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Economic Freedom and Imperative Requirements in the General Interest-Conflict of Coexistence of Values in European and Polish Economic Law? Remarks Against the Background of Cross-Border Business Activities of Companies in the European Union

Katarzyna Pokryszka
Dr. habil., Asscociate Professor, Faculty of Law and Administration, University of Silesia in Katowice; correspondence address: Bankowa 11B street, 40-007 Katowice, Poland; email: katarzyna.pokryszka@us.edu.pl

https://orcid.org/ 0000-0003-4975-7496

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Abstract: Economic freedom is one of the basic principles of Poland's economic system and, at the same time, a fundamental rule on which the functioning of the European Union's internal market is based. In the judgment in Case C-106/16 Polbud, which was issued on the basis of Polish law, the Court of Justice confirmed the possibility for companies to carry out activities in the territories of EU Member States in the form of a cross-border conversion into a company governed by the law of another Member State, and stressed the need for Member States to verify the restrictions imposed on companies in connection with their cross-border activities in terms of their compliance with EU law. The article focuses on analysis of the idea of economic freedom in the context of cross-border business activities of companies and on the presentation of the concept of "imperative requirements in the general interest" as conditions determining the admissibility of restrictions on cross-border activities of companies by the company's home State in the light of European Union and Polish law.

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1. Introduction

The operation of companies in the territory of the internal market of the European Union associated with the cross-border transfer of the real or registered office to the territory of another Member State, has long been regarded in legal doctrine and case law as one of the most controversial forms of exercising freedom of establishment under EU law.[1] Interpretation-related doubts arising in this regard, primarily concerning the scope of application of the freedom of establishment and related to differences in the substantive and conflict of laws of the Member States, as well as the permissibility of EU Member States to impose restrictions on the exercise of freedom of establishment by companies in the form of cross-border conversion, were finally resolved by the Court of Justice in the judgment in case C-106/16 Polbud[2], the issue of which was based

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1 On the interpretation-related issues related to the possibility for companies to exercise their freedom of establishment in the form of cross-border transfer of their real head office or registered office to another Member State, see in particular: Ewa Skibińska, "Komentarz do art. 54 Traktatu o Funkcjonowaniu Unii Europejskiej," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Volume I (Articles 1–89)*, ed. Andrzej Wróbel, Dawid Miąsik and Nina Półtorak (Warsaw: LEX a Wolters Kluwer business, 2012), 919–927; Adam Opalski, *Europejskie prawo spółek,* (Warsaw: LexisNexis 2010), 92–149; Jacek Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego* (Warsaw: Wydawnictwo C. H. Beck, 2013), 112–125, 399–425; Ewa Skibińska, *Swoboda zakładania przedsiębiorstw przez osoby prawne (art. 43–48 TWE)* (Warsaw: Wydawnictwo C.H.Beck, 2008), 175–202; Marek Szydło, *Krajowe prawo spółek a swoboda przedsiębiorczości*, Warsaw: LexisNexis, 2007), 15–120; Ariel Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego* (Warsaw: Difin SA, 2020), 113–149, 161–164; Ariel Mucha, "Transgraniczne przeniesienie siedziby spółki w prawie unijnym," *Glosa* no. 2 (2018): 56–68; Thomas Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," in Thomas Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (Oisterwijk:Wolf Legal Publishers, 2015), 54–79, (https://ssrn.com/abstract=2747103 or http://dx.doi.org/10.2139/ssrn.2747103); Francesco Costamagna, "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?," *European Papers*, vol. 4, no. 1 (2019): 185–199; Mirosława Myszke-Nowakowska, *Transfer siedziby spółki w Unii Europejskiej,* (Warsaw: Wydawnictwo C. H. Beck, 2015), 60–110, 115–126, 133–136; Katarzyna Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy* (Warsaw: Difin SA, 2017), 102-115 and the literature cited therein.

2 Marek Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation

on the provisions of Polish law. The purpose of this article is to analyse the principle of economic freedom from the perspective of Polish law and European Union law, with a particular focus on two important aspects of that principle: its applicability to the cross-border activities of companies and the permissibility and conditions for the application of restrictions in this regard by the company's country of origin. This issue will be presented in light of the Court's judgment in Case C-106/16 Polbud and the provisions of Directive 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[3], which regulates the conditions and procedure for cross-border company conversion and should be implemented by Member States by 31 January 2023.

2. Economic Freedom as One of the Basic Principles of Undertaking and Conducting Economic Activity in the Law of the European Union and Polish Law

The principle of economic freedom is indicated in Article 20 of the Polish Constitution[4] as one of the foundations of the social market economy, which gives it the status of a fundamental principle of Poland's economic system.[5] Having the rank of a constitutional principle and, at the same time, a constitutional norm, it obliges state bodies to guarantee

("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804, "*Common Market Law Review*" vol. 55, issue 5 (2018): 1555–1568; Ariel Mucha and Krzysztof Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol 15, no. 2 (2018): 280–294; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI:EU:C:2017:804, hereandafter reffered to as Case C-106/16 Polbud.

[3] 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, O.J. of the EU No L 321, 12 December 2019, hereandafter reffered to as Directive 2019/2121.

[4] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483, as amended, hereandafter reffered to as the "Polish Constitution" or "the Constitution of the Republic of Poland".

[5] Marek Szydło, *Swoboda działalności gospodarczej* (Warsaw: Wydawnictwo C.H. Beck, 2005), 5–6. See also: Katarzyna Pokryszka, "Podejmowanie i prowadzenie działalności

entrepreneurs the freedom to undertake and conduct business activities to the fullest extent possible.[6] While analysing the essence of the principle of economic freedom from the point of view of the rights that entrepreneurs gain from it, it can be seen as a set of economic freedoms that involve undertaking, organising and conducting business activities.[7] In the doctrine of Polish law, these freedoms include, first and foremost, the freedom to undertake and carry out business activity, the freedom to choose the organisational and legal form in which business activity will be conducted, the freedom to compete with other entrepreneurs, the freedom to conclude contracts, and the freedom to decide how to conduct business activity, change its profile and term.[8] The constitutional principle of economic freedom is developed and clarified by the provisions of Article 2 of the Law on Entrepreneurs Act[9], according to which the undertaking, performance and termination of business activities are available for everyone on equal terms. However, in Polish law the principle of economic freedom is not absolute. Indeed, the provisions of Article 22 of the Constitution of the Republic of Poland provide for its limitations. Under Article 22 of the Constitution, however, these restrictions can only be imposed by law and only if they are justified by an important public interest. The introduction of restrictions on the principle of economic freedom solely on the basis of statutory provisions is an absolute

gospodarczej," in *Publiczne prawo gospodarcze*. *Zarys wykładu*, ed. Rafał Blicharz (Warsaw: Wolters Kluwer, 2017), 23 and the literature cited therein.

6 Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: Lexis Nexis 2007), 75. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 23 and the literature cited therein.

7 Beata Sagan, "Zasady prowadzenia działalności gospodarczej," in *Publiczne prawo gospodarcze*, ed. Jan Olszewski (Warsaw: Wydawnictwo C.H. Beck, 2005), 11 and the literature cited therein; Anna Walaszek – Pyzioł, *Swoboda działalności gospodarczej. Studium prawne* (Cracow: Księgarnia Akademicka, 1994), 36–38; Artur Żurawik, *Interes publiczny w prawie gospodarczym* (Warsaw: Wydawnictwo C. H. Beck: 2013), 67 and the literature referred to by the Author. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 24 and the literature cited therein.

8 Szydło, *Swoboda działalności gospodarczej*, 10; Sagan, "Zasady prowadzenia działalności gospodarczej," 11; Walaszek – Pyzioł, *Swoboda działalności gospodarczej. Studium prawne*, 37–39; Żurawik, *Interes publiczny w prawie gospodarczym*, 67–68 and the literature referred to by the Author. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 24 and the literature cited therein.

9 Law on Entrepreneurs Act of 6 March 2018, Journal of Laws of 2021, item 162, as amended.

requirement that derives from the principle of a democratic state under the rule of law.[10] However, there is some controversy in the doctrine over the concept of "important public interest", which has not been defined for the purposes of interpreting Article 22 of the Constitution and, as a general clause, can be understood individually in the light of specific laws introducing restrictions on the undertaking and conduct of business activities.[11] Doubts arose especially regarding the possibility of interpreting the concept of "important public interest" from the point of view of the provision of Article 31(3) of the Polish Constitution, which indicates a closed catalogue of premises justifying the introduction of restrictions on constitutional rights and freedoms.[12] When making a systemic interpretation of Article 22 and Article 31(3) of the Constitution in the context of the possibility and prerequisites for introducing restrictions on economic freedom, the Constitutional Tribunal stressed that "freedom of economic activity, as a principle of the system of the Republic of Poland, has a different, "broader" perspective and a different degree of abstraction than the constitutional freedoms and rights indicated in Chapter II of the Constitution. It is also reasonable to assume, on the one hand that every case of the need to protect the goods indicated in Article 31(3) of the Constitution falls within the "important public interest" clause within the meaning of Article 22 of the Constitution. On the other hand, it should be stated that the scope of "important public interest" also includes values not listed in Article 31(3) of the Constitution. Consequently, the scope of permissible restrictions on freedom of economic activity is, at least when viewed in terms of the substantive grounds (prerequisites) for restrictions, broader than the scope of permissible restrictions on

[10] Strzyczkowski, *Prawo gospodarcze publiczne*, 75; Żurawik, *Interes publiczny w prawie gospodarczym*, 69–70 and the literature referred to by the author See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 23 and the literature cited therein.

