

CROSS-BORDER TRANSFER OF THE COMPANY SEAT: ONE STEP FORWARD, FEW STEPS BACKWARD

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Cross-border transfer of the company seat for more than decade was and still is hot and unresolved topic in EU Company Law. Freedom of establishment is indisputable cornerstone of EU company law and Internal Market enshrined in Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) but still the company's cross border mobility is unsolved. The company transfer of the seat is closely connected with different Member States legal tradition in relation with the two different "seat theories" that apply. By the practice of the European Court of Justice both seat theories "the real seat theory" and "the incorporation theory" are proclaimed as in line with the EU law. Nevertheless, the process of cross border transfer of the seat occurs as compelling problem for the cross-border company mobility. In most Member States at the moment the cross border transfer of the company seat requires the winding-up of the company and establishing the new one in the other Member State. This procedure leads to the loss of legal and business continuity and national approaches to this issue differ. The Member States intention is to protect shareholders, creditors and employees and they justify restrictions on these reasons. After a long and quite successful journey of the European Court of Justice judgments in favorem of the EU Internal market and with VALE case on the top, there was European Parliament initiative for a proposal for 14th Directive with an aim to regulate cross border transfer of seat. The initiative is still not realized. After the ECJ judgment in Case VALE where the "importance to continue the economic activity" was enshrined there is new European Court of Justice case Polbud that deals with cross-border transfer of the company seat. The authors will examine new developments in the area of EU company law with accent on cross border transfer of the company seat and analysis of the case Polbud.

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INTRODUCTION

Cross-border transfer of the company seat for more than decade was and still is hot and somehow unresolved topic in European Union company law. Freedom of establishment¹ is indisputable cornerstone of the European Union company law and Internal Market enshrined in Articles 49 and 54 of the Treaty on the Functioning of the European Union² (further: TFEU) but still the company's mobility is unsolved. After a long and quite successful journey of European Court of Justice judgements³ in favorem of Internal market⁴ and with VALE case⁵ on the top there was an initiative for a

¹ See more about the freedom of establishment: N. Bodiřoga-Vukobrat & H. Horak & A. Martinović, *Temeljnegospodarskeslobode u Europskojuniji*, Inženjerski biro (Zagreb 2011); H. Horak & K. Dumančić & J. Pecotić Kaufman, *Uvod u europskopravodruštava*, Školskaknjiga (Zagreb 2011); S. Rodin & T. Čapeta, *Osnoveprava Europskeunije*, Narodnenovine (Zagreb 2011); D. Babić, *Slobodakretanijatrgovačkihdruštava u Europskojuniji*, *Zbornik Pravnogfakulteta u Zagrebu* (Collection of essays Faculty of Law Zagreb), 56 (Posebnibroj 2006); D. Babić & S. Petrović, *Priznanjestranihtrgovačkihdruštava u EuropskojunijinakonpresudeSudaEuropskihzejednica u predmetu Centros*, 52, *Zbornik Pravnogfakulteta u Zagrebu* (2002); C. BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (Oxford University Press 2007); D. CHALMERS & C. HADJIEEMMANUIL & G. MONTI & A. TOMKINS, *EUROPEAN UNION LAW: TEXT AND MATERIALS* (Cambridge University Press 2006); P. CRAIG & G. DE BURCA, *EU LAW, TEXT, CASES AND MATERIALS*, 4TH ED. (Oxford University Press 2008); P. Cabral & P. Cunha, *Presumed Innocent: Companies and the Exercise of the Right of Establishment under Community Law*, 25 *EUROPEAN LAW REVIEW* (2000).

² Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115, 9.5. 2008.

³ Daily Mailand General Trust 81/87 [1998] ECLI:EU:C:1988:456; Centros C-212/97 [1999] ECLI:EU:C:1999:126; Überseering C-208/00 [2002] ECLI:EU:C:2002:632; InspireArt C-167/01 [2003] ECLI:EU:C:2003:512; Sevic Systems. C-411/03 [2005] ECLI:EU:C:2005:762; Cadbury Schweppes C-196/04 [2006] ECLI:EU:C:2006:544; Cartesio C-210/06 [2008] ECLI:EU:C:2008:723.

