Corporate mobility in Europe: new hand in corporate shopping after the judgment of the Court of Justice in Polbud-Wykonastwo (C-106/16)

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I. Introduction

In the European cross-border context, legal corporate mobility may be defined as the general ability of a company in the meaning of Article 54 TFEU to change its current legal form to a form provided for under the law of another Member State[1]. This is generally guaranteed through the non-discrimination strategy (national treatment, germ. *Inländerbehandlung*) embedded in the provisions of the freedom of establishment (Article 54 reads in conjunction with Article 49 of the TFEU). The aforementioned legal framework has been further clarified over the last three decades by the European Court in the series of judgements[2]: Daily Mail[3], Centros[4], Überseering[5], Inspire Art[6], Sevic System[7], Cartesio[8], National Grid Indus[9], Vale[10], and Kornhaas[11]. In addition, specific rules were adopted in case of cross-border mergers enabling companies to merge into a company set up in another Member State ('shell' company) in order to indirectly change its legal clothes (downstream merger, also known as reverse vertical

[1] This is different from mere physical corporate mobility, which is composed of transferring company's economic activity abroad. See, to that effect, Oliver Mörsdorf, 'The Legal Mobility of Companies within the European Union through Cross-Border Conversion' (2012) 49 CMLR 629, 630.

[2] What is characteristic for the case-law in the European corporate mobility area is that all judgments were issued as a result of questions refereed for a preliminary ruling by national courts.

[3] ECJ, 27 September 1988 Case C-81/87, the Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.

[4] ECJ, 9 March 1999, Case C-212/97, Centros ltd v Erhvevrs-og Selskabsstyrelsen.

[5] ECJ, 5 November 2002, Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH.

[6] ECJ, 30 September 2003, Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.

[7] ECJ, Grand Chamber, 13 December 2005, Case C-411/03, SEVIC Systems AG.

[8] ECJ, Grand Chamber, 6 December 2008, Case C-210/06, Cartesio Oktató és Szolgáltató bt.

[9] CJEU, Grand Chamber, 29 November 2011, Case C-371/10, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam.

[10] CJEU, Third Chamber, 12 July 2012, Case C-378/10, Vale Epítési kft.

[11] CJEU, Sixth Chamber, 10 December 2015, Case C-594/14), Simona Kornhaas v Thomas Dithmar.

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merger[12])[13], and relocation of of a Societas Europaea's seat from one Member State to another, which procedure entails change of SE nationality[14].

It is apparent, however, that corporate mobility law in Europe is at the current stage of development like a Swiss cheese, this is to say there are many key areas which raise serious and yet unresolved doubts. A particular controversial area concerns the cross-border conversion of a company (germ. *Grenzüberschreitende Formwechsel*) – the concept delineated by the CJEU[15] as transfer of a company's statutory seat accompanied by a change in the governing law[16]. Notwithstanding recent decisions of the Court (Cartesio on 16 December 2008 and Vale on 12 July 2012), there are still Member States reluctant to introduce provisions regulating cross-border conversion of companies. The rationales behind this attitude differ in practice, but at least two groups of them can be identified, i.e. economic reasons accounted for protection of national beneficiaries, i.e. creditors, employees and minority shareholders[17], and legal reasons having its source in the lack of clear guidance on how the transaction in question can be developed in national law[18].

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[12] Mathias Siems, 'European Directive on Cross-Border Mergers: An International Model?' (2008) 11 CJEL 167, pp. 179-81.
[13] See Articles 118-134 of the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169. Former, the European Parliament and Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1. This regulation has greatly simplified and facilitated cross-border merger transactions in Europe. The most prominent example of this in recent years is the merger of Fiat S.p.a. and Fiat Chrysler Automobiles N.V. See for more details Federico Pernazza, 'Fiat Chrysler Automobiles and the New Face of the Corporate Mobility in Europe' (2017) 14 ECFR 37. However, this measure is not the most optimal way for cross-border reincorporation. See Jessica Schmidt, 'Cross-border Mergers and Divisions, Transfer of Seat: Is There a Need to Legislate?' Study for JURI committee (Legal Affairs) of the European Parliament (2016) 32-33.
[14] See Article 8 of the Regulation of the Council 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/1. In this case, European law imposes on SE companies obligation to not only transfer their register office, but also their head office (the place where essential decisions concerning the general management of a company are taken), which leads to increase with regard to the cost of such transaction. See Article 7 therein. Wolf-Georg Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 Journal of Corporate Law Studies 185, 186-91.
[15] Formerly the Court of Justice of the European Communities (ECJ).
[16] See Case C-210/06 Cartesio, paras 111-113, where the Court made *obiter dictum* a seminal distinction between 'pure' transfer of a seat and transfer that is combined with transformation into a foreign legal form. See Veronika Korom, Peter Metzinger, 'Freedom of Establishment for companies: the European court of justice confirms and refines its Daily Mail decision in the Cartesio case C-210/06' (2009) 6 ECFR 125, 154; Stefano Lombardo, 'Regulatory Competition in Company Law in the European Union after Cartesio' (2009) 10 EBOR 627, 646; Adam Opalski, Andrzej Wiśniewski, 'Companies' Freedom of Establishment after the ECJ Cartesio Judgement' (2009) 10 EBOR 595, 617.
[17] See Carsten Gerner-Beuerle et al., 'Cross-border reincorporations in the European Union: the case for comprehensive harmonisation' (2017) 17 Journal of Corporate Law Studies 1, 14-17.
[18] This is mainly because of the fact that all attempts, which began at some point at 1997, to regulate the cross-border transfer of company seats in a directive have thus far failed. See Carsten Gerner-Beuerle et al. (n 17), at 11-14; Gert-JanVossestein, 'Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive' (2008) 4 Utrecht Law Review 53.

Apparently, both mentioned reasons have had their impact on Polish company law, which does not offer any special measures facilitating cross-border conversion of companies. Yet, the prevailing majority of the Polish legal doctrine present the opinion that the outbound cross-border conversion is available for Polish companies through application, by analogy, of provisions originally intended to regulate domestic conversions.[19] Recently, this view seems to have been shared by the Polish Supreme Court in the case of conversion of a Polish limited liability company – Polbud-Wykonawstwo *spółka z ograniczoną odpowiedzialnością* (*sp. z o.o.*) into a *société à responsabilité limitée* govern by Luxembourg law,[20] and where the Court also decided to refer three questions to the CJEU related to the issue of compatibility of Polish provisions with European law and the interpretation of the freedom of establishment. In general, the questions concern the right of a company to choose the most favourable governing law and the privilege of a State, in which a company was initially incorporated (home Member State) to restrict this right.[21]

Since these questions was addressed by the European Court in the judgment on 25 of October 2017 in Polbud case[22], this paper aims to provide a comprehensive analysis of the findings included therein. The paper is structured as follows: first, it provides basic information about Polish law. Following section outlines factual background of the Polbud case. Next section covers critical examination of the questions which has been raised by the Polish Supreme Court. Following that the opinion of AG Kokott is addressed.[23] Last part comprises of comments on the judgment and covers the expected impact of Polbud on corporate mobility in the internal market.

II. Corporate mobility under Polish law in brief

1. Polish substantive company law

This section briefly discusses the polish law pertaining to corporate mobility so far as relevant to enhancing an understanding of Polbud case. The structure, functioning and other aspects of

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[19] See Jacek Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego*, (CH Beck, Warszawa 2013) 423–42; Krzysztof Oplustil, 'Transgraniczne przekształcenie i podział spółki w świetle prawa europejskiego i polskiego' (2014) 23 KPP 71, 101-05 and 116-24; Adam Opalski, *Kodeks spółek handlowych: Spółka Akcyjna. Komentarz*, vol 3b (CH Beck, Warszawa 2016) 1234.

[20] Case IV CSK 664/14.

[21] OJ C211/23 (13 June 2016). The exact content of the questions can be found in section IV. below.

[22] CJEU, Grand Chamber, 25 October 2017, Case C-106/16, Polbud-Wykonastwo.

[23] Opinion of Advocate General Juliane Kokott, 4 May 2017, Case C-106/16, Polbud-Wykonastwo.

a company life is regulated predominantly by the provisions of the Code of Commercial Partnerships and Companies 2000 (CCPC)[24]. According to them, a company's seat is understood as a location (city, town or village) specified in the articles of association. Both a statutory seat and company address[25] determine, *inter alia*, a jurisdiction of registry courts.[26] In practice, the location of a seat may be established regardless of the company's place of management or principal place of business.[27, 28] Furthermore, it is prohibited for a company, incorporated under Polish law and registered in the Polish commercial register, to place its statutory seat abroad and maintain simultaneously the status of a Polish company. While the latter possibility of the existence of a company outside the Polish jurisdiction is inadmissible, yet nothing in practice hinders the avenue of setting the company's place of management or the principal place of business abroad.

In principle, cross-border transfer of a company's seat triggers a mandatory dissolution of a company (Article 270 point 2 CCPC for a limited liability company and Article 459 point 2 CCPC for a public company). The prevailing view in the contemporary Polish literature is critical about these rules as being not in line with the EU freedom of establishment[29]. This is in sharp contrast with the opinion defending the current legal regime.[30] These views rest on the assumption that the obligation to wind-up a company in the event of transfer of a statutory seat abroad is to serve the overriding requirements of the public interest, such as protection of interests of creditors, minority shareholders and employees, and therefore this measure is justified in the light of EU law.

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[24] Kodeks spółek handlowych z dnia 15 września 2000 r., consolidated version Journal of Laws of the Republic of Poland of 2017, item 1577.

[25] This is the exact place where company official administrative establishment is located and where all correspondence should be mailed. Foremost it is revealed in the public register and not included in the company's constitution, thus, it can be altered by the management board of a company.

[26] See art 164(1) CCPC and 316(1) CCPC.

[27] It means that the Polish registrar normally does not examine whether the connection does exist between the place of a statutory seat of a company and places where this company conducts any of its activity.