[11] Henryk Nowicki and Paweł Nowicki, "Reglamentacja działalności gospodarczej a zasada proporcjonalności," in *Przedsiębiorcy i ich działalność*, ed. Andrzej Powałowski and Hanna Wolska (Warsaw: Wydawnictwo C.H. Beck, 2019), 125–126.

[12] Nowicki and Nowicki, "Reglamentacja działalności gospodarczej a zasada proporcjonalności," 125–126. On this topic, see also: Żurawik, *Interes publiczny w prawie gospodarczym*, 71–72 and the literature cited by the Author as well as Daria Świerblewska and Michał Nowacki, "Klauzula interesu publicznego w kontekście swobody działalności gospodarczej," in *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, ed. Henryk Nowicki, Paweł Nowicki, and Krzysztof Kucharski (Toruń: Wydawnictwo Adam Marszałek, 2018), 159.

those freedoms and rights to which Article 31(3) of the Constitution refers."[13] At the same time, the Constitutional Tribunal stressed that premises that fall within the concept of "important public interest" but go beyond the catalogue of premises enumerated in the provisions of Article 31(3) of the Constitution of the Republic of Poland must remain in harmony with the other values indicated in the Constitution, the classification of which is a consequence of adoption of the principle of a democratic state of law.[14]

It should also be noted that the Constitutional Tribunal, in its judgment of 25.05.2009, ref. SK 54/08 clearly emphasized the importance of the principle of proportionality and the need to respect it as a prerequisite for introducing restrictions on economic freedom.[15] In its ruling of 6 December 2006, ref. SK 25/05, the Constitutional Tribunal underlined that restrictions on freedom of economic activity must be justified by an important public interest. The Court explained that the premise of "importance" of public interest should be identified with the principle of proportionality, which should be understood to mean that the purpose of the statutory regulation should be justified by the values adopted in the Constitution of the Republic of Poland, and the means used should be applied in appropriate proportions to the intended purpose.[16]

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[13] Polish Constitutional Tribunal, Judgment of 29 April 2003, Ref. no. SK 24/02, OTK-A 2003, No 4, item. 33), see in: Katarzyna Grabarczyk, "Pojęcie "nadrzędnego interesu publicznego" w prawie unijnym oraz w polskich przepisach dotyczących prowadzenia działalności gospodarczej," in *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, ed. Henryk Nowicki, Paweł Nowicki and Krzysztof Kucharski (Toruń: Wydawnictwo Adam Marszałek, 2018), 61. See also: Żurawik, *Interes publiczny w prawie gospodarczym*, 72 and the judgement of the Polish Constitutional Tribunal cited by the Author, i.e. Judgment of 25 May 2009, Ref. No 54/08, OTK-A 2009, no. 5, item. 69.

[14] Grabarczyk, "Pojęcie "nadrzędnego interesu publicznego" w prawie unijnym oraz w polskich przepisach dotyczących prowadzenia działalności gospodarczej," 61–62 and the judgement of the Polish Constitutional Tribunal cited by the Author: Polish Constitutional Tribunal, Judgment of 17 December 2003, Ref. no. SK 15/02, OTK-A 2003, no 9, item. 103.

[15] Żurawik, *Interes publiczny w prawie gospodarczym*, 72 and the judgement of the Polish Constitutional Tribunal cited by the Author: Judgment of 25 May 2009, Ref. no 54/08, OTK-A 2009, no. 5, item. 69).

[16] Żurawik, *Interes publiczny w prawie gospodarczym*, 70 and the judgement of the Polish Constitutional Tribunal cited by the Author: Polish Constitutional Tribunal, Judgment of 6 December 2006 r., ref. no. SK 25/05, OTK-A 2006, no.11, item. 169.

The principle of economic freedom under European Union law is recognized in its cross-border perspective related to the right to undertake and carry out economic activity in the territory of the internal market of the European Union based on the fundamental freedoms of that market – the freedom of establishment regulated in the provisions of Articles 49–55 of the Treaty on the Functioning of the European Union[17] and the freedom to provide services regulated in the provisions of Articles 56–62 of the TFEU.[18] Both freedoms provide the basis for undertaking and carrying out activities in the territory of another Member State[19]. The important difference between the two, however, is that freedom of establishment allows one to carry out an economic activity in another Member State on a permanent basis, which involves setting up an establishment there, while freedom to provide services allows one to carry out an activity in the territory of another state on a temporary basis, without having to set up an establishment or settle permanently in that state.[20]

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17 Treaty on the Functioning of the European Union (consolidated version) OJ of the EU 2012 No C 326/01 of 26 October 2012, hereandafter reffered to as TFEU or Treaty.

18 Aleksander Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I* (Warsaw: Wydawnictwo C.H. Beck, 2009), 307–308.

19 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I,* 308; Marek Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej* (Toruń: Towarzystwo Nukowe Organizacji i Kierownictwa "Dom Organizatora", 2005), 39; Pokryszka, *"Podejmowanie i prowadzenie działalności gospodarczej,"* 25; Katarzyna Pokryszka, "Prowadzenie działalności gospodarczej przez osoby zagraniczne i świadczenie usług przez usługodawców z Unii Europejskiej na terytorium Polski w świetle „konstytucji biznesu," in *Prawo przedsiębiorcy*, ed. Rafał Blicharz and Andrzej Powałowski (Warsaw: Wydawnictwo C.H. Beck, 2019), 242.

20 Monika Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Volume I (Articles 1–89)*, ed. Andrzej Wróbel, Dawid Miąsik, and Nina Półtorak (Warsaw: LEX a Wolters Kluwer business, 2012), 858-859 and the judgement cited by the Author, i.e. CJEU Judgment of 30 November 1995, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C 55/94, ECLI:EU:C:1995:411, paras, 25–27; Michael Ahlt and Maciej Szpunar, *Prawo europejskie* (Warsaw: Wydawnictwo C.H. Beck, 2011), 246; Pokryszka, "Prowadzenie działalności gospodarczej przez osoby zagraniczne i świadczenie usług przez usługodawców z Unii Europejskiej na terytorium Polski w świetle „konstytucji biznesu," 249–251.

The basic principle underpinning freedom of establishment is the prohibition of discrimination on the basis of nationality, which imposes an obligation on Member States to treat all entrepreneurs from any Member State equally. What is important here is that, in light of Article 49 TFEU, the obligation to treat entrepreneurs equally includes not only the establishment of an economic activity, but also its conduct in the territory of the destination country in a broad sense.[21]

However, it should be emphasized that, according to the current line of CJEU judicial decisions, the Treaty provisions governing freedom of establishment oblige Member States not only to remove restrictions of a discriminatory nature, but also those that are not based on discriminatory criteria, but nevertheless constitute a restriction on freedom of establishment.[22] This principle was indicated by the Court in its judgment of 31 March 1993 in Case C-19/92 Kraus and definitively reaffirmed it in its judgment of 30 November 1995 in Case C-55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.[23] The ruling in Case C-55/94 Gebhard had very important consequences for evaluation of Member States' regulations on business activities. Since its issue, laws governing the undertaking and pursuit of economic activities have been subject to scrutiny for their compatibility with freedom of establishment, and it is no longer sufficient for Member States to provide national

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21 Ahlt and Szpunar, *Prawo europejskie*, 230; Szwarc – Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 865. More on the principle of equal treatment of the prohibition of discrimination on the basis of nationality as a basis for the functioning of freedom of establishment, including in the field of tax law and access to social privileges, see in: Catherine Barnard, *The Substantive Law of the EU. The four Freedoms* (Oxford, New York: Oxford University Press, 2010), 299–305.

22 Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866.

23 Ahlt and Szpunar, *Prawo europejskie*, 231–232; Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866; Anna Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny* (Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza, 2005), 210–216, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 192–193. See also: Barnard, *The Substantive Law of the EU. The four Freedoms*, 300; CJEU Judgment of 31 March 1993, Dieter Kraus v Land Baden-Württemberg, Case C-19/92 ECLI:EU:C:1993:125; CJEU Judgment of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, ECLI:EU:C:1995:411.

treatment to entrepreneurs from other European Union countries to ensure such compatibility. Indeed, in light of the ruling in Case C-55/94 Gebhard, Member States were obliged to guarantee the most far-reaching liberalisation of the rules on access to professions and the exercise of an economic activity, which goes beyond the application of the prohibition of discrimination on the basis of nationality. However, this liberalisation does not need to be absolute. Indeed, Member States may exceptionally maintain restrictions on the undertaking and pursuit of economic activities that are justified by so-called imperative requirements in the general interest.[24] The so-called Gebhard test is used to review the compatibility of national law with European Union law and allows challenges to regulations in force in a Member State that apply equally to domestic entrepreneurs and those from another Member State, if these regulations impede the exercise of freedom of establishment or make the exercise of freedom of establishment less attractive, and therefore constitute barriers to access to the exercise of economic activity in the territory of that state. Under the conditions of the Gebhard test, Member States should demonstrate that such restrictions are not only applied to entrepreneurs without discrimination on the basis of nationality, but are also necessary and justified by the imperative requirements of protecting the general interest. While planning to apply these requirements to entrepreneurs from the European Union, Member States should additionally demonstrate that these requirements are adequate to ensure the achievement of the intended objective and do not go beyond what is necessary to achieve it.[25]

3. Imperative Requirements in the General Interest and the Principle of Proportionality as Conditions for Application of Restrictions on Freedom of Establishment by European Union Member States

With its ruling in Case C-55/94 Gebhard, the Court sanctioned the full applicability of the doctrine of imperative requirements in the field of freedom

24 Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866–867.

