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Cross-border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross-border conversions, mergers and divisions — selected issues

Transgraniczne przekształcenie spółki w świetle przepisów dyrektywy 2019/2121 dotyczącej transgranicznego przekształcania, łączenia i podziału spółek — wybrane zagadnienia

Abstract

The main purpose of this article is to present the concept of the cross-border conversion of a company and the possibilities for companies to carry it out under the freedom of establishment in the light of the recent judgment of the CJEU in case C-106/16 Polbud, and the provisions of Directive 2019/2121 EU of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, which should be implemented by the Member States by 31 January 2023. The article discusses selected aspects of the procedure of cross-border conversion of a company, regulated in new Directive 2019/2121, and focuses on the scrutiny of legality of cross-border conversion of a company by competent national authorities. Particular attention is paid to the concept of abuse of law in the context of the possibility for national authorities to issue a pre-conversion certificate as the precondition for registration of the company undergoing conversion in the Member State of destination.

Keywords: freedom of establishment, cross-border conversion of the company, abuse of law

Streszczenie

Celem artykułu jest przedstawienie pojęcia transgranicznego przekształcenia spółki oraz możliwości jego dokonywania przez spółki w ramach korzystania ze swobody przedsiębiorczości w świetle orzeczenia TSUE w sprawie C-106/16 Polbud oraz przepisów Dyrektywy 2019/2121 Parlamentu Europejskiego i Rady z 27.11.2019 r. zmieniającej Dyrektywę 2017/1132 w odniesieniu do transgranicznych przekształceń, połączeń i podziałów spółki, która powinna zostać implementowana przez państwa członkowskie do 31.01.2023 r. W artykule przedstawiono wybrane aspekty procedury transgranicznego przekształcenia spółki na podstawie przepisów Dyrektywy 2019/2121 oraz skoncentrowano się na analizie kontroli legalności transgranicznego przekształcenia spółki dokonywanej przez właściwe organy krajowe. Szczególną uwagę poświęcono problematyce nadużycia prawa w kontekście możliwości wydania przez organy krajowe zaświadczenia potwierdzającego zgodność z prawem transgranicznego przekształcenia jako warunku niezbędnego do rejestracji przekształcanej spółki w państwie przyjmującym.

Słowa kluczowe: Swoboda przedsiębiorczości, transgraniczne przekształcenie spółki, nadużycie prawa

JEL: K19, K20, K22, K33

Introduction

International business activity of companies in the European Union often entails the need for cross-border restructuring in the form of company conversion, merger or division. The recent judgment of the Court of Justice of the European Union (CJEU) issued in case C-106/16 Polbud (Case C-106/16 Polbud — Wykonawstwo sp. z o.o., w likwidacji, judgment of the CJEU of 25.10.2017, ECLI:EU:C:2017:804) had a significant impact on the interpretation of the freedom of establishment as the legal basis for carrying out cross-border conversions by companies on the territory of the internal market of the European Union (Kozieł, 2018, pp. 26–27; Mucha, Oplustil, 2018a, p. 293; Szydło, 2018, p. 1568).

CJEU's ruling in case C-106/16 Polbud also highlighted the necessity to regulate the conditions and procedure for cross-border conversions of companies in the European Union law (European Commission's 'Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM (2018) 241 final, pp. 2–3; Davies *et al.*, 2019, pp. 198–199; Mucha, Oplustil, 2018b, p. 12; Szydło, 2018, pp. 1569–1570). However, it should be underlined that the need for adoption of legal provisions concerning the procedure of cross-border transfer of the registered office of the company in order to facilitate the companies to exercise freedom of establishment as the legal basis for conducting international business activity in the European Union, had been emphasized by several authors even before the judgment in case C-106/16 Polbud was issued (see for example: Biermeyer, 2015, pp. 397–398; Błaszczyk, 2012, p. 44; Błaszczyk, 2013, p. 24; Napierała, 2012, pp. 94–96; Opalski, 2008, pp. 94–97; Opalski, 2010, pp. 143–145; Sachabińska, 2015, pp. 89–93, 104–105; Szydło, 2010, p. 443).

Over the past years, companies that have been running international business operations in the European Union, have had to rely on the provisions of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390, hereinafter referred to as the TFEU or the Treaty), judgments of the CJEU and domestic law of the Member States in order to carry out cross-border conversion. That situation led to numerous legal problems arising out of lack of common procedure of cross-border conversion regulated on the European level, and caused a considerably high level of uncertainty of the situation of stakeholders of the company. For these reasons, the European legislator has decided to adopt a new directive to regulate the procedure for cross-border conversion of companies (European Commission 'Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM (2018) 241 final, p. 3). The European Commission highlighted that, on the one hand, in the judgment in case C-106/16 Polbud, the CJEU corroborated that under the provisions regulating freedom of establishment, a European company has the right to transfer its registered office to another Member State of the European Union without losing its legal personality and convert itself into the company governed by the law of that State, and such a cross-border conversion conducted in order to enable the company to take advantage of the benefits resulting from the more favourable legal system could not, in itself, be considered as an abuse of law. On the other hand, the CJEU could not introduce any procedure which would have been necessary in order to complete the conversion, nor could it lay down the conditions for adequate protection of the company's stakeholders. For the above reasons, the action on the part of the European legislator seemed to be very needed (European Commission's 'Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM (2018) 241 final, pp. 2–3; Davies, *et al.*, 2019, pp. 198–199; see also: case C-106/16 Polbud paras. 35, 44, 62–63).