[28] See Mateusz Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz* (LexisNexis, Warszawa 2014) 255; Ariel Mucha, 'Transgraniczne przekształcenie polskiej spółki kapitałowej – uwagi na temat niezgodności Artykułu 270 pkt 2 oraz Artykułu 459 pkt 2 k.s.h. z prawem europejskim', [2015] TPP No 4, 43, 5ff. Some authors assert that a registered seat should be situated in the place overlapping with some of the company's activity, e.g. the place where the business premises are located, although not necessarily overlapping with the management board's location or where crucial decisions concerning a company are made. See Stanisław Sołtysiński et al, *Kodeks spółek handlowych. Komentarz*, vol 2 (CH Beck, Warszawa 2014) Article 157, para 43.

[29] See *supra* note 20.

[30] See Maciej Mataczyński, 'Transgraniczne przeniesienie siedziby statutowej polskiej spółki handlowej za granicę' (2013) 23 Problemy Prawa Prywatnego Międzynarodowego 43, 43-54.

2. *Polish conflicts of laws rules*

With respect to the Polish International Private Law Act 2011 (IPLA)[31], the transfer of a company's seat and its consequences are hotly debated in the legal doctrine. The new legal act was introduced in 2011 and generally maintained in Article 17(1) IPLA the previous literal wording of the provision[32] that indicates *lex societatis* of a company[33]. While in this case the connecting factor links a company with the state in which it has its seat, the departure point is to define how the term 'seat' should be construed. Prior to Poland's accession to the EU, it was commonly understood in accordance with the real seat theory[34] and translates roughly into the actual place where the head office of a company is located[35]. In the light of the series of decisions of the CJEU essentially restraining application of the real seat theory and counterproductiveness of this theory, the majority of the Polish legal doctrine opted for a change regarding the interpretation of the connecting factor under IPLA towards the location of a statutory seat (registered seat).[36] However, there are still some opinions in legal literature and among the judiciary in favour of the real seat theory understood as the location of the company's head office.[37]

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[31] Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe, consolidated version Journal of Laws of the Republic of Poland of 2015, item 1792.

[32] Article 9(2) of the Polish International Private Law Act 1965.

[33] Moreover, Article 17(2) IPLA has been added and it has introduced the renvoi doctrine stipulating that if a company has its seat in a State which follows the incorporation theory, the law of the State of incorporation will govern this company. Still, it is disputable in the Polish doctrine what the term 'seat' means in this context. It seems that the Polish legislator's intention is to understand this term in line with the real seat doctrine. However, K. Oplustil suggests that this provision may be applied also when the 'seat' is understood as a statutory (registered) seat. This will be a rare case where the company's statutory seat is located in a different State than a place of this company's incorporation. See Krzysztof Oplustil, 'Łącznik siedziby spółki w nowym prawie prywatnym międzynarodowym. Uwagi na tle prawa europejskiego' [2011] 20 KPP No 3, 635, 675.

[34] In general, this theory determines the applicable national law by reference to the place where a company conducts its main business activity or establishes its head office (central administration or headquarters). In turn, the incorporation theory (registration or statutory seat) is based on the connecting factor of the place where a company was created – fulfilled all incorporation requirements (respectively, the place where a company was registered by the competent public authority, or the place specified in the company's constitution). For a comprehensive presentation of these theories and their derivatives see Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporation* (OUP, Oxford 2012) chs 1-2.

[35] See review of opinions on the issue Andrzej Wiśniewski, 'W sprawie Statutu Personalnego Osób Prawnych: Uwagi na tle tomu 20A Systemu Prawa Prywatnego' [2015] 24 KPP No 1, 215, 216-220.

[36] See Adam Opalski, *Europejskie prawo spółek* (LexisNexis, Warszawa 2010) 98-106; Krzysztof Oplustil (fn 16), 646-649; Maciej Mataczyński, 'Kolizyjnoprawne pojęcie siedziby osoby prawnej' [2013] 22 KPP No 2, 277, 300; Maksymilian Pazdan, *Prawo prywatne międzynarodowe* (Wolters Kluwer, Warszawa 2011) 110f.

[37] See Arkadiusz Wowerka, '*Osoby prawne i inne jednostki organizacyjne* in: Maksymilian Pazdan (ed), System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, vol. 20A (CH Beck, Warszawa 2014) 634; and in judiciary see the latest decision of the Polish Supreme Court on the matter in question from 12 March 2015, Case No. I CSK 452/14. In the latter case, the company was established before World War II on the territory of Poland. After the war the company's statutory seat became part of Ukraine (City of Lviv). The Supreme Court, in order to de facto maintain company's legal personality, decided that the company was governed by Polish law as its management board was located, since the moment of incorporation of the company, on the current territory of Poland. Obviously, the solution adopted by the Court may be assumed as insufficiently representative or it could be down

In addition, IPLA 2011 introduced a new rule in art 19(1) which requires that legal personality of a company that transferred its seat to another Member State within the EU is to be maintained. The importance of this provision for the effectiveness of the transfer of the company's seat might seem remarkable, but in fact it is not so significant as this rule is partly inconsistent with the abovementioned Article 270, point 2, and 459, point 2, CCPC.

III. Factual background and proceedings before national courts in Polbud case

Polbud-Wykonawstwo spółka z o.o.[38] is a limited company established under Polish law, which has been seeking to convert itself into a Luxembourgian *société à responsabilité limitée*. To this aim, the general assembly of shareholders of Polbud-Wykonawstwo adopted a resolution on 30 September 2011. According to the content of it, the company's statutory seat is to be transferred to Luxembourg with a change of company's legal form. Under Article 270, point 2, CCPC, this translates into mandatory opening of legal procedure to liquidate and wind up a company[39].

In the resolution, it was pointed out that the company wished to convert into Luxembourg *société à responsabilité limitée*, an equivalent to the Polish private limited company. But it was not until 28 May 2013[40], when the meeting of shareholders took place in Rambrouch (Luxembourg)[41] with the goal of adopting a decision on transferring the statutory seat of the company to Luxembourg in accordance with that State law, without losing legal personality and creating a new legal entity. The only shareholder declared that a decision on emigration of the company has already been taken lawfully and conforms with Polish law. The converted company was entered into the Luxembourg Public Register (*Registre de Commerce et des Sociétés*) and the company's name was changed into Consoil Geotechnik S.à r.l.[42]

Subsequently, on 24 June 2013, the directors of the company filed and application with the Polish Registry for removing a company from the commercial register due to completion of

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to the specific circumstances surrounding the case. Nevertheless, it shows that the real seat theory might be used not only as a 'sword' for pseudo-foreign companies, but also as a 'shield' for keeping a company alive.

[38] An abbreviation z o.o. comes from „spółka z ograniczoną odpowiedzialnością" meaning verbatim a company with limited responsibility. This legal form resembles German "*Gesellschaft mit beschränkter Haftung*" (GmbH) or French "société à responsabilité limitée".

[39] Currently, Polbud continues to appear in Polish commercial register as a company in liquidation.

[40] In this almost two years period what happens is the change in the company structure. From two shareholders left only one.

[41] Polish law requires that the shareholders' meetings of a Polish company must take place in a venue located exclusively within the territory of Poland. See art 234 and art 403 CCPC.

[42] See Memorial Journal Officiel du Grand-Duché de Luxembourg from 31 of July 2013, C-1841, 88334f, see http://www.etat.lu/memorial/2013/C/Pdf/c1841317.pdf.

cross-border conversion in Luxembourg. The company argued that it ceased to be a legal person incorporated under Polish law, thus it should be deleted from the register.

Both the first and the second instance court dismissed the application. The lower court noted that the applicant did not conduct the emigration procedure lawfully. Given that the shareholders took the decision to transfer a company's seat in line with the procedure set forth in Article 270, point 2, CCPC, the emigration has reached only the economical dimension save continuity of legal personality as the company would have to be dissolved before moving abroad. Nevertheless, the court stressed in the *obiter dictum* that the possibility to conduct cross-border conversion of a Polish company may not be ruled out. To be legally effective in the legal dimension, in the opinion of the first instance court, transfer of company's seat should be carried out in accordance with the Polish provisions applied in relation to domestic conversions (Articles 551 to 580 CCPC). In turn, the Court of Appeal asserted that cross-border conversion of a company is inadmissible under Polish law, and thus, the company must undergo the liquidation procedure.

The company then appealed the case to the Polish Supreme Court. The latter submitted on 22 February 2016 a request for a preliminary ruling to the CJEU in accordance with art 267 TFEU.

IV. The referred questions

The content of all the questions was broadly explained by the referring court in its opinion from 22 October 2015 attached to the decision containing the request for a preliminary ruling. As the sense of the referred questions may be difficult to understand without reviewing the opinion, the following analysis includes the content of the latter. Yet, it must be stressed at the outset that it is at times almost impossible to discern any coherent approach especially in the rationale given by the Polish SC to the first two questions.

1. The first question: if the re-registration decision has a binding effect

Do Articles 49 and 54 TFEU preclude the application, by the 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 that company being wound up after liquidation has been carried out, if that 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?

The very first question deals with the issue of a possible binding effect on a home State of the decision made by a host Member State's authorities relating to reincorporation of a company, even though this company did not undergo a compulsory winding-up procedure in the State of origin.[43] From the perspective of the Polish Supreme Court, the most significant problem was whether it had to recognise the decision of Luxembourg authorities concerning the re-registration of the company as a legal continuation of the formerly Polish company being still listed in the Polish commercial register. To date, neither the existing rulings of the CJEU, nor any secondary legislation in the EU have directly addressed this issue.

2. *The second question: dissolution of a company as a restriction of the freedom of establishment in relation to the outbound cross-border conversion*

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

As regards the second question, the Supreme Court has requested an answer to it if the first one is to be answered in the negative. It means that the Court has demanded an explanation only if the CJEU considers that the re-registration of a company in another jurisdiction is not binding on a home Member State and has no effect on the commenced winding-up procedure therein. Apparently, for the Supreme Court the second question is nothing but a continuation of the issue if the mandatory winding-up procedure can adequately be reconciled with the freedom of establishment in the event of cross-border conversion. In the first question the emphasis was

[43] Referring to the SC's opinion, 'To remove all doubt raised in the case, it is essential to establish whether a home Member State is bound only by the fact that the émigré company, subject to the winding-up procedure, was reincorporated in a State of arrival on the basis of the shareholder's resolution and the entry in the commercial register' (own translation from Polish).

placed on the impact of the re-registration of a company on the sovereignty of a State of departure to still govern and exercise control over a company, while the second question has a more general nature and concerns the issue whether the liquidation and winding up procedure constitutes a restriction on the European Union's fundamental freedom that needs to be justified.