25 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 423. See also: CJEU Judgment of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, ECLI:EU:C:1995:411, paras. 35–37.

of movement.[26] According to the so-called Gebhard test, the concept of "imperative requirements in the general interest" and the values they represent as a rationale justifying the application of restrictions on economic freedom under European Union law, is crucial to control the restrictions applied by Member States on the undertaking and pursuit of economic activities. What is also of utmost importance is the principle of proportionality, which in turn refers to the legitimacy of application of such restrictions by Member States, and also defines their permissible scope.[27]

When analysing the concept of "imperative requirements in the general interest" in the context of restrictions on the freedoms of the internal market, it is worth noting that under European Union law, this is not a normative concept, as the EU legislator does not generally apply it. It appears only in some secondary legislation, and most often in CJEU judicial decisions.[28] In the context of restrictions on the freedom of movement of goods, the Court usually invokes the concept of "imperative requirements", while in assessing the legality of restrictions on the freedom of movement of services and the freedom of establishment, it introduces the concepts of "imperative reasons of public interest"[29] and "imperative requirements in the general interest"[30]. The catalogue of values and

[26] Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 243. See also: Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 192.

[27] Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 423–424; Justyna Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2020), 203–315.

[28] Andrzej Borkowski, "Swoboda przedsiębiorczości w kontekście realizacji interesu ogólnego Unii Europejskiej," in *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, ed. Jerzy Korczak (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Faculty of Law, Administration and Economics, University of Wroclaw, 2016), 42.

[29] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243, see also: "imperative reasons of public interest" – while analysing the permissibility of restrictions on the freedom to provide services in Case C-384/93 – CJEU Judgment of 10 May 1995 – Alpine Investments BV v Minister van Financiën ECLI:EU:C:1995:126, para. 44.

[30] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243, see also: "imperative

interests covered by these concepts may differ somewhat because it takes into account the differences between freedom of establishment and freedom to provide services.[31]

The list of imperative requirements identified in the Court's judicial decisions since the CJEU's judgment in Case C-55/94 Gebhard, is open. Member States may invoke still other reasons that, in their view, justify the application of restrictive national laws limiting access to a certain type of economic activity.[32] The imperative requirements in the general interest most frequently cited by Member States that have gained acceptance by the Court as grounds justifying restrictions on the freedom of establishment and the freedom to provide services, are: protection of consumers and all persons using the services of a given entrepreneur, protection of the legitimate interests of employees, effectiveness of tax control and cohesion of the tax system, protection of pluralism and diversity in the sphere of mass media, protection of financial balance in the social security system, protection of certain intangible national values and protection of fundamental rights.[33] In the case of the freedom of establishment, the Court also considered the following important reasons in the general interest as requiring protection, and therefore justifying the introduction of restrictions by Member States: protecting lenders from the risk of losing borrowed capital[34], ensuring that the doctor can communicate with the patient,

requirements in the general interest" – in the context of restrictions on the freedom of establishment in Case C-55/94 Gebhard, para. 35, and "overriding general interest" – in connection with restrictions on the freedom of establishment in Case C-264/96 Colmer, Judgment of the Court of July 16, 1998, Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes, Case C-264/96, ECLI:EU:C:1998:370, para. 28..

31 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243–244.

32 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 202.

33 Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 200 and the CJEU judgments referred to by the Author.

34 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 239–240 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 9 March 1999, Centros Ltd v Erhvervs-og Selskabsstyrelsen., Case C-212/97, ECLI:EU:C:1999:126.

administrative authorities and the medical self-government[35], and protecting public health.[36]

It is worth noting that the concept of "overriding reasons relating to the public interest" is defined in the provisions of the Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market.[37] According to the provisions of Article 4(8) of the Services Directive: "overriding reasons relating to the public interest" means considerations identified as such in the judicial decisions of the Court of Justice, and includes: public order, public safety, public security, public health, maintaining the financial equilibrium of the social security system, protection of consumers, recipients of services and employees, fairness in commercial transactions, combating fraud, protection of the natural and urban environment, animal health, intellectual property, protection of the national historical and artistic heritage, social and cultural policy objectives. The list of prerequisites indicated in that provision is not exhaustive, and the EU legislator expressly allows it to be supplemented by pointing out in paragraph 40 of the preamble to the Services Directive that the concept of "overriding reasons relating to the public interest" has been shaped by the Court's judicial decisions relating to freedom of establishment and freedom to provide services, and may continue to evolve.[38] The EU legislator, giving interpretative guidance on the concept of "overriding reasons relating to the public interest," develops this concept

[35] Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 240–241 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 4 July 2000, Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein, Case C-424/97, ECLI:EU:C:2000:357.

[36] Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 241–243 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 1 February 2001, Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervener: Union professionnelle belge des médecins spécialistes en ophtalmologie et chirurgie oculaire, Case C-108/96, ECLI:EU:C:2001:67.

[37] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. of the EU, no. L 376, 27.12.2006, P. 0036–0068, hereandafter reffered as Services Directive.

[38] Catherine Barnard, "Unravelling the services Directive," *Common Market Law Review*, vol. 45, no. 2 (2008): 353–354.

by adding new values that are not indicated in the provisions of Article 4(8) of the Services Directive. Some of these have already been pointed out in the Court's judicial decisions (such as, for example, preventing unfair competition or safeguarding the sound administration of justice. Interestingly, however – some of the values identified in the preamble as falling within the concept of "overriding reasons relating to the public interest" have not been invoked in this capacity before in the Court's judicial decisions or in EU legislation. In this regard, it is worth pointing out, in particular, such premises as "the objectives of cultural policy, including safeguarding the free expression of various views, especially the social, cultural, religious and philosophical values of society, the need to provide quality education, the promotion of the national language or veterinary policy."[39]

It should be emphasised that, in light of the provisions of the Services Directive, an "overriding reasons relating to the public interest" comprising, in fact, an open-ended catalogue of grounds, may justify the introduction by Member States of restrictions on the freedom of establishment, in particular justification of making access to the undertaking and pursuit of economic activities subject to authorization within the meaning of the Services Directive in the areas of economic activity covered by its regulation or to the application of so-called " requirements to be evaluated". However, the application of such restrictions must respect the principle of proportionality, which means that the requirements must be suitable to achieving the stated objective and must not go beyond what is necessary to achieve that objective, and there must be no possibility of replacing these requirements with other, less restrictive means by which the same effect can be achieved (Article 15(3)(b) and (c) of the Services Directive).[40]

The literature points out that the Court verifies whether the reasons invoked by Member States for imposing restrictions on undertaking and carrying out economic activities are actually relevant and can fall within those objectives, the implementation of which remains within the scope of the European Union's tasks. This is important, because "imperative

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39 Catherine Barnard, "Unravelling the services Directive," 354.

40 Inga Kawka, *Gospodarcza działalność usługowa w prawie polskim w świetle unijnych swobód przedsiębiorczości i świadczenia usług* (Warsaw: LEX a Wolters Kluwer business, 2015), 256–257.

requirements" is a concept of European Union law, not national law, and therefore Member States should clarify its meaning in the context of protecting certain values "in the spirit of EU law".[41]

It should also be noted that the Court does not accept all of the reasons for the restrictions on undertaking and pursuing economic activities cited by Member States. According to the Court, the concept of "imperative requirements in the general interest" that can justify the introduction of restrictions on the freedom of establishment does not include considerations of a "purely economic nature," such as, for example, "preventing a reduction in state revenue from taxes."[42] In turn, when analysing the legitimacy of Member States' restrictions on the freedom to provide services, the Court held that they could not be justified on "purely administrative" grounds.[43]

In the law of the European Union, the principle of proportionality has been emphasised from the beginning in the judicial decisions of the Court of Justice, and then only introduced into the treaty regulations that relate to the exercise of competencies by the Union. Currently, that principle is expressed in the provisions of Article 5 (1) and (4) of the Treaty on European Union, which stipulates that, in accordance with the principle of proportionality, the scope and form of the Union activities must not exceed what is necessary to achieve the objectives of the Treaties.[44] The Court of Justice emphasises that "the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition

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41 Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 199-200 and the literature referred to by the Author; Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 85–88.

42 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej, a interes publiczny*, 201, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 201 and the judgement cited by the Authors, i.e. CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), Case C-264/96, ECLI:EU:C:1998:370, par. 28.

43 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej, a interes publiczny*, 201, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 201-202 and the Court's judgments referred to by the Authors.

