *Polbud* judgment clarified all legal aspects for cross-border business conversion. However, the European Court of Justice, as a judicial body, cannot create and enforce any regulatory procedures for such transformations or set the relevant legal rules. As Gabriël van Gelder noticed, in the absence of harmonization of the legislation on the cross-border transformation in the EU, national legislators still can set the rules for their implementation procedures to be followed, as well as rules for the protection of minority shareholders, creditors, and employees or to combat tax or other abuse in the case of cross-border conversion of companies.[342]

For that perspective, the adoption of the new Directive on cross-border conversions, mergers and divisions[343] seem like an appropriate tool that will contribute to the companies' mobility in Europe, will enhance legal certainty, and will assist in those operations by digitalizing the procedure of establishing and running businesses.[344]

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[340] See footnote 80.
[341] Калініна О. М., "Переміщення компаній в межах Європейського Союзу: нові перспективи для юридичних осіб", *Журнал європейського і порівняльного права*, випуск 9 (2). (Olga Kalinina, "Transfer of Companies within the European Union: New Perspectives for Legal Entities", *Journal of European and Comparative Law*, Issue 9 (2)), (2018), p. 33, accessed on 15/04/2020, http://journals.iir.kiev.ua/index.php/pravo/article/view/3643/3311.
[342] Gabriël van Gelder, "The Polbud-Case and New EU Company Law Proposal: Expanding the Possibilities for Cross-Border Conversions in Europe", *EC Tax Review*, Volume 27, Issue 5, (2018), p. 263, accessed on 15/04/2020.
[343] See footnote 2.
[344] *Ibid.*, at 8.

In conclusion, the aforementioned activities of the European Court of Justice, carried out in a number of highlighted judgments, are ambiguous and, sometimes, contradictory, and the issues involved in the decisions required further development, interpretation and regulation. It has been drawing attention to the lack of rules, the absence of a unified mechanism for all companies that allows its cross-border relocation, and the need for their regulation at the EU level.

The Court of Justice of the European Union rulings pushed the EU legislators to the drafting and further adoption of the uniform legal act that will be able to address all the issues arising from the concept of the cross-border conversion of companies. By its judgments, the European Court of Justice prepared a basis for the future piece of legislation presently known as the Directive as regards cross-border conversions, mergers and divisions.

CONCLUSIONS

With due regard to the topic of the present Master thesis, the indicated aim, and the assigned objectives, the following should be concluded hereupon.

1. The subject matter of this study is a concept of the cross-border conversion of companies, which was a controversial disputable issue up until recently. It was interpreted in the rulings of the Court of Justice of the European Union but did not present in the form of the unified comprehensive legal act in spite of multiple attempts of the European Commission to adopt it. Due to the dissatisfaction of existing provisions related to their business in national law or orientation to the different market and target auditorium, the enterprises looking for a jurisdiction more suitable to their needs. The companies want to rely on the stable mechanism of actions in order to fulfill their demands. Despite, the procedure was almost unattainable, existing options were very limited and required significant economic infusion. The need for a consolidated act that will set up a standardized process was very substantial.

2. Regardless of the freedom of establishment provision at the Treaty on the Functioning of the European Union, the legislators preferred to invoke to the Court of Justice of the European Union in main while trying to create the uniform legal act to address the problems encountered on the way to transfer the company abroad. After the adoption of the Directive 2019/2121 as regards cross-border conversions, mergers and divisions, the limited liability companies, to which it applies exclusively, will efficiently be able to move between the European Union Member States. The provisions of the Directive aim, in particular, at coordinating the precautionary measures and safeguards, as well as the information to be disclosed to shareholders and third parties in order to make their protection equivalent at the European Union level. These days, the situation became apparent on many matters, the action plan for companies that want to convert itself in another state is now clearly and explicitly stated, but controversial points still exist.

3. The Directive set outs a rather uniform, comprehensive, and legitimate process for the operations of the cross-border conversion of companies. The procedure, provided by it, includes converting from a legal form in one Member State into the closest equivalent in another, transferring registered office in the process. The act simplifies and speeds up the procedure, by waiving reports for members and employees in certain circumstances, and reduces costs, incurred by companies.

4. Concerning the Member States themselves, a number of them envisage the provisions and governed procedure on the cross-border transfer of corporate seats in their national

legislation while the other does not provide such, or even forbid the operation. With the adoption of the new Directive, the latest will get a chance to provide their enterprises, as well as alien companies, wanted to convert themselves into this State, with this opportunity in a proper manner, and such companies as well the stakeholders will be protected. For the Member States, who already provides a similar provision in their national legislation, it would be necessary to enhance their national regulations, and, subsequently, they will be able to rely upon the identical treatment for their undertakings in the other Member States.

5. Assessed case law shows that the Court of Justice of the European Union interprets the concept of the cross-border conversion of companies ambiguously and, sometimes, contradictory. It had been drawing attention to the lack of rules, the absence of a unified mechanism for all companies that allows its cross-border relocation, and the need for their regulation at the European Union level.

RECOMMENDATIONS

Based on the research, it is suggested to implement the following recommendations with a view to reconcile the usage of the 'cross-border conversion of companies' concept.

