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VARIOUS ASPECTS REGARDING THE CONCRETE APPLICATION OF THE EU LEGISLATION IN COMERCIAL ACTIVITY

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Abstract
Establishing a more competitive business environment, which will develop in the internal market, is an essential objective, which has been pursued through the entire legislation on commercial companies, developed at the level of the European Union. Therefore, in the first part of the paper, the legal regulations in the field will be commented on in detail, which only cover certain aspects, such as: the mergers, the divisions and the conversions; the transfers of registered office of the companies. The effectiveness of these normative legal acts is determined by their concrete application, with all the challenges that have existed in practice. In this regard, in the second part of this presentation, the most relevant decisions on the matter, pronounced by the Court of Justice of Luxembourg, will be presented and analyzed, with all their consequences.
The article is of real importance, on the one hand, for companies carrying out commercial activities and which are obliged to comply with the existing Union legal order. On the other hand, the Member States of the Union must transpose, properly and without delay, all secondary Union legislation in the field and comply with the content of the judgments of the Court of Justice, which relate to the interpretation of the provisions of primary Union legislation.
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1. INTRODUCTORY CONSIDERATIONS

The present analysis is a continuation of another study (Verga, 2024) and concerns some of the key legal regulations of the secondary legislation in the field of company law at the level of the European Union (EU), considering essential aspects relating to mergers, divisions and conversions of the companies, on the one hand, and, on the other hand, to the transfers of registered office.

In the institutional framework of EU, the role of the Court of Justice of the European Union (CJEU) was from the very beginning of the member states cooperation, both specific and evolving towards the present status (Tofan and Verga, 2023). The article examines, through the significant decisions commented on, how the case law of the CJEU has made an important contribution to the effective application and interpretation of legal provisions in the field under our attention. The content of the Court decisions regarding the interpretation of the provisions of the Union Treaties in force is binding for all subjects of Union law.

2. THE LEGAL FRAMEWORK IN FORCE

The legal framework governing companies within EU has developed gradually over decades, shaped by the need to facilitate the functioning of the internal market and ensure the freedom of establishment across Member States. While primary legislation, notably the Treaty on the Functioning of the European Union (EU, 2012) and the Charter of Fundamental Rights of the EU (European Convention, 2012) lays the foundations, the concrete rules enabling corporate mobility and restructuring are found in secondary legislation.

Article 26 TFEU defines the internal market, while Article 49 establishes the principle of freedom of establishment, further operationalized through directives under Article 50. Article 54 provides a definition of companies, and Article 16 of the Charter enshrines the freedom to conduct business. These provisions form the constitutional basis upon which directives regulating mergers, divisions, conversions, and cross-border operations have been adopted.

Over time, the EU has enacted a series of directives, gradually expanding and refining the rules to ensure both corporate flexibility and stakeholder protection. The following sections trace this evolution chronologically, analyzing how the directives addressed challenges in company law, from the earliest sectoral rules in the 1970s to the modern "Mobility Directive" and recent digitalization initiatives.

2.1. Early directives on mergers and divisions

The Third Council Directive 78/855/EEC (1978) - The EU's first significant step was the Third Council Directive of 9 October 1978 on mergers of public limited liability companies (Council of the European Communities, 1978). The directive sought to protect shareholders, employees, creditors, and third parties during corporate mergers. It defined procedures for different forms of mergers: mergers by acquisition, mergers through the creation of a new company, and acquisitions where a company already held at least 90% of another's shares.

Key obligations included detailed reporting, mandatory publication of merger plans, and safeguards against nullity by specifying limited grounds for invalidation. The directive aimed to balance corporate flexibility with legal certainty, enabling restructuring while protecting stakeholder rights.

The Sixth Council Directive 82/891/EEC (1982) - Given the parallels between mergers and divisions, a specific framework for divisions soon followed. The Sixth Council Directive of 17 December 1982 (Council of the European Communities, 1982) regulated two forms of division: by absorption and by the creation of new companies. It required prior publication of draft division terms, general meeting approval, explanatory reports, and expert opinions where necessary.