44 Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 23; Treaty on European Union (consolidated version), OJ of the EU 2012, No C 326/01.

that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[45] In the Court's decisions, the principle of proportionality is defined as the injunction that "an individual should not have his freedom of action limited beyond the degree necessary for the public interest."[46] The literature indicates that in light of the Court's decisions, the principle of proportionality is formed by three essential components: suitability, necessity and proportionality stricto sensu.[47] In examining the criterion of suitability as an element of the principle of proportionality, the Court assesses whether the objective indicated by the Member State can be legitimised under European Union law, and then examines whether the measure applied by the state under consideration can achieve this objective.[48] At the stage of assessing the fulfilment of the criterion of suitability (adequacy), the Court analyses whether the values indicated

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[45] CJEU Judgment of 13 November 1990, The Queen v. Minister of Agriculture, Fisheries and Food i Secretary of State for Health, ex parte: Fedesa and others, Case C-331/88, ECLI: EU:C:1990:391, para. 13, See in: Margot Horspool, Matthew Humphreys, and Michael Wells – Greco with contributions by Noreen O'Meara and Menelaos Makakis, *European Union Law* (Oxford: Oxford University Press, 2018), 147.

[46] Anthony Arnull, Alan Dashwood, Michael Dougan, Malcolm Ross, Eleanor Spaventa, Derrick Wyatt Q.C., *Wyattt and Dashwood's European Union Law* (London Sweet & Maxwell, 2006), 240 and the judgement referred to by the Authors: CJEU Judgment of 17 December 1970, Internationale Handelsgeselklschaft, Case 11/70, ECLI:EU:C:1970:114. This principle was expressed in principle by Advocate General Dutheillet de Lamothe – Joined opinion of Mr Advocate General Dutheillet de Lamothe delivered on 2 December 1970 – Case 11–70, Case 25–70, Case 26–70, Case 30–70; ECLI:EU:C:1970:100 – "In fact, the fundamental right invoked here – that the individual should not have his freedom of action limited beyond the degree necessary for the general interest – is already guaranteed both by the general principles of Community law, the compliance with which is ensured by the Court and by an express provision of the Treaty!"

[47] Horspool and Humphreys and Wells – Greco with contributions by O'Meara and Makakis, *European Union Law*, 147; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 64–84; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 198–210.

[48] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 65.

by the Member States justify the introduction of restrictions on freedom of establishment, that is, whether these values fall within the concept of "imperative requirements in the general interest."[49] In the context of the Court's review of restrictions on the freedoms of the internal market introduced by Member States, the criterion of necessity means that a Member State should compare measures that are suitable for achieving a given objective (i.e., meet the criterion of suitability) and, if it has an alternative, it should choose one among them that is equally effective in protecting its legitimate interests while restricting the freedoms of the internal market to the smallest possible degree.[50] Proportionality stricto sensu, on the other hand, refers directly to the need to balance the two protected values. In assessing state activity in this regard, the Court must balance conflicting interests, which, when analysing restrictions on the freedoms of the internal market, means that the Court should compare the values protected by Member States with the permissible scope of restrictions on the functioning of the internal market. Consequently, restrictions on the freedoms of the internal market introduced by Member States can only be considered proportional if the state has applied the least restrictive measure available, while at the same time the measures undertaken by the state do not have unduly negative consequences for the functioning of the internal market.[51]

4. Restrictions on the Freedom of Establishment Applied by Member States in Connection with the Activities of Companies in the Internal Market

Due to the regulation of Article 49 TFEU, according to which, on the basis of the freedom of establishment, entrepreneurs have the right to undertake and carry out economic activity in the territory of another Member State under the same conditions under which local entrepreneurs carry out their activity, the concept of restrictions on this freedom is most often analysed

49 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 65–66; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej,* 199.

50 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 73.

51 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77, 79.

in CJEU judgments in the context of acts taken and measures applied by a Member State that impede access to the market of that country for entrepreneurs from other Member States.[52] However, the Court also noted that the introduction by Member States of restrictions or prohibitions that prevent or impede their own entrepreneurs from undertaking and carrying out business activities abroad, is likely to significantly jeopardise the effective implementation of the freedom of establishment.[53]

This aspect of freedom of establishment – the ability to do business in another Member State and the associated restrictions imposed by the country of origin on its domestic entrepreneurs – is particularly relevant to the activities of companies in the internal market of the European Union. The issues addressed in this paper do not require a more extensive discussion of the Court's judgments on the exercise of freedom of establishment by companies, especially since it has been the subject of detailed analysis in both Polish and foreign literature.[54] From the point of view of the subject matter of this article, however, it is necessary to draw attention to the position taken by the Court on the issue of permissibility of restrictions by Member States on the cross-border activities of companies justified by overriding reasons in the general interest in cases that were precedent-setting for the formation of the Court's decisions and the subsequent adoption of provisions of European Union law on the cross-border transfer of the registered office, i.e. the so-called cross-border conversion

52 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 427.

53 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428-429 and the CJEU judgement referred to by the author: CJEU Judgment of 14 July 1994, Criminal proceedings against Matteo Peralta, Case C-379/92, ECLI:EU:C:1994:296.

54 On the capacity of companies exercising freedom of establishment, see in particular: Ariel Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego* (Warsaw: Difin SA, 2020), 98–164; Adam Opalski, *Europejskie prawo spółek* (Warsaw: Lexis Nexis Polska sp. z o.o., 2010), 85–160; Jacek Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego* (Warsaw: Wydawnictwo C.H.Beck, 2013), 63–172; Thomas Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," in Thomas Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (Oisterwijk:Wolf Legal Publishers, 2015), 54–79 (https://ssrn.com/abstract=2747103 or http://dx.doi.org/10.2139/ssrn.2747103). See also: Katarzyna Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy* (Warsaw: Difin SA, 2017), 81-121 and the literature cited therein.

of a company. This is primarily the nature of the judgments of the CJEU in the cases: C-210/06 Cartesio[55], C-378/10 Vale[56] and C-106/16 Polbud.[57]

The Court's ruling in Case C-210/06 Cartesio was very important for interpretation of the Treaty's provisions on the possibility of cross-border conversion of a company under freedom of establishment, although the basic problem analysed in that ruling concerned the possibility of transferring the real head office of the company to another Member State while retaining its original personal statute. However, the Court pointed out that the transfer of the real head office company should be distinguished from the transfer of a company that is governed by the law of one state to another Member State, associated with a change in the national law applicable to the company and its conversion into a company governed by the law of the state of its new registered office.[58] The Court emphasised that a Member State cannot prevent a company from converting to a company operating under the national law of another state by requiring its dissolution and liquidation if the law of the state to which the company is moving permits such conversion.[59] In the Court's view, such a provision would constitute a restriction on the freedom of establishment that is impermissible under Article 49 TFEU, which could only be justified by overriding reasons relating to the public interest.[60]

55 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723

56 CJEU Judgment of 12 July 2012, VALE Építési kft., Case C-378/10, ECLI:EU:C:2012:440.

57 CJEU Judgment of 25 October 2017, 16 Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804.

58 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, par. 111, 119, ECLI:EU:C:2008:723, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 99-100 and the literature cited therein.

59 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, par. 112, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 100 and the literature cited therein.

60 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, par. 113, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 100 and the literature cited therein. An analysis of the conflict-of-law issues associated with the cross-border transfer of a company's registered office in the exercise of freedom of establishment is beyond the scope of the subject matter of this article. It is worth noting, however, that in the judgment in Case C-210/06 Cartesio, which was issued in a case related to the cross-border transfer of the real head

In case C-378/10 Vale the Court analysed the issue of transferring the registered office of a company to another Member State and converting it into a company governed by the law of that state in the context of the destination state's ability to impose restrictions in this regard. However, with regard to the exercise of freedom of establishment by companies and the scope and grounds for the ability of Member States to impose restrictions on this freedom, the Court made a very important point. The Court of Justice expressly stated that the freedom of establishment also includes the right of companies to carry out cross-border conversions.[61] It is worth noting that the Court did not exclude the possibility for Member States to impose restrictions in this regard, but stipulated that they must be justified by imperative requirements in the general interest, and that concept in the case of cross-border activities of companies includes such values as the protection of the interests of creditors, minority shareholders and employees and preservation of effective tax control, as well as fairness of commercial transactions. However, the CJEU stressed that such considerations may justify a measure constituting a restriction on the freedom of establishment, but it is necessary that the measure meets the criterion of proportionality, i.e. that it is appropriate to ensure the achievement of the adopted objective and does not go beyond what is necessary to achieve it.[62]

office of a company, the CJEU stressed that Member States are entitled to determine the criteria that determine a company's belonging to that state, by which it can exercise freedom of establishment. This results in the possibility that a Member State may refuse to allow a company to maintain its status as a company under the national law of that state in the event that the company moves its registered office to another state and thus loses its connection to the law of the state under the laws of which it was established (Judgment in Case C-210/06 Cartesio, paras. 109–110). See in: Opalski, *Europejskie prawo spółek,* 127–128*;* Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego*, 95–96*;* Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego*, 119–121*, see also:* Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy,* 98–99 and the literature cited therein.

