XXXVIII POLISH YEARBOOK OF INTERNATIONAL LAW
2018
DOI 10.24425/pyil.2019.129616
PL ISSN 0554-498X

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CROSS-BORDER TRANSFER OF A SEAT, CROSS-BORDER CONVERSION OR THE COMING INTO EXISTENCE OF A NEW COMPANY?

DOUBTS AGAINST THE BACKGROUND OF THE COURT OF JUSTICE'S JUDGMENT IN C-106/16 POLBUD – WYKONAWSTWO SP. Z O.O.

Abstract:
This article focuses on mobility of companies in the European Union in the light of the Court of Justice's judgment in the C-106/16 Polbud – Wykonawstwo sp. z o.o. case.[1] *The Court of Justice has once again interpreted the treaty provisions relating to the EU freedom of establishment in the context of cross-border conversion of companies. The in-depth analysis of the case from the substantive law perspective as well as from the conflict-of-law perspective has raised some doubts with regard to the background of the judgment. Therefore, the article assesses whether the cross-border transfer of a seat took place in the Polbud case or the cross-border conversion, or possibly a new company has come into existence. Most of the analysis is aimed at exposing the risks related to the companies' mobility under the rules adopted in the Polbud judgment, in particular in the absence of respective European and national regulation.*

Keywords: cross-border transfer of seat, cross-border conversion of company, mobility of companies, EU freedom of establishment, conflict-of-laws, statutory seat, real seat, registered office, continuation of legal personality, company's liquidation, protection of creditors, protection of minority shareholders

INTRODUCTION

The subject of this publication falls within the issues surrounding the mobility of companies in the European Union. The Court of Justice has already issued a number of

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[1] Judgment of the Court of Justice of the EU of 25 October 2017 in the case C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804.

well-known judgments on cross-border mobility of companies.[2] However, not many areas of EU law arise equally strong feelings in the legal commentariat. At the same time, the legal issues related to the companies' mobility have the development potential. Therefore, taking up further in-depth debate seems to be desirable. In addition, as it has been mentioned by Advocate General J. Kokott in her opinion "it's all been said before, just not by everyone yet."[3] The Court of Justice, in its judgment in C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, covered by the subject of this article, has once again interpreted the treaty provisions relating to the EU freedom of establishment in the context of cross-border conversion of companies. The judgment has been extensively commented on, both in Polish[4] as well as foreign legal writings.[5] Its reception and

[2] Judgments in the following cases: C-81/87 *Daily Mail and General Trust*, EU:C:1988:456; C-212/97 *Centros*, EU:C:1999:126; C-208/00 *Überseering*, EU:C:2002:632; C-167/01 *Inspire Art*, EU:C:2003:512); C-411/03 *SEVIC Systems*, EU:C:2005:762; C-210/06 *Cartesio*, EU:C:2008:723; C-378/10 *VALE Építési kft.*, EU:C:2012:440. While this matter has hardly ever been subject to regulation at the level of secondary legislation, *see* however Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, [2001] OJ L 310, and Regulation (EC) 2157/2001 of 8 October 2001 on the Statute of a European company (SE), [2001] OJ L 294.

[3] Opinion of Advocate General Kokott delivered on 4 May 2017 in case C−106/16 *Polbud — Wykonawstwo sp. z o.o., in liquidation*, ECLI:EU:C:2017:351, para. 4 (quoting Karl Valentin – a Bavarian comedian, cabaret performer and author who coined countless "well-known sayings").

[4] A. Nowacki, *Artykuł 270 pkt 2 k.s.h. a transgraniczne przeniesienie siedziby statutowej spółki* [Article 270(2) CCC and the cross-border transfer of seat of a company], in: A. Olejniczak and T. Sójka (eds.), *Societates et obligationes – tradycja, współczesność, przyszłość. Księga jubileuszowa Profesora Jacka Napierały* [Societas et obligations – tradition, the present, and the future. Liber amicorum for professor Jacek Napierała], UAM, Poznań: 2018; G. Kozieł, *Dopuszczalność i zasady przeniesienia siedziby statutowej polskiej spółki handlowej do innego państwa członkowskiego Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 25.10.2017 r., C-106/16, Polbud-Wykonawstwo sp. z o.o.* [The permissibility and principles of a cross-border transfer of the registered office of a Polish commercial company or partnership to another EU Member State – commentary on CoJ judgment of 25 October 2017, C-106/16, *Polbud-Wykonawstwo sp. z o.o.*], 2 Europejski Przegląd Sądowy 25 (2018); A. Mucha, *Ochrona wierzycieli w przypadku transgranicznego przeniesienia siedziby polskiej spółki kapitałowej do innego państwa członkowskiego Unii Europejskiej* [Protection of creditors in the outbound cross-border conversion of a Polish company], 1 Transformacje Prawa Prywatnego 113 (2017); A. Mucha, *Transgraniczne przeniesienie siedziby spółki w prawie unijnym. Glosa do wyroku TS z dnia 25 października 2017 r., C-106/16* [Transborder transfer of a company seat in EU law. A commentary on the ECJ judgement of 25 October 2019, C-106/16], 2 Glosa 56 (2018); E. Skibińska, *O zgodności art. 270 pkt 2 i art. 459 pkt 2 k.s.h. z prawem Unii Europejskiej* [On the compatibility of Art. 270(2) and 459(2) CCC with EU law], in: J. Frąckowiak (ed.), *Kodeks spółek handlowych po 15 latach obowiązywania* [The Commercial Companies Code after 15 years in force], Wolters Kluwer, Warszawa: 2018.; A. Guzewicz, *Skutki uchwały o przeniesieniu spółki kapitałowej do innego państwa członkowskiego* [Effects of the resolution on the transfer of a capital company to another Member State], in: K. Bilewska (ed.), *Efektywność zarządzania i nadzoru w spółce handlowej. W poszukiwaniu optymalnego modelu ustroju spółki* [Effectiveness of management and supervision in a commercial company. Searching the optimal model of the company's system], Wolters Kluwer, Warszawa: 2018, p. 375.