The directive clarified the effects of divisions: transfer of all assets and liabilities to successor companies, automatic conversion of shareholders' rights, and dissolution of the divided entity. Safeguards included protection for employees, creditor guarantees, and provisions for judicial or administrative review of legality. Like mergers, divisions could only be declared null under strictly defined conditions, reinforcing certainty.

Together, the 1978 and 1982 directives laid the foundation for cross-border corporate mobility, though initially confined to purely domestic transactions.

2.2. Expansion to cross-border restructuring

Directive 2005/56/EC on Cross-Border Mergers - The next major milestone was Directive 2005/56/EC (EU, 2005) which for the first time established a framework for cross-border mergers of limited liability companies. Recognizing the need to enable companies from different Member States to merge, the directive permitted three forms: merger by absorption, merger through the creation of a new company, and absorption of a wholly owned subsidiary.

The directive imposed conditions ensuring compatibility with national laws, compliance with domestic merger procedures, and the right of Member States to oppose mergers for public interest reasons. Safeguards mirrored those of earlier directives: publication of merger plans, management reports on economic and legal consequences, expert reports for shareholders, and general meeting approval. It also mandated legality checks by competent national authorities, followed by registration of the resulting company. Crucially, it extended protections for shareholders, creditors, and employees to the cross-border context, addressing the risks of mobility across legal systems. Its implementation was reviewed in Directive 2009/109/EC (Council of the EU, 2009a), which sought to simplify reporting and reduce administrative burdens by allowing online publication of merger documents.

Tax Harmonization: Directive 2009/133/EC - Corporate restructuring inevitably raised tax questions. Council Directive 2009/133/EC (Council of the EU, 2009b) established a common tax system for mergers, divisions, partial divisions, transfers of assets, and exchanges of shares between companies from different Member States. Its objective was to eliminate fiscal obstacles to cross-border reorganizations by ensuring tax neutrality.

The directive stipulated that capital gains would be taxed only upon realization, not when restructuring, and shareholders would not incur immediate tax liabilities when receiving shares. It also allowed provisions and reserves to be carried forward and regulated subsequent taxation of gains. This framework ensured that taxation would not undermine the economic rationale for cross-border operations.

2.3. Consolidation and simplification

Directive 2011/35/EU (EU, 2011) replaced the original 1978 directive on mergers, aiming to unify and modernize the rules on domestic mergers of public limited liability companies. It largely replicated the established framework but sought to simplify and harmonize implementation across Member States.

The drive for consolidation culminated in Directive (EU) 2017/1132 (EU, 2017), which brought together several prior directives into a single legislative act. It covered company establishment, operations, conversions, mergers, and divisions. While it did not substantially alter existing rules, it provided a coherent framework, enhancing clarity and accessibility of EU company law.

2.4. The Mobility Directive and modern developments

Directive (EU) 2019/2121 (EU, 2019b) - The so-called Mobility Directive marked a transformative step by addressing gaps left by earlier legislation. It introduced rules for cross-border conversions and divisions, areas previously characterized by legal uncertainty and fragmentation. Companies could now transfer their registered office and legal form to another Member State without liquidation, retaining legal personality. The directive provided detailed procedures for conversions and divisions, mirroring those for mergers: preparation of project terms, reports, general meeting approval, and legality checks. It harmonized rules for full and partial cross-border divisions, whether by absorption or by creating new companies. Critically, it strengthened stakeholder protections. Employees gained clearer consultation rights, creditors received stronger safeguards, and minority shareholders were offered fair exit mechanisms. It also introduced rigorous legality checks to prevent abuse, such as operations intended to evade tax or labor laws. Competent authorities were required to assess not only formal compliance but also the good faith of transactions.

Another innovation was the emphasis on digitalization. The directive mandated the use of electronic registers, online platforms, and the Business Registers Interconnection System (BRIS) to streamline cross-border operations and ensure secure information exchange. Member States were required to transpose the directive by January 2023. In Romania, this was achieved through Law No. 222/2023 (Romanian Parliament, 2023), which amended national company and trade register legislation.

2.5. Digitalization: Directive 2019/1151 and Directive 2025/25

Parallel to the Mobility Directive, Directive 2019/1151 (EU, 2019a) advanced the digitalization of company law, enabling online company formation, branch registration, and document filing. It required data to be stored in machine-readable formats to facilitate electronic exchange. Building on this, Directive (EU) 2025/25 (EU, 2025) further enhanced digital tools, aiming to remove administrative barriers and harmonize electronic procedures across Member

States. Although not limited to restructurings, its provisions significantly impact how mergers, divisions, and conversions are processed, emphasizing transparency and accessibility.