⁴ H. Horak & K. Dumančić & J. Pecotić Kaufman, *Uvod u europsko pravo društava*, Školska knjiga, (Zagreb 2011); H. Horak & K. Dumančić, *L'influence ducadrereglementaire sur l'identite d'organisation de l'entreprise*, poglavlje u knjizi "Economicintegrations, competitionandcooperation, Integrationséconomiques, concurrence et cooperation", V. KANDŽIJA & A. KUMAR (EDS.), CEMAFI INTERNATIONAL (Rijeka 2016); H. Horak & N. Bodiřoga-Vukobrat & K. Dumančić, *Sloboda pružanja usluga na unutarnjem tržištu Europske unije* (Školska knjiga 2015); H. Horak & K. Dumančić, *The VALE Case as Direction for New Rules: Dream or Reality?*, in *NEW EUROPE—OLD VALUES? REFORMAND PERSEVERANCE* (N. Bodiřoga-Vukobrat & S. Rodin & G. Sander (eds.), Springer 2015); H. Horak & K. Dumančić & K. Poljanec, *European Market Law, Textbook, Ekonomski fakultet u Zagrebu* (H. Horak (ed.) 2015); H. Horak & K. Dumančić, *Jačanje prava dioničara in "Korporativno upravljanje u Hrvatskoj, Ocjena kvalitete korporativnog upravljanja hrvatskih dioničkih društava SEECGAN metodologijom"*, (D. Tipurić (ed.), CIRU, Zagreb 2015); H. Horak & K. Dumančić & K. Poljanec & D. Vuletić, *EUROPEAN MARKET LAW, HANDBOOK Vol. 1*, State University Faculty of Law Voronezh, Faculty of Economics and Business Universtiy of Zagreb (Voronezh 2014), retrieved from: http://web.efzg.hr/dok/kid/EUROPEAN_MARKET_LAW.pdf; H. Horak & K. Dumančić & K. Poljanec, *The Interconnection of Company Data—A Way Forward Indvelopment of Freedom of Establishment?*, International 4th OFEL Conference on Governance, Management and Entrepreneur

proposal for 14th Directive aiming at regulating the cross-border transfer of seat. The initiative for the Directive was accompanied with lots of discussion and studies⁶ and then left in unpleasant silence. The one of the explanation was that directive on cross border mergers and acquisitions⁷ and Regulation on Societas Europea⁸ already regulate some of the necessary issues. It must not be forgotten that this was a short-term goal of Action plan in 2003⁹ and still is outlined in Action plan 2012!¹⁰ Also one of the reasons for this silence is different rules and different application in the Member

ship “New Governance for Value Creation towards Stakeholding and Participation”, Dubrovnik, Croatia (April 14-16, 2016); H. Horak & K. Dumančić & K. Poljanec, Neuskladenost prava pripajanja i spajanja na unutarnjem tržištu EU kao prepreka slobodi poslovnog nastana, Conference proceedings from the scientific conference “Zakon o trgovačkim društvima—20 godina primjene u interdisciplinarnom okruženju”, Faculty of Economics and Business Zagreb (2015), <http://web.efzg.hr/dok/KID//Zbornik%20trg.%20drustva.pdf>; H. Horak & K. Dumančić, Regulation of Non-financial Reporting—Corporate Governance New Developments or Old Requirements, 7th International Scientific Conference Economic and Social Development, Varaždin Development and Entrepreneurs Agency, New York (2014); H. Horak & K. Dumančić & K. Poljanec, *Principle of Transparency as Integrative Factor of the Internal Market and Harmonisation of Croatian Law on Companies Registries*, 3 (14) INTERNATIONAL LAW READINGS (МЕЖДУНАРОДНО-ПРАВОВЫЕ ЧТЕНИЯ), Voronezh State University, Russia (2014).

⁵ VALE C-378/10 [2012] ECLI:EU:C:2012:440.

⁶ In December 2007, the European Commission published an impact assessment on the Directive on the cross-border transfer of the seat (so called the Fourteenth Directive) COMMISSION STAFF WORKING DOCUMENT: Impact assessment on the Directive on the cross-border transfer of registered office, Brussels, 12.12.2007. SEC (2007) 1707. Document contains arguments pro et contra potential activity of the Commission and potential consequences of non-acting in this regulatory area. After this document, the European Commission did nothing further concerning this directive. In 2011, two documents were prepared concerning the freedom of establishment, possibilities of cross-border transfer of the companies’ seat and further activities proceeding the Fourteenth Directive. These documents are: European Parliament: Draft report with recommendations to the Commission on the 14th Company Law directive on the cross-border transfer of company seats (2011/2046(INI)) of 27.9.2011 and European Parliament: Opinion of the Committee on Employment and Social Affairs for the Committee on Legal Affairs on the 14th Company Law directive on the cross-border transfer of company seats (2011/2046(INI)) 27.9.2011.

⁷ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (Text with EEA relevance) OJ L 310, 1—9 (25/11/2005); Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions OJ L 259, 14—21 (2.10.2009).

⁸ Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294 (10/11/2001).

⁹ Commission Communication of 21 May 2003, “Modernising Company Law and Enhancing Corporate Governance in the European Union-A plan to Move Forward” (COM (2003) 0284).

¹⁰ Commission Communication of 12 December 2012, “Action Plan: European Company Law and Corporate Governance” (COM (2012) 740 final).

States national company laws.¹¹ The authors still rely on their opinion that company law is the first and foremost part of the national law and that must be borne in mind when regulating this issue. Still the focus remains on company mobility and nowadays so important digitalization issues like online registration and digitalization of company registers within commercial courts.¹²

I. DEVELOPMENTS IN THE AREA OF EU COMPANY LAW

Authors support opinions and comments of other authors in the field of the European Union Company Law that Company law is not a static category¹³ and there is continuous need of harmonization of national laws in order to bring them closer¹⁴ for the sake of the EU Internal market with special emphasis on freedom of establishment and free movement of capital.¹⁵ It must be underlined that the most important issue is application of the real seat theory or incorporation theory in member states. But as Hopt explains the influx of the member states company laws can no longer be obstructed based on the seat theory beside the fact that the seat theory maintains that in conflicts of law the relevant law for a corporation is determined by its legal seat/application in Germany/and not by the place of incorporation like in many other Member States.¹⁶