[5] S. Frazzani et al., *The Polbud Judgment and the Freedom of Establishment for Companies in the European Union: Problems and Perspectives*, European Parliament, Brussels: 2018; S. McLaughlin, *Unlocking Company Law* (4th ed.) Routledge, London: 2018, pp. 120 et seq.; M. Szydło, *Polbud – Wykonawstwo Sp. z o.o., in Liquidation ('Polbud')*, 55(5) Common Market Law Review 1549 (2018); A. Mucha and K. Oplustil, *Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable*

assessments range from enthusiastic to very critical, which gives rise to further lively discussion.

This commentary aims at the in-depth analysis of the *Polbud* case from the substantive law perspective, taking into consideration selected essential conflict-of-law elements as well. The conflict-of-law aspects were absent in the judgment of the Court of Justice, but they had been covered by the opinion delivered by Advocate General J. Kokott. On the other hand, the facts of the case adopted by the Court of Justice and its findings on the contents of Polish legislation have been made imprecisely. Consequently, the analysis presented in the opinion of Advocate General J. Kokott is more comprehensive and in addition, it does not raise doubts as to the facts of the case established, as well as to applicable law. The Court of Justice has only partially accepted the proposal submitted by the Advocate General. In the end the text of the judgment does not provide legal certainty as to whether the Court of Justice accurately foresaw all the effects that the *Polbud* judgment may produce. This article examines the *Polbud* case taking into consideration the circumstances which arose after the question had been referred to the Court of Justice for a preliminary ruling. Additionally, the risks related to companies' mobility under the rules adopted in the *Polbud* judgment, in particular in the absence of the relevant national regulation, are referred to as well.

1. THE FACTS OF THE CASE, PRELIMINARY QUESTIONS AND THE JUDGMENT

The case concerned a Polish private limited liability company which intended to assume the legal form of a company governed by Luxembourg law while at the same time retaining its legal identity. To complete the operation in question it was necessary to remove the company from the Polish commercial register. However, removing thereof could not be effected, since in accordance with Polish law, the removal of a company from the register requires a prior liquidation and the winding up of the company.

The Polish Supreme Court (*Sąd Najwyższy*) referred the following three questions to the Court of Justice:

> (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 newly established 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

Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud, 15(2) European Company & Financial Law Review 270 (2018).

> 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 principal establishment, which remains in the State of initial incorporation?[6]

The first question came down to determining whether the freedom of establishment precludes Polish regulations under which a company incorporated under Polish law may not be converted into a company governed by the law of another Member State, which in the given case was the law of Luxembourg. Therefore, the question seeks to clarify the scope of application of the EU freedom of establishment, and in particular to determine whether the freedom guarantees to a company incorporated under one Member State's law not only the freedom to choose the location of pursuing its economic activity within the European Union, but irrespective of that the right to make the cross-border change of its legal form.[7]

On one hand, both the Advocate General and Court of Justice decided that the freedom of establishment should apply to the right to carry out the cross-border conversion of the company into a company governed by the law of another Member State. On the other hand, the Advocate General posed additional requirements, including the requirement of an intention to actually pursue an economic activity from the territory of the host state. The Advocate General proposed an answer according to which the freedom of establishment applies to the transfer of the statutory seat of the company, incorporated under the law of one Member State, to the territory of another Member State with the aim of converting it into a company governed by the law of the latter Member State, "in so far as that company actually establishes itself in the other Member State, or intends to do so, for the purpose of pursuing genuine economic activity there."[8] In addition, the Advocate General emphasized that "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."[9]

Whereas the Court of Justice held that the freedom of establishment was "applicable to the transfer of the registered office of a company formed in accordance with the law

[6] Opinion of AG Kokott in C−106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 19.
[7] *Ibidem*, paras. 1-3.
[8] *Ibidem*, para. 43.
[9] *Ibidem*.

of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company."[10] In addition, the Court of Justice held that the Polish legislation "which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State is subject to the liquidation of the first company"[11] was precluded by the EU freedom of establishment.