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (OJ L 321, 12.12.2019, hereinafter referred to as Directive 2019/2121) came into force on 1 January 2020 and should be implemented by Member States by 31 January 2023.

Cross-border conversion as one of the aspects of conducting business activity by companies on the basis of the freedom of establishment

Freedom of establishment constitutes one of the fundamental freedoms of the internal market of the European Union, which plays a particularly significant role in development of international business activity, since it confers on the citizens of the Member States of the EU the right to take up and conduct business activity on the territory of another Member State under the same conditions which are applied to the nationals of the host Member State (art. 49 of the TFEU). As regards the possibility to invoke freedom of establishment to carry out cross-border operations by companies, it is pointed out in the legal doctrine that the CJEU referred directly to that issue in its judgments issued in cases C-411/03 SEVIC Systems (Case C-411/03 SEVIC Systems AG, judgment of the Court of 13.12.2005, ECLI:EU:C:2005:762), C-210/06 Cartesio (case C-210/06 Cartesio Oktató és Szolgáltató bt., judgment of the CJEU of 16.12. 2008, ECLI:EU:C:2008:723) and C-378/10 VALE (Case C-378/10 VALE Építési kft, judgment of the Court of 12.07.2012, ECLI:EU:C:2012:440), in which the CJEU indicated the conditions and principles of carrying out cross-border restructuring of companies in the light of the provisions of the Treaty related to freedom of establishment (Oplustil, 2014, p. 73).

In the judgment in case C-378/10 VALE, the CJEU referred directly to the cross-border conversion of the company as the operation involving conversion of the legal form of the company established under the law of one

Member State into legal form of the company formed in accordance with the law of another Member State with the concomitant change as regards the national law applicable to that company (Oplustil, 2014, p. 74; see also: Błaszczyk, 2012, p. 41). The CJEU underlined that the cross-border conversion of a company constitutes a type of economic activity in respect of which Member States are obliged to apply the provisions of the TFEU regulating the freedom of establishment. The CJEU highlighted that in so far as the national law of Member State regulates only conversions of the companies which have their seat on the territory of that State, the legislation of that State must be regarded as introducing a difference in treatment between companies by reason of domestic or cross-border character of the conversion that may discourage companies formed under the law of another Member State from exercising freedom of establishment and, consequently, such legislation must be considered as equivalent to the restrictions in the meaning of articles 49 and 54 of the TFEU (case C-378/10 VALE, paras. 24, 36; see also: Błaszczyk, 2012, pp. 41–42; Mucha, 2015, p.66; Mucha, 2018, p. 58; Oplustil, 2014, pp. 74–75; Napierała, 2013a, pp.108–109; Napierała, 2013b, pp. 9–12, 21).

While analysing the opportunities for conducting business activity by companies on the basis of the freedom of establishment, it is worth pointing out the position the CJEU presented in case C-212/97 Centros and case C-167/01 Inspire Art (Kopiczko, 2005, pp. 14, 16–17; Szydło, 2018, p. 1560; case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen, judgment of the Court of 9.03.1999, ECLI:EU:C:1999:126; case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., judgment of the Court of 30 September 2003, ECLI identifier: ECLI:EU:C:2003:512). The CJEU, in case C-212/97 Centros, emphasised that setting up a company in the Member State the provisions of company law of which are the least restrictive, and establishing a branch of that company in another Member State in order to enable the company to pursue all its economic activity only in that Member State where the branch is established cannot, in itself, be considered as an abuse of the freedom of establishment (case C-212/97 Centros paras. 27, 29; see also: Kopiczko, 2005, p. 14; Szydło, 2018, p. 1560). However, this is the latest judgment of the CJEU in case C-106/16 Polbud, which is, in the legal doctrine, considered to be a milestone in interpretation of the provisions of the Treaty governing freedom of establishment in the context of cross-border conversion of companies (Davies *et al.*, 2019, p. 198; Mucha, Oplustil, 2018a, p. 293; Mucha, Oplustil, 2018b, p. 11; Szydło, 2018, pp. 1568–1569). As for the situation of the Polish limited company that transferred its registered office to Luxemburg with the intention to apply Luxemburg law to it without losing its legal personality, from the perspective of the European Union law, the CJEU unambiguously highlighted that cross-border conversion of a company falls within the scope of application of the freedom of establishment irrespective of the fact that the company conducts its business activity, even entirely, in the home Member State, when that company meets the requirements imposed by the law of the host Member State with regard to the connecting factor with the national law of that State (Mucha and Oplustil, 2018b, p. 11; case C-106/16 Polbud para. 38). In that statement, the CJEU referred to the position it had already taken in its previous judgment in case C-212/97 Centros, and maintained the view presented in the aforementioned judgment (Mucha and Oplustil, 2018b, p. 11; see also: Davies *et al.*, 2019, p. 198; Mucha 2018, pp. 62–63; Napierała, 2018, p. 800; Case C-212/97 Centros para. 17).