The evolution of EU company law demonstrates a steady expansion from domestic regulation of mergers to a comprehensive framework for cross-border mobility. Early directives focused on legal certainty and stakeholder protection within national contexts. Later instruments extended these principles to cross-border mergers, divisions, and conversions, while addressing tax neutrality and administrative efficiency. The Mobility Directive represents a culmination of these efforts, harmonizing procedures across Member States and embedding digital tools into corporate restructuring. At the same time, the EU has increasingly balanced corporate flexibility with protection against abuse, reflecting broader concerns with tax avoidance, social dumping, and creditor rights.

From the 1970s to the present, EU legislation on company restructuring has evolved into a sophisticated, multi-layered framework. Rooted in the TFEU's provisions on the internal market and freedom of establishment, the directives collectively facilitate corporate mobility, remove barriers to the single market, and protect stakeholders.

The trajectory reveals three phases: initial harmonization of domestic mergers and divisions; expansion to cross-border mergers and tax coordination; and finally, comprehensive regulation of conversions, divisions, and digitalized procedures. As corporate structures grow increasingly international, and as digitalization reshapes corporate governance, the EU's legislative framework continues to adapt. The challenge remains to strike a balance between fostering mobility and safeguarding fairness, transparency, and trust. The reforms of 2019 and 2025 suggest a future of greater integration, harmonization, and technological modernization, ensuring that EU company law keeps pace with economic and social realities of a dynamic internal market.

3. THE RELEVANT JURISPRUDENCE OF THE CJEU ON THE MATTER

The CJEU has consistently included in the content of the freedom of establishment the right of companies to transfer their registered office or to reorganize through cross-border operations (mergers, divisions, transformations), without losing their legal personality, if they obey the legislation of the Member State of destination. This view has been essential in removing legal and administrative obstacles in the Member States to corporate mobility.

3.1. Judgment of the Court of 9 March 1999. Centros Ltd v Erhvervs- og Selskabsstyrelsen - Case C-212/97 (CJEU, 1999)

Centros Ltd was a company incorporated in the United Kingdom, with its registered office in the United Kingdom, but which did not carry on any business in that Member State. Its share capital was very small (GBP 100), since the British legal framework at that time did not require a significant minimum share capital for limited liability companies. The associates of that company were two Danish nationals, Mr and Mrs Bryde, resident in Denmark, who wished to set up a company in the United Kingdom to avoid the much stricter Danish minimum share capital requirements for limited liability companies (at that time DKK 200,000). In this regard, the two partners applied to the Danish Trade and Companies Agency (Erhvervs- og Selskabsstyrelsen) to register a branch of Centros in Denmark. The Danish authorities refused to register this because the company sought to establish its head office in Denmark, thereby circumventing the Danish legislation on minimum share capital. The Trade Agency also justified its refusal by the need to protect creditors and prevent fraudulent insolvencies.

The Danish Court (Højesteret) referred a preliminary question to the CJEU, seeking the interpretation of the articles of the EC Treaty (now TFEU) on freedom of establishment (Articles 52, 56 and 58 at the time, now Articles 49 and 54 TFEU), to determine whether Denmark's refusal to register the Centros branch was compatible with Community law.

The Court held that "it is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalizing fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned".

This judgment also established that the practice of refusing, in certain circumstances, to register a branch of a company established in another Member State has the effect of making it impossible to exercise the right of establishment conferred by Articles 52 and 58 of the Treaty and constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions. The Court determined four conditions regarding national measures likely to make it difficult or less attractive to exercise the fundamental freedoms guaranteed by the treaty: they must be applied in a non-discriminatory manner, be justified by imperative reasons of general interest, be adequate to guarantee the achievement of the objective pursued and not exceed what is necessary for its achievement.

This case highlighted the priority of the incorporation theory over the real seat doctrine or the main seat of the activity. Incorporation theory refers to the fact that the legal status of a company is determined by the law of the state in which it was registered, regardless of where it carries out most of its activities. This theory allowed companies to be established in states with the most favorable legislation in the field, thus facilitating corporate mobility.