¹¹ Different instruments of harmonization can be used. Recommendation is not binding for Member States and that instrument guarantees the maximum of flexibility to the Member States as they have discretion on implementation in their national law. The directive is a binding instrument for Member states and they have a flexibility to apply it in their national system as it is most convenient. The regulation would introduce obligatory rules and it is directly applicable in Member states no matter of their specificities. We have to mention that in the European company law only three regulations exist and all of them regulate supranational companies. All other company law issues are regulated by the directives; H. Horak & K. Dumančić, *Freedom of Establishment: VALE Case—Direction for New Rules: Dream or Reality?*, chapter in: NEW EUROPE—OLD VALUES? (N. Bodiřoga-Vukobrat & S. Rodin & G. Sanders, Springer, Switzerland 2015).

¹² H. Horak & K. Dumančić & K. Poljanec, *Modernizacija i usklađivanje prava društava u Republici Hrvatskoj sa pravnom stečevinom Europske unije i načelo transparentnosti podataka*, zbornik radova s II. Međunarodne konferencije “Bosna i Hercegovina i Euroatlanske integracije-trenutni izazovi i perspektive” (Faculty of Law University of Bihać and Centar za društvena istraživanja Internacionalnog Burč univerziteta, Bihać 2014).

¹³ J. Barbić, *Utjecaj njemačkog prava na stvaranje hrvatskog prava društava*, Zbornik radova Pravnog fakulteta u Splitu, god. 44, 3-4/2007.

¹⁴ K. HOPT, *MODERN COMPANY LAW PROBLEMS: A EUROPEAN PERSPECTIVE*, COMPANY LAW REFORM IN OECD COUNTRIES 12 (Stockholm, December 7-8, 2000), retrieved from <http://www.oecd.org/dataoecd/21/28/1857275.pdf>.

¹⁵ M. ADENAS & H. WOOLDRIDGE, *EUROPEAN COMPARATIVE COMPANY LAW* (Cambridge University Press 2009).

¹⁶ Hopt J. K., *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance*, Law Working Paper No. 296/2015, www.ecgi.org/wp/ (last visited June 1, 2017).

There is still opinion that Daily Mail¹⁷ doctrine has not fully overcome but pathway for free departure from one member state to another has been reached. It is important to outline that in the absence of harmonized legal framework, national laws apply. In practice the situation in the Member States more or less usually requires a liquidation of a company in home member state and establishment of new legal entity in host member state.

The last ECJ judgment in the area of establishment was VALE case. The case concerned the Italian company VALE Costruzioni S.r.l. which was incorporated in the commercial register in Rome, Italy in 2000. On 3 February 2006, VALE Costruzioni applied to be deleted from that register and the reason for deletion was its wish to transfer the company seat and business to Hungary and to discontinue further business in Italy. On 13 February 2006, the company was removed from the Italian commercial register in which it was noted that the company had moved to Hungary.¹⁸

Once the company had been removed from the register, the director of VALE Costruzioni and another natural person incorporated VALE Építési in Hungary. The representative of VALE Építési requested from the Hungarian commercial court to register the company in the Hungarian commercial register, together with an entry stating that VALE Costruzioni was the predecessor in law of VALE Építési. However, that application was rejected by the commercial court on the ground that a company which was incorporated and registered in Italy could not transfer its seat to Hungary and could not be registered in the Hungarian commercial register as the predecessor in law of a Hungarian company.¹⁹

Under Italian law it is possible for a company to convert into a company established under foreign law. Under Hungarian law only companies incorporated under the Hungarian law are allowed to convert. The Hungarian Supreme Court which had to adjudicate on the application to

¹⁷ In Case C-81/87 *Daily Mail and General Trust* [1988] the ECJ gave its judgment regarding the freedom of establishment. The *Daily Mail* was a company registered in United Kingdom. In order to evade paying taxes in the UK, *Daily Mail* transferred its central management to the Netherlands. UK gave no consent for such a transaction since they saw the transaction as a tax evasion. The ECJ held that Articles 49 and 54 TFEU § 24 "... cannot be interpreted as conferring on companies incorporated under the law of a Member state a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State." The base for the ECJ judgment was a presumption that companies unlike natural persons are creatures of the national Law and hence they exist only by virtue of national Law. Therefore, it is upon discretion of each Member State how it will treat the domestic companies.

¹⁸ Case C-378/10 *VALE*, § 9.

¹⁹ H. Horak & K. Dumančić, *The VALE Case as Direction for New Rules: Dream or Reality?*, in *NEW EUROPE—OLD VALUES? REFORM AND PERSEVERANCE* (N. Bodiřoga-Vukobrat, S. Rodin, G. Sander, (eds.), Springer 2015).

register VALE Építési, asked the ECJ whether Hungarian legislation which enables Hungarian companies to convert but prohibits companies established in another Member State from converting to Hungarian companies is compatible with the principle of the freedom of establishment. In that regard, the Hungarian court tried to determine whether, when registering a company in the commercial register, a Member State could refuse to register the predecessor of that company which originated in another Member State.