The great impact of the judgment of the CJEU in case C-106/16 Polbud on interpretation of the scope of application of the freedom of establishment lies in the fact that the CJEU resigned from its former approach to this freedom based on the consideration that the idea of freedom of establishment had to be connected with setting up a fixed establishment in the host Member State and the necessity to conduct genuine economic activity in that State, which the CJEU presented in its judgments in cases: C-221/89 Factortame, C-196/04 Cadbury Schweppes and C-378/10 VALE (Mucha, Oplustil 2018a, pp. 285–289; Mucha, Oplustil, 2018b, p. 11; Szydło 2018, pp. 1557–156; see also: Davies *et al.*, 2019, p. 198; Mucha, 2018, pp. 62–64; case C- 221/89 The Queen v. Secretary of State for Transport, ex. Parte Factortame Ltd, judgment of the Court of 25.07.1991, ECLI identifier ECLI:EU:C: 1991:320, para. 20; case C-196/04 Cadbury Schweppes, judgment of the CJEU of of 12.09.2006 ECLI:EU:C:2006:544, para. 54; case C-378/10 VALE, para. 34). In the wake of issuing the judgment in case C-106/16 Polbud, it became clear that freedom of establishment encompasses the right to choose the law applicable to the company and, under the provisions of art. 49 TFEU, a company has the right to convert into a company governed by the law of another Member State, and such a cross-border conversion does not have to entail the concomitant relocation of the head office or business activity of the company to the host Member State unless it is required by the law of that State (Davies *et al.*, 2019, p. 198; Mucha, 2018, pp. 63–64; Mucha, Oplustil 2018a, pp. 286, 291, 293–294; Mucha, Oplustil, 2018b, p. 11; Napierała 2018, p. 800; Szydło 2018, p. 1558; see also: case C-106/16 Polbud, para. 44).

In other words, by presenting such a wide approach to interpretation of the freedom of establishment in the judgment in case C-106/16 Polbud, the CJEU gave European companies the green light to invoke freedom of establishment in order to transfer their registered offices and convert themselves into the companies governed by the law of the host Member State in order to select the most beneficial legal and economic surroundings for the company (Costamagna, 2019, p. 200; Mucha, Oplustil, 2018a, pp. 298, 300; see also: Mucha, 2018, p. 63; Szydło, 2018, pp. 1560, 1567; case C-106/16 Polbud paras. 40, 62–63). However, it must be stressed that in its previous judgment in case C-196/04 Cadbury Schweppes, the CJEU underlined that Member States may introduce restrictions on the exercise of the freedom of establishment on the ground that the company intends to take advantage of this freedom in order

to abuse the European or national law (Mucha, Oplustil, 2018a, pp. 298–299, 300; Szydło, 2018, pp. 1567–1568).

It must be also pointed out that in the judgment in case C-106/16 Polbud, the CJEU highlighted that, within the framework of the freedom of establishment, companies do not have an unlimited possibility to choose the law applicable to the company, because the conversion into a company governed by the law of the host Member State requires fulfilment of the conditions applicable under the law of that State and, in particular, those relating to the connecting factor with the legal system of the host Member State (Napierała, 2018, p. 801; see also: case C-106/16 Polbud, para. 35).

The idea and procedure of cross-border conversion of a company under the provisions of Directive 2017/1132

The provisions of Directive 2019/2121 determining the legal definition of cross-border conversion of a company and laying down the procedure of such cross-border operation, has been incorporated into Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.06.2017, pp. 46–127, hereinafter referred to as Directive 2017/1132) in articles 86a–86t, which constitute a new chapter in Directive 2017/1132 titled "Cross-border Conversions".

Under the provisions of art. 86b of Directive 2017/1132, "'cross-border conversion' means an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality". It is worth emphasising that the legal definition of cross-border conversion of a company set forth by the provisions of Directive 2017/1132, in which the European legislator stressed that the essence of cross-border conversion is the transfer of the registered office of a company to another Member State, which is a condition sufficient for an operation to be considered a cross-border conversion of a company and which does not need to be accompanied by the concomitant transfer of the real head office of the company to that State, is inspired by the position of the CJEU on cross-border conversion of the company expressed in the judgment in case C-106/16 Polbud (Mucha, Oplustil 2018b, p. 12; see also : case C-106/16 Polbud paras. 38, 44).

The procedure of cross-border conversion of a company consists of several stages. Firstly, the administrative or management body of the company draws up the draft terms of cross-border conversion and the report for members and employees that should include the explanation and justification of the legal and economic aspects of the cross-border conversion and explanation of the consequences of the cross-border conversion for employees (art. 86d and art. 86e of Directive 2017/1132). The draft terms of the cross-border conversion should be disclosed by the company in the register of the Member State of departure (art. 86g of Directive 2017/1132). Subsequently, the general meeting of the company has to adopt the resolution concerning the approval of the draft terms of cross-border conversion (art. 86h of Directive 2017/1132). During the next stage of the procedure, the competent authority of the Member State of departure of the company has to scrutinise the legality of the cross-border conversion in order to issue the pre-conversion certificate (art. 86m of Directive 2017/1132). The last part of the procedure encompasses approval of cross-border conversion by the competent authority of the Member State of destination, and disclosure of the information on completion of the cross-border conversion of the company in the register of the Member State of departure as well as in the register of the Member State of destination (art. 86o, 86p of Directive 2017/1132; see also Costamagna, 2019, pp. 202–203). It is important to stress that the provisions of Directive 2017/1132 provide that the companies carrying out the cross-border conversion are required to apply adequate measures to ensure that the rights of the shareholders who voted against the approval of the draft terms of the cross-border conversion, the creditors of the company, and its employees, are properly protected (art. 86i–86l of Directive 2017/1132).