Taking into account the Court of Justice's ruling on the preliminary reference, the Polish Supreme Court *(Sąd Najwyższy)* has formulated the following theses:

> 1. If the company's connecting factor with the national territory under the law of Luxemburg is satisfied, the EU freedom of establishment covers the Polish company converting itself into a company governed by Luxemburg law. The location where the company pursues an essential portion, or even the whole, of its activity is not relative, as far as it meets the requirements relating to newly establishing [itself] as a legal person of a host State.
>
> 2. A registry court is obliged – although the regulations, found by the judgment of the Court of Justice of the European Union of 25 October 2017 as precluding the principle of the freedom of establishment, have not been repealed – to refuse to apply the Polish regulations providing for the completion of the full procedure of the company's liquidation and to interpret the other provisions applying the "EU-compatible" interpretation, breaking the rules of the textual interpretation.[12]

2. TRANSFER OF THE SEAT ABROAD AND CROSS-BORDER CONVERSION

The whole case started with the resolution of shareholders of the [private] limited liability company, governed by Polish Law, to transfer the "the company's seat" to the Grand Duchy of Luxemburg in accordance with Art. 270(2) of the Polish Commercial Companies Code. *(Kodeks Spółek Handlowych)* (CCC).[13] First of all, it should be explained that Art. 270(2) CCC explicitly refers to the "transfer the company's seat" and not to the "conversion", and therefore the provision in question cannot be the legal basis for the cross-border conversion. It should be emphasized that the "conversion" and the "transfer of a seat" should be treated separately in the substantive area. The transfer of the seat is not a *sine qua non* condition for the conversion in the substantive area and

[10] C-106/16 *Proceedings brought by Polbud - Wykonawstwo sp. z o.o.*, para. 1 of the operative part of the judgment.

[11] *Ibidem*.

[12] Decision of the Supreme Court of 25 January 2018, IV CSK 664/14.

[13] Opinion of AG Kokott in C−106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 13.

those concepts should not be equated. Consequently, it is erroneous to claim that the conversion of the company means automatically the transfer of the company's seat. On the other hand, it is also erroneous to claim that the transfer of the seat means, or is automatically associated with, the conversion of the company. Even though the conversions are usually accompanied by the transfer of the seat, both institutions should be treated separately in legal terms. The same refers to Art. 270(2) CCC as well. The transfer of the seat, referred to in the provision in question, relates to the transfer of the seat only and not to the operation of conversion *sensu stricto* and even more, not to the cross-border conversion *sensu stricto*. Therefore, the provision in question is not applicable to the cross-border conversions.[14] In conclusion, no fragment of Art. 270(2) CCC is the legal basis for the transfer of the seat in that sense that a right to transfer the seat could be derived from that provision. It only provides that the resolution to transfer the seat abroad results in winding up the company in the light of that provision. Therefore, Art. 270(2) CCC is only a provision specifying the reason for winding the company up.

Firstly, it should be emphasized that in no regulation thereof does Polish law prevent or preclude the cross-border conversion of a company and undoubtedly the abovementioned Art. 270(2) does not preclude that. The provision in question applies to the transfer of the company's seat only, and not to the conversion of a company, and therefore cannot preclude the conversion. The provision in question may be applicable, at most, in a situation when, within the framework of the conversion, a resolution to transfer the company's seat is adopted. Nevertheless, also in such a situation the provision in question relates to the transfer of the seat itself and not to the conversion. What is more, it is worth noticing that the resolution to transfer the seat, in itself, cannot be considered the resolution on the company's conversion.

Secondly, the conversion requires to adjust the articles of incorporation of the hitherto company to a new company. The adjustment is processed in accordance with the requirements provided for a new company. It is necessary to draft the "new articles of incorporation", including the indication of the seat required in accordance with those provisions. Any resolution referred to in Art. 270(2) CCC is not covered thereby and is not an act related to adjusting the articles of incorporation. That proves that such a resolution is unnecessary and, undoubtedly, it is not required by law. It can be assumed that such a resolution is treated as a separate act in the meaning of Art. 270(2) CCC not covered by the transformation process since it does not find any teleological justification. Thus, the Supreme Court has erroneously found such a resolution to be the resolution on conversion.