3.2. Judgment of the Court of 5 November 2002. Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) Case C-208/00 (CJEU, 2002)

Überseering BV represented a company established in the Netherlands, according to domestic legislation in the field, which concluded a contract with Nordic Construction Company Baumanagement GmbH (NCC), a German company. Immediately thereafter, all the shares in Überseering BV were acquired by two German nationals, which resulted in the transfer of the real and effective place of management of Überseering BV from the Netherlands to Germany, while the statutory registered office remained in the Netherlands. The German legal framework enshrines the "real seat theory" (or principal place of business). Überseering BV then brought legal action against NCC in Germany for non-performance of contractual obligations. The German courts refused to recognize the legal personality of Überseering BV in Germany, and therefore its capacity to bring legal actions, because by moving its real seat to Germany, the company lost its legal capacity in German territory, as it did not re-incorporate as a German company.

The German Supreme Court (Bundesgerichtshof) referred a question to the CJEU for a preliminary ruling and asked for the interpretation of Articles 43 EC and 48 EC (now Articles 49 and 54 TFEU) of the EC Treaty (now TFEU), in order to determine whether the refusal of a Member State (Germany) to recognize the legal personality and capacity to bring legal proceedings of a company legally established in another Member State (the Netherlands), on the grounds that it had moved its real seat to the territory of the first State, is compatible with the freedom of establishment. The Court ruled that this refusal constitutes a restriction on the freedom of establishment, even where the company subsequently transferred its real place of management to the host Member State.

The Luxembourg Court has substantiated the "seat theory" (or country of registration), arguing that the Member State in which a company has been legally incorporated and registered determines the law applicable to the legal status of that company. This law must be recognized by all other Member States.

Companies can therefore freely pursue their specific activities in any Member State without losing their legal personality, if they have been legally incorporated in their State of origin.

The recognition of the legal personality of the company in the host Member State, as defined by the law of the state of incorporation, does not prevent the host state from applying certain provisions of its law in relation to the activities carried out in its territory, provided that these provisions are justified by an imperative public interest and are proportionate.

3.3. Judgment of the Court of 30 September 2003. Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd Case C-167/01 (CJEU, 2002)

Inspire Art Ltd was a company incorporated in the United Kingdom under the laws of England and Wales with a minimum share capital. This company, which did not carry on any significant activities in the United Kingdom, was set up by a Dutch national to carry on commercial activities in an art studio in the Netherlands. The Dutch legislation at that time contained a legal regulation imposing certain additional requirements on companies incorporated abroad but carrying on the majority or all their activities in the Netherlands. These requirements concerned, for example, the obligation to indicate in the company name that it was a foreign company and to comply with the Dutch rules on minimum share capital and directors' liability, even though the company was registered in another Member State.

The Dutch Court (Kantongerecht te Amsterdam) referred a preliminary question to the CJEU on the interpretation of Articles 43 EC, 46 EC and 48 EC (now Articles 49 and 54 TFEU), in order to determine whether Dutch national legislation, which imposed additional requirements on a company legally established in another Member State but which carried out its main activity in the Netherlands, was compatible with the freedom of establishment. In this regard, the Court ruled that "it is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis".

The European Court reaffirmed that the protection of creditors is an imperative reason of general interest, which can justify restrictions on the freedom of establishment. However, it reiterated that national measures must be proportionate and non-discriminatory. It also reconfirmed the recognition of the legal personality of a company legally established in another Member State.

This decision determined the Member States to amend their national legislation, so that it is consistent with the content of the freedom of establishment and the mutual recognition of the legal personality of companies.

3.4. Judgment of the Court (Grand Chamber) of 13 December 2005. SEVIC Systems AG Case C-411/03 (CJEU, 2005)

Two companies (German and Luxembourg) wanted to merge by cross-border acquisition, in which case Sevic Systems AG (the German company) would have been the acquiring company and Imprema GmbH (the Luxembourg company) the acquired company. At that time, the German legal framework allowed mergers by acquisition, but only between companies governed by German law. The competent German authority refused to register the merger because national law did not provide for such a cross-border merger, but only for a purely German internal merger.