As regarding the absence of rules on the cross-border transfer of the company seat laid down in the secondary EU law, the ECJ notes that their existence cannot be a precondition for implementation of the freedom of establishment. Any restriction of this freedom may only be justified based on overriding reasons in the public interest.²⁰ ECJ underlines the difference when observing the migration of companies.²¹ In case of immigration, departure of the company is regulated by the national law of the home Member State and in the case of company emigration, the European law is applicable, as it was the situation in VALE.

Accordingly, the ECJ finds out that, as regarding the conversion of companies which already have their seat in Hungary, the Hungarian national legislation at issue, treats, in general, companies differently according to whether the conversion is of domestic or of a cross-border nature. However, since such difference in treatment is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment, it amounts to unjustified restriction on the exercise of that freedom. In other words, EU law precludes the authorities of a Member State from refusing to record in its commercial register, in the case of cross-border conversions, the company of the Member State of origin as the predecessor in law of the converted company, if such record is made of the predecessor company in the case of domestic conversions.²² The VALE judgement underlines the importance of economic reasons overcoming the legal reasoning. The request for assuring the continuance in company due to security of the third party and assuring the economic activity of the company, as economic reason prevailed all the other reasons for the judgement. The conclusion of the VALE case in line with the AG Jääskinen opinion²³ that economic and business continuity without losing legal personality of the company is of outmost importance for all the stakeholders

²⁰ Case C-378/10 VALE, § 39.

²¹ Case C-210/06 Cartesio, § 111, 112, 113.

²² Case C-378/10 VALE, § 55.

²³ Opinion of Advocate General Jääskinen, delivered on 15 December 2011.

of the company.

According to Panizza²⁴ while some Member States opt for the incorporation theory (where company is governed by the law of the country where it has its registered office) in other Member States they adopt the real seat theory (where company is governed by the law of the country where the headquarter of principal place of business is located). These differences affect the rules and procedures governing cross-border operations.

From the employee protection, minority shareholder and creditors' point of view, the real seat approach should be strengthened and for the sake of other EU goals maybe the freedom of establishment should be "harmonized" and balanced with them, especially from the socioeconomic point of view and to avoid erasure of European social model and possibly to avoid the grey economy because the numbers are quite alarming.²⁵ Again, there is a possible clash between private and public interest and issues that are priorities between the public and private law.

We cannot foresee these achievements as a full application of regulatory competition like in the USA. The result of such different application in Member States is risky for the stakeholders in the first place the minority shareholders, employees and investors. Of course then come out issues like insolvency, taxes, tort etc. Besides that there are also administrative costs and unpredictable social issues. The aforementioned possibilities from SE and SCE Regulation and Cross Border Merger Directive as Horak and Dumančić explained²⁶ there are quite complicated procedures which do not provide a direct transfer of the seat. Instead it requires an option conversion to supranational form or merger with already established company in another Member State!

The silence is again broken by investing AG opinion in Polbud case²⁷ but still the ECJ practice does not provide a strict guidance and set of rules, in such complicated situations where procedural rules in member states differ so much.

²⁴ R. Panizza, Cross Border Transfer of Company Seats, Policy Department for Citizens Rights and Constitutional Affairs, European Parliament, Briefing, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI\(2017\)583143_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf).

²⁵ See the study: The Grey Economy 2014, Grey Economy Information Unit, Finnish Tax Administration, Vero Skatt.

²⁶ H. Horak & K. Dumančić, *Freedom of Establishment: VALE Case—Direction for New Rules: Dream or Reality?*, chapter in NEW EUROPE—OLD VALUES? (N. Bodiřoga Vukobrat, S. Rodin, G. G. Sanders, Springer, Switzerland 2016).

²⁷ Opinion Polbud C-106/16 ECLI:EU:C:2017:351.

II. ANALYSIS OF THE AG KOKOTT OPINION IN ECJ CASE C 106/16 POLBUD

Polbud—Wykonawstwosp.zo.o. (“Polbud”) is a private limited liability company incorporated under Polish law and established in Łącko. On 30 September 2011, its shareholders passed a resolution to transfer the “company’s seat” to the Grand Duchy of Luxembourg, in accordance with Polish Law. The place in which it actually carries on its economic activity remained unchanged.²⁸ On that basis, on 19 October 2011, Polbud applied to the competent registry court to initiate the liquidation procedure. On 26 October 2011, the initiation of that procedure was entered in the commercial register and a liquidator was appointed.²⁹ On 28 May 2013, the meeting of Polbud’s shareholders agreed before a notary in Rambrouch (Luxembourg) to implement the transfer-of-seat resolution passed in September 2011 and to transfer the company’s seat to Luxembourg with effect from that date, without terminating the company’s legal personality or forming a new legal person. The shareholders further resolved that the company would take the legal form of a private limited liability company governed by Luxembourg law, that its name would be changed to Consoil Geotechnik SARL (“Consoil”), and that its Articles of Incorporation would be redrafted. Accordingly, the Consoil was entered in the Luxembourg Companies Register on 14 June 2013.³⁰

Moreover, on 24 June 2013, Polbud filed an application to be removed from the commercial register with the registry court in Poland. Polbud failed to carry out the instruction given to it by that court that it should prove for the purposes of its application that the company had been wound up and liquidated. It referred instead to the transfer of the company’s seat to Luxembourg and the company’s continued existence under the law of that Member State.³¹ The registry court refused the application by order of 19 September 2013. The appeals lodged against that order at first and second instance were unsuccessful.³²

By means of an appeal in cassation of 4 June 2014, the company finally brought the matter before the Sąd Najwyższy (Supreme Court, Poland). It claims that, on the day of the transfer of its seat to Luxembourg, it lost its status as a Polish corporation and became a company under Luxembourg law. By that stage, the liquidation procedure had ended and the

²⁸ Polbud C-106/16, § 13.