Consequently, in the *Polbud* proceedings the Supreme Court had erroneously identified the transfer of the seat with the conversion of the company and therefore misled the Court of Justice. On this faulty assumption, both the Supreme Court and the Polbud company, as well as the Polish government represented before the Court of Justice, based their deliberations. The facts evidence that the conversion of the company has not taken

[14] Hence aptly, although with different arguments Nowacki, *supra* note 4, pp. 423- 424, 425.

place. There can be no doubt that the possibility to carry out the cross-border conversion is acceptable under the EU freedom of establishment, and it is only the substantive procedure to effect *sensu stricto* conversions, similar to cross-border mergers, that is missing.

3. THE TRANSFER OF THE REGISTERED OFFICE OF THE COMPANY TO ANOTHER MEMBER STATE WITHOUT THE TRANSFER OF THE REAL HEAD OFFICE

The very factual and legal situation established in the case and presented to the Court of Justice by the Polish Supreme Court is doubtful. The Supreme Court emphasized the lack of intention to transfer the real head office of the company[15] and suggested that it was only about the change of the company's registered office. Whereas, it does not result from the resolution of the general meeting of shareholders that the company had directly declared non-transfer of the real head office of the company but only the change of the State of the company's registration. Perhaps this element was added by the Supreme Court following the hearing, and perhaps on its own initiative, in order to remove doubts arising from the heated debates in the legal literature. At the same time, the facts contradict the thesis that the company had not been willing to transfer the real head office, since it was gradually organizing its office in Luxemburg with the aim of pursuing a portion of its activity from the territory of Luxemburg. It should be recalled that the law of Luxembourg, just like the legal systems of all other Member States, requires as the condition of incorporation and continued existence of the companies under the law of Luxemburg, that they have a statutory seat in the national territory. This means that the registration of the company in Luxembourg necessarily entails the transfer of the statutory seat.[16] Finally, the Court of Justice has held that the fact of transferring the real head office bears no relevance to the case, which in turn, happens to be interpreted as the absence of a requirement to carry out genuine activity in the territory of a particular Member State in order to submit the company's activity to the law of the company's registration State.

The conclusion of the Court of Justice presented seems to be too far-reaching in view of the EU law. First of all, the requirement of carrying out [business] activity in a Member State is a condition of exercising the EU freedom which is confirmed by the established case-law of the Court of Justice. At the same time, the position presented by the Court of Justice in *Polbud* remains in confrontation with the view commonly presented in legal literature, according to which an intrinsic or isolated (German

[15] For the purposes of this article the 'real head office' means the place where the management of the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties. This definition also applies to the concept of the real seat of the company in private international law. *See* A. Wowerka, *Pojęcie siedziby spółki w prawie prywatnym międzynarodowym* [The concept of a company's seat in private international law], in: Olejniczak and Sójka (eds.), *supra* note 4, pp. 709-721.

[16] Opinion of AG Kokott in C−106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 21.

„*isolierte Satzungsitzverlegung*" – i.e. not accompanied by the transfer of the real head office) transfer of the registered office is not covered by the scope of application of the freedom of establishment.[17] The Court of Justice has not referred to the arguments put forth in this regard in the legal literature. However, the brief reasoning presented by the Court of Justice in the *Polbud* case raises essential objections in view of the significant matter covered thereby. The grounds presented by the Court of Justice are, in principle, limited to arguments "under its own authority." However, a conclusion, opposite to that presented by the Court of Justice, could be drawn from the judgments which had been referred to by the Court in support of its position.

Moreover, the selectivity of the case-law referred to raises objections. The so far case-law of the Court of Justice clearly shows that the EU freedom of establishment requires the actual connecting factor of the company with the State of incorporation. Just to remind in this regard, for example, the judgments in the *Cadbury Schweppes* and *Vale Építési kft* cases. The Court of Justice expressly pointed out therein that the freedom of establishment assumed the actual establishment of the company in question in the host Member State and the pursuit of a genuine economic activity there.[18] In the light of that case-law it can be assumed that also the conversion of the company should correspond to opening the actual establishment which aims to pursue genuine economic activity in the State of the target form of the company.

Unfortunately, the Court of Justice has not explained why that case-law is not applicable in a case such as the one under discussion. The relevant and compelling comments of Advocate General J. Kokott[19] may be indicated in this place. She found that "[i]f, in contrast, Polbud seeks only to change the company law applicable to it, the freedom of establishment is not relevant. For, although that 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 by the freedom of establishment where it is an end in itself, but only where it is accompanied by actual establishment."[20]

It is worth mentioning that the transfer of the real seat is important from the point of view of Polish law. The real seat constitutes a connecting factor for the determination of the law applicable to the company view to Polish private international law in force which is traditionally based on the real seat theory.[21]

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[17] G. Janisch, *Die grenzüberschreitende Sitzverlegung von Kapitalgesellschaften in der Europäischen Union*, Nomos, Baden Baden: 2015, pp. 54, 64.