When analysing the role played by the competent authorities in the Member States in the procedure of cross-border conversion of a company, particular attention should be paid to issue of the pre-conversion certificate by the competent authorities of the Member State of departure. During this stage of cross-border conversion of a company, the competent authorities of the Member State of departure are required to scrutinise the legality of such a cross-border operation. Assessment by the competent authority if the company intending to transfer its registered office and convert itself into the company incorporated in another Member State complies with all the relevant conditions and carries out the conversion in accordance with the legal provisions of the Member State of departure, is necessary in order to guarantee the proper level of protection against infringement, evasion or circumvention of the national or European Union law (Preamble to Directive 2019/2121 pt. 35 and 33; art. 86m paras. 7–8 of Directive 2017/1132).

The result of such a scrutiny should be the issue of a pre-conversion certificate, which is a pre-requisite for the approval of the cross-border conversion of a company in the Member State of destination. The cross-border conversion of a company cannot be approved by the national authorities of the Member State of destination without the pre-conversion certificate since, under the provisions of Directive 2017/1132, the certificate is considered to be an official confirmation that the company completed all the pre-conversion procedures and met all the conditions required for this operation in the departure Member State (Preamble to Directive 2019/2121 pt. 33; art. 86o para. 5 of Directive 2017/1132).

Directive 2017/1132 imposes on the Member States the obligation to designate the authorities competent to scrutinise the legality of the cross-border conversion. Directive 2017/1132 stipulates that Member States may indicate as competent authorities both courts and notaries or other authorities, including tax authorities or financial services authorities. Interestingly, in the light of the provisions of Directive 2017/1132, Member States may designate more than one authority competent to issue a pre-conversion certificate. It should be highlighted that, in such a case, the company should have the possibility to submit the application for issuing the pre-conversion certificate to one single competent authority, which should coordinate its work with the actions of the other authorities (art. 86m para. 1 of Directive 2017/1132; preamble to Directive 2019/2121 pt. 34).

Carrying out cross-border conversion of a company for abusive or fraudulent purposes as a criterion that excludes the possibility of issue of a pre-conversion certificate

It is worth emphasising that, under the provisions of Directive 2017/1132, the competent authorities in the Member States will have extensive powers to scrutinise the legality of cross-border conversion of a company, including the right to obtain all the relevant information and documents from the company as well as from the competent authority in the Member State of destination, and the possibility to have recourse to an independent expert opinion (art. 86m paras. 2–3, 6, 12 of the Directive 2017/1132; preamble to Directive 2019/2121 pt. 37–38).

There is no doubt, that the competent authorities of the Member State of departure should not issue a pre-conversion certificate when a company has failed to comply with all the relevant conditions or to complete all the necessary procedures and formalities (art. 86m paras. 7b of Directive 2017/1132; preamble to Directive 2019/2121 pt. 34). The interesting point is that the pre-conversion certificate should not be issued when the competent authority establishes that the cross-border conversion is to be carried out for abusive or fraudulent purposes, the intention or consequence of which is to evade or circumvent the national or European law or to achieve criminal aims (art. 86m para. 8 of Directive 2017/1132; preamble to Directive 2019/2121 pt. 34–35). Due to the fact that the possibility of completion of the procedure of cross-border conversion of the company depends on the assessment done by the national authority that the aim of such cross-border operation is not fraudulent or abusive, the proper interpretation of these notions becomes very important. In the preamble to Directive 2019/2121, the European legislator included a kind of interpretative guidance related to the term "fraudulent or abusive purposes" in the context of cross-border operations of companies and underlined that this notion encompasses circumvention of the rights of the employees, social security payments or tax obligations, as well as criminal purposes. Particular attention should be paid by national authorities to preventing the setting up of "shell" or "front" companies, i.e. ones established in order to evade, circumvent or infringe the European Union or national law (preamble to Directive 2019/2121 pt. 35; see also Mucha, Oplustil, 2018b, p. 12; Davies *et al.*, 2019, pp. 203–204). In the case of having serious doubts related to legality of the cross-border conversion of a company, the national authorities, while scrutinising the cross-border operation, are obliged to analyse all the relevant facts and circumstances and should take into consideration, where necessary, at least the indicative factors of which they have gained knowledge during the scrutiny (art. 86m para. 9 of Directive 2017/1132). The indicative factors that the national authorities should take into account in order to assess whether the cross-border conversion of a company is carried out for abusive or fraudulent purposes, should be related to the characteristics of the establishment in the Member State, where the company intends to be registered as the result of cross-border conversion. The European legislator, in the preamble to Directive 2019/2121, gives examples of the indicative factors that should be considered by the national authorities. It seems possible to distinguish three basic groups of these factors. Firstly, the national authority should consider the intention of the cross-border conversion. Secondly, it should analyse the information concerning the economic characteristics of the establishment in the host Member State including, inter alia, the sector, the investment and the commercial risks assumed by the company before and after the cross-border conversion. Thirdly, the national authority should take into account the information related to the employees and their rights of participation in the converted company. It is important to stress that national authorities should not analyse these circumstances separately, but rather as indicating factors enabling an overall assessment of cross-border conversion of the company (preamble to Directive 2019/2121 pt. 36). What is interesting, while explaining what circumstances should be taken into consideration in order to scrutinise the legality of cross-border conversion, the European legislator highlights that the national authority may recognise that the cross-border conversion is not carried out for the abusive or fraudulent purposes when that operation is to lead to the effect of the company conducting its business activity or having the place of its effective management located in the Member State where that company is to be registered as the result of the cross-border conversion (preamble to Directive 2019/2121 pt. 36).