3. The third question: the isolated cross-border conversion of a company

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

The last question deals with the dilemma whether from the perspective of the freedom of establishment cross-border conversion may be performed without transferring the economic activity of a company to a host Member State. This question is rather general and concerns only the matter of whether transfer of a company's seat without changing its place of principal establishment, prior to completing the cross-border transformation, might constitute a justified reason for imposing some restrictions on the émigré company, without making any specification with regard to the form of sanctions. One may wonder if the Polish SC meant that home Member State's authorities are entitled to force a converting company to leave their country (transfer all the assets abroad) or just refuse this company to emigrate if only it does not have or intent to have its principal place of establishment in a destination State. Yet, the most notable pending question is for what reason the SC referred to the company's place of principal establishment, which is radically at odds with the opinion of the CJEU. This latter Court has never defined the concept of establishment under the freedom of establishment regime by setting such a demanding and rigorous standard to be met by companies migrating around Europe.[44]

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[44] To some point this would resemble one of the prerequisites for effective transferring the SE's seat arising under art 7 of SE Regulation, which stipulates that a registered office and head office of a SE should be located in the same Member State. The Polish SC has gone one prominent step further by circumscribing in its opinion the principal place of establishment as "the place where an actual head office (central administration) is placed and economic activity of a company is conducted" (own translation from Polish).

4. *Brief comment on questions and the Supreme Court findings*

It is noteworthy that the Supreme Court did not deliberate much on the distinction between cross-border conversion and transfer of a statutory seat abroad and in fact used these two terms as synonyms. On many occasions this distinction is irrelevant, as these two mentioned phenomena are often two sides of the same coin since it would be a very rare situation when a company moving its seat abroad would not be obliged under the law of the departure State to convert into a foreign legal form. Nevertheless, in theory, these two concepts have a different meaning. On the one hand, in principle, seat transfer depends vastly on how the national law defines the term 'seat'. The situation turns out to be even more complicated when these definitions differ under national company law and private international law. On the other hand, the conversion of a company is a formalised procedure involving managers, shareholders and at times other stakeholders such as creditors or employees consisting in changing company's legal clothes.[45]

From this reason, the Supreme Court agreed with the conclusion presented by the first instance court about two ways through which a company may transfer its seat to a different Member State. Each company incorporated in Poland may opt for either its dissolution and cease to exist (economic seat transfer) or conversion of a company by undergoing a special procedure (legal seat transfer)[46]. The latter constitutes the primary mechanism enabling a company to sustain its legal personality, which is provided by the provisions intended originally by the legislator to serve only to regulate domestic conversions (Articles 551 to 584[13] CCPC). The application of this particular set of rules follows from the notion of the indirect effect of EU law (consistent interpretation) and therefore were selected by the SC to regulate cross-border operations.[47] Without any further guidelines, however, this has little practical impact on Polish entrepreneurs. Due to the lack of rules referring to, *inter alia*, cooperation between company registers or the lack of comprehensive measures concerning protection of creditors and employees, current Polish regulation of Articles 551 to 584[13] CCPC in no way can serve as a proper legal framework for cross-border conversion of a company. Hence, one may find in the Polish legal

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[45] See Marek Szydło, 'The Right of Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishment' (2010) 7 ECFR 414, 415f; Christoph Teichamann, *Corporate Restructuring under the EMCA*, (2016) 13 ECFR 277, 283f.

[46] This distinction was not recognized by AG Kokott in her opinion, thus, she assumed that the right to cross-border conversion was refused to Polbud. In fact, it was the company that has chosen as a legal basis of its motion Article 270, point 2, CCPC which entails the obligation to liquidate and wind up a company. See AG Kokott Opinion, para. 23.

[47] Apparently, this approach is in line with the general instruction provided by the CJEU in Vale, although the latter concerned the inbound seat transfer. See Case C-378/10 Vale, para 54.

doctrine[48] some proposals to expand the scope of potential solutions over the legal provisions in force due to the transposition of CBMD's provisions.[49] So even though the Supreme Court accepted the academia's view on admissibility of cross-border conversion of Polish company, all the complications ensuing from applying the domestic provisions *mutatis mutandis* will continue to prompt serious doubts as to the practical significance of this conclusion.

V. The opinion of AG Juliane Kokott

The opinion of the AG Kokott was delivered on 4 May 2017. She rephrased the rather complicated questions into three general issues[50]. Firstly, AG Kokott deliberated if a company may invoke the freedom of establishment when it does not seek to change its place of commercial activities into a place located in the immigration State. Secondly, she made suggestion on the conformity with the EU law of obligation imposed on a company to conducted liquidation of all its assets and wind up prior to converting into a legal form govern by other Member State. Thirdly, she scrutinised whether this obligation may be justified as proportional to the objective of protecting interests of creditors, employees and minority shareholders.

For the AG Kokott the third question had priority since the answer to it would indicate should the freedom of establishment applied in the case at all. She assumed thus that the concept of establishment in the meaning of Article 49 TFEU entails some changes in the economic activity of a company in order to prevent purely artificial movements. This observation followed from analysis of case law[51] of the Court of Justice, in which was clarified that "concept [of establishment] presuppose actual establishment in the host Member State and the pursuit of genuine economic activity there".[52] However, she also admitted that not fulfilment of establishment requirement has never been in the jurisprudence of the European Court the sole

[48] See Jacek Napierała (n 19), 424; Krzysztof Oplustil (n 19), 118-120.
[49] Such as registry court's competence to issue a certificate of conformity with the Polish law following the completion of all obligations set out in the national law (Article 516^{12} CCPC), a right of a shareholder who voted against the cross-border merger resolution to request that his shares be bought out by the company prior to issuance of the conformity certificate (Article 516^{11} CCPC); or granting creditors appropriate security over their claims, when the cross-border operations threaten satisfaction of these claims (Article 516^{10} CCPC).
[50] AG Kokott Opinion, paras 21-24.
[51] At this point, AG Kokott referred to ECJ judgments of 25 July 1991, Case C‑221/89, Factortame and Others, para. 20; 4 October 1991, Case C‑246/89, Commission v United Kingdom, para. 21; 12 September 2006, Case C‑196/04, Cadbury Schweppes and Cadbury Schweppes Overseas, para. 54; 12 July 2012, Case C‑378/10, VALE, para. 34); and of 21 December 2016, Case C‑201/15, AGET Iraklis, para. 51.
[52] AG Kokott Opinion, para. 34.

basis for automatic refusal of the right to free movement within the EU, but rather it served as a justification for applying some restriction or restrictive measures[53]. Moreover, the AG Kokott attempted to generalise existing case law as regards corporate mobility and suggested "that freedom [of establishment] 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"[54].

Regarding the definition of the establishment, the AG Kokott embraced a much milder approach to corporate mobility from the perspective of companies wanting to reincorporate itself. She pointed out that each emigrating legal entity needs to install in a host Member State such factors of production ("infrastructure") which are necessary to conduct business on "a stable and continuous basis"[55]. At the same time, she did not precisely explain whether it means that this legal person must produce, sale or provide any other goods or services in a host Member State. There is only an indication in the footnote 19 of the opinion that a company must perform something more than mere registration in a host Member State. A sufficient portion of activity would be, for instance, "renting of premises for business purposes". The AG Kokott seems to concentrate on 'input' elements of an undertaking, i.e. ones which will be used to conduct business, such as a certain number of employees or rented office[56]. This a low bar standard was further reduced by defining how an emigrating company should prove and national authorities are competent to assess that sufficient elements of company's business were transferred to another Member State. Following the Vale decision, what enough is to show in such a case is an intention[57]. How that intention is to be scrutinised, in particular, whether it may be inferred from objective circumstance remained unanswered.

Against this background, the AG Kokott added that irrelevant for resolving the case should be the fact that the new company named Consoil Geotechnik was incorporated in Luxembourg as a legal successor of Polbud[58]. In her opinion, re-registration in a host State would have no effect on existence of a company set up in a home State, should the prerequisites pertaining to the

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[53] AG Kokott Opinion, para. 34.

[54] AG Kokott Opinion, para. 38. Having in mind that the Court in Cartesio and Polbud confirmed that the home Member State has the power to determine a connection between its territory and companies incorporated in that State, this includes a real seat or head office, the contention about the full economic freedom seems to be incorrect. As regards legal freedom, namely the right to choose *lex societatis*, see below section VI and VII.

[55] AG Kokott Opinion, para. 36.

[56] 'Input' signs of economic activity should be distinguished from 'output' ones, which can be described in short as good and services offered on the market. See more Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* (HP, Oxford 2016) 131ff.

[57] AG Kokott Opinion, para. 36 with reference to Case C-378/10, Vale, para. 35.

[58] AG Kokott Opinion, para. 42.

company's cross-border conversion procedure laid down in the law of the latter State were not met[59]. This conclusion in the AG's opinion allegedly follows from Vale, namely the assertion that "*such conversions presuppose the consecutive application of two national laws*"[60]. In practice, it implies that Consoil and Polbud are two separate legal entity since the procedure of conversion in the country of departure has not been accomplished yet.