61 Myszke-Nowakowska, *Transfer siedziby spółki w Unii Europejskiej*, 109; Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," 60; see also: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 101 and the literature cited therein.

62 CJEU Judgment of 12 July 2012, VALE Építési kft., Case C378/10, ECLI:EU:C:2012:440, par. 39 and the reference made by the CJEU to CJEU Judgment of 13 December 2005 SEVIC Systems AG, Case C-411/03, ECLI:EU:C:2005:762, paras. 28–29.

However, the breakthrough for the possibility of cross-border conversions by companies and the development of European Union law in this regard was the ruling in the case C-106/16 Polbud, issued several years later.[63]

5. Permissibility of EU Member States to Apply Restrictions on the Exercise of Freedom of Establishment by Companies Justified by Imperative Requirements in the General Interest in Light of the CJEU Judgment in CASE C-106/16 POLBUD

The possibility for companies to exercise the freedom of establishment in the form of a cross-border conversion into a company governed by the law of another Member State, as well as the admissibility of introduction by Member States of restrictions in this regard, were the main issues addressed by the Court in the widely commented judgment of 25 October 2017 in case C-106/16 Polbud – Wykonawstwo sp. z o.o. in liquidation, which was issued on the basis of the provisions of Polish law.

In the case under review, the problem arose in connection with the transfer by the limited liability company – Polbud Wykonawstawo spółka z o.o. – of its registered office from Poland to Luxembourg for the purpose of continuing its existence as a company incorporated under Luxembourg law - 'Consoil Geotechnik' Sàrl. Polbud cited Article 270(2) of the Code of Commercial Companies as the legal basis for transferring its registered office to another state.[64] However, according to that provision, the resolution

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[63] Marek Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," *Common Market Law Review,"* vol. 55, issue 5 (2018): 1568–1571; Ariel Mucha and Krzysztof Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol 15, no. 2 (2018): 306; Ariel Mucha and Krzysztof Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," *Przegląd Prawa Handlowego* no. 11 (2018): 1–13; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106, ECLI: EU:C:2017:804;

[64] The Code of Commercial Companies of 15 September 2000 (consolidated text: Journal of Laws of 2022, item 1467, as amended), hereandafter reffered to as the Code of Commercial Companies.

of the shareholders to transfer the company's registered office abroad, as stated in the minutes prepared by a notary public, is a cause for dissolution of the company. As a result, the company's application to the court for removal from the register of entrepreneurs in the National Court Register, which the company justified by moving its registered office to Luxembourg, was dismissed on the grounds that it had not filed the documents required to liquidate the company. Since the position of the court registrar in the case was upheld by the courts of first and second instance, the company filed a cassation appeal with the Supreme Court. The Supreme Court suspended the proceedings and requested a preliminary ruling from the CJEU on the interpretation of Articles 49 and 54 TFEU. On that basis, the Court analysed three important issues presented in the preliminary questions. First of all, the CJEU answered the question of whether, in light of the provisions of the TFEU governing the freedom of establishment (Article 49 TFEU and Article 54 TFEU), it is permissible for Member States to apply provisions that make the deletion of a company from the register conditional on winding up the company after its liquidation if the company has been reincorporated in another Member State and its legal existence continues there. Next, the Court assessed whether the requirement to carry out the liquidation procedure of the company, which includes, inter alia, activities such as the termination of the company's current business, the performance of obligations, the recovery of debts, the sale of company assets, the satisfaction or securing the creditors and which precedes the winding up of the company resulting from the transfer of the company's registered office to another state, constitutes a measure that is adequate, necessary and proportional to protection of the interest of minority shareholders, creditors and employees of the company. The third major issue analysed by the CJEU in that case, however, was the possibility for a company to invoke freedom of establishment in order to move its registered office alone to another Member State, without transferring its main business or real head office there.[65]

[65] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106, ECLI: EU:C:2017:804, paras. 8–18; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 10–11; Aleksander Chłopecki, "Transgraniczne przeniesienie

In the C-106/16 Polbud judgment, the CJEU started its considerations from the assertion that cross-border company conversions are subject to the Treaty provisions governing freedom of establishment.[66] In the Polbud ruling, the Court dispelled any doubts that had hitherto arisen regarding the applicability of the Treaty's provisions to cross-border company conversions by categorically stating 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 purpose of converting it into a company governed by the law of that other state, falls within the scope of freedom of establishment. However, the Court noted that European Union law, at its current stage of development, does not specify the criteria for recognition of a company as formed in accordance with the law of a particular state; Member States identify these criteria themselves. For that reason, a cross-border conversion depends on whether the subject company meets the conditions established by the destination country's laws.[67] It should also be noted that the Court has unequivocally stated that under European Union law, a cross-border conversion of a company does not have to be accompanied by the transfer of its real head office or place of business to the territory of the destination state.[68] In doing so, the CJEU

siedziby spółki – glosa do postanowienia Sądu Najwyższego z 25.01.2018., IV CSK 664/14," *Glosa*, no. 1 (2019): 27–28; Ariel Mucha, "Przeniesienie siedziby polskiej spółki za granicę (uwagi na tle pytań prejudycjalnych Sądu Najwyższego do Trybunału Sprawiedliwości)," *Glosa,* no. 3 (2016): 41–42.

66 Jacek Napierała, "Transgraniczne przekształcenie spółki w świetle wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-106/16 (Polbud – Wykonawstwo – sp. z o.o., w likwidacji)," in *Ius est ars boni et aequi: księga pamiątkowa dedykowana profesorowi Józefowi Frąckowiakowi,* ed. Anna Dańko-Roesler, Marek Leśniak, Maciej Skory and Bogusław Sołtys (Warsaw: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2018), 800; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 29,33,35,38,41,43,44.

67 Napierała, "Transgraniczne przekształcenie spółki w świetle wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-106/16 (Polbud – Wykonawstwo – sp. z o.o., w likwidacji)," 800–801; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 43, 44.

68 Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1557–1560; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law

made it clear, referring to its earlier judgment in Case C-212/97 Centros, that the establishment by a company of a registered office in another Member State in order to benefit from more favourable regulations, cannot in itself be seen as an abuse of law.[69]

In its judgment in Case C-106/16 Polbud, the CJEU also addressed the concept of restrictions on the freedom of establishment in the context of cross-border company conversions and pointed out that under European Union law, the CJEU understood such restrictions to mean any rules that prevent the exercise of the freedom of establishment, impede it or make it less attractive. The Court found that the regulations of Polish law under review, including primarily Article 270 (2), Article 272 and Article 288 of the Code of Commercial Companies which requires the filing of a liquidation report with the court and the conduct of liquidation to remove the company from the register, may make it difficult, if not impossible, to carry out a cross-border conversion of a company. Therefore, in the Court's view, these provisions constitute restrictions on the freedom of establishment.[70]

While analysing the issue of permissibility of restrictions on the freedom of establishment, the Court, referring to its previous rulings, stressed that such restrictions may be permissible only if they are justified by imperative requirements in the general interest. In addition, they should be adequate to guarantee the achievement of the given objective and not go

as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 285–291; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 11.CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 38,44.

69 Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 298; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 40 and the judgments cited by the Court of 9.03.1999 in Case C-212/97 Centros, ECLI:EU:C:1999:126, para. 27 and of 30.09.2003 in Case C-167/01 Inspire Art., ECLI:EU: C: 2003:512, para. 96.

70 CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 48, 51.

beyond what is necessary to achieve it.[71] The CJEU acknowledged that in the context of companies' activities in the internal market area, the imperative requirements in the general interest justifying the introduction of restrictions on the freedom of establishment include the protection of the interests of minority shareholders and the protection of employees.[72] In view of this, the CJEU held that, in principle, the provisions of Articles 49 and 54 TFEU do not preclude the laws of a Member State from guaranteeing the protection of the interests of creditors, minority shareholders or employees of a company in a situation where its registered office is transferred to another Member State and converted into a company governed by the law of that state.[73] However, the Court stressed that these provisions must be applied in accordance with the principle of proportionality, which means that they must be adequate to achieve the goal of protecting the interests of creditors, minority shareholders and employees and not go beyond what is necessary to achieve that goal.[74] In this context, the Court noted that the provisions of Polish law under review provide for a general obligation to liquidate the company regardless of whether the transfer of its

[71] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 52 and the judgement cited by the Court – CJEU Judgment of 29 November 2011, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-371/10, EU:C:2011:785, para. 42 and the judicial decisions cited therein

[72] Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1566; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 54, and the CJEU Judgment cited therein of 13 December 2005, SEVIC Systems, Case C-411/03, ECLI: EU:C:2005:762, para. 28 and CJEU Judgment of 21 December 2016, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis), Case C-201/15, ECLI:EU:C:2016:972, para. 73.

[73] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 55.

