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Cross-Border Conversions of Companies within the EU: The Lithuanian Example

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Abstract

Transfer of aregistered office of a company incorporated in a Member State through a cross-border conversion within the EUas falling within the scope of the freedom of establishment should be a reality rather than an aspiration. In the light of the case law of the Court of Justice of the European Union, the article identifies the regulatory-related difficulties for voluntary inbound and outbound conversions of companies that can be encounteredunder Lithuanian law and evaluates whether the Lithuanian legal framework ensures smooth corporate mobility within the EU.

Keywords: cross-border conversion, domestication, freedom of establishment of companies, re-incorporation, transfer of company's registered office

Introduction

There are different ways for migration of companies within the EU and across-border conversion is one ofthem.The Court of Justice of the European Union (hereafter the Court of Justice) treateda cross-border conversion as falling within the scope of the freedom of establishment of companiesprovided under Articles 49 and 54 of the Treaty on the Functioning of the European Union (hereafter TFEU).In particular, in the *Cartesio* case in 2008, the Court of Justice has been addressingsuch an operation as a cross-border conversion[1]. Subsequently, the Court of Justice specifically dealt with across-border conversion within the EUin the *VALE case* in 2012 and in the *Polbud* case in 2017.

The case law of the Court of Justice suggests that voluntary cross-border conversionscarried out on the basis ofthe freedom of establishment of companies should be a reality rather than an aspiration. However, in the absence of secondary EU law specifically designed for cross-border conversions within the Single Market, the Member States share divergence approaches as to regulating cross-border conversions and it is likely thatcompanies seeking to carry out cross-border conversionsin the EU may facepractical obstacles in some Member States (LSE Enterprise, 2016, p. 83-84, 215-216, 223-253, 331-336). Suggestionswere thus to reviveinitiatives to harmonizere-incorporation of companies created in the Member States through cross-border conversionswithin the Single Market (LSE Enterprise, 2016, p. 18, 219-220, 336-345, 351). Recently, the European Commission announced its proposal as of 25 April 2018 to harmonize cross-border conversions within the EU by changing the directive No. 2017/1132 (European Commission, 2018).

Process of adoption of changes to the directive No. 2017/1132 and its implementation stage may take certain time. While in the absence of valid secondary EU law detailing operations of cross-border conversions, implementation of a national company's right to convert which is granted by the EU law largely depends on application of national laws of Member States (*VALE*, paras 48, 49). Lithuania is one among the Member States where the national legal framework does not regulatevoluntary cross-border conversions, including thosewithin the EU.Therefore, thearticle aims at identification of regulatory-related difficulties that can be potentially encountered under the Lithuanian law when the case law of the Court of Justice is the basis for carrying outa cross-border conversion.

Firstly, the articles concentrates on the key aspects of the case law of the Court of Justice on voluntary cross-border conversionswithin the EU. Then, it analysis a concept of a voluntary conversion and related proceedings under the Lithuanian law and evaluates whether the Lithuanian legal framework ensures smooth EU corporate mobility through a voluntary cross-border conversion[2].

[1]The scholarsmade a notice that the preliminary ruling did not, however, specifically concerned a cross-border conversion within the EU (Vossestein, 2009, p. 120).

[2]The focus of the analysis is on companies limited by shares. In Lithuania, there are two different types of companies limited by shares, i.e. public stock company (*akcinė bendrovė, AB*) and closed stock company (*uždaroji akcinė bendrovė, UAB*).

The Case Law of the Court of Justice: Cross-Border Conversion within the EU

According to the Court of Justice,thefreedom of establishmentprovided under Articles 49 and 54 of TFEUincludes*inter alia*a company's right to convert within the EU (*VALE*, paras 33, 49, *Polbud*, para 33).

The case law of the Court of Justice reveals both the general meaning of an operation as a cross-border conversion, although with certain conditions for its implementation, and types of companies as beneficiaries enjoying the right of establishment in the form of a cross-border conversion. In that context, the *Cartesio*, *VALE* and *Polbud* cases should be necessary addressed.

In the *Cartesio* case, the Court of Justice dealt with a transfer of the company's seat from a Member State of incorporation to a host Member State when the companyattempted to remain a company governed by the law of the Member State of incorporation (*Cartesio*, paras 23-24, 100, 102). The Court of Justice underlined that such operation is different from a conversion. A cross-border conversion constitutes a transfer of the seat of a company incorporated under the law of one Member State and governed by the law of this Member State (hereafter Member State of incorporation), without being liquidated or winded-up, to another Member State with the attended change of the national law and, as a result, becoming a company of this Member State (hereafter Member State of arrival)(*Cartesio*, paras 111-113).

In the *VALE* and *Polbud* cases, the Court of Justice interpreted provisions of Articles 49 and 54 TFEU governing the freedom of establishment with respect toboth inbound and outbound conversions of companies respectively.