In reference to the first question, the AG Kokott showed little doubt that liquidation and winding up requirement in face of cross-border conversion forms a restriction of the freedom of establishment[61]. Following this assertion, the opinion addressed the dilemma whether this restriction may be justified by preventing abusive behaviour and protecting company's stakeholders. As regards the former, the AG Kokott consequently argued that any artificial conversion in terms of economic dimension of this transaction falls out of the scope of the said freedom. Then, she focused her attention on an assessment whether the Polish provision of Article 270, point 2, CCPC complies with the proportionality test ('Gebhard test')[62], this is to say if this regulation serves specific public interest in appropriate manner and to the extent that it is necessary to attain it. Sufficient is to say that in the AG Kokott opinion the measure in question not only does not meet requirement of the Gerhard Test but also has a counterproductive effect. Using the words of the AG Kokott, "*[i]ts effect is thus that the company's private creditors lose their previous contractual partner, the employment relationships of all employees are terminated and the minority shareholders — like other shareholders — are directed towards the remaining proceeds of the liquidation*".[63]

VI. The Grand Chamber's decision

The Grand Chamber of the Court of Justice[64] delivered the judgment in Polbud case on 25 of October 2017, less than six month after the AG Kokott opinion. As the AG Kokott, the Court commenced its deliberation with answering to the third question. To this aim, it was assumed after the referring court that Polbud did not intend to transfer its economic activity to

[59] AG Kokott Opinion, para. 42 *in fine*.
[60] See Case C-378/10, Vale, para. 37.
[61] AG Kokott Opinion, para. 47.
[62] See ECJ judgment, 30 November 1995, Case C‑55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, para. 37.
[63] AG Kokott Opinion, para. 57.
[64] It is noteworthy to say that the composition of the Court in the case truly represents almost all national legal systems and different interests which nationals from the EU countries may represent in terms of corporate mobility.

Luxembourg[65]. Otherwise, the problem being integrated part of the third question would be only hypothetical and at the same time the very third question inadmissible because of this reason[66]. In second part of the judgment, the court combined two first questions and addressed, in general, the issue of whether the mandatory liquidation of all assets imposed on a company in face of outbound reincorporation complies with EU law.

1. The right to choose governing law

When resolving the matter whether the freedom of establishment in case of reincorporation from one jurisdiction to another requires relocation of the "real head office" to the country of new arrival, the Court of Justice rejected arguments presented by the Austrian and Polish governments. In the latter State opinion, the lack of the true economic justification renders the right provided in Article 54 and 49 of the TFEU inapplicable to such a transaction as this performed by Polbud[67]. In more detailed way, the Austrian government suggested that a company should be prevented from invoking the freedom of establishment when it does not conduct any business in the host Member State[68]. In turn, the Polish government raised the argument that to apply the said freedom in case of outbound cross-border conversion, a company is required to transfer its real head office from the home to host Member State[69].

Against this assertion, the Court first recapitulated the general premises after fulfilment of which the freedom of establishment may be invoked by a company, namely formation of a company under the law of a Member State, which includes setting a connection with that State territory in the form of either the registered office, central administration or principal place of business[70]. At some point latter, it was added that such a power of a host Member State does not constitute any immunity as regards the general prohibition of discriminatory treatment[71].

Then, the Court said that as the EU law currently stands it provides the right to incorporate a company in conformity to the law of any Member State. It seems that in the Court opinion, the

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[65] A different position of Polbud at this matter which was presented before the Court had no relevance for the Court since it is up to the referring court to provide facts of the dispute which are necessary to issue a decision by the Court. See Polbud, paras 19-25.
[66] See to this regard judgment of the Court, third Chamber, of 7 April 2016, Case C-483/14, KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group, para. 41.
[67] Polbud, para. 30.
[68] Polbud, para. 37.
[69] Polbud, para. 42.
[70] Polbud, para. 32.
[71] Polbud, para. 43.

conversion of a company is an equivalent to setting up a company from scratch, therefore it falls with the scope of the freedom in question[72]. To perform a successful conversion, as it is the case of a 'ordinary' incorporation, it is needed to satisfy all conditions enshrined in the law of a host Member State. This includes the test, as the Court formulated, so as to determine if a company connects itself appropriately with the State of new arrival. In conclusion of its line of reasoning, the Court held that the right to convert itself by Polbud into a Luxemburg company is guaranteed pursuant to the Treaty's provisions if the company follows the rules of Luxembourg law[73]. However, it was said without any indication to whose hands, a host or home Member State, the competence to conduct such assessment lies.

When directly refers to the Austrian government arguments, the Court invokes the seminal Centros decision. This case concerned the legality of the action taken by the Danish Trade and Companies Board. The Board refused to register a branch of an English limited company incorporated by Danish citizens residing in Denmark. The main reason behind the refusal was the assessment that setting up a company in England aimed only at circumvention of the Danish minimum capital requirements. The Court of Justice did not acknowledge rationale presented by the Danish government and found irrelevant from the EU law perspective the fact that the company has never conducted and has had no intentions to conduct business in the place of initial incorporation[74]. Despite the factual differences between Centros and Polbud, the Luxembourg Court recognised that the *ratio decidendi* presented in Centros may fully find its application to Polbud case[75]. So, it means that the very fact that Polbud will not perform any economic activity in Luxemburg is immaterial when the freedom of establishment is considered. At this point, the Court recalled that the application of the said freedom should be distinguish from actions undertaken to circumvent some national provisions where in the case of the latter a Member State may take appropriate measures to prohibit such actions[76]. Nevertheless, the choice of the "most favorable" legal system in itself cannot be made the basis for any intervention by the home Member State[77].

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[72] Polbud, para. 33. This may seem surprising to some degree that the Court refers at this point to Daily Mail judgment, in particular para. 17, where the Court said mainly that a company may establish a new company, which translates into a subsidiary, in other Member State and participate in its capital on the same footing as nationals of that Member State. There was no account taken of the reincorporation of a company.
[73] Polbud, para. 35.
[74] Case C-212/97, Centros, para. 17.
[75] Polbud, para. 38.
[76] Polbud, para. 39.
[77] Polbud, para. 40.

The Court then referred to the Polish government objections, which in the decision were somehow ambiguously summarized as rejecting the company's right to reincorporate itself when both registered and real head office have not been transferred to the country of new arrival[78]. In response, it was pointed out that a company must satisfy such requirements as prescribed in the legislation of the country where company seeks to be (re)incorporated.[79] Given the arguments presented in previous cases[80], those requirements may not be more restrictive than those applicable in domestic situation[81].

Concluding its answer for the third question, the Court stated that when a company converted itself into a company govern by the law of another Member State, namely it fulfilled all requirements set out in the law of the latter State, it will be irrelevant for application of the freedom of establishment if the company has changed its "real head office".[82]

2. The first and second question

The court boiled down the first and second question to the issue of admissibility of the liquidation and winding up requirements imposed on a company in the course of the cross-border reincorporation transaction. The court showed no doubt that those requirements constitute restriction of the freedom of establishment[83]. Therefore, Polish provision of Article 270, point 2, CCPC was juxtaposed with the conditions of the fundamental Gebhard test, which goal is to examine whether the measure in question is compatible with EU law, thus being non-discriminatory, justified by overriding reasons in the public interest, appropriate for ensuring the attainment of the assumed aim and not going beyond what is necessary to attain that aim[84]. The court observed that Article 270, point 2, CCPC fails on the last condition as it applies

[78] Polbud, para. 42. It is not explained what was the exact line of reasoning which led Polish government to this conclusion apart from invoking Daily Mail and Cartesio judgments in general. In this context, it is obvious that this argument was raised instrumently only for hampering Polbud possibility to reincorporate in Luxembourg. On the other hand, it must be remembered that by forcing companies to move its business abroad Polish government places at a disadvantage its own beneficiaries since it would be harder to satisfy their claims where most of the companies' assets are abroad.
[79] Polbud, para. 43. Some confusion may arise as to exactly which Member State the Court referred to. If and insofar as there is a case of conditions for reincorporation of a company, this is the competence of the country of new origin to define them within its national law.
[80] At this point, for the Court the relevant cases were: Case C-81/87, Daily Mail and General Trust, paras 19 to 21; Case C‑210/06, Cartesio, paras 109 to 112; and Case C‑378/10, VALE, para. 32.
[81] Polbud, para. 43.
[82] Polbud, para. 44.
[83] Polbud, para. 51.
[84] Polbud, para. 52.

regardless of the risk that the cross-border conversion may pose to the interests of creditors, minority shareholders and employees[85].

Furthermore, the Court also challenged the Polish Government objections that the liquidation and winding up requirement are necessary in order to prevent abusive practices. In that regard, once again the Luxembourg Court underlined that the mere fact that a company chooses to be govern by the foreign law may not be base for a general presumption of fraudulent behavior[86].

All in all, the Court found regulation as this of Polish Article 270, point, 2 CCPC as disproportionate, and hence inconsistent with the EU law.

VII. Comments on Polbud case

Since the AG Kokott opinion has been largely based on the well-established case-law of the European Court, it was hard to predict that the CJEU in Polbud case would be eager to departure from its previous decision-making practice. In fact, given latest tendencies, e.g. Kornhaas decision[87], one could reasonably have expected that the Court would have tightened its jurisprudence in the area of corporate mobility, in particular by extending prohibition of artificial practice. The final result of Polbud is quite opposite. Therefore, the following section

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[85] Polbud, para. 59.

[86] Polbud, para. 63.