The German Federal Court (Bundesgerichtshof) has referred a question to the CJEU for a preliminary ruling, seeking the interpretation of Articles 43 EC and 48 EC (now Articles 49 and 54 TFEU) of the EC Treaty, in order to determine whether the prohibition of a cross-border merger by acquisition, imposed by the law of a Member State (Germany), on the ground that one of the companies involved is governed by the law of another Member State, is compatible with the freedom of establishment. The Court held that the refusal of a Member State to authorize a cross-border merger by acquisition constitutes a restriction on the freedom of establishment (now Article 49 TFEU). That restriction does not allow companies to carry out restructuring operations (in this case mergers) which they would be permitted to carry out if they were both established in the same Member State. The Court admitted that such a restriction can only be justified by imperative reasons of general interest and only if it is proportionate to the objective pursued. In the analyzed case, it was found that Germany did not bring arguments to justify the total prohibition of cross-border mergers, in compliance with the criteria established by the CJEU jurisprudence in the field.

Through this decision, the Court recognized, for the first time, that the freedom of establishment also includes the right of companies to carry out cross-border mergers, although there was no adequate Union framework in the field at that time. The decision commented on above is of particular significance, as it led to the drafting of Directive 2005/56/EC on cross-border mergers of commercial companies, thus strengthening the mobility of companies, which are free to carry out various cross-border operations within the single market.

3.5. Judgment of the Court (Grand Chamber) of 12 September 2006. Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue Case C-196/04 (CJEU, 2006)

Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd (both UK companies, part of the Cadbury group) established two subsidiaries (CSTS and CSTI) in Ireland, a country with a much more favorable tax regime at the time than the UK. The subsidiaries were set up primarily to handle intra-group financing and other financial activities, taking advantage of the lower corporate tax rates in Ireland. UK Controlled Foreign Company (CFC) legislation allowed UK tax authorities to include the profits of certain foreign subsidiaries in the tax base of the UK parent company, if the subsidiaries were in low-tax jurisdictions and met certain conditions. The aim of this legislation was to prevent UK companies from shifting profits to tax havens or low-tax jurisdictions to avoid UK taxation.

The UK tax authorities applied CFC legislation to the profits of Cadbury Schweppes' Irish subsidiaries, arguing that they were set up to benefit from a more advantageous tax regime. Cadbury Schweppes contested this decision, arguing that the measure infringed the freedom of establishment guaranteed by EU law.

The British national court (Special Commissioners of Income Tax, London) has referred a preliminary question to the CJEU, requesting the interpretation of Articles 43 EC and 48 EC (now Articles 49 and 54 TFEU) on freedom of establishment. The European court was asked to answer the question whether national legislation (such as the British legislation on CFCs) is compatible with freedom of establishment when it allows the inclusion of the profits of a foreign subsidiary, located in another Member State, in the tax base of the parent company, on the grounds that the subsidiary was established in a low-tax jurisdiction.

Since the United Kingdom imposed an additional tax burden on a parent company on the profits of its subsidiaries in other Member States, the Court confirmed that the United Kingdom's CFC legislation constituted a restriction on the freedom of establishment (Article 49 TFEU). The British legal framework in this area discouraged companies from setting up subsidiaries in other Member States to take advantage of a more favorable tax regime. The Court found that the need to combat tax evasion and avoidance can be an imperative reason of general interest, which imposes such a restriction. This justification is valid to prevent abusive behavior, which would cause damage to the national tax system.

The CJEU emphasized that a restriction of the freedom of establishment, justified by combating tax evasion, can only be applied in the case of "wholly artificial arrangements". An arrangement is considered wholly artificial if it does not reflect economic reality but has as its sole purpose the obtaining of a tax advantage. To determine whether an arrangement is wholly artificial, the national court must analyze objective elements, such as the existence of physical establishments in the host Member State; the existence of real staff carrying out economic activities; the existence of adequate equipment and assets; the real capacity of the subsidiary to carry out economic activities in the host Member State. In the same sense, the European court appreciated that the simple fact that a company establishes a subsidiary in another member state to benefit from a less onerous tax regime does not constitute an abuse of law or an artificial arrangement. Freedom of establishment includes the right to choose the most advantageous location from an economic and tax point of view, as long as there is an effective economic activity, staff, establishments.