²⁹ Polbud C-106/16, § 14.

³⁰ Polbud C-106/16, § 15.

³¹ Polbud C-106/16, § 16.

³² Polbud C-106/16, § 17.

company should have been removed from the Polish register.³³

The Sąd Najwyższy referred the following questions to the Court:

1. Do Articles 49 and 54 TFEU preclude the application by a Member State, in which a [private limited liability] company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on the company being wound up after liquidation has been carried out, if the company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

If the answer to that question is in the negative:

2. Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that proceedings for the liquidation of the company be carried out—including the conclusion of current business, recovery of debts, fulfilment of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of those acts, and indication of the person to whom the books and documents are to be entrusted—which precede the winding-up thereof, which occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection in the form of safeguarding of creditors, minority shareholders, and employees of the migrant company?

3. Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on the freedom of establishment include a situation in which—for the purpose of conversion to a company of another Member State—a company transfers its registered office to that other Member State without changing its place of principal establishment, which remains in the State of initial incorporation?

The idea is that Polbud wanted to change its legal form to that of a private limited liability company governed by Luxembourg law. Since Luxembourg, like all other Member States, requires as a condition of incorporation and continued existence under national law that companies have a statutory seat in the national territory, such a plan necessarily entails the transfer of Polbud's statutory seat.³⁴ Indeed, this appears to have been achieved as Consoil was entered in the Luxembourg Companies Register.

According to the EU company law this situation is considered as the cross-border conversion when one company is converted into a company subject to the law of another Member State.³⁵

AG Kokott compares this situation with VALE case which states para. 23 that the success of such a conversion depends in principle on the legal systems of both the Member State of origin and the host Member State.

³³ Polbud C-106/16, § 18.

³⁴ Polbud C-106/16, § 21.

³⁵ Polbud C-106/16, § 22.

Thus, the judgment in VALE³⁶ concerned a situation in which the host Member State provided for the possibility of conversion for domestic companies but did not permit cross-border conversions. The situation in the present case, on the other hand, concerns obstacles on the part of the Member State of origin. The Polish law, after all, does not allow Polbud, in which legal personality is to be carried on through Consoil, to be removed from the commercial register without first being liquidated and wound up.³⁷

According to the previous judgments in such cases it is obvious that the ECJ has established a rule which differs two main situations: immigration and emigration of the company. In the case of company immigration the rule is that the host Member State can act in accordance with the EU law and has obligation to register the company within its legal system. On the other hand, in the situation of emigration, the home Member State has right to establish its own rules and to apply national law which restricts the company emigration.³⁸ We may conclude that in the present situation the rule in question refers to the application of law in the situation of the company emigration and implementation of the restrictive national law. As regarding the previous ECJ practice it would be predictable of ECJ to give priority to the national law in this situation.

AG Kokott states that it must now be clarified, in essence, whether the freedom of establishment precludes that arrangement. What sets the situation in this case apart is the fact that, according to the information contained in the request for a preliminary ruling, the cross-border conversion is not accompanied by a change to the centre of the company's commercial activities. The referring court asks whether, in that context, the freedom of establishment is applicable (third question), whether that freedom has been restricted (first question) and, if so, whether that restriction is justifiable (second question).³⁹

In order to give answers on the aforementioned questions AG Kokott starts the third question with definition of the right of establishment.

By its question, the referring court wishes to ascertain whether the freedom of establishment applies to an operation whereby a company incorporated under the law of one Member State, with the aim of converting itself into a company in another Member State, transfers its statutory seat to that other Member State without changing its "place of principal

³⁶ VALE C-378/10.

³⁷ Polbud C-106/16, § 23.

³⁸ VALE C-378/10; H. Horak & K. Dumančić, *Freedom of Establishment: VALE Case—Direction for New Rules: Dream or Reality?*, chapter in: *NEW EUROPE—OLD VALUES?* (N. Bodiroga Vukobrat, S. Rodin, G. G. Sanders, Springer, Switzerland 2015).