[87] In this case, the German court requested clarification regarding application of German provisions stipulating liability of limited company's directors in the wake of insolvency. The facts of the case concerned a company that was a typical pseudo-foreign (English) company conducting its business exclusively on the German territory. The court noted that as the regulations in question neither deny the existence of the foreign company nor constitute its directors' lability with reference to the minimal capital requirement prescribed in the national law, it does not infringe the freedom of establishment. See Case C-594/14, Kornhaas, paras 26-28. In the upshot, even though a foreign company may pursue its business activity outside the State of its incorporation, it may become subject to arrival State's legislation which imposes stricter rules as regards, *inter alia*, liability of directors. See critical opinion about Kornhaas: Wolf-Georg Ringe, 'Kornhaas and the challenge of applying Keck in establishment' (2017) 42 E.L. Rev. 270. Some voices in academia suggest that the reasoning of the Court parallels the thesis developed under the free movement of goods in Keck case (see ECJ judgment of 24 November 1993, Case C-267/91 et al, Bernard Keck and Daniel Mithouard, paras 15-17). The translated distinction between 'product arrangement' and 'certain selling arrangements', in their opinion, applies to the European company law by dividing company's life, in the context of the freedom of establishment into two phases: the phase of entering (forming in) a Member State and the phase of pursuing its business activity afterwards. The measures in the second phase do not affect the Freedom of Establishment. See Peter Kindler, 'Insolvenzrecht als Tätigkeitsausübungsregel, Die sachliche Reichweite der Niederlassungsfreiheit nach dem Kornhaas-Urteil des EuGH' (2016) 27 EuZW 136, 138. However, cf. with opinion of Casper Behme, who seems to be more accurate in adopting a stringent approach to defining the 'framework condition', such as mandatory participation in commercial chambers, which are not capable, in his opinion, of infringing internal market freedoms. See Casper Behme, 'The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies' (2016) 13 ECFR 31, 43ff. As it is not the subject of this paper, it must be noted merely that the Court failed to qualify what kind of legal requirements can constitute the 'framework conditions' of company's establishment. At the very least thus, Kornhaas urgently needs further clarification.

mainly concentrates on the legal reasoning presented by the Court and probable effects which Polbud may cause to the European company law environment.

However, at the outset, some preliminary remarks are required relating to the arguments the European Court have already presented in the discussed area of the corporate mobility. According to settled case law, "companies are (…) creatures of national law".[88] This, in general, bestows almost unlimited power over companies on the Member State of their origin.[89] Furthermore, according to Article 54 TFEU, each of that Member States is entitled to determine a connecting factor between its territory and a company. As company law and conflict of laws rules in this respect are not fully harmonised within the EU[90], formation, functioning and finally dissolution of a company all fall within the State of origin's remit. However, this competence is limited in some circumstances, especially when it comes to imposition of discriminatory measures or such restrictions which make companies' right to re-establish themselves in a different Member State less attractive[91], unless those restrictions are properly justified under the proportionality test.[92]

In accordance with Sevic Systems[93], which concerned the cross-border merger between German and Luxembourg companies prior to the enactment of the CBMD harmonizing the law in this area, the absence of harmonisation of company cross-border transformation operations does not eliminate the company's right to pursue its economic activity through various measures within different EU Member States.[94] Moreover, it also follows from the Vale judgment, representing an inbound cross-border conversion case, that whereas no cross-border reincorporation rules exist on the EU level, the provisions regulating this operation should be adopted in all Member States provided that such a procedure is to be allowed in a domestic situation.[95]

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[88] See Case C-81/87, Daily Mail and General Trust plc, para 19; and Case C-210/06, Cartesio, para 104.
[89] See Mathias Siems, 'SEVIC: Beyond Cross-Border Mergers' (2007) 8 EBOR 307, 307.
[90] See at this regards the latest report for the European Commission (DG Justice): Carsten Gerner-Beuerle at al., 'Study on the Law Applicable to Companies: Final Report' (June 2016), which is available at <https://dx.doi.org/10.2838/527231> accessed 9 November 2017.
[91] See Jérôme Vermeylen Ivo Vande Velde, '*European cross-border mergers and reorgainizations'* (OUP, Oxford 2012) 46f.
[92] See Adam Opalski and Andrzej Wiśniewski (n 16) 607.
[93] See Case C-411/03, Sevic Systems, para 19.
[94] Although on many occasions, in practice, this might make it very problematic.
[95] See Case C-378/10, Vale, para 46.

1. Free choice of corporate law

It is worthy to embark on with the analysis of the answer to the third question, not only because this is what the Court did but foremost it has paramount importance to the development of the internal market. It deals with the hotly debated issue of the isolated cross-border conversion, this is the operation consists in changing the company governing law save any integration into the economy of a host Members State, and in a wider perspective – a crusade against letterbox companies[96].

In a long line of cases, those are foremost Factortame II[97], then Cadbury Schweppes[98] and the latest Vale case[99], the European Court has been of the opinion that: "the concept of establishment within the meaning of the Treaty provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period". Therefore, in the literature it was asserted that, at least from the perspective of the country of arrival, the change of law applicable to a company that occurred because of transferring the company's statutory (registered) seat abroad requires certain modification as to the place of doing business by an emigrating company[100]. Thus, company's reincorporation performed with a sole purpose to exploit the discrepancies between competing company legal systems (regulatory arbitrage), falls outside the scope of the freedom of movement and such transaction is not protected by the EU law. As it was rightly observed in the academia, the function of this is to hamper artificial cross-border transactions by increasing costs of their completion[101]. However, since some Member States do not create any obstacle for pseudo-foreign companies, the requirement to pursue real economic activity in the place of (re)incorporation has yet limited significance to the internal market[102].

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[96] See about the problem in general: Karsten Engsig Sørensen, 'The Fight Against Letterbox Companies in the Internal Market' (2015) 52 Common Market Law Review 85.

[97] ECJ judgment of 19 June 1990, Case C-221/89, The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others, para 20.

[98] ECJ judgment, Grand Chamber, of 12 September 2006, Case C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas, para 54.

[99] Case C-378/10, Vale, para 34.

[100] Karsten Engsig Sørensen (n 96), at 88; Gerner-Beuerle et al. (n 17), at 11; Christoph Teichmann, 'Der Grenzüberschreitende Formwechsel ist spruchreif: das Urteil der EuGH in der RS. Vale' (2012) 37 Der Betrieb 2085, 2088. The latter author noted that even when an immigrating company did not establish itself in host Member State, this does not create an immunity for that Member State from the general duty of non-discriminatory treatment. Thus, the host Member State may not render isolated conversion impossible, if it does not require form domestic companies to maintain their real seat on that State territory. The opinion that isolated cross-border conversion is protected by the freedom of movement was presented *inter alia* by Marcus Lutter, Jessica Schmidt, Jessica, Walter Bayer, '*Europäisches Unternehmens- und Kapitalmarktrecht*' (De Gruyter, Berlin 2011) 99f.

[101] See Alexandre Saydé (n 56) 120-122.

[102] Christoph Teichmann, 'Gesellschaftsrecht im System der Europäischen Niederlassungsfreiheit' (2011) 40 ZGR 639, 672.

Furthermore, it has not been specified what exactly the concept of "establishment" consists of, and, therefore, what is the exact cost of setting up a proper establishment in a State of arrival. In Vale and Cadbury Schweppes respectively, the CJEU said laconically that "establishment" must be ascertainable by third parties[103] in a host Member State and encompassing certain "premises, staff and equipment".[104] This statement was aptly summarised as one that does not shed any new light on the matter as it is still troublesome to point out a very clear-cut division between the actual economic transfer of a company and only such which lead to set up a mere letterbox company.[105] As it was construed by K.E. Sørensen with the reference to the free movement of workers jurisprudence, the company's activity at this regard must not be "purely marginal" to meet the establishment criterion.[106] Indeed, it would have a real meaning only for small private limited companies in which case even the cost of renting premises or hiring a very limited number of staff may outweigh the advantages that choice of another company's legal system could bring. Having in mind that in the EU internal market such small companies show the strongest tendency to migrate[107], in opposite to the U.S. market[108], even very low standard as regards establishment may have huge impact on corporate mobility in Europe.

Another more practical aspect that merits attention is what sort of evidence a migrating company has to provide to prove the real and continues link with the economy of a host Member State in order to enjoy the right to free movement. Against this background, the European Court said that suffice is to show an intention to engage in the economy of the arrival country[109]. Although, it has not been clarified in what way this intention should be presented before competent national authorities. Thus, in one country it may be enough to deliver a properly formulated statement, but in other countries it will be demanded that this declaration is to be

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[103] Case C-378/10, Vale, para 35. It was also confirmed by the AG Kokott in her opinion, para. 36.

[104] Case C-196/04, Cadbury Schweppes, para 67. See also some elaboration on these establishment features within the meaning of the Treaty Karsten Engsig Sørensen, (n 96), at 87f.

[105] See Pierre Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System' (2008) 14 ELJ 351, 375f; Tim Drygala, ‚Europäische Niederlassungsfreiheit vor der Rolle rückwärts?' (2013) 15 EuZW 569, 570.

[106] See Karsten Engsig Sørensen (n 96), at 88.

[107] See some existing empirical research to the extent of corporate mobility: Marco Becht at al., 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 Journal of Corporate Finance 241; Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition' (2013) 10 European Company and Financial Law Review 230; Christoph Teichmann, Ralf Knaier, 'Experiences with the Competition of Regulators - a German Perspective', in Christoph Teichmann, Krzysztof Oplustil (eds), 'Grenzüberschreitende Unternehmensmobilität' (Nomos, Kraków, Würzburg 2016) 205; and the latest Carsten Gerner-Beuerle at al. (n 90) 33ff.

[108] Lucian Arye Bebchuk, Alma Cohen, 'Firms' Decisions where to Incorporate' (2003) 46 J.L. & Econ. 383, 388ff; Jens C. Dammann, 'Freedom of Choice in European Corporate Law' (2004). 29 Yale J. Int'l L. 477, 507.

[109] Case C‑378/10, Vale, para. 35.

supported by further planning documents, e.g. a business plan, or even concrete, tangible results in an immigré Member State.

In juxtaposition of the material requirement of the 'establishment' and the standard of proof set out by the Luxembourg Court, it made the doctrine of real economic activity severely restrain. Nevertheless, it still could create barriers to the internal market and at the same time there was no certainty that this measure effectively hinders abusive behaviour. Instead, it has constituted a poor compromise between liberalisation of EU market and countering some negative effects of pseudo-foreign companies.

Despite its all shortcomings, the real economic approach towards the freedom of establishment was shared by the AG Kokott in her opinion. Moreover, she seemed to accept the more stringent variant of policy for tackling the problem of letterbox companies, namely 'the centre of gravity doctrine'[110]. For her, the real economic element is embedded in the concept of establishment, thus any failure to meet the certain level business in host Member State results in general refusal of the right to free movement[111]. Consequently, the AG Kokott rejected the idea that under the EU law companies were accorded with the right to free choice of governing law showing by this aversion towards the regulatory competition phenomenon.