[74] Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1565–1566; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 297.

registered office to another country entails a real risk of prejudicing the interests of the company's creditors, minority shareholders and employees, and does not provide the possibility of choosing less restrictive measures to protect those interests. The Court agreed with the opinion of the European Commission indicating that such protection, particularly for creditors, could be provided by the establishment of bank guarantees or other equivalent security. Therefore, in the Court's view, the provisions introducing a general requirement to liquidate a company as a consequence of a resolution to transfer its registered office to another country go beyond what is necessary to protect the interests of the company's creditors, minority shareholders and employees, and are therefore incompatible with the principle of proportionality.[75]

It is interesting to note that in the judgment in case C-106/16 Polbud, the Court also referred to the possibility of imposing restrictions on the freedom of establishment on the grounds of protection against abuse. This argument was raised by the Polish government and the CJEU recognised its validity in that, as it noted, the need to protect against abuse justifies the introduction of restrictions by Member States. However, the Court made it clear that this argument could not be applied in the case at hand, since the mere transfer of a company's registered office from one Member State to another, even if carried out in order to take advantage of more favourable rules, does not constitute an abuse of rights and cannot be the basis for a general presumption of abuse and justify the adoption by Member States of rules that violate the exercise of the freedom of establishment.[76]

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[75] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 56–59, 64; Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1566.

[76] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 62–65 and the judgement cited by the CJEU, i.e. Judgment of 29 November 2011, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-371/10, ECLI:EU:C:2011:785, para. 84. See: Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol. 15, no. 2 (2018): 297–300; Szydło, "Cross–border

6. Exercising Freedom of Establishment by Companies in the Form of Cross-Border Conversions and Requirements Related to the Protection of the Interest of Company's Shareholders, Creditors and Employees as well as the Protection Against Abuse Under the Provisions of Directive 2019/2121

The CJEU judgment in case C-106/16 Polbud inspired the adoption of new Directive 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 of companies.[77] The provisions of Directive 2019/2121 introduce a definition of cross-border conversion of a company, according to which it is 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" (Article 86b point 2 of Directive 2017/1132). In light of this definition, the departure Member State may not require that the cross-border conversion of a company involve the transfer of its real head office or the undertaking by the company of business activities in the territory of the destination state. This definition clearly reflects the position adopted by the CJEU in its judgment in case C-106/16 Polbud, according to which freedom of establishment applies to the transfer of the registered office of a company formed in accordance with the laws

conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1565–1568.

77 Directive (EU) 2019/2121of 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 of the EU 2019, No L 321/1, hereandafter reffered to as Directive 2019/2121; Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ of the EU No L 169/46, hereandafter reffered to as Directive 2017/1132. See: Mucha and Oplustil, "Transgraniczne przekształcenie polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12, 20; Katarzyna Pokryszka, "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," *Przegląd Ustawodawstwa Gospodarczego,* no. 3 (March 2021): 20, see also Preamble of the Directive 2019/2121 recitals 2–5.

of one state to the territory of another Member State and its conversion into a company governed by the law of the destination state, which is not accompanied by a simultaneous transfer of the real head office of the company.[78] While regulating the procedural aspects of a cross-border conversion of a company, Directive 2019/2121 also requires Member States to put in place appropriate legal instruments to protect such values as the rights of the company's shareholders, creditors and its emploees, as well as to protect against abuse of the law.[79] The procedure for cross-border conversion of a company regulated by Directive 2019/2121 introduces the obligation for the competent authorities in the Member States to check that the company meets the legal and formal requirements necessary for such an operation, including primarily those related to safeguarding the interests of the company's shareholders, creditors and employees. Only as a result of a positive outcome of such a scrutiny will the competent authorities be able to issue "pre-conversion certificate" confirming the admissibility of cross-border conversion, which is a condition for the effectiveness of such an operation and the basis for registration of the company in the destination country.[80]

Protection of the interests of the shareholders who voted against the company's cross-border conversion should be guaranteed by granting them the right to exit the company and to dispose of their shares for adequate cash compensation. According to the provisions of Directive 2019/2121, the share repurchase offer should be examined by an independent

78 Krzysztof Oplustil and Ariel Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," *Transformacje Prawa Prywatnego* No 3 (2020): 136, 142–143; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12; Pokryszka, "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," 20, 23–24.

79 Pokryszka, "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," 20–21, 24; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136, 156–169, 173–178.

80 Pokryszka, "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," 20–21, 25; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 148, 168–169, 173–174; Art. 86m – 86o of the Directive 2017/1132, Preamble of the Directive 2019/2121 recitals 33–45.

expert, and shareholders should have a claim for additional cash compensation if, in their opinion, the price proposed by the company has not been properly determined. These rights should be governed by the laws of the departure Member State, and any disputes arising from their exercise should be subject to the exclusive jurisdiction of the departure Member State (Article 86 i of Directive 2017/1132).[81]

Directive 2019/2121 obliges Member States to introduce a system of protection for creditors of a company subject to a cross-border conversion whose claims arose before the disclosure of the draft terms of the cross-border conversion and had not become due at that time. Two of these instruments are mandatory, while one, the declaration of solvency, can be introduced optionally by Member States.[82] The mandatory instruments for the protection of creditors of a converted company include the right to apply to the relevant administrative authority or court in the departure Member State for appropriate safeguards. Such a right will be enjoyed by creditors who are dissatisfied with the safeguard granted to them in the draft terms of the cross-border conversion, provided that they can credibly demonstrate that the cross-border conversion may jeopardise the security of their claims and that they have not obtained adequate collateral from the company. In doing so, Member States are required to ensure that safeguards are dependent on the effectiveness of the cross-border conversion (Article 86j(1) of Directive 2017/1132). The second mandatory creditor protection instrument is procedural in nature. Creditors, whose claims arose before disclosure of the draft terms of the cross-border conversion, will also have the right to bring an action against the company in the departure Member State within two years after the cross-border conversion became effective (Article 86j(4) of Directive 2017/1132). The peculiarity of this measure lies primarily in the fact that the continuation of the domestic jurisdiction on which it is based is a consequence of the choice of creditors, who will also be able to bring an action against the company

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81 More on this issue: Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 156–162. See also Preamble to the Directive 2019/2121, recitals 14 and 18.

82 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 163. See also art. 86 j (1)(2)(4) of the Directive 2017/1132 and Preamble of the Directive 2019/2121 recitals 23–25.

in the country of its new registered office.[83] In turn, the optional measures to protect the interests of creditors include the ability of Member States to require a company to provide a certificate of its financial condition along with a statement that it will be able to pay its debts after a cross-border conversion (Article 86j(2) of Directive 2017/1132).[84]

Under the provisions of Directive 2019/2121, Member States are also required to guarantee protection for employees of a company undergoing a cross-border conversion. This protection focuses on two issues. First of all, employees of the converted company will be guaranteed the right to be informed and consulted about the company's cross-border restructuring plan (even before the draft terms of the cross-border conversion or the report referred to in Article 86e, is adopted and announced (Article 86 k(2) of Directive 2017/1132). In addition, Directive 2019/2121 aims to ensure that if a company operated under a system of so-called employee participation, or in other words, its employees had a say in determining the composition of the company's management or supervisory bodies[85], its cross-border conversion will not lead to an unjustified violation of the right of employee participation. This should be prevented by the company's obligation to adopt a legal form that allows employees to exercise their right to participate (recital 30 of the preamble to Directive 2019/2121). The basic principle concerning the protection of employee participation rights in a company's corporate bodies is the rule according to which the employee participation rules of the destination country will apply to the company subject to cross-border conversion if, of course, such rules have been adopted (Article 86(1) of Directive 2017/1132). The provisions of Directive 2019/2121 provide for certain exceptions to this rule (Article 86 l (2) of Directive 2017/1132). However, in situations subject to

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83 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 163–165.

84 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 165–166.

85 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 166. The concept of participation is defined in the provisions of Article 2(k) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ of the EU No L 294/22, hereandafter reffered to as Directive 2001/86.

exclusion, the EU legislator prescribes the application (mutatis mutandis and subject to paragraphs 4 to 7 of Article 86l of Directive 2017/1132) of the principles and procedures of the protection of employee participation rights provided for in the provisions of Directive 2001/86, which apply to a European company[86]. The company carrying out the cross-border conversion should be obliged to negotiate with employees on the terms of their participation, and if such negotiations fail, to adopt the standard methods of employee participation provided for in the provisions of Directive 2001/86.[87]

In light of the judgments of the CJEU and the provisions of the Services Directive, the values that fall within the concept of "imperative requirements in the general interest" also include protection against abuse of the law, which consists in evading the application of national or EU law, which justifies the introduction by Member States of restrictions on the fundamental freedoms of the internal market.[88] Such possibility is also provided in Directive 2019/2121. The EU legislator notes that "in certain circumstances, the right of companies to carry out a cross-border operation could be used for abusive or fraudulent purposes, such as for the circumvention of the rights of employees, social security payments or tax obligations, or for criminal purposes."[89] The greatest danger of abuse of the law, according to EU legislators, may be the creation of so-called

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[86] Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 166–167; Article 86l (3) of the Directive 2017/1132. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ of the EU No L 294/1, hereinafter reffered to as Council Regulation 2157/2001. See art. 12 of Council Regulation 2157/2001.

[87] Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 167; see Article 86l (4) points a) b) c) of the Directive 2017/1132, recital 30 of the Preamble to Directive 2019/2121.

[88] See: CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 39 and the judicial decisions in the following cases cited therein: CJEU Judgment of 9 March 1999, Centros Ltd v Erhvervs-og Selskabsstyrelsen. Case C-212/97, ECLI:EU:C:1999:126, paras. 18, 24 and CJEU Judgment of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd. C-167/01, ECLI: EU: C: 2003:512, para. 98. See also Article 4(8) of the Services Directive.