The decision led the EU member states to amend their CFC legislation, in accordance with the requirements of CJEU jurisprudence, having as a reference the concept of " wholly artificial arrangement". The judgment under review also significantly reduced the discriminatory application of CFC legislation in Member States (Hadjipanayi, 2018). Thus, any tax restriction imposed by national legislation on subsidiaries in other Member States must respect the principle of proportionality and only apply to cases where abuse has been proven.

3.6. Judgment of the Court (Grand Chamber) of 16 December 2008. CARTESIO Oktató és Szolgáltató bt Case C-210/06 (CJEU, 2008)

Cartesio Oktató és Szolgáltatói bt. was a company established in Hungary which decided to transfer its actual place of management from Hungary to Austria, without changing the applicable legislation and, therefore, without changing its legal status as a Hungarian company. The Hungarian Commercial Register refused to approve that transfer, since Hungarian law provided that a Hungarian company must maintain its actual place of management in Hungary. In the case of the transfer of the real seat to another state, the respective company had to be deregistered, which thus ceased to exist.

By submitting a preliminary question, the Court of Appeal of Szeged (Szegedi Ítélőtábla) asked the CJEU to determine whether Articles 43 EC and 48 EC (currently 49 and 54 TFEU) preclude national legislation which prohibits a company established under its law from transferring its real seat to another Member State, without changing its nationality and, implicitly, without ceasing to be governed by the law of the Member State of registration.

The Court pointed out that, in the absence of complete harmonization of company law at European level, the Treaty does not require a Member State to allow a company formed in accordance with its law to transfer its effective place of management to another Member State, while maintaining its nationality and the applicable law, thus reaffirming the principle established in the Daily Mail Case (Case 81/87). This decision also stated that a Member State, as the State of registration, has the power to determine not only the conditions for the establishment of a company on its territory, but also the conditions necessary for that company to maintain its connection with its legal system and, implicitly, the conditions under which it ceases to exist under its law.

In the *Centros, Überseering, Inspire Art Cases* analysed above, the Court required the host State to recognise the legal personality of a company registered in another Member State. In the *Cartesio Case*, the State of origin is not obliged to accept that a company registered under its national law may transfer its real seat to another Member State and retain its legal status, that is to say, the quality of a Hungarian company, as long as its legislation does not provide for such a possibility (Marek, 2009).

In the legal literature (Korom and Metzinger, 2009) it has been stated that "the pro-freedom of establishment attitude of the Court witnessed in recent years seems to have yielded to a more conservative approach, upholding the distinctions between outbound v inbound and primary v secondary freedom of establishment". This case thus reflected the urgent need for a Union legislative act on cross-border conversions (transfer of the registered office and/or the applicable law), to complete the European legislative framework on the mobility of companies. This judgment confirmed that a company formed under the law of a Member State may, in principle, transfer its registered office to another Member State, without being obliged to dissolve and re-establish itself. However, the Court emphasized the fact that the Member State of registration can condition the maintenance of legal personality on compliance with certain requirements of its national law.

3.7. Judgment of the Court (Grand Chamber) of 25 October 2017. Polbud - Wykonawstwo sp. z o.o. Case C-106/16 (CJEU, 2017)

Polbud - Wykonawstwo sp. z o.o., a limited liability company established in Poland, decided to transfer its registered office from Poland to Luxembourg, where it intended to operate as a "Société Anonyme" (SA). Polbud intended to continue its legal existence in Poland, not to dissolve the company and to change its registration from one Member State to another, but to be governed by Luxembourg law. Polbud also wished to maintain part of its activity in Poland, as a branch. The Polish Commercial Register refused to remove Polbud from Poland, without it having first entered liquidation, on the grounds that national law provided that the transfer of the registered office abroad had the effect of ceasing the legal existence of the company in Poland, i.e. liquidation.

The Polish Supreme Court (Sąd Najwyższy) referred three preliminary questions to the CJEU, two of which are relevant to our study. The first raised the issue of whether Articles 49 and 54 TFEU (on freedom of establishment) "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 European Court answered affirmatively to this question and appreciated that Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.