However, even if someone is to criticise the attitude taken by the AG Kokott, it has to be admitted that her opinion reflects, to a large extent, existing case-law of the Court of Justice in the context of corporate mobility. Even though, the Court in Polbud decided to challenge the doctrine of real economic activity, at least in the context of corporate mobility. On the one hand, Polbud has *de facto* set aside conclusion made in Vale that an émigré company must conduct genuine economic activity in the host Member State. On the other hand, the Court distinguished cases comprising the mere establishment problem from those where some circumstances ('wholly artificial arrangements') amount to an abuse of law (*fraude à la loi*). From this reason, Cadbury Schweppes as a case concerning alleged abusive behaviour in the field of taxation (rather than incorporation of a company) is to that extant still good law[112].

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[110] As regards the notion of centre of gravity approach see Alexandre Sayde (n 56), at 120ff.
[111] Cf. Carsten Gerner-Beuerle et al. (n 17), at. 34.
[112] See Case C-196/04, Cadbury Schweppes, para. 51. This is not the aim of this article to further analysis this judgment, but for the sake of clarity it should be said that Cadbury Schweppes case concerned situation in which two companies were incorporate in in the International Financial Services Center in Dublin, Ireland and controlled indirectly by English Cadbury Schweppes Overseas limited (CSO) and Cadbury Schweppes plc (CS). According to the UK authorities, the main aim of this corporate structure was to evade application of certain United Kingdom tax provisions on exchange transaction. In consequence, the Commissioners of Inland Revenue in UK imposed on CSO obligation to pay corporation tax from profits made by foreign companies according to special provisions of

One result of Polbud is that a company initially incorporated in one Member State may now freely cherry-picking its new 'clothes' from almost any legal form in the meaning of Article 54 TFEU offered by company laws of Member States save any other modification in company's activity. The right to choose applicable corporate law at initial incorporation is after Polbud available also when a company has already established in one Member State. This conclusion abruptly end the above presented discussion on if and how a converting company must establish a real and continues link with the economy of a host Member State. This conclusion arises directly, in the Court opinion, from the EU primary law and Article 49 TFEU does not impose any requirements as regards installation of real economic activity in place of incorporation of a company in the meaning of Article 54 TFEU. This understanding of the freedom of establishment undermines the theological aspect which is common for all the four freedoms, which are based on economic dimension of European integration[113]. In other words, Polbud diminishes economic portion in companies' activity in case of reincorporation to mere registration in a commercial register.

Simultaneously, the stance taken by the Court in the matter in question effectively limits practical implications of distinction between the primary and secondary establishment[114] under the freedom of establishment. This finding is all the more striking, given that the Court without any reservation stated that the facts in Polbud do not very as much from those in Centros case to be legally addressed in a different way. The latter highly influential case is qualified, but not without controversy[115], as a secondary establishment since it concerns setting up a branch in a host Member State. The breakthrough nature of this case follows from the fact it enables companies established in the internal market to *ex ante* choice of law. Therefore, company founders may single out the most favourable legal framework for their new company and then conduct commercial activity in the form of a secondary establishment, for instance branches, anywhere else in the internal market. This leads to the split between physical and legal aspect of the functioning of this type of a company. To date of Polbud decision, somehow artificially,

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legislation on controlled foreign companies. See this case in the abuse of EU rights context in: Pierre Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System' (2008) 14 European Law Journal 351.

[113] Pierre Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System' (2008) 14 European Law Journal 351, 371.

[114] The first includes the right, for instance, to set up a company or reincorporate it by transferring a register office of a company. The latter refers to locate agencies or branched in another Member State than this where a company was set up. See Wolf-Georg Ringe, 'No Freedom of Emigration for Companies?' [2005] EBLR 621, 621, 628f. For further criticism of this distinction see the AG Maduro opinion delivered on 22 May 2008 in Case C‑210/06, Cartesio, para. 28.

[115] Oliver Mörsdorf (n 1), at 647f.

it was presumed that the right to choose of law as understood in the light of Centros judgment expires after the first incorporation and it is excluded during the life-cycle of a company. This has meant that a company may be govern by the State A and conduct its all business in the State B, but it is not entitled to be first incorporated and economically established in the State B and then to freely choose the State A as a place of new incorporation. It is hard to explain why the second scenario should be assessed differently from the freedom of establishment perspective. Apparently, the Court in Polbud came to the same conclusion for the sake of attain more clarity and in order to ensure consistency of interpretation within the meaning of Article 49 and 54 TFEU.

In the normative sense, the aforementioned conclusion presented by the Court arises from strictly textual interpretation of the EU primary law[116]. It can be summarised as follows. First, a company may invoke the right of establishment after meeting requirements of Article 49 and 54 TFEU. This includes formation of a company and setting a registered office, central administration or principal place of business in accordance with the legislation of the Member State of incorporation[117]. Secondly, the freedom of establishment enables a company to convert itself into a company governed by the law of another Member State, if it complies with condition laid down in the law of a host Member State. So, two operation, a cross-border conversion (reincorporation) and an establishment of a new company (incorporation), are put on equal footing and, in general, very similar rules apply to them. When seen from this perspective, a company may be still obliged to transfer its commercial activity to a Member State of its (re)incorporation. However, it cannot be directly derived from Article 49 and 54 TFEU since these provisions only authorised Member States of origin to provide in their national legislation for additional prerequisites pertaining to connection between its territory and a company[118]. In most cases, this would mean a reference to regulation of the national private international law of the host Member State, which are not harmonized at the European

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[116] See Polbud, paras 32-35.
[117] It is pertinent to say that Article 54 does not precisely introduce obligation to set one of the connecting factor mentioned in this provision in line with the Member State of origin, but rather it stipulates that a registered office, central administration or principal place of business should be placed in the territory of the EU. It seems that the Court's finding is based on general observation that the three criteria mentioned in Article 54 are not harmonised within EU, mainly due to the differences between legal tradition and systems of the Member States. Thus, while the EU law impose obligation to install one of the criteria set out in Article 54 in the EU, where exactly and how they should be defined is a dilemma which should be worked out under the law of the country of origin of a company. It is a matter to discussion, whether the CJEU's approach is to be regarded as contrary to the EU law, or only it clarifies the true meaning of the Article 54 TFEU. Cf. Veronika Korom, Peter Metzinger (n 16), at 149ff; Carsten Gerner-Beuerle et al. (n 17), at 9.
[118] Moreover, this finding shows that the Court upheld distinction between an inbound and outbound cases.

level[119]. So, the EU law, as construed by the CJEU, still respects diversity as regards the linkage between a company and a Member State's territory as prescribed in the legal provisions applicable in the jurisdiction of incorporation[120]. The latter finding is not a novelty and it comes from Daily Mail dictum, which were confirmed in Cartesio[121]. Against this background, O. Mörsdorf rightly observed that whereas many home Member States do not demand from companies to set its real seat within their territory, it does not pose significant obstacles for mobility of EU companies[122].

However, the Court did point out which national institutions (registry), in a departure, arrival country or both, is competent to examine if a company satisfies the above-mentioned conditions. In other words, it was only pointed which law should apply, but not which national authority has the power to take a binding decision. Taking an example of Polbud, this loophole in the Court's reasoning might have a practical meaning to Polish courts in Polbud case. Luxembourg follows the so-called seat of administration theory (*théorie du siège reel*) when deciding the issue which law applies to a company[123]. Therefore, courts in Luxemburg would be more inclined to examine the actual place of the effective management of a company rather than place of that company incorporation. However, given the Luxembourg courts are not generally inclined to deprive any company of its legal personality, Polish or other national authorities in Member States may differently address the issue whether Polbud satisfied requirements arising from the Luxembourg law. This issue will be analysed in depth in subsection VII.3 below.

Second, with respect to arguments presented by the Austrian Government in the proceedings, the Court also clarified how the doctrine of abusive of EU law may be subsumed to facts such as these in Polbud case. To be more precise, the Court *de facto* excluded application of the doctrine to the vast majority of cross-border conversion scenarios. In this context, the Court stressed that the question whether a company satisfied conditions included in the provisions of the EU law regarding the freedom of establishment should be distinguished from the power vested in the Member States to restrict wholly artificial arrangements designed to circumvent a national legislation[124]. Even though the Court did not deny the general right of Member States

[119] Polbud, para. 34.
[120] Marek Szydło, 'Case C–210/06, CARTESIO Oktató és Szolgáltató bt, Judgment of the Grand Chamber of the Court of Justice of 16 December 2008' (2009) 46 Common Market Law Review 703, p. 712ff.
[121] See Case C-210/06, Cartesio, paras 108-110.
[122] O. Mörsdorf (n 1), at 629f.
[123] See Pierre-Henri Conac, 'Le siège social en droit luxembourgeois des sociétés' (2009]) 1 JTL 2, 4f.
[124] Polbud, paras 39.

to fight this sort of behaviour, in the very next two paragraphs of the judgment[125] it was held, by reference to the Centros and Inspire Art dicta[126], that the mere fact that a company wished to select the most beneficial legal system, either in the way of incorporation or reincorporation, does not in itself empower Member States to adopt any restrictive measure in order to fight this sort of action. Base on previous case law, this would mean that each Member State is entitled to restrict, proportionally to the gravity of the infringement, the company's right to invoke the freedom of establishment either when a company not only exercised it in the absence of establishment in a host Member State (objective element)[127] but it is also necessary to find if the company conducted it in an abusive manner (subjective element)[128], e.g. with the aim to violate the rights of its minority shareholders or to evade taxation[129]. In this context, combining the mentioned elements brings more flexibility in countering some pseudo-foreign companies, but also diminishes the real power of national authorities to constrain abusive activities and improper exploitation of legal advantages provided by the freedom of establishment. In other words, this should take the wind of the sails of those Member State which would seek to restrain in the future the confirmed right of companies to choose its governing law.