The interpretation of the provisions of Directive 2019/2121 prohibiting the issue by the competent national authorities of a pre-conversion certificate when the cross-border conversion of a company is carried out for abusive or fraudulent purposes leading to or aimed at evasion or circumvention of Union or national law, or for criminal purposes, requires reference to the concept of abuse of law under European Union law. This concept has been developed in the case law of the CJEU in the area of the freedoms of the internal market, and has been subsequently

transposed into tax law. It is assumed in legal doctrine that it means the principle of prohibition of abusive behaviour, according to which legal entities may not invoke the provisions of the European Union law for abusive or fraudulent purposes (Wojciechowski, 2019, p. 317). The CJEU referred to the concept of abuse of law for the first time in the judgment in Case 33/74 van Binsbergen (Case 33–74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Judgment of the Court of 3 December 1974, ECLI identifier: ECLI:EU:C:1974:13) in the context of the abuse of European Union law to circumvent national law (Godlewska, 2011a, pp. 25–26; Sørensen, 2006, pp. 425, 443–444; Zalasiński, 2006, p. 11). In this judgment, the CJEU held that a Member State should be guaranteed the right to prevent the person who provides services entirely or principally on the territory of that State from exercising freedom to provide services with the intention to avoid the rules of professional conduct which would be applicable to the person concerned in the case of being established on the territory of that State (Case 33/74 Binsbergen para. 13; Sørensen, 2006, pp. 425, 443; Zalasiński, 2006, p. 11; see also: Godlewska, 2011a, pp. 25–26). On the basis of the case-law of the CJEU, it is possible to identify various criteria for establishing abuse of law, which is a consequence of the fact that abuse of law takes different forms depending on the area of law in which it appears (Godlewska, 2011b, p. 11; see also Zalasiński, 2007, p. 45). In the case of freedom of establishment, the CJEU, in the judgment in case C-196/04 Cadbury Schweppes, considered the creation of wholly artificial arrangements having no economic link with the business activity being carried out in order to avoid the application of particular provisions of national legislation as an abuse of law (Godlewska, 2011b, p. 11; see also: case C-196/04 Cadbury Schweppes, para. 55; Davies *et al.*, 2019, p. 204; Mucha, 2018, p. 63; Mucha, Oplustil, 2018a, pp. 298–299, 300; Szydło, 2018, pp. 1567–1568).

The regulations of Directive 2017/1132 concerning cross-border conversion of a company should not be analysed without reference to the position of the CJEU on the scope of application of the freedom of establishment and the rights conferred on the companies in connection with exercising this freedom that the CJEU presented in the judgment in case C-106/16 Polbud, and in its previous judgments concerning the concept of abuse of law with regard to exercising the freedom of establishment. The stance taken by the CJEU in the above-mentioned judgments as regards the possibilities to invoke the freedom of establishment by companies, should shed light on the aim of particular regulations of Directive 2017/1132 related to the scrutiny of legality of cross-border conversion and issue of the pre-conversion certificate by the national authority as a result of such scrutiny (see also: Costamagna, 2019, pp. 202–205; Davies *et al.*, 2019, pp. 202–205; Mucha, Oplustil 2018b, p. 12).

First of all, while scrutinising the legality of cross-border conversion, the national authority should keep in mind that the CJEU, in its latest judgment in case C-106/16 Polbud confirmed that freedom of establishment is applied to the situation in which the company set up under the law of one Member State converts itself into the company governed by the law of another Member State even though the company conducts business activity in the first Member State (case C-106/16 Polbud, paras. 38, 44; Mucha, 2018, pp. 63–64; Mucha, Oplustil 2018b, p. 11; Szydło, 2018, pp. 1560, 1567). In this context, it is worth emphasising that the CJEU clearly stated that the fact that the registered office or the real head office of the company is established in another Member State in order to take advantage of the more favourable legal system, cannot be considered as an abuse of law (case C-106/16 Polbud, para. 40; Costamagna, 2019, pp. 195–196, 199–200; Szydło, 2018, pp. 1567).

On the other hand, it should be underlined that the CJEU, in its previous judgments in cases C-212/97 Centros and C-167/01 Inspire Art, presented such a tolerant approach to the possibility to exercise freedom of establishment in order to set up a company in another Member State with the intention to search for the most beneficial legal system only with regard to the evasion of the requirements imposed by the company law of the Member State where the branch of the company was established and where that company conducted its whole business activity (Szydło, 2018, p. 1567; Costamagna, 2019, pp. 198–199; case C-212/97 Centros, paras. 26–27; case C-167/01 Inspire Art, paras. 95–96, 98). It is debatable whether, in that case, the exercise of the freedom of establishment to circumvent other provisions of national law concerning the pursuit of a business or profession or carrying on a trade, should be regarded as an abuse of law (Sørensen, 2006, pp. 444–445; see also: Szydło, 2018, p. 1567–1568). However, it seems that the exercise of the freedom of establishment for such a purpose would hardly be considered an abuse of law (Sørensen, 2006, pp. 445; see also Costamagna, 2019, pp. 198–199; Zalasiński, 2007, p. 44). In this way, the CJEU interpreted the possibility of exercising the freedom of establishment in the judgment in case C-106/16 Polbud, in which the Court stated that the mere fact that a company's registered office or head office was established in accordance with the law of one Member State for the sole purpose of benefiting from a more favourable legislation, did not in itself constitute an abuse of law. The CJEU referred in that ruling not to company law, but to the legal system of another Member State in general. In so doing, it stressed that freedom of establishment includes the right to select the most favourable legal regime, which is not limited to the rules governing the formation of a company, but covers all the areas of its activity (Costamagna, 2019, p. 200; see also : case C-106/16 Polbud, paras. 40, 62). However, when analysing the concept of abuse of law in the context of the exercise of freedom of establishment, it should be emphasised that, as regards setting up companies with no economic purpose in another Member State in order to circumvent the tax law of the home Member State, in the light of the ruling by the CJEU in case C-196/04 Cadbury Schweppes, such operations will be considered, by the CJEU, as forming "wholly artificial arrangements" that constitute an abuse of the freedom of