³⁹ Polbud C-106/16, § 24.

establishment” (that is to say, in the language used by the Court in the judgment in *Cartesio*, (10) its “real seat”), which remains in the Member State of origin.⁴⁰ In accordance with the Court’s case-law, company transformation operations are, in principle, amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment. (11) This does not mean, however, that such operations are generally caught by the scope of that fundamental freedom. Rather, the conditions laid down in Article 49 TFEU must always be satisfied. Under that provision, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited, while Article 54 TFEU provides that companies duly incorporated under the law of a Member State are to be treated in the same way as nationals.⁴¹ A company can rely on the freedom of establishment if it concerns a company established under the EU Member State national law. In this legal situation *Polbud* is to be regarded as a Polish company and as such capable of relying on the freedom of establishment. Subsequently, a legal person is subject to the law of the State in which it has its seat and by the Polish legislature the concept of the seat refers to the company’s “statutory seat”. Since *Polbud* has changed its statutory seat, as AG Kokott state in her Opinion, paras. 30 and 31, if, however, that term refers to a company’s statutory seat, *Polbud* could no longer be regarded as a company under the Polish law and this question is the matter for the referring court to resolve and need not be dealt with here, since that the court is not itself in any doubt that *Polbud* is able to rely on the freedom of establishment. As regarding that issue we can conclude that the freedom of establishment is applicable to *Polbud* company.

As concerns the present case, it appears that the centre of *Polbud*’s commercial activities remained in Poland. This does not rule out the possibility that the company will nonetheless pursue in Luxembourg activities which constitute actual establishment within the meaning of case-law, or that it intends to establish itself in this way. If that is the case, the freedom of establishment will apply.⁴² AG Kokott makes the difference if *Polbud* only seeks to change the company law applicable to it in which case the freedom of establishment is not relevant. Although the freedom gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them. Consequently, a cross-border conversion is not caught

⁴⁰ *Polbud* C-106/16, § 26.

⁴¹ *Polbud* C-106/16, § 27.

⁴² *Polbud* C-106/16, § 37.

by the freedom of establishment where it is an end in itself, but only where it is accompanied by actual establishment.⁴³

In the judgment in *Cartesio*⁴⁴ the ECJ concluded that regarded cross-border conversions as falling within the scope of the freedom of establishment irrespective of any actual act of establishment. Considered as a whole, its findings suggest rather that it draws a distinction between a transfer of a company's actual seat that involves no change of the law applicable to that company, on one hand, and a transfer that involves a change of the law applicable to it, on the other. That conclusion seems compelling not least because the Court's obiter dictum is to be read in the light of the principal finding that precedes it, and because the judgment in question is, from the point of view of the substance of that case, concerned with the transfer of a company's "real seat".⁴⁵

AG Kokott compares the situation with judgments in *Centros*⁴⁶ and *Inspire Art*⁴⁷ and concludes that in so far as Polbud's plan is, as a company governed by the law of one Member State, to engage in economic activity exclusively in another Member State, and here is an existing company which would simply like to change its legal clothes.⁴⁸

The AG Kokott conclusion in this question is in accordance to the existing "rule" given by the ECJ when she states that the fact that, in Luxembourg, a company, in the form of Consoil, was successfully registered as having the object of carrying on Polbud's legal personality does not support any other conclusion in this regard. So far as Poland is concerned, this makes no material difference. After all, as the Court has held, cross-border conversions of companies presuppose the consecutive application of two national laws.⁴⁹ Figuratively speaking, although Polbud already has one foot in Luxembourg, it still has the other one in Poland.⁵⁰

The answer of AG Kokkot is in line with previous ECJ judgments and the authors agree that the freedom of establishment provided for in Articles 49 and 54 TFEU applies to an operation whereby a company incorporated under the law of one Member State transfers its statutory seat to another Member State with the aim of converting itself into a company governed by the law of the latter Member State, in so far as that company actually

⁴³ Polbud C-106/16, § 38.

⁴⁴ Case C-210/06 *Cartesio*.

⁴⁵ Polbud C-106/16, § 40.

⁴⁶ Case *Centros* C-212/97 [1999] ECLI:EU:C:1999:126.

⁴⁷ Case *Inspire Art* C-167/01 [2003] ECLI:EU:C:2003:512.

⁴⁸ Polbud C-106/16, § 41.

⁴⁹ *VALE* C-378/10, EU:C:2012:440, § 37.

⁵⁰ Polbud C-106/16, § 42.

establishes itself in the other Member State, or intends to do so, for the purpose of pursuing genuine economic activity there. This does not detract from the power of the latter Member State to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law, and the connecting factor required to maintain that status.⁵¹

When it is clearly analysed and concluded that Polbud case should be analysed by the application of EU rules on the freedom of establishment the decision on the restrictions given by the Polish law is discussed above. According to Articles 51 and 52 TFEU, restrictions of the freedom of establishment are permissible only if they are justified by overriding reasons in the public interest. In that regard, they must be appropriate to attain the objective which they pursue and not go beyond what is necessary to attain it.⁵²

It is a settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom.⁵³

The central question that the ECJ should answer is whether there is a restriction of the freedom of establishment where the removal of the company in question from the commercial register of the Member State of origin, as a condition of completion of a cross-border conversion, is the subject to that company's prior liquidation and winding-up.⁵⁴ According to the AG Kokott Opinion and in line with the information supplied by the referring court, the transfer of a Polish company's seat within the European Union does not lead to the loss of legal personality in Polish Law. Even if the law applicable to the company is changed, the company's identity as a person in law is maintained. In principle, therefore, Polish law recognises that Polbud's legal personality may be carried on through Consoil. It is at the same time the case, however, that, pursuant to the Polish law, a resolution to transfer a company's seat requires that the company be wound up after it has been liquidated.