One may wonder during a lecture of the answer to the third question, why the Court paid so much attention to conditions laid down in a host Member State and almost forgot about a home Member State legislation when considering cross-border conversion. Obviously, it does not mean that conversion is a one-side operation. This is to say that Polbud should not be construed as undermining one of the main conclusion presented in Vale judgment, that "*such conversions presuppose the consecutive application of two national laws*"[130]. This is clearly manifested by the fact that the answer to the first and second question concerns measures laid down by the Member State of company's emigration. Nevertheless, trying to explain logic underlying the legislation of the country of new arrival, which is likely to yield many different interpretations in the future, it may be said that the Court emphasised the overriding role of that Member State in the course of the cross-border reincorporation. From the EU law perspective, it is not necessary for the effective performance of such operations to introduce special legalisation in a home Member State[131] since only the execution of conditions enshrined for the

[125] Polbud, paras 40-41.
[126] Case C-212/97, Centros, para. 27; Case C-167/01, Inspire Art, para. 96.
[127] This approach was endorsed by the AG Kokott in her opinion. See the AG Kokott opinion in Polbud, para 43.
[128] See Alexandre Saydé (n 56), at 120-137.
[129] Cf. Tim Drygala (n 105), at 570.
[130] Case C‑378/10, Vale, para. 37.
[131] See *a contrario* Case C-210/06, Cartesio, para. 112 in fine; Case C‑378/10, Vale, para. 46.

(re)incorporation in a host Member State suffices for a company to retain its status as a company incorporated under the legislation of one of the EU Member States[132]. So, if a country does not stipulate any provisions for outbound seat transfer operations linked with a change as regards *lex societatis* of a company, it only does so for the risk of negative consequences for the creditors, employees and minority shareholders of a converting company.

2. *Liquidation and winding-up requirement*

As it was said above, the Court combined the first and second question and treated them as one. Even though, the CJEU's deliberation covered two issues, which was similar to how AG Kokott construed the first two questions. First of them relating to the dilemma whether the imposition of the obligation to liquidate and wind up a company as a result of cross-border conversion amounts to a restriction of the freedom of establishment. Secondly, the Court attempts to solve the problem whether the imposed obligation, if restrictive, can be justified under EU law.

Prior to the Court's decision, there was little doubt that such a measure like the liquidation and winding up prerequiste in the case of cross-border conversion would be regarded as being everything but in conformity with the EU law[133]. The main argument supporting this statement (but not the only one since this measure amounts to a perfect example of a breach of the right to transfer a company's seat combined with change of the corporate law) follows from the fact that in the case of cross-border conversion there are less restrictive mechanisms which effectively protect the shareholders' and other stakeholders' interests. This are, for instance, public announcement of the commencement of a conversion, appraisal rights for minority shareholders, creditors' right to be satisfied or sufficiently secured[134]. Moreover, the measures in question discourages not only from conducting cross-border operations which endanger the interests of some individuals and have a negative effect on the economy of a home Member State, but also render impossible carrying out some transformations with a goal to "benefit from better access to finance and to reduce costs" in a country of arrival[135]. These reasons lead to the conclusion that the mandatory liquidation of all assets and winding up obligation is disproportionate to its intended objective[136].

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[132] Case C-210/06, Cartesio, para. 111.
[133] See Oliver Mörsdorf (n 1), at 650.
[134] In a similar vein, see the opinion of AG Kokott, para. 60.
[135] See the opinion of AG Jääskinen in Case C-378/10 Vale, para 68.
[136] See Oliver Mörsdorf (n 1), at. 650.

This was entirely shared by AG Kokott[137]. She seems to even indicate that this measure is not capable ('counterproductive') of attaining goals allegedly set by art 270(2) CCPC. The Court, in turn, decided that measure in question fail at the last prong of the Gebhard test, so it goes beyond what is necessary to attain the set objective. Obviously, it does not make any difference, in practice, which part of the test was not fulfilled. After all, the Court could have said that Polish provision amount to the total denial of the freedom of establishment and there had not been need to use the said test[138].

3. No real answer to the first question

Taking into considerations the above explanation as to what seems to have the referring court in mind by formulating the first question[139], the Court did not provide any clarification in this scope. Despite the apparent ambiguity of the first question, when taking a closer look, it comprises two fundamental issues, which are crucial for resolving dispute in Polbud and other similar cases, i.e. binding effect of the decision on reincorporation of the émigré company (the registration of the converted company – Consoil Geotechnik), and whether the shareholders resolution on cross-border transfer of statutory seat might be sufficient to convert a company into a foreign legal form without fulfilling requirements laid down in the law of a home Member State. Accordingly, in the absence of any clear indication how to deal with these problems in the light of EU law, Polbud case will be still an extremely hard nut to crack for Polish courts. The reason is that, first, Polbud company did not satisfy any condition under Polish law, even when Article 270, point 2, CCPC is to be ignored. Second, under Luxembourg law Polbud has ceased to exist and become Consoil Geotechnik since registration of the latter in Luxembourg commercial register. In other words, the CJEU did not provide any clear answer to the question whether Polish courts may ignore the fact that the company has been reincorporated under Luxembourg law. It seems that the Court decided on pretending that the issue does not exist at all. Neither the fact of existence of Polbud company has been challenged in any place in the judgment, nor the Court has stated that Polish authorities must recognise Consoil Geotechnik as a company converted from Polbud. Above all, however, had the Court established that

[137] Opinion of AG Kokott, paras 56-66.
[138] See Marek Szydło, 'The right of companies to cross-border conversion under the TFEU rules of freedom of establishment' (2010) 7 ECFR 414, 433f.
[139] See subsection IV.1 above.

Polbud effectively transformed into Consoil Geotechnik, it should have refused to answer all questions as purely hypothetical[140].

It must be submitted that the first question presented by the referring court was very obscure in its content and much of the explanation could be only found in the Polish Supreme Court opinion attached to the decision on the request for a preliminary ruling. Thus, it should come with no surprise that this question was limited by the European Court to the matter whether making completion of the cross-border conversion subject to prior liquidation and winding up procedure constitutes a restriction on the free movement of companies. This happened, even though, neither in the questions nor in its opinion from 22 October 2015 has the Supreme Court cast doubts as to restrictive nature of the Polish provisions in question. Moreover, the Luxembourg Court's attitude is all the more regrettable given the AG Kokott in her opinion hinted at the fact of incorporation of Consoil Geotechnik at least [141]:

> *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. Figuratively speaking, although Polbud already has one foot in Luxembourg, it still has the other in Poland.*

It is apparent that for AG Kokott the incorporation of Consoil Geotechnik had no impact for resolving Polbud case. Notably, her approach to the issue is based on a finding that the cross-border conversion, as allegedly provided for in EU law, consists of two stages, these are the stage of company's departure from the Member States of origin and the stage of arrival to the Member State of new incorporation. Each stage is separately regulated by the Member States and completion of both stages is a *sine qua non* for the success of the transaction in question. Yet, this conclusion does not represent the ultimate solution. Since a lack of common rules relating to the cross-border transfer of corporate seat prevents effectively sound cooperation between different Member States' authorities, a company may apply for conversion into a different legal form and subsequently it can be accepted by a host Member State and rejected

[140] Nevertheless, since the general issue of relation between Polbud and Consoil Geotechnik has not been subject of the CJEU's assessment, before rushing to any conclusion one should embrace cautious approach.

[141] Opinion of AG Kokott, para. 42. In particular, it seems to derive from the Case C-‑378/10, Vale, para 37. In the same vein, see Christoph Teichmann, 'Grenzüberschreitender Formwechsel kraft vorauseilender Eintragung im Aufnahmestaat?' [2017] 25-26 ZIP 1190, 1191.

by a State of departure[142]. This occurs since the absence of measures, which are widely used in other, already regulated, cross-border restructuring operations, such as a certificate attesting the completions of all formalities foreseen in the country of origin.[143]

The divergent approaches amid the Member States may create uncertainty under which national law a company, which has been subject to the cross-border conversion, is operating within the internal market. Considering facts in Polbud, in practice, when a third party were to bring an action at the court of law in Poland, it is likely that the company would be considered as a Polish limited liability company and Counsil Geotechnik would be treated as a new company which is neither the same legal person as Polbud, nor its legal successor. The respective assessment conducted by any court in Luxembourg would lead to conclusion that Polbud only exists now as Consoil Geotechnik. The situation is even more complicated when the authorities of a third Member State were to decide which *lex societatis* applies to such a company. It is submitted that according to Überseering ruling, a Member State must acknowledge a foreign company in accordance with mutual recognition standard.[144] Therefore, a foreign company may not be deprived of its legal personality obtained in the prior process of incorporation. Whereas it will make the seat theory almost inapplicable if it leads to the non-existence of a company[145], still the incorporation theory does not deliver an optimal solution in such a case either. This is because the latter theory refers to the current place where incorporation was completed[146], but this notion proves of little or no assistance if it may be contended that the company is incorporated in two different states.

Obviously, one may argue that the complicated picture of Polbud-Wykonastwo case arose from the facts that the Luxembourg public notary erroneously believed[147] that the company had completed all the formalities requested under Polish law. However, it does not have any impact on the fact that the Polish company according to Luxembourg law converted validly into a

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[142] For instance, the case of the Italian company – *Interedil*, which has been cancelled from the Italian commercial register and never properly registered in the UK Companies House (only as a branch) in the course of transferring its statuary seat to the latter country. See more: Federico M. Mucciarelli, 'The Hidden Voyage of a Dying Italian Company, from the Mediterranean Sea to Albion Carsten' (2012) 9 ECFR 571, 573ff; Carsten Gerner-Beuerle et al. (n 17), at 31.
[143] See, for instance, Article 127 of directive relating to certain aspects of company law (n 13).
[144] See Case C-208/00, Überseering, para. 60; Justin Borg-Barthet, 'The governing law of companies in EU law' (HP, Oxford 2012) 167.
[145] Cf. Stefano Lombardo (n 16), at 628.
[146] Under the statutory seat theory, it will be the current place specified in a company's constitution (articles of association or statute); and under the register seat theory, the place indicated in a national commercial register.
[147] A different question is whether it was justified and might be partly attributed to the obscurity of Polish law in this ambit. See section II. *supra*.

foreign legal entity and its existence may not be called into question at least until a competent institution in Luxembourg will cancel the registration[148].