[18] *Cf.* para 34 of the judgment in C-378/10 *VALE Építési kft.* and paras. 54 and 66 of the judgment in C-196/04, *Cadbury Schweppes plc*.

[19] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, in particular paras. 32-43.

[20] *Ibidem*, para. 38.

[21] M. Pazdan, *Zagadnienia kolizyjnoprawne w prawie spółek handlowych* [Conflict of laws issues in the commercial companies law], in: A. Szumański (ed.), *Prawo spółek handlowych* [Commercial companies law], C.H. Beck, Warszawa: 2019, vol. 2A, p. 349; A. Wowerka, *Zakres zastosowania statutu personalnego spółki* [The scope of aplication of the law applicable to a company], C.H. Beck, Warszawa:

Notwithstanding the foregoing, a kind of dualism in treatment of an isolated transfer (i.e. without the real head office) of the registered office, from the point of view of EU freedom of establishment, arises in connection with the decision of the Court of Justice in the present case. Thus, it can be reasonably assumed that, under the current interpretation of the Court of Justice, the scope of application of that freedom covers the isolated transfer of the registered office effected within the framework of conversions, including the *sensu stricto* conversion, while the isolated transfer of that seat, not related to conversions, is excluded from the scope of application of that freedom. Although, in the majority of cases the isolated transfer of the registered office will involve conversions, nevertheless, it can also occur without conversions. Could it be that the Court has deliberately decided that in the latter case, the restrictions laid down by the Member States are not subject to assessment from the point of view of compliance with the EU freedom of establishment?

For the sake of accuracy, it should be emphasized that Art. 270(2) CCC does not constitute a legal basis for the shareholders' resolution on the transfer of the registered office abroad. Simultaneously, no part of Art. 270(2) CCC constitutes a legal basis for the transfer of the registered office in the sense that it could be possible to derive the shareholders' right to cross-border transfer of registered office from the provision. The same rules apply to the company itself. An opposite assumption appears to stem from the referring court's findings in the present case. In this respect it should be highlighted that the provision at stake merely provides that the resolution on the transfer of the registered office abroad results in the dissolution of the company in the light of this provision. Therefore, Art. 270(2) CCC exclusively specifies the reason for the dissolution of the company and does not constitute the legal basis for the transfer of the registered office abroad.

4. CONTINUATION OF LEGAL PERSONALITY

As it results from the opinion of Advocate General, the company wished to convert a Polish [private] limited liability company registered at the Polish commercial register *KRS* into the company governed by Luxemburg law while at the same time retaining its "legal identity" (Eng. *legal identity*, Fr. *identité juridique*, germ. *Recht anzunehmen*).[22] The resolution of the shareholders to transfer the "company's seat" to Luxemburg was the basis for applying, by Polbud, to the competent registry court to [enter] initiating the liquidation procedure, which took place on 19 October 2011. Subsequently, on

2019, pp. 122-123; A. Wowerka, *Wyznaczanie statutu personalnego osób prawnych* [Determination of the law applicable to legal persons], 19 Problemy Prawa Prywatnego Międzynarodowego (2016), pp. 52-61; A. Wowerka, *Osoby prawne i inne jednostki organizacyjne* [Legal persons and other organisational units], in: M. Pazdan (ed.), *System prawa prywatnego* [Private law system], vol. 20A: *Prawo prywatne międzynarodowe* [Private international law], C.H. Beck, Warszawa: 2014, pp. 633, 634-637, 670-673.

[22] Opinion of AG Kokott in C−106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 2.

26 October 2011 the initiation of the liquidation procedure was entered into the commercial register and a liquidator was appointed. Approximately two years later, i.e. on 28 May 2013, the meeting of the Polbud's shareholders agreed before a notary in Luxemburg to implement the resolution, on transfer of the seat, passed in September 2011. Thereby, the meeting of shareholders decided to transfer the seat of the company to Luxemburg with effect from that date, without terminating that company's legal personality or forming a new legal person. Moreover, it has been decided to: assume the legal form of a private limited liability company under Luxemburg law, to change the name to Consoil Geotechnik S.à.r.l. (Consoil) and to redraft the company's articles of incorporation. Consequently, on 14 June 2013 Consoil was entered into the register of Luxemburg companies.[23]

Whereas, the only basis for the continuation of a legal personality may be the relevant legislation. No resolution of the shareholders can, in itself, be the legal basis for the continuation of the legal personality, since the legal personality can be imposed by the statute only as it is provided for, e.g., in Art. 33 of the Polish Civil Code. Recognising that the shareholders themselves, acting upon the power of their own actions, for example their own statements, could decide on retaining or terminating the legal personality of the company would lead to absurd conclusions. This applies not only to the original obtaining the legal personality when establishing a particular entity, but also the continuation of that personality in the event of its conversion. However, it is possible to imagine that legislation concerned provides, as a condition of obtaining the legal personality, for passing any possible resolution on that matter. Polish law does not provide for such a requirement. Nor does it result from the *Polbud* case that such a requirement was established in Luxemburgish law. In conclusion, it should be concluded that the shareholders' resolution to continue the legal personality has no legal relevance.