establishment, which Member States can counteract by applying proportionate measures (Szydło, 2018, pp. 1567–1568; Costamagna, 2019, pp. 197–198; Davies *et al.*, 2019, p. 204; Godlewska, 2011b, p. 11; Mucha, Oplustil, 2018a, pp. 298–299, 300; Napierała, 2013a, p. 160; Sørensen, 2006, pp. 443–444, Zalasiński, 2007, p. 44; see also: case C-196/04 Cadbury Schweppes, paras. 51, 55, 64).

The regulation of scrutinising the legality of cross-border conversion of a company by national authorities that should prevent the setting up of "shell" or "front" companies with the intention to evade or circumvent the national or EU law, seems to refer to the above-mentioned position of the CJEU concerning creation of "wholly artificial arrangements" in another Member State in order to evade tax law of the home Member State, presented in the judgment in case C-196/04 Cadbury Schweppes (Davies *et al.*, 2019, pp. 203–204; see also: Costamagna, 2019, pp. 204–205). In the light of the CJEU case-law, it is difficult to define "wholly artificial arrangements". Legal doctrine indicates that these are transactions which are carried out for purposes other than the exercise of freedom of establishment in good faith (Sørensen, 2006, p. 447).

Taking into consideration the interpretation of the scope of application of the freedom of establishment presented by the CJEU in case C-106/16 Polbud, and the approach of the CJEU to the concept of abuse of law connected with exercising this freedom by creating "wholly artificial arrangements" in another Member State, expressed in the ruling in case C-196/04 Cadbury Schweppes, it is argued in the legal doctrine that cross-border conversion of a company falls within the freedom of establishment in every case when it is carried out for economic purposes (Mucha, Oplustil 2018a, pp. 300, 306). In other words, the competent authority of the Member State of departure should recognise such a cross-border operation as justified for economic reasons if it could bring such effects for the company as, in particular, improvement of its internal structure or reduction of the operating costs and, in consequence, if it could make the company become more attractive for the customers or financial institutions in the host Member State (Mucha, Oplustil, 2018a, p. 300). The idea that cross-border conversion of a company should have economic justification, presented in the legal doctrine (Mucha, Oplustil 2018a, p. 300, 306), appears to be right also in the light of the provisions of Directive 2017/1132 related to scrutiny of the legality of cross-border conversion (see also: Davies *et al.*, 2019, p. 203–204). Under the provisions of this Directive, national authorities, in the case of doubts as to whether a cross-border conversion is carried out for abusive or fraudulent purposes, should take into account the indicative factors pointed out in the preamble to the Directive. The list of these factors is the intention of the operation, but also the economic characteristics of the establishment in the Member State in which the company would be registered as a result of cross-border conversion, such as the sector, investment, net turnover, profits or losses and business risks assumed by the company before and after the cross-border conversion. The evaluation of the legality of cross-border conversion of the company should therefore be based primarily on criteria of economic character. Taking into account the indicative factors and the need to counteract "shell" or "front" companies set up in order to evade or circumvent EU or national law, highlighted in the preamble to Directive 2019/2121, it seems that the intention of the EU legislator is that cross-border conversion of a company should be carried out in connection with the business activity conducted by the company. Such a concept of cross-border conversion is justified in the light of the additional interpretative guidance for assessing the legality of cross-border conversion mentioned in the preamble to Directive 2019/2121, according to which, when a company is to conduct business activity in the Member State where it is to be registered after the cross-border conversion this may indicate that there are no circumstances leading to abuse or fraud (preamble to Directive 2019/2121 para. 36).

It is worth noticing that the criterion for assessing the legality of cross-border conversion based on the fact that a company is to carry out its economic activity in the country where it is to be registered as a result of cross-border conversion, clearly refers to the concept of freedom of establishment expressed by the CJEU in its judgments in cases C-221/89 Factortame, C-196/04 Cadbury Schweppes and C-378/10 VALE. In these judgments, the CJEU indicated that the idea of exercising the freedom of establishment "involves the actual pursuit of an economic activity through a fixed establishment" in another Member State (Mucha, Oplustil 2018a, pp. 285–289; Mucha, Oplustil, 2018b, p. 11; Szydło, 2018, pp. 1557–1560; see also: Costamagna, 2019, p. 197; Davies *et al.*, 2019, p. 198; Mucha, 2018, pp. 62–64; case C-221/89 Factortame, para. 20; case C-196/04 Cadbury Schweppes, para. 54; case C-378/10 Vale, para. 34). However, such a criterion for assessing that a cross-border conversion is not carried out for abusive purposes, may seem to be controversial from the point of view of its compatibility with the concept of the scope of application of the freedom of establishment as presented by the CJEU in its judgment in case C-106/16 Polbud. The legal definition of cross-border conversion of a company, in which it is sufficient for a company to transfer "at least" its registered office to another Member State, is based on the concept of the freedom of establishment expressed in the ruling in case C-106/16 Polbud (Mucha, Oplustil 2018b, p. 12; see also: article 86b pt. 2 of Directive 2017/1132), and the EU legislator also refers to it in the preamble to Directive 2019/2121 (Costamagna, 2019, p. 204; Preamble to Directive 2019/2121 pt. 3).