In the view of the foregoing elaborations, the cross-border conversion is a composite procedure leading to the alteration of the company's legal form. Although it is within the province of each Member State to regulate this procedure, this competence is inherently limited since it needs to be split between two States, whose provisions must be successively applied. This situation triggers at least two fundamental questions: how to strike a balance between divergent interests of the States engaged in the conversion and to what extent shareholders of such a company are free to decide which law is to govern their company.

When seeking to resolve these issues, at this point it must be noted that the cross-border conversion may consist of three main and successive decisions made by competent authorities in two countries: certification, re-registration and cancelation. Apparently, each of them is different in nature and in a distinct way affect the conduct of competent national authorities. Moreover, unlike a typical decision taken by judiciary or administrative bodies, these related to a company may have a significant impact not only on the primary addressees of a decision (the company itself and its shareholders), but also third parties (employees, creditors, consumers, business partners, etc.). Thus, the possibility to refuse to recognise the decisions in question, in particular the decision on re-registration, should be strongly limited.

In principle, the philosophy that the national authorities in a Member State, where the register office (statutory seat) of the immigré company is about to be installed, have the final word on the accomplishment of the cross-border restructuring procedures is deeply rooted in the European Union secondary legislation. When it comes to cross-border mergers, should the merger have been effectuated, it could not be considered void (Article 134 of directive relating to certain aspects of company law[149])[150] and the final say on the legal effectiveness of the

[148] Similar case to Polbud has recently occurred in Germany, where the German court (OLG Frankfurt a.M.) in its judgment of 3 March 2017 (20 W 88/15) decided that a German limited company (GmbH) could have converted itself into an Italian limited company (srl). This was despite the fact that the German company did not follow any rules that should be interpreted from German regulation in accordance with the guidelines provided for by the Luxembourg Court case-law. See Ansgar Frank, 'Formwechsel im Binnenmarkt' (Mohr Siebeck, Tübingen 2016) 236ff. The conversion in this case was based only on a decision of the German company shareholders. The decision of the German Court has already been strongly criticised. See Christoph Teichmann (n 140). However, there is also an opinion in favour of this decision in the light of EU law. See in Polish doctrine: Ariel Mucha, 'O transgranicznym przekształceniu spółki na przykładzie jej „wrogiego przejęcia" przez państwo członkowskie Unii Europejskiej - glosa do orzeczenia niemieckiego Oberlandesgericht Frankfurt am Main z 3.01.2017 r. (20 W 88/15)' (2017) EPS No. 11, (forthcoming).

[149] Former Article 17 CBMD.

[150] See Adam Opalski and Andrzej Wiśniewski (n 16), at 610.

operation is vested in the authority designated by the Member State to whose jurisdiction the company resulting from the cross-border merger is subject to (art 129 of directive relating to certain aspects of company law[151]). As for the transfer of the Societas Europaea'a (SE) seat, the authorities of the Member State of the new establishment also play an essential role in completing this operation (art 8(10) SE Regulation). The possible repeal of the pre-merger or pre-transfer seat certification issued in the Member State of the company's origin due to its invalidity or other causes has no immediate effect on the existence of a company. Finally, deletion from the former registry rests on simple notification after the operation has taken effect (art 130 of directive relating to certain aspects of company law[152]), what makes it just a kind of formality rather than an act entitling authorities of the State of origin to scrutinise the correctness of the procedure conducted in the State of destination.

The above-mentioned legal framework of cross-border operations is premised on distributive application of national rules, which means that every decision of the host Member State authorities is issued after obtaining a certificate attesting due fulfilment of all the requirements set forth in the law of the original home Member State. This two-stage model secures the interests of all the parties involved in a specific cross-border operation and provides for a balance between the Member States' national interests and the effectiveness of the single market. It might be disputable whether the same approach, as the one adopted at the current stage of European Union law development, can be applied in the area deprived of harmonisation. Moreover, the importance of a thorough examination of the conditions prescribed in a Member State of origin for a sound cross-border conversion procedure was stressed in Vale[153]. In this case, it was asserted that a host Member State is competent to regulate the re-registration procedure, which requires that a converting company furnish the evidence in order to prove fulfilment of all the requirements in a State of origin[154]. The Court concentrated on the limitation of the competence to stipulate the procedure of re-registration (equivalence and effectiveness principle) and it did not set out how the verification of the conversion legality should be carried out. The following three-pronged categorisation of potential occurrences could be of assistance in addressing this issue.

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[151] Former Article 12 CBMD.

[152] Former Article 13 CBMD.

[153] Case C-378/10, Vale, para. 58.

[154] Case C-378/10, Vale, para. 59. This notion seems to indicate that the confirmation issued by a home Member State's body has only probative value, thus it is not binding for the host state's authorities and redundant, too, to complete the operation since the fulfilment of conditions laid down in the State of departure might be demonstrated in a different way pursuant to the regulations of the Member State of arrival.

At the one end of the scale, one may consider a jurisdiction where competent authorities in a State of departure issue a certificate attesting that a migratory company has met all the legal conditions prescribed in national law. Similarly to the current regulation of cross-border mergers, this would ease the task of the designated authorities in a country of arrival as they may presume that the foreign stage of the cross-border operation has been duly completed. *De facto* exterritorial effect of the certification decision is achieved because it is legitimate to assume that the decision-issuing state authorities are well informed and trained to correctly apply their own national provisions.

At the other end of the scale, however, one may consider a jurisdiction where no special pre-conversion procedure exists either in domestic or cross-border configuration, there is no possibility for an immigré company to provide any certification, so there is no such requirement to obtain it, as otherwise the company would be deprived of its rights enshrined in the Treaty. In such situation, it would be for host Member State‘s authorities to determine whether a company fulfilled all pre-conversion requirements by applying both the law of the company's current place of incorporation and its own law pursuant to the principle of equivalence and effectiveness.[155] Without prejudice to the application of any other provisions prescribed under the national law of Member States consistent with the said principle, it would be sufficient, as a default rule, to initiate and finalise any conversion operation in the new place of incorporation by delivering the consent of the shareholders expressed in a special resolution. It happens since EU law does not require in such circumstances any approval of a Member State of origin for performing cross-border restructuring operations[156]. Any additional requirements, such as an obligation to acquire a special 'exit' certificate, are merely optional for a State of departure and they are subject to the proportionality test.

Finally, one can imagine a third possibility, in which a home Member State expressly refuses to issue a decision, either by issuing an individual decision or introducing a special requirement in national legislation, to the company. Should authorities in a State of destination are aware of it, they may not ignore this refusal and therefore informally override it, even though it might be inconsistent with the EU law. This rule serves upholding mutual trust between Member States. As a residual remedy, the measure accessible in such an occurrence is to bring an action before the CJEU or file a complaint to the Commission against the non-complying State.[157] This results

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[155] Case C-378/10, Vale, paras 48 and 53.

[156] See subsection VII.1 above.

[157] A Member State may either ask the Commission to bring an action against another Member State (under Article 258 TFEU) or bring itself an action against another Member State (under Article 259 TFEU). See, in particular,

from the fact that it is not desirable under EU law to resolve this kind of dispute *ad casum* but rather at an inter-state level.[158]

In the light of the foregoing, the consecutive application of national law poses a risk to some home Member States as it partly deprives them of control over companies incorporated therein.[159] However, this risk might be mitigated by implementing in national law provisions dealing with the issue of the cross-border conversion procedure, which would include an obligation to attain proper certificate prior to initiation of the proceeding in the state of destination. Therefore, it is likely that Member States would be more inclined to regulate this procedure, which is already their duty under Union law, to prevent other States from "taking over" their companies.

VIII. Conclusions

Generally speaking, the Court's decision in Polbud case does not differ from other judgments, so it provides with some useful hints concerning the freedom of establishment, but at the same time it leaves many questions unanswered.

The much-awaited clarification pertaining to the issue whether an emigrating company is under obligation to transfer its real seat to the State of new arrival. This is another trade-off between equity of legal outcomes (prohibition of artificial practice) and legal certainty. In other words, Polbud is a clear departure from the condition of physical establishment at least in case of cross-border conversion of a company from the perspective of a home MS. The reason for this might be that it would be very difficult, and it was as Cadbury Schweppes case showed, to delineate a clear-cut distinction between companies that do and do not pursue sufficient economic activity in the host Member State in order to rely on the freedom of establishment.

Moreover, Polbud extends free choice of governing law (identity preserving law change) which affords companies with the possibility to attain efficiency gain due to the application of a more suitable company law. To this aim, the Court in Polbud made an attempt at translating main

ECJ judgment of 23 May 1996, Case C-5/94, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd., paras 19 and 20.

[158] Cf Henrik Wenander, *Recognition of Foreign Administrative Decisions Balancing International Cooperation, National Self-Determination, and Individual Rights*, (2011) 71 ZaöRV 755, 776.

[159] This concern is also expressed by the Polish Supreme Court in the opinion attached to the decision on the request for a preliminary ruling: "The renunciation of the compulsory winding up of the company in case of the transfer of the company's seat would allow the company to carry out this operation without any control and would create a risk for creditors, minority shareholders and employees" (own translation from Polish).

thesis included in Centros into emigration scenarios. At the same time, it upheld division into moving in and moving-out situation. Thus, Daily Mail is still good law. It means that the Member State of incorporation or new incorporation may decide upon the criterion of charting the company.

This judgment is everything save the final settling the case since it does not provide a clear answer whether Polish court may ignore the fact that the company has been reincorporated under Luxembourg law. So, the problem of 'ghost' companies (limbo or suspended in vacuum) are not resolved. This situation confirms that without a proper harmonisation of EU law the complex issue of corporate mobility in EU cannot be successfully resolved in a judicial forum.

The jurisprudence on corporate mobility tends to fluctuate between the prevention of abusive behaviour and facilitation of regulatory competition. The Polbud case falls into the second category. This judgment motors liberalization of the internal market. This is to say that the pendulum of the choice of law freedom in the company law area continues to swing and this time set an angle towards the regulatory competition paradigm.