AG Kokott concludes that, in the case where a company incorporated under the law of one Member State has actually established itself, or intends to establish itself, in another Member State for the purpose of carrying on genuine economic activity there, and converts itself into a company governed by the law of the latter Member State, the application of national legislation under which the removal of that company from the commercial

⁵¹ Polbud C-106/16, § 43.

⁵² Articles 51 and 52 TFEU.

⁵³ Polbud C-106/16, § 45. Also *see* judgments Gebhard C-55/94, EU:C:1995:411, § 37; Payroll and Others C-79/01, EU:C:2002:592, § 26; Caixa Bank France C-442/02, EU:C:2004:586, § 11; National Grid Indus C-371/10, EU:C:2011:785, § 36; AGET Iraklis C-201/15, EU:C:2016:972, § 48.

⁵⁴ Polbud C-106/16, § 45.

register of the Member State of origin is subject to the condition that company must first be wound up after having been liquidated restricts the freedom of establishment.⁵⁵

Member States can restrict the freedom of establishment but they have to justify their restrictions and this restriction has to be proportionate. In that sense, the question is the obligation to carry out a liquidation procedure which constitutes a proportionate means of protecting the creditors, minority shareholders and employees of a company that performs a cross-border conversion.⁵⁶ It is settled case-law that, other than in situations referred to in Articles 51 and 52 TFEU, restrictions of the freedom of establishment are permissible only if they are justified by overriding reasons in the public interest. In that regard, they must be appropriate to attain the objective which they pursue and not go beyond what is necessary to attain it.⁵⁷ Poland invokes the following overriding reasons: combating abusive practices and protecting interests of creditors, minority shareholders and employees.

As regarding the reason of combating abusive practices Poland takes the view that the conversion at issue here is an artificial arrangement which is not justified on economic grounds. Liquidation of the company, it contends, is an appropriate means of preventing undertakings from circumventing domestic law.⁵⁸ AG Kokott considers this justification not applicable since the national measure through obligation to carry out a liquidation procedure goes beyond what is necessary and if the cross-border initiative is inspired by dishonest motives the Member States have possibility to adopt any appropriate measure to prevent and penalise fraud.⁵⁹

As regarding the justification by recalling the protection of interests of creditors, minority shareholders and employees it is clear from the previous ECJ practice that the interests of creditors, minority shareholders and employees are overriding reasons in the public interest.⁶⁰ It is by no means apparent, however, that the requirement to carry out a liquidation procedure is an appropriate means of protecting the interests of the aforementioned groups. In fact, cross-border conversions are impeded or prohibited by that requirement even where those interests are not threatened.⁶¹ So far as

⁵⁵ Polbud C-106/16, § 48.

⁵⁶ Polbud C-106/16, § 49.

⁵⁷ Para. 51, *see* judgments Gebhard, Futura Participations and Singer C-250/95, EU:C:1997:239, § 26; Cadbury Schweppes and Cadbury Schweppes Overseas C-196/04, EU:C:2006:544, § 47; National Grid Indus; AGET Iraklis. *See also* the judgment Cartesio, § 113.

⁵⁸ Polbud C-106/16, § 53.

⁵⁹ Polbud C-106/16, § 55.

⁶⁰ Polbud C-106/16, § 56. *See also* judgments Ü berseering C-208/00, EU:C:2002:632, § 92; SEVIC Systems C-411/03, EU:C:2005:762, § 28; and VALE, § 39.

⁶¹ Polbud C-106/16, § 56.

concerns the protection of creditors, it is only the interests of the company's existing creditors that may be relevant. After all, as soon as Polbud continues to trade in Poland following its cross-border conversion into the legal form of a Luxembourg company, it will become apparent to potential creditors that the company's internal and external relations are not governed by Polish law.⁶² There is a risk, however, that the interests of existing creditors will be adversely affected by the conversion. In particular, the company might henceforth be subject to less stringent rules in relation to capital protection and liability. That being the case, there could be no objection to the prospect of such creditors being permitted to request appropriate safeguards, provided that they can demonstrate that, on account of the conversion, the satisfaction of their existing claims is at stake.⁶³

The change to the law applicable to the company might also be detrimental to the position of any shareholders who unsuccessfully opposed the conversion. The new law applicable to the company may bring about changes to the rights and obligations of those with a holding in the company. In those circumstances, it would seem to be proportionate to enable the shareholders concerned to terminate their participation in the company in return for a fair price.⁶⁴

The third reason protection of employees must be taken into consideration since the conversion and associated transfer of the company's statutory seat could, however, have an impact on certain rights which employees enjoy by virtue of the location of the company's statutory seat. One of the crucial issues concerned is the corporate co-determination, that is, the participation [by workers] in the management of the undertaking. The company law to which the undertaking will be the subject may provide for less extensive rights of co-determination on the part of employees after the conversion.⁶⁵

AG Kokott explains para. 65 that from the point of view of its potential effects on employees' rights, a cross-border conversion is not different in this regard from a cross-border merger. The latter were regulated separately by the EU legislature in Directive 2005/56, Article 16 of which contains a special provision on the safeguarding of employees' interests that is geared in essence towards the achievement of a negotiated settlement. In the light of the foregoing, no concerns would be raised if the member state of origin of a company carrying out a cross-border conversion was to insist on

⁶² Polbud C-106/16, § 59.