[89] Preamble to Directive 2019/2121, recital 35, first sentence.

“shell companies” created to avoid, circumvent or violate national or EU regulations. Therefore, the competent authorities in the Member States should exercise particular care in scrutinizing the legality of cross-border conversions, and where they consider that a cross-border conversion serves to commit fraud or abuse, to circumvent the law or for criminal purposes, they should not issue the pre-conversion certificate confirming the admissibility of the cross-border conversion of the company, which is a necessary condition for allowing the company to be registered in the destination state.[90] It is worth noting that the regulations of Directive 2019/2121 aimed at protection against abuse of rights are among the provisions of this Directive, the interpretation of which is most controversial.[91] Doubts may arise, in particular, in interpretation of the provisions concerning the control of the legality of a cross-border conversion of a company by the competent authorities on the basis of the so-called “indicative factors” listed by example in recital 36 of the Preamble to Directive 2019/2121 and referring to the characteristics of the company in the Member State to which it transfers its registered office. In particular, the interpretive guideline in the preamble, which allows the competent authorities in a Member State to determine the absence of circumstances leading to fraud or abuse when, as a result of a cross-border conversion, the company’s place of effective management or place of business will be in the Member State in which the company is to be registered, may raise legitimate objections.[92]

90 Oplustil and Mucha, “Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121,” 173–174; Pokryszka, “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,” 21–24, 25 and the literature cited therein.; Preamble to Directive 219/2121 recital 35, second sentence, Article 86m(7)-(11), Article 86o(5) of Directive 2019/2121.

91 Oplustil and Mucha, “Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121,” 173–178; Pokryszka, “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,” 21–25 and the literature cited therein. See also: Francesco Costamagna, “At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?,” *European Papers*, 2019 vol. 4, no. 1 (2019): 203–204.

92 Oplustil and Mucha, “Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121,” 174–176; Pokryszka, “Cross-border conversion of a company in the light

This rationale may provide a basis for national authorities to interpret the provisions on the control of the legality of cross-border company conversions based on a presumption of abuse of rights, which will have to be rebutted by the company by demonstrating that the cross-border operation is carried out for economic purposes. Such an interpretation will not only be able to significantly impede cross-border company conversions by constituting a restriction on the freedom of establishment, but will be in conflict with the Court's position expressed in the judgments in the case C-212/97 Centros and C-106/16 Polbud, according to which the exercise of the freedom of establishment may involve the establishment of a company's registered office in a Member State with more favourable legislation, which in itself does not constitute an abuse of the law. In its judgment in Case C-106/16 Polbud, the Court further emphasized that a cross-border conversion of a company does not have to involve the simultaneous transfer of its real head office or the undertaking by the company of business activities in the territory of the destination state.[93] The correct interpretation of the provisions of Directive 2019/2121 on the scrutiny of legality of cross-border company conversions will therefore require the competent authorities in the Member States to have an exceptionally good knowledge of EU law and the case law of the CJEU and to take into consideration the concept of cross-border conversion of the company presented by the CJEU in its judgment in case C-106/16 Polbud.[94]

of the provisions of Directive 2019/2121 as regards cross – border conversions, mergers and divisions. Selected issues," 21–24, 25 and the literature cited therein.

93 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 174–175; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras.40,44, 62,63 see also: Pokryszka, "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," 23–25 and the literature cited therein.

94 Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 299; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 174–175, 178. See also: Pokryszka, "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," 23–24, 25 and the literature cited therein.

The Directive should be implemented by 31 January 2023. It is worth noting that the CJEU's judgment in the case C-106/16 Polbud has already provided the inspiration to propose draft amendments to the Code of Commercial Companies concerning the introduction of a simple joint-stock company, and provisions indicating the reasons for dissolution of this company.[95] Indeed, according to Article 300.120 §1(2) of the Code of Commercial Companies, the reason for dissolution of a simple joint-stock company is not a resolution of the general meeting of that company to transfer its registered office abroad, if the transfer of the registered office is to take place to another Member State of the European Union or to another country – a party to the EEA, and the law of that country allows it. This provision can be considered a harbinger of the changes that should be introduced into Polish law as a consequence of the CJEU's judgment in case C-106/16 Polbud and the adoption of Directive 2019/2121.[96] A bill to amend the provisions of the Code of Commercial Companies to implement it has been prepared by the Ministry of Justice and was published on the website of the Government Legislation Center on 8 August 2022. Currently, the draft has been sent for public consultation and as well as submitted to the competent authorities to obtain their opinions.[97]

95 Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw, druk 3236, 82 (Explanatory Memorandum to the bill amending the Code of Commercial Companies and Certain Other Laws, form 3236, p. 82). The bill was received by the Sejm on 13 February 2019.

96 Katarzyna Pokryszka, "Przeniesienie siedziby statutowej spółki za granicę w świetle wyroku Trybunału Sprawiedliwości w sprawie C-106/16 Polbud Wykonawstwo spółka z o.o. Wybrane zagadnienia dotyczące prounijnej wykładni prawa polskiego," in *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*, ed. Piotr Pinior, Paweł Relidzyński, Wojciech Wyrzykowski, Ewa Zielińska and Mateusz Żaba (Warsaw: Wydawnictwo C.H. Beck, 2019), 243. The provisions of the Act of 19 July 2019 amending the Act – The Code of Commercial Companies and certain other acts (consolidatet text: Journal of Laws of 2019, item 1655 as amended) concerning the simple joint-stock company entered into force on 1 July 2021.

97 Bill amending the Code of Commercial Companies and Certain Other Laws, accessed February 3, 2023, https://legislacja.gov.pl/projekt/12362751/katalog/12901057#12901057.

7. Conclusions

Economic freedom in European Union law is a principle based on the concept of the internal market and related to the functioning of its fundamental freedoms – freedom of establishment and freedom to provide services. The realisation of these freedoms has traditionally been seen in terms of the obligation of Member States to lift restrictions on entrepreneurs from other Member States to undertake and carry out economic activities on their territory.[98] However, CJEU judgments have for some time shown a tendency for adopting a broader interpretation of the provisions governing this freedom, according to which, at the current, already advanced, stage of development of the internal market, freedom of establishment also means prohibiting Member States from applying restrictions to their entrepreneurs that make it difficult for them to undertake economic activities in another Member State, or from extending the territorial scope of their activities beyond the borders of their country of origin.[99] The need for such an interpretation of the scope of the freedom of establishment has been confirmed by the Court in its rulings on the exercise of this freedom by companies in the form of transferring their registered office to another Member State with simultaneous conversion into a company governed by the law of the destination state, i.e. cross-border company conversion. In its judgments in cases C-210/06 Cartesio and C-106/16 Polbud, the Court stressed that the Treaty provisions on freedom of establishment prohibit the Member State in which a company is formed from preventing it from converting into a company governed by the law of another Member State, in particular by applying the requirement to dissolve and liquidate the company if the law of the destination state permits such conversion. Such a restriction, according to the Court, could only be justified by overriding requirements of the general interest.[100] However, the adoption of this concept of

98 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 303–304, 307–308, 427.

99 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428 and the judgement of the CJEU cited by the Author: CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v. Keneth Hall Colmer (Her Majesty's Inspector of Taxes), C-264/96, ECLI:EU:C:1998:370.

100 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, paras. 112, 113; CJEU Judgment of 25 October 2017,

interpretation of the freedom of establishment, according to which a Member State should not hinder its entrepreneurs from undertaking activities in other Member States, is most clearly evidenced by the position expressed by the CJEU in its judgment in case C-106/16 Polbud, issued on the basis of Polish law.[101] In that ruling, the Court not only affirmed that cross-border company conversions are subject to the freedom of establishment, but also emphasised that, from the perspective of the company's home state, this means that it cannot prevent or discourage a company from carrying out such a cross-border restructuring by establishing more restrictive requirements for cross-border conversions than those applicable to domestic company conversions carried out in its territory. In light of the judgment in Case C-106/16 Polbud, it can also be assumed that this prohibition also applies to the application of non-discriminatory restrictions by the company's Member State of origin, unless they are justified.[102]

The Court's ruling in Case C-106/16 Polbud has resonated widely in the doctrine of Polish law, confirming correctness of the view presented even before its issue by many Authors, according to which the provisions of Article 270(2) of the Code of Commercial Companies and Article 459(2) of the Code of Commercial Companies which order dissolution and liquidation of a company in the event of adoption of a resolution by shareholders to transfer its registered office abroad, are incompatible with the TFEU regulations on freedom of establishment and should

Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 43, 51, 52, 65.

101 Marek Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," *Common Market Law Review,* vol. 55, Issue 5 (2018): 1561, 1564–1565.