The second question addressed to the Court raised the question if "Articles 49 and 54 TFEU must 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 Court clarified that freedom of establishment also applies where a company changes only the place of its registered office and, by implication, the law applicable to its statutes, even if it does not simultaneously transfer its principal place of business or initially carry out significant activity in the new Member State. In this way, the point of view expressed by the ruling in the Centros Case was reaffirmed.

The judgment handed down is of major importance, because the Court established that the freedom of establishment allows not only the establishment of branches (Centros) or the transfer of the actual headquarters (Überseering), but also the full transfer of the statutory registered office (with a change in the applicable law), without the need to liquidate the company of origin.

On 25 April 2018, the European Commission proposed new company law rules to enable companies to make best of business opportunities in the EU's Single Market and to ensure that cross-border conversions, mergers and divisions are accompanied by adequate safeguards against abuse (Van Gelder, 2018).

This decision had a direct influence on the adoption of *Directive (EU) 2019/2121* (which amended *Directive EU 2017/1132*), which introduced a new legal framework for cross-border conversions, including the transfer of the registered office.

Therefore, by interpreting the freedom of establishment broadly and by emphasizing the need to eliminate barriers to cross-border restructurings, the Court has directly and significantly influenced the adoption and amendment of EU directives.

In the same time, the CJEU focuses on the protection of the private interests of companies by allowing them to choose a favorable legal order. Economic interests of the Member States are of lesser importance under the Court's approach (Fillers, 2020).

4. CONCLUSIONS

Consequently, within the framework of the freedom of establishment enshrined in the TFEU (art. 49-55) a series of normative legal acts have been developed in secondary legislation, which are important in terms of mergers, fusions, conversions and transfers of registered office. These have created a uniform legislative framework at the level of the Member States of the Union, with precise procedures, which provide more clarity, predictability, legal certainty and remove the various legal and administrative obstacles that previously existed in national legislation.

The Union normative acts regarding the mergers, the mergers and the conversions analyzed in the paper aimed to facilitate the restructuring of companies from different member states and to ensure the protection of all interested parties (shareholders, creditors, employees). The legislation in this area has undergone changes over time, as detailed in this study, changes that have considered the needs of the single market, which is in constant evolution.

The combined efforts of the EU and the Member States have thus led to the development of a consolidated legal framework on the issues examined in the field of commercial companies, essential to ensure a competitive business environment, which is in continuous transformation. This legislation facilitates the implementation of various cross-border operations, gives stability to companies in the Member States of the EU, allows them to adapt to existing and future needs and take advantage of cross-border opportunities. Directive 2019/2121 added an essential mechanism to prevent abuses, thus ensuring that the freedom of establishment is not used for illicit purposes.

At the same time, the CJEU rulings have obliged Member States to align themselves with the lines of action determined by specific case law in the field and provide precise guidelines for companies, so that they can carry out their activity as efficiently as possible, by highlighting the importance of one of the basic principles of the Union, the freedom of establishment. In this regard, the judgments in the Centros cases (C-212/97), Überseering (C-208/00) and Inspire Art (C-167/01) established the mutual recognition of the legal personality of companies registered in other Member States, even if the legal rules of registration in the State of origin were more permissive. The aim was thus to prevent the imposition of unjustified restrictions by the host Member States. The freedom of establishment was thus strengthened. However, if the latter implies the right to enter and operate in another Member State, as in the Cartesio judgment, it does not oblige the State of origin to allow a company to transfer its real seat, while maintaining its nationality. However, the Luxembourg Court ruled, in the Polbud judgment, that the State of origin cannot prevent a company from transferring its registered office to another Member State, without there being an obligation to dissolve in the State of origin. In this way, increased mobility of companies was facilitated.

Finally, both the relevant secondary EU legislation in the field and the Luxembourg case law have made an essential contribution to maintaining a functioning single market, a major objective of the EU, the achievement of which is facilitated, in a significant way, by the harmonization, consolidation and effective application of the legal framework regarding mergers, conversions and transfers of registered office.

However, in the specialized literature (Gerner-Beuerle and Schillig, 2010) it was found that the case laf2019w of the European Court of Justice after Cartesio, rather than providing for a coherent system of European company law, leads to arbitrary distinctions and significantly impedes the free movement of companies.

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