1. It is recommended to revise the scope of application of the recently adopted Directive 2019/2121 since for now it is only applied for the limited liability companies and to extend the scope to the partnerships and limited partnerships since they are also covered by the article 54 of the Treaty on the Functioning of the European Union on freedom of establishment and, therefore, entitled to the cross-border conversion, taking into account also the *Cartesio* judgment which dealt with a limited partnership.

2. It is suggested to implement to the Directive 2019/2121 the provision related to the opposition to the cross-border transfer of the company's seat on the basis of the public interest as it is stating in the article 52(1) of the Treaty on the Functioning of the European Union and to provide the instruction on what is included in this term, and which Member States' national competent authority could be entitled to oppose.

3. It is advised to add to the provisions regarding the documentation required during the procedure, standardized forms of such documents, and specify the recommendation to fill them in one single language, preferably English.

4. For the European Union Member States: it is recommended to bring their national laws in line with the Directive 2019/2121 as soon as possible without waiting for a deadline in 2023 to implement the possibility of transboundary relocation of undertakings in their national regulations. It will give their domestic companies as well the enterprises wanted to relocate their business into this State, legal assurances, predictability, and certainty in regulating their possibility to perform the stated operation.

5. For the corporate entities: while the legislation of the Member State is not brought in line with the provisions of the Directive 2019/2121 as regards cross-border conversions, mergers and divisions, it is suggested to plan the operation of the cross-border conversion of companies in advance, by examining the existing legal practice between the State of incorporation and the target State, legal regulations regarding the conducting of the desired procedure in the State of destination, and Court of Justice of the European Union and national's case law in relation to the discussed issue, for the purpose of obtaining the most advantageous position and stakeholder protection.

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ABSTRACT

The present Master Thesis is devoted to the concept of the cross-border conversion of companies within the European Union, as a method of transfer a legal entity to another Member State, without losing its legal personality. The study examines a comprehensive approach to the present phenomenon in European Company Law.

The research is mainly devoted to the analysis of the concept and tracking the evolution of its development. The newly adopted Directive as regards cross-border conversions, mergers and divisions was considered, the legal procedure of the transboundary moving of the companies outlined. The practice of the Member States, which provide for cross-border seat transfer on the basis of national law, studied and collated. The case law of the Court of Justice of the European Union on the elaboration and establishment of corporate mobility as a realization of freedom of establishment of companies in the European Union internal market reviewed.

Keywords: cross-border conversions of companies, corporate mobility, freedom of establishment, cross-border seat transfer, Court of Justice of the European Union case law.

CROSS-BORDER CONVERSION OF COMPANIES: A COMPARATIVE ANALYSIS

DARIA KOLIADYNSKA

SUMMARY

The Master thesis emphasizes on the issue of the cross-border conversion of companies phenomenon in the European Company Law, particularly on how to transfer a legal entity to another Member State, without losing its legal personality.

The framework of the present research is mainly defined by the goal of the work, which is to identify and estimate the main issues connected with the cross-border conversion of companies, to conduct a comparative parse of existing provisions related to the topic of this work within the EU and, to assess the precedents, decisions on which are ruled by the CJEU, on the present issue. Accordingly, it consists of two parts, which are divided into chapters and subchapters. The first part highlights the generic assertion of the discussed phenomena. It includes the chapter dedicated to the analysis of the very meaning of the cross-border relocation of companies and the historical development of the concept and the chapter devoted to the examination of the newly adopted Directive as regards cross-border conversions, mergers and divisions. The second part is connected with the practical importance of the concept application. Therefore, it represents the legislation at the Member States, which provide for cross-border seat transfer on the basis of national law, along with the existing CJEU case law and its impact on the development of the referred phenomenon of the cross-boundary transfer of companies.

The main outcomes are that the cross-border conversion of companies is now a comprehend unified mechanism enshrined in the uniform legal act, addressing most of the problems the companies could face with. However, the legislation of the Member States has not implemented the provisions of the Directive yet, hence the utilizing of the existing national provisions continuing further. In the process of evaluating the CJEU's case law, it was confirmed that the court interpreted the concept ambiguously and, sometimes, contradictory. It has been drawing attention to the lack of rules, the absence of a unified mechanism, and the need for their regulation at the EU level.

For the purposes of enlargement of the scope of the Directive, the application of it for other types of businesses was proposed. Based on the analysis of the existing practices, it was suggested to revise the text of the legal act on the subject of adding the provision concerning public interest, and standardized forms of documents in one common language. For the Member States itself, in order to give their companies the legal assurances, predictability, and certainty in regulating their possibility to perform the stated operation, was advised to bring their national laws in line with the Directive as soon as possible.

Form approved on 20 November 2012 by the decision No. 1SN-10
of the Senate of Mykolas Romeris University

HONESTY DECLARATION

12/05/2020
Vilnius

I, Daria Koliadynska, student of Mykolas Romeris University (hereinafter referred to University), Law School/Institute of Private Law/European and International Business Law, confirm that the Master thesis titled

"CROSS-BORDER CONVERSION OF COMPANIES: A COMPARATIVE ANALYSIS":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

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