5. THE COMING INTO EXISTENCE OF A NEW COMPANY

Performing by the Polbud company actions, such as assuming a legal form of the [private] limited liability company under Luxemburg law, the change of the company's name and re-drafting of the company's articles of incorporation, should be jointly assessed as incorporation of a company governed by Luxemburg law. It can even be said that there has been the conclusion of the [private] limited liability company's articles of incorporation, governed by Luxemburg law, in which the name has been provided. At the same time, the actions typical of conversion, including among others. drawing up a conversion plan or calling the shareholders to make statements on participation, provided for in the Polish CCC, were not undertaken.

Moreover, the claim that it was not about a conversion, can be supported by a relatively considerably [long] time, in particular as far as the conversion procedure is

[23] *Ibidem*, paras. 14-16.

concerned, from the moment of passing the shareholder's resolution to transfer the company's seat abroad [to] registering the company in Luxemburg and submitting an application for removing the Polbud company in liquidation from the Polish commercial register. In addition, in the shareholders' resolution itself it is only the transfer of the seat that is referred to and not the company's conversion into the company governed by Luxemburg law. In this context, it is also significant that the application for removal has been submitted not by the Luxemburg company, allegedly incorporated as a result of conversion, but by the Polbud company itself. In the light of those circumstances an irresistible impression arises that it was just establishing a separate company, governed by Luxemburg law, that had taken place, whose incorporation seemed to be supposedly applied as a mechanism designed to enable, in some way, retaining the continuance of the company's identity as a legal person in new clothing ("under a new coat").

6. REMOVING THE COMPANY FROM THE COMMERCIAL REGISTER OF THE MEMBER STATE OF ORIGIN

On 24 June 2013, i.e. almost a month after registering the company in Luxemburg, Polbud private limited liability company governed by Polish law filed an application, with the registry court in Poland, to be removed from the commercial register. Polbud failed to carry out the instruction by that court, that it should submit the documents required for that purpose that the company had been wound up and liquidated, but referred to the transfer of the company's seat to Luxemburg and its continued existence under the law of that Member State. The company claims that on the day of its seat transfer to Luxemburg it lost its status as a Polish corporation and became a company under Luxemburg law. In its opinion at that stage the liquidation procedure had ended and the company should have been removed from the Polish register.[24]

However, in Polish legislation there are no bases for a mechanism according to which the registration of a company in another EU Member State means "automatic" removing thereof from the first register. It is not possible even upon the application by the company concerned. In Polish law there is such a provision only in respect of domestic conversions governed by Art. 552 CCC ("A company under conversion shall be the converted company upon the entry of the converted company to the register (the conversion day). At the same time, the registry court removes *ex officio* the company under conversion"). By the way, in passing of the foregoing deliberations, it is worth noticing that Polish legislation and, in particular Art. 552 CCC in question, does not make removing, the company under conversion, from the register conditional upon winding the company up after completing its liquidation. That provision refers to removing the company under conversion after entering thereof to the register as a converted company only. Therefore, the entry is a condition for removal.

[24] *Ibidem*, paras. 16-18.

Thus, according to the Polish CCC in the case of domestic conversions the regulation providing for removing the company *ex officio* has been adopted. The action upon the application is possible, but it is not required. This solution has been adopted on the assumption that there is cooperation between the State authorities as far as the exchange of information is concerned. This provision is not applicable to cross-border conversions, since there is no binding and effective information flow between the registry authorities of particular Member States. Poland so far has not even participated in the European Business Register (EBR) which is a network of National Business Registers and Information Providers from currently 25 European countries. In its current state, in each case of cross-border conversion the application of the parties would be necessary. In addition, under the CCC a principle is that the entry on removing a company from the register is constitutive and therefore the company ceases to exist only upon that moment. In this situation, if there had not been an application by the parties, the company would have continued to exist as an "unconverted" company from the Polish perspective, and in Luxembourg it would have already been existing as a possibly converted company from the perspective of Luxembourg law. Nonetheless, on the basis of conflict-of-law adjustment it could be considered that, in the case of cross-border conversion, such an application is required in the light of Art. 552 CCC. However, it will only be the case if this provision is to be applicable to the conversion procedure at all, which in turn, should be determined on the basis of private international law.