⁶³ Polbud C-106/16, § 60.

⁶⁴ Polbud C-106/16, § 62.

⁶⁵ Polbud C-106/16, § 64.

compliance with requirements to that effect.

At the end, the AG Kokott concludes that the general obligation to carry out a liquidation procedure does not constitute a proportionate means of protecting the creditors, minority shareholders and employees of a company that performs a cross-border conversion.⁶⁶

This conclusion is not completely in line with earlier ECJ practice where the strong difference between immigration and emigration was made. According to this opinion the measures that restrict freedom of establishment given by the home Member States were regarded as part of the application of EU Law obligation with no distinction between exit and entrance to the Member State concerned.

In the case where a company incorporated under the law of one Member State has actually established itself, or intends to establish itself, in another Member State for the purpose of carrying on genuine economic activity there, and converts itself into a company governed by the law of the latter Member State, the application of national legislation under which the removal of that company from the commercial register of the Member State of origin is subject to the condition that company must first be wound up after having been liquidated restricts the freedom of establishment.

In the same time obligation of the home Member State to carry out a liquidation procedure does not constitute a proportionate protection measure for the creditors, minority shareholders and employees of a company that performs a cross-border conversion.

AG Kokott opinion goes “slightly in different” direction comparing to the previous practice of the ECJ. This change can be primarily regarded as a move from the idea of application of national law when the company exits the Member State and application of EU law when company enters the Member State. This earlier established rule in case of *Polbud* has been changed as regarding the application of national law rules of the Member State where the company has its seat when the company exits that State and has to comply with the national rule regarding the liquidation of a company as a prerequisite for the exit. In this case the liquidation is considered as a national restriction to the free movement. This reasoning goes in favour of the idea of “protecting and continuing the economic activity in another Member State”⁶⁷ and may show further trend in ECJ practice of giving the advantage to economic activity before other protected values.

This is the first opinion in which the liquidation of a company as a prerequisite to exit the Member State is concerned as a restriction since

⁶⁶ *Polbud* C-106/16, § 66.

⁶⁷ Compare with *VALE* case.

many national laws concern the liquidation of a company as a part of regular procedure when the company wants to exit the Member State.

CONCLUSION

Almost all European Union legal documents regulating the rules applicable to the companies, recommend the adoption of the directive that would regulate cross-border transfer of the company seat and that will go in favorem of the incorporation theory. This idea is also accentuated in ECJ judgments *Cartesio* and *VALE*.

The AG Kokott opinion in *Polbud* case does not follow the idea of the proposal for the Fourteenth Directive but it is based on the idea of continuity of the company economic activity. AG Kokott goes further and underlines the importance of the idea that the national rules on the liquidation of a company can restrict the freedom of establishment and further activity of a company in another Member State. That possibility is the reason that rules on liquidation can constitute a restriction to the free movement of the seat and have to be justified.

The European Commission activities follow the idea of common conflict of law rules in a new “Rome V Regulation” based on incorporation principle and proposal for the adoption of Directive on cross-border transfer of the seat with harmonized rules and procedures for cross-border reincorporation and protection of all stakeholders.⁶⁸

From the employee, minority shareholders and creditors protection point of view, there must be an approach for strengthening the real seat theory on one side and incorporation theory on the other side for the sake of internal market. Again we have a clash between private and public law and private and public interest.

The judgment in the *Polbud* case⁶⁹ potentially can lead to a different

⁶⁸ R. Panizza, Cross Border Transfer of Company Seats, Policy Department for Citizens Rights and Constitutional Affairs, European Parliament, Briefing, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI\(2017\)583143_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf).

⁶⁹ ECJ judgment in the case *Polbud* was brought up on the 25th of October 2017. The judgment is in accordance with the AG Opinion and it states that the Polish legislation constitutes a restriction on the freedom of establishment. Such a restriction may, in principle, be justified by overriding reasons in the public interest, such as the protection of the interests of creditors, minority shareholders and employees. However, the Polish legislation prescribes, in general, mandatory liquidation, there being no consideration of the actual risk of detriment to those interests and no possibility of choosing less restrictive measures capable of protecting those interests. In the Court’s view, such a requirement goes beyond what is necessary to achieve the objective of protecting the abovementioned interests. Finally, as regards the argument of the Polish government that that legislation is justified by the objective of preventing abusive practices, the Court holds that, since a general obligation to implement a liquidation procedure amounts to establishing a general presumption of the existence of abuse, such legislation is disproportionate.

attitude towards the request for the liquidation of a company as a prerequisite for the cross-border transfer of the company seat. From the authors' opinion AG Kokott after quite a long period of time underlines the importance of economic activity and strongly advocates against the company liquidation. This concept is for the first time stated in this opinion irrespective of the practice and regulation of many Member States that require the company liquidation when leaving the country.

If the ECJ judgment will follow the AG Kokott opinion this would be small but anyway a big step forward in the cross-border transfer of the company seat.