102 Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1561–1562; 1564–1565; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 43 and the judgement cited therein, i.e. CJEU Judgment of 12 July 2012 VALE Építési kft., Case C-378/10, ECLI:EU:C:2012:440, para. 32.

therefore be amended.[103] However, it seems that the consequences of that ruling for evaluation of Polish law regulations could be analysed from a perspective broader than the one exclusively related to cross-border company conversion and the need to amend the provisions of the Code of Commercial Companies in this regard. Indeed, the prohibition on a Member State from applying restrictions on a company's transfer of its registered office to another country is, in fact, a result of the prohibition under the freedom of establishment against hindering or preventing entrepreneurs from undertaking activities outside their home country.[104] When analysing the concept of economic freedom in Polish law and its practical significance for entrepreneurs, it is therefore also worth noting its cross-border dimension, resulting from Poland's membership in the European Union and related to the State's obligation to comply with the principles of functioning

[103] On incompatibility of the provisions of Article 270(2) of the Code of Commercial Companies and Article 459(2) of the Code of Commercial Companies with the provisions of the Treaty (TFEU) on freedom of establishment and on the need to amend the Code of Commercial Companies, see in particular: Ariel Mucha, "Transgraniczne przekształcenie polskiej spółki kapitałowej – uwagi na temat niezgodności art. 270 pkt. 2 oraz art. 459 pkt. 2 k.s.h. z prawem europejskim," *Transformacje Prawa Prywatnego*, no. 4 (2015): 45–46, 70, 90–91 and the literature cited by the Author; Olga Sachabińska, "Transgraniczne przeniesienie siedziby spółki kapitałowej – potrzeba działania unijnego i polskiego ustawodawcy," *Transformacje Prawa Prywatnego*, no. 3 (2015): 73–106; Marek Szydło, "Przeniesienie siedziby statutowej spółki kapitałowej za granicę," *Rejent,* no. 7–8 (2008): 146; Opalski, *Europejskie prawo spółek, Europejskie prawo spółek* (Warsaw: LexisNexis 2010), 93, 131–133, Adam Opalski, "Komentarz do art. 270 kodeksu spółek handlowych," in *Kodeks spółek handlowych. Tom IIB. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 227–300,* ed. Adam Opalski (Warsaw: Wydawnictwo C.H. Beck, 2018), 952–958; Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego*, 422; Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 121 and the literature cited by the Author; Pokryszka, "Przeniesienie siedziby statutowej spółki za granicę w świetle wyroku Trybunału Sprawiedliwości w sprawie C-106/16 Polbud Wykonawstwo spółka z o.o. Wybrane zagadnienia dotyczące prounijnej wykładni prawa polskiego," 243 and the literature cited by the Author.

[104] See: Marek Szydło, "The Right of Companies to Cross – Border Conversion under the TFEU Rules on Freedom of Establishment," *European Company and Financial Law Review,* vol. 3 (2010), 422, 425–426, 443; Szydło, "Przeniesienie siedziby statutowej spółki kapitałowej za granicę," 136–139; Sachabińska, "Transgraniczne przeniesienie siedziby spółki kapitałowej – potrzeba działania unijnego i polskiego ustawodawcy," 79–81.

of the internal market and its fundamental freedoms.[105] This means that economic freedom entails a prohibition on the State to impose restrictions on undertaking and carrying out economic activities in Poland, but also to impede entrepreneurs from undertaking activities outside its territory, i.e. on the territory of other Member States, if they are not justified by imperative requirements in the general interest.[106]

The Court's decisions on the cross-border activities of companies, including in particular the judgment handed down in Case C-106/16 Polbud, confirms that respect for the principle of proportionality is of key importance for the ability of Member States to introduce restrictions on economic freedom as a fundamental principle of the functioning of the internal market of the European Union.[107] The literature correctly emphasises that this requires a very careful "balancing act" between values that are sometimes considered to be on a par, such as the objectives of the internal market and the freedom to conduct economic activity within its territory versus, for example, the protection of public order, state security or

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105 Żurawik, *Interes publiczny w prawie gospodarczym,* 67 and the literature referred to by the Author; Sagan, "Zasady prowadzenia działalności gospodarczej," 11 and the literature cited therein.

106 On the interpretation of the provisions of the TFUE concerning freedom of establishment in the light of which Member Statees are prohibited from imposing the restrictions on national entrepreneurs undertaking business activities outside the territory of their home State – see: Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428 and the judgement cited by the Author, i.e. CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v. Keneth Hall Colmer (Her Majesty's Inspector of Taxes), C-264/96, ECLI:EU:C:1998:370.

107 Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud")," 1565–1567; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud,", 283–284, 3030–306. See also: CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, ECLI: EU:C:2017:804, Case C-106/16, paras. 52–65. On the principle of proportionality as the basis for assessing the permissibility of restrictions on internal market freedoms under European Union law, see: Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 97–320, 316, 323.

consumer interests.[108] For that reason, the choice of means by which Member States impose restrictions on economic freedom in the EU dimension, is extremely important. These measures must not only meet the criteria of suitability and necessity, but also be the least restrictive of the measures possible for the Member State to apply in order to protect certain values.[109] In light of the Court's decisions on admissibility of restrictions on economic freedom, it can be assumed that in many situations the CJEU does not question the necessity of protecting the values invoked by a Member State, only the legitimacy of its application of specific measures which, in the Court's view, are disproportionate and too harsh, and the Member State could ensure the protection of certain values by applying measures that are less severe for entrepreneurs.[110] Such a position was presented by the Court in its judgment in Case C-106/16 Polbud, in which it did not question the need to protect the company's minority shareholders, its creditors or its employees, whose interests could be affected as a consequence of the company's cross-border conversion, but found that the measures used to guarantee their protection, consisting of mandatory dissolution and liquidation of the company, were disproportionate because they were too restrictive, and that the intended objective could be achieved by means that would not deprive the company of the right to exercise its freedom of establishment.[111] Directive 2019/2121 on the cross-border conversion of a company, the adoption of which was inspired by the judgment in Case

[108] Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 86; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77, 96, 316–317; Agnieszka Frąckowiak – Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej* (Warsaw: Oficyna a Wolters Kluwer business: 2009), 332.

[109] Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 79.

[110] Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I,* 89–95 and the CJEU decisions cited by the Author; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej,* 322–323.

[111] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 52–59; Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud")," 1565–1566.

C-106/16 Polbud, was also maintained in this spirit. It should be emphasized that enabling the companies to exercise freedom of establishment and, at the same time, reconciling this with the need to ensure the protection of the company's employees, creditors and shareholders, as well as the protection of the public interest related primarily to the prevention of attempts to abuse the law, was one of the primary objectives of the European Commission's Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and division.[112] The provisions of Directive 2019/2121 aim to achieve this goal.[113] The EU legislator has guaranteed companies the right to exercise freedom of establishment in the form of a cross-border conversion to a company governed by the laws of another Member State. However, the exercise of that right is subject to the fulfilment of certain conditions including, first and foremost, the company's fulfilment of its obligations to shareholders, creditors

112 Paul Davies, Susan Emmenegger, Ellis Ferran, Guido Ferrarini, Klaus J. Hopt, Niamh Moloney, Adam Opalski, Alain Pietrancosta, Markus Roth, Rolf Skog, Martin Winner, Jaap Winter, Eddy Wymeersch, "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment," *European Company and Financial Law Review,* vol. 16 (1–2), (2019), 199; Thomas Biermeyer and Marcus Meyer, "European Commission Proposal on Corporate Mobility and Digitalization: Beetwen Enabling (Cross – Border Corporate) Freedom and Fighting the "Bad Gay"," European Company Law Journal 15, no. 4 (2018): 111; Francesco Costamagna, "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?," *European Papers*, 2019 vol. 4 (1), 202; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12. On the need for introducing amendments in Polish law and the necessity to strike a balance between the interest of the company and its shareholders, emploees and creditors on the one hand and the protection of public interest on the other hand in Polish regulations on cross-border company conversions that should be adopted see in: Zuzanna Hajłasz, "Transgraniczne przeniesienie siedziby spółki kapitałowej w prawie polskim oraz w porządkach prawnych wybranych państw europejskich," *Monitor Prawniczy*, no. 12 (2020): 644–651; 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 (Brussels,25.4.2018, COM(2018) 241 final

113 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136,182,186; Preamble to Directive 2019/2121 recitals: 4, 5, 6. See also: Pokryszka, "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," 25.

and employees of the company as stipulated in the Directive, which ensures a significant strengthening of the protection of their interests.[114] Striking a balance between the realisation of the freedoms of the internal market and protection of values that are not economic in nature, is the essence of the principle of proportionality in the context of the functioning of the freedoms of the internal market.[115] The solutions adopted in Directive 2019/2121 on cross-border company conversions reflect the specificity of this principle, aiming, on the one hand, to ensure that companies can enjoy the economic freedom on the territory of the internal market of the EU and, on the other hand, to impose restrictions in this regard justified by imperative requirements in the general interest.[116]

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[114] Oplustil, Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136,182; Preamble to Directive 2019/2121 recitals 5, 6.

[115] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77; Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, 330.

[116] See: Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136, 176, 182, 186; Preamble to Directive 2019/2121 recitals: 4, 5, 6. On the need for the competent national authorities to strike a balance between the need to remove restrictions on freedom of establishment and the necessity to guarantee protection of the interests of company's shareholders, employees and creditors and to counteract the abuse of law when scrutinising the legality of a cross-border conversion see in: Pokryszka, "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", 25 and the literature cited therein.

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