7. THE REQUIREMENT OF COMPANY'S WINDING UP AND LIQUIDATION

The Polish provision of Art. 270 CCC has the potential to restrict the mobility of companies. The Court of Justice, in its previous judgments, held that the companies were not eligible for the migrant freedom of establishment of companies (81/87 *Daily Mail*, C-210/06 *Cartesio*). It was only in the judgment in *Polbud* where the Court of Justice found that such a freedom existed, but it was specific, since migrant conversion was concerned. The change in the settled case law turned out to be quite a surprise, particularly [in view of the fact] that in relation to the transfer of a seat itself (C-210/06 *Cartesio*) the Court of Justice has explicitly confirmed the Daily Mail doctrine stating that the migrant company is not covered by the guarantee scope of the freedom of establishment. This meant that the law of the Member State, as it was decisive of the company's incorporation, could similarly decide on the loss of the personality of the company which intended to transfer its seat abroad. Everyone expected that if a host state could not refuse the personality to an immigrating company (the company transferring the seat to that State) (C-208/00 *Überseering*), all the more so the emigration State of the company (transferring the seat from that State) could not take that personality away. At the same time, in the *Polbud* case the Court of Justice ruled differently with regard to the conversion only, which in turn, could mean that the Daily Mail doctrine continues to apply to

the seat's transfer outside the conversion, and the restrictions on that freedom, provided for by national law, are admissible. In this context, the judgment [issued] by the Court of Justice in the *Polbud* case poses a risk of threatening the cohesion and coherence of EU law. The two situations, although clearly somewhat comparable from the point of view of EU freedom of establishment, are treated in a radically different way. Following this line of reasoning also Art. 270 CCC should be found in compliance with the freedom of establishment, on the erroneous assumption that it is also applicable to conversions.

Irrespectively of any acceptable national restrictions on emigration of companies, it results from the case law of the Court of Justice that the Member States may take measures to prevent the establishment of purely artificial arrangements, independently of the economic reasons, whose objective is to avoid the applicability of national legislation. Establishing a company of an artificial undertaking nature, which actually does not conduct any business activity on the territory of a host Member State – as it is the case particularly in the event of address companies or a "fly-by-night" companies – should be considered as having the characteristics of a purely artificial arrangement.[25] Thus, it follows that such artificial companies are not beneficiaries of EU freedom of establishment; in the area of conflict-of law rules it is possible to apply thereto, fully, Art. 270(2) CCC and regardless of whether that provision applies to the transfer of the company' s seat, or at the same time, to the conversions of the company.

In cases, such as Polbud, which show a relationship with more than one legal system, the essential question on the applicable law, which should apply to such situations, arises. The designation of the applicable law is carried out in accordance with the norms of private international law. In view of doubts, referred to above relating to the facts of the case, the designation of the applicable law in that case is as problematic as the application of Art. 270 CCC; since, depending on the assessment and subsumption of the operation, which is a reference point for the judgment of the Court of Justice, it is possible to apply various conflict-of-law norms concerning the companies, in particular, the basic conflict-of-law norm designing the applicable law for companies on the basis of the seat connecting factor or a conflict-of-law norm designing the conversion status. This complex issue was not considered by the Court of Justice in its judgment under discussion, although it is of a fundamental importance, since the appropriateness of considering the compliance of national substantive law, such as e.g. Art. 270 CCC, with EU law exists only when that law is applicable at all. However, the framework of this publication does not allow for further development of that issue.[26]

[25] *Cf.* judgment in case C-196/04 *Cadbury Schweppes plc*, in particular paras. 51, 55, 57, 61, 68. *Cf.* M. Lutter, W. Bayer, J. Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht*, 1(1) Zeitschrift für Unternehmens- und Gesellschaftsrecht 118 (2018).

[26] *See* A. Wowerka, *Kolizyjnoprawne transgraniczne przekształcenie spółki a przeniesienie siedziby spółki. Kolizyjnoprawna zasada jednoczesnego stosowania prawa właściwego dla spółki przekształcanej i prawa państwa formy spółki docelowej (zasada kombinacji, zjednoczenia). Przeniesienie siedziby spółki i zmiana statutu personalnego spółki. Glosa do wyroku Trybunału Sprawiedliwości UE z dnia 25 października 2017 r., C-106/16, Polbud* [Comment on the judgment of the Court of Justice of the European Union of 25 October 2017 in Case C-106/16, Polbud. Cross-border transformation of the company and the transfer of the company's seat