A company's conduct of economic activities in the host state as a criterion for assessing the legality of cross-border conversion can only be taken into account by the competent authorities in order to establish that the cross-border conversion is not carried out for abusive or fraudulent purposes (Preamble to Directive 2019/2121 pt. 36). In the light of the idea of the freedom of establishment presented in the judgment in case C-106/16 Polbud and taking into account the legal definition of cross-border conversion of a company introduced in Directive 2019/2121, the fact that

the company will not transfer its real head office or place of business to the country of destination should not, in itself, constitute grounds for assuming that the cross-border conversion of the company is carried out in the circumstances amounting to an abuse of law or fraud (Case C-106/16 Polbud, paras. 38, 41, 44, 62, 63; Szydło, 2018, p. 1558, 1567; see also: Davies *et al.*, 2019, p. 198; Mucha, 2018, pp. 63–64; Mucha, Oplustil 2018a, pp. 286, 291, 293–294; Mucha, Oplustil, 2018b, p. 11; Napierała, 2018, p. 800).

Under the provisions of Directive 2017/1132 the minority shareholders who voted against the cross-border conversion of the company have been guaranteed the exit right together with disposal of their shares for an adequate compensation (art. 86i of Directive 2017/1132), the creditors should be protected by the safeguards introduced by the company and by the Member State (art. 86j of Directive 2017/1132) and the rights of the employees to information, consultation and participation in the converted company are regulated as well (art. 86k, art. 86l of Directive 2017/1132). Some authors argue that due to the fact, that the company is obliged to fulfill all the duties related to protection of the stakeholders and comply with all the procedures in order to receive the pre-conversion certificate, in the light of provisions of the Directive 2017/1132, the national authority has rather limited power to prevent cross-border conversion for the sake of protection of the stakeholders rights and, in fact, it should be possible to stop that operation only in case of egregious violation of stakeholders interests (Davies *et al.*, 2019, p. 204–205).

Assessment that a cross-border conversion of a company is being carried out for the purpose of abusing the law

Bearing in mind such general criteria defining the concept of abuse of law, in particular in the context of creating "artificial arrangements" to circumvent national law, it becomes extremely important to determine how the competent authorities in the Member States are to establish that an abuse of the law may occur. In the judgment in case C-110/99 Emsland Stärke (Judgment of the Court of 14 December 2000 — Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas, Case C-110/99 ECLI:EU:C:2000:695), the CJEU presented the test that should be applied to determine whether there an abuse of law takes place, which should be based on two conditions to be met (Sørensen, 2006, p. 451; Wojciechowski, 2019, p. 312; Zalasiński, 2006, pp. 13–14). In this judgment, the CJEU indicated that the assessment of whether there has been an abuse of the law must be made on the basis of a variety of objective circumstances indicating that the purpose of the provisions of Union law has not been achieved despite the fact that they have been formally complied with. Such an assessment must also take account of the subjective element, which implies an intention to obtain an advantage from the application of Union law as a consequence of the fact that the conditions for such an advantage have been artificially created (case C-110/99 Emsland-Stärke paras. 52, 53; Sørensen, 2006, p. 450; Wojciechowski, 2019, p. 312; Zalasiński, 2006, pp. 13–14). In accordance with the first condition, in order to determine that an abuse of rights has occurred, it is necessary to establish the purpose of the provision in question and then to assess whether the company's activities are compatible with that purpose (Sørensen, 2006, p. 451, see also: Wojciechowski, 2019, p. 317). Therefore, if the purpose of the provisions governing freedom of establishment is to facilitate companies from the Member States to carry out their business activities, it seems obvious that the creation of artificial arrangements which have no economic connection with any business activity carried out by the company, but are created with the sole aim of circumventing national law, does not fall within the scope of that freedom (Godlewska, 2011b, p. 10). The second condition for assessing whether there has been an abuse of rights appears to be based on a subjective element relating to establishment of the intention to abuse the Union law. However, in this case objective evidence is also essential for assessing whether there has been an abuse of law. The motives to rely on the European Union law may be relevant in certain situations, but they should be taken into account only in order to support the objective evidence for an abuse of law (Sørensen, 2006, pp. 451, 457–458). In the light of the case-law of the CJEU, Member States, in order to determine whether there has been an abuse of law, should meet high procedural standards (Sørensen, 2006, p. 452). National authorities, who are authorized to take measures in order to prevent individuals from abusing the European Union law, are obliged to analyse each case individually on the basis of objective evidence (case C-212/97 Centros, paras 24–25; Sørensen, 2006, p. 453) and take into account objective factors that are verifiable by third parties (Godlewska, 2011b, p. 11; Sørensen, 2006, p. 454; see also case C-196/04 Cadbury Schweppes, para. 67). The provisions of Directive 2017/1132 on the scrutiny of legality of cross-border conversion of a company clearly reflect the approach of the CJEU to the standards for assessing the abuse of law. The reference to the principles of control of the transactions that may constitute an abuse of law that have been established in the case-law of the CJEU, can be seen in the provisions of the Directive which require the competent authorities to carry out a very thorough analysis and scrutiny of the cross-border conversion. The national authorities should conduct the assessment of legality of cross-border conversion on a case-by-case basis, analyse all the relevant facts and circumstances and take into account indicative factors to assess whether such transformation is being carried out for abusive purposes (art. 86m p. 9 of Directive 2017/1132). Importantly, the preamble to the Directive highlights that competent authorities should examine these factors together and use them as the basis for an overall assessment of the cross-border conversion (Preamble to Directive 2019/2121 para. 36). The need to refer to objective evidence to establish an abuse of law emphasized by the