8. PROTECTION OF CREDITORS, MINORITY SHAREHOLDERS AND EMPLOYEES

If it was assumed, following the Court of Justice, that in the *Polbud* case the conversion operation was concerned, then regardless of the above issues, it is worth to pay attention to other relevant issues related to such an operation. The aim is to protect creditors of the company, the minority shareholders and workers. Those elements have been aptly addressed by Advocate General Kokott in her opinion. As far as the creditors are concerned "there is a risk, […] that the interests of existing creditors will be adversely affected by the conversion", since "the company might henceforth be subject to less stringent rules in relation to capital protection and liability."[27] Similarly, as far as the minority shareholders are concerned, the conversion might be detrimental to the position of those shareholders who possibly unsuccessfully opposed to the conversion, "[f]or new law applicable to the company may bring about changes to the rights and obligations of those with a holding in the company."[28] Finally, such an operation might have an impact on certain rights enjoyed by workers, in particular, corporate co-determination within an undertaking, i.e. the participation in the management of the undertaking, for the "[t]he company law to which the undertaking will be subject after the conversion may provide less extensive rights of co-determination on the part of employees.[29] The Court of Justice, by adopting a decision on the *Polbud* case, should take into account these elements for the purpose of security of trade in the internal market.

CONCLUSIONS

The heated debate in the legal literature, relating to the judgment under discussion, confirms the significance of the topic in question and perhaps also the astonishment caused by that judgment. In the *Polbud* case the Court of Justice has extended the principle of equivalence to the country of origin, and not only the Member State of destination. In particular, the Court of Justice held that the country of origin could not impose, with respect to a cross-border conversion, the conditions which were more restrictive than those applied to a conversion of the company within that Member State. Such a solution entails serious consequences, including the potential risk of "forum and tax shopping."[30] In addition, at the moment of issuing the judgment in the *Polbud* case

in private international law. The conflict-of-laws principle of simultaneous application of the law applicable to the company being transformed and the law of the form of the target company (the principle of combination, unification). Transfer of the company's seat and the change of the law applicable to the company], 4 Gdańskie Studia Prawnicze. Przegląd Orzecznictwa 53 (2018).

[27] Opinion of AG Kokott in C−106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, paras. 59 and 60.

[28] *Ibidem*, para. 62.

[29] *Ibidem*, para. 64.

[30] Frazzani et al., *supra* note 5, p. 36.

the Member States were not ready to accept unconditional possibility of cross-border transfer of a registered office only.

Looking toward the future the recommendations include, among others, the proposals to exclude the situation of cross-border conversion from the scope of application of the norm of Art. 270(2) CCC or even to repeal immediately the above-mentioned provision. The latter proposal entails a risk of enabling the cross-border conversions from the territory of Poland to the outside of the territory of the European Union or even outside the European Economic Area, which might not be in line with the intention of the Polish legislature.[31] Although those theses are based on the erroneous assumption that Art. 270 CCC is applicable to conversions, nevertheless that fact does not affect the rationality of the claim to repeal the provision concerned and to introduce a regulation in compliance with European Union law. On the other hand, the lack of regulation, in Polish legislation, of the procedure for cross-border re-incorporation of the companies, may result in leaving creditors without protection.[32] Hence, a proposal to introduce additional protective instruments, in the area of protecting the companies' creditors, appears in the legal literature, which includes for example, enabling the company's creditors to obtain security for the claims, as in the case of a division of companies under Polish law in accordance with Art. 546 (2) CCC, or adopting the transparency of the procedure for cross-border transfer of the company's seat, including an obligation to record relevant information in official publications and submitting suitable files to the court register.[33]

Unquestionably, the biggest problem is the lack of substantive legal regulation enabling to carry out the cross-border conversion procedure. Subsequently to the judgment in the *Polbud* case such an admissibility results from the EU freedom of establishment. However, there is no substantive implementation tool to implement that freedom, including regulations that take into account the need to protect shareholders, creditors and workers. The own national regulation could be adopted, however, the uniform EU regulation would be more desirable. The *Polbud* case confirms rather the reasonableness and need to harmonize the cross-border conversions by means of consistent EU law. The model adopted in cross-border mergers could serve as a reference point. However, it should be kept in mind that any possible regulations, covering the companies law and private international law, ought to be followed by coherent solutions in the area of the companies' taxation in the event of cross-border transfer of the registered office of a company.[34]

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[31] A. Guzewicz, *Likwidacja spółki z ograniczoną odpowiedzialnością a zakres zastosowania swobody przedsiębiorczości* [Liquidation of a limited liability company and the extent of the freedom of establishement], in: Frąckowiak (ed.), *supra* note 4, pp. 857-865.

[32] C. Gerner-Beuerle et al., *Cross-Border Reincorporations in the European Union: The Case for Comprehensive Harmonisation*, 18(1) Journal of Corporate Law Studies 1 (2018), pp. 32-33.

[33] Kozieł, *supra* note 4, pp. 31-32.

[34] For more on the need to regulate the taxation aspect of cross-border transfers of a registered office, see: J. Meeusen, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market?*, 13(2) Journal of Private International Law 297 (2017).