CJEU is also reflected in the provisions of the Directive indicating the possibility for the scrutinising authorities to consult other authorities competent in the fields related to cross-border conversion and to obtain the necessary information and documents from the company as well as to have recourse to an independent expert's opinion (art. 86m p. 12 of Directive 2017/1132).

Conclusions

When analysing the consequences of CJEU's judgment in case C-106/16 Polbud from the perspective of European Union law, it should be emphasised that, by issuing a judgment in this case, the CJEU opened up new opportunities for companies to exercise the freedom of establishment within the territory of the internal market of the European Union. The Court's interpretation of the freedom of establishment presented in case C-106/16 Polbud allows companies to carry out cross-border conversion without the need to undertake genuine economic activity in the State, in the territory of which the company is to be registered as a result of the cross-border conversion. In consequence, companies, in exercising the freedom of establishment, have the opportunity to choose the most favourable legal regime to be incorporated (Davies *et al.*, 2019, p. 198; Mucha, 2018, pp. 63–64; Mucha, Oplustil, 2018a, pp. 286, 291, 293–294; Mucha, Oplustil, 2018b, p. 11; Szydło, 2018, pp. 1560, 1567–1568; see also: case C-106/16 Polbud, paras. 38,40, 44, 62). It is also argued, that, in its judgment in case C-106/16 Polbud, the CJEU demonstrated an even more liberal stance related to the scope of application of the freedom of establishment than that in its previous judgments, indicating that, under this freedom, companies have the right to search for the most beneficial legal system, which is not restricted to the company law only (Costamagna, 2019, p. 200; see also: case C-106/16 Polbud, paras. 40, 62).Concerning the influence of the judgment of the CJEU in case C-106/16 Polbud for development of the European Union legislation, it is uncontested that it constituted not only an inspiration, but also a motivation, for the European legislator to adopt Directive 2019/2121 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions and regulate the procedure of cross-border conversion of companies (European Commission's 'Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM (2018) 241 final, pp. 2–3; Davies *et al.*, 2019, 198–199; Mucha, Oplustil, 2018b, p. 12). Taking into account the necessity to counteract the possible abuses of law resulting from cross-border conversions, a key stage in the cross-border conversion procedure is the scrutiny of the legality of that operation that should be carried out by the competent authorities of the State where the company was registered before the conversion. One of the most important issues to consider, while assessing the legality of the cross-border conversion, is evaluation if that operation can result in an abuse of law or if it is carried out for fraudulent purposes. The interpretative guidance introduced by the European legislator in the preamble to Directive 2019/2121 that points out the indicative factors that national authorities should take into consideration while analysing if the cross-border conversion of a company is carried out for abusive or fraudulent purposes, may lead to the conclusion that the legality of a cross-border conversion should be assessed on the basis of the criteria of economic nature and the impact of that operation on the business activity conducted by the company and the situation of its employees. It is important to stress that the view that cross-border conversion of a company should be justified in economic terms, had already been presented in the legal doctrine in the light of CJEU's judgment in case C-106/16 Polbud and the concept of abuse of law (Mucha, Oplustil, 2018a, pp. 300, 306) before Directive 2019/2121 was adopted. However, it should be noted that, although, under the provisions of Directive 2017/1132, the national authorities of the home Member State of the company are obliged to prevent cross-border conversion of that company with the intention of committing abuse or fraud, and the Directive indicates the circumstances to be taken into account in order to control the legality of cross-border restructuring, the concept of fraudulent or abusive operations may still give rise to doubts as to its interpretation (Costamagna, 2019, pp. 204–205; Davies *et al.*, 2019, pp. 203–204; see also: Mucha, Oplustil, 2018a, pp. 297–300; Sørensen, 2006, pp. 443–447). For this reason, national authorities that are competent to analyse the legality of cross-border conversion and authorized to issue a pre-conversion certificate, will play a significant role in the procedure of cross-border conversion of the company. When implementing Directive 2019/2121, Member States will have to pay particular attention to identifying the authorities competent to issue the pre-conversion certificate. Notwithstanding the fact that they will gain the opportunity to have recourse to independent expert's opinion (art. 86m of Directive 2017/1132), national authorities should demonstrate a high level of competence and be able to scrutinise the legality of cross-border conversion from the perspective of both national and European law and the CJEU case law (Mucha, Oplustil, 2018a, p. 299). In making this assessment, they will have to strike the right balance between the need to remove restrictions on the exercise of the freedom of establishment and the necessity to guarantee an adequate level of protection of the interests of the company's shareholders, employees and creditors, and to counteract the abuse of national or EU law (preamble to Directive 2019/2121 pt. 6, 35; Costamagna, 2019, p. 204). Due to the fact that Directive 2019/2121 should implemented by 31 January 2023, Member States should have enough time to consider identification of the appropriate national authorities which should be competent to scrutinise the legality of cross-border conversion of companies.

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