In the *VALE*case, the Court of Justice dealt with a transfer of the registered office and business of the company from a Member State of incorporation to a Member State of arrival under the following conditions. When transferring its seat, the company did not intend to remain a company governed by the law of the Member State of incorporation, but rather attempted to become a company of the Member State of arrival and at the same time to retainits legal personality as "the predecessor in law" (*VALE*, paras 9-11, 15, 35, 58). The subject matter in the case was the national measures of the Member State of arrival and it thus concerned an inbound conversion. The Court of Justice *inter alia*following classification of the operation as a cross-border conversion of a company presented by the referring national court (*VALE*, paras 15, 19) confirmed that an inbound conversion is within the scope of Articles 49 and 54 TFEU governing the freedom of establishment of companies (*VALE*, paras 33, 49). The Court of Justice ruled that the Member State of arrival should permit a cross-border conversion, if the national law allows a domestic conversion (*VALE* par. 36, 46):

> *"Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company*." (*VALE*, para 41).

In the *Polbud* case, the Court of Justice dealt with an outbound conversionand the national measures of the Member State of incorporation were at stake. The *Polbud* case involved a transfer of the registered office of the company from a Member State of incorporation to a Member State of arrival while retaining its legal personality and continuing existence (*Polbud*, paras 10, 12, 14-15). The real seat of the company was not, however, subject to transfer (*Polbud*, para 29).The Court of Justice ruled that a company may enjoy a right to convert when exercising the freedom of establishment even though the company does not simultaneously transferits real seat (*Polbud*, paras 38, 41-42):

> *"Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company."*(*Polbud*, para 44).

It can be concludedthat a cross-border conversion within the EU is understood as a transfer of the company's registered office from a Member State of incorporation to a Member State of arrival by becoming a company of the Member State of arrival, while at the same time retaining its legal personality and without conducting liquidation or winding-up proceedings. The legal effect of a transfer of the company's registered office through a cross-border conversion is a change in applicable company law and thus nationality of the company.

It should be noted, that a Member State of incorporation cannot prevent its national company to convert to a company of another Member Statewith the condition thata Member State of arrival permits such a cross-border conversion (*Cartesio*, para 112; Vossestein, 2009, p. 121). Further, a company re-incorporating itself in aMember State of arrival mustcomply withthe requirements of thatState, in particular, those establishing connection of a company to the legal system of that State (*Polbud*, paras 33, 35).

National measures of a Member State of incorporation restricting the company's right to leave through a cross-border conversion should be permissible under the EU law. For example, the Court of Justice ruled that national legislation of a Member State of incorporation, whichimposes a general requirement to liquidate a domestic company seeking to convert to a company of another Member State, constitutes a restriction on the freedom of establishment, which is not justifiable (*Polbud*, paras 49-51, 58, 65)[3].

A cross-border conversion involves consecutive application of national laws of two different Member States, i.e. national law of a Member State of incorporation and national law of a Member State of arrival (*VALE*, paras 37, 43, 44). National laws of both Member States apply based on the principles of equivalence (i.e. the rules

[3]In the *Cartesio* case, the Court of Justice also stated that national measures requiring the winding-up or liquidation of a company in the Member State of incorporation which is being relocated to the Member State of arrival constitutes a restriction on the freedom of establishment (para 113).

should not be less favourable than those governing domestic conversions) and effectiveness (i.e. the rules should not make a cross-border conversion impossible in practice or excessively difficult) (*VALE*, paras 48-49).

Various companies that comply with the criteria established by Article 54 TFEU may enjoy the right to carry out a cross-border conversionon the basisof the freedom of establishment. For instance, *Cartesio* was a limited partnership governed by Hungarian law (*Cartesio*, para 21). *VALE Costruzioni Srl* was a limited liability company governed by Italian lawbeing converted to a limited liability company governed by Hungarian law (*VALE*, paras 9-10). *Polbud — Wykonawstwo sp. z o.o.*was a private limited liabilitygoverned by Polish law converting itself to a private limited liability company governed by Luxembourg law (*Polbud*, paras 8, 10, 12)[4].

The Lithuanian Legal Framework: Cross-Border Conversion within the Eu

In some cases, the Lithuanian legislation refers to such an operation as a cross-border transfer of corporate seat[5]. Nevertheless, it does not specifically regulate a transfer of corporate seat through a cross-border conversion, including within the EU.

Having in mind the above case law of the Court of Justice, Lithuania should guarantee the company's right to convert granted by the EU law[6], even though the Lithuanian legal framework does not in particular regulate cross-border conversions of companies[7]. Otherwise, any national measure restricting the freedom of establishment througha cross-border conversion needs to be justified to legitimate the restriction (Soegaard, 2018, p. 22, 24).

The next part of the article thus analysis the regulatory-related issues that may be relevantin structuring a cross-border conversion when Lithuania is involved,

[4]See also Opinion of Advocate General Kokott of 4 May 2017, case C-106/16, ECLI: EU:C:2017:351, para 15.

[5]The Lithuanian legislation seldom refers to a cross-border transfer of the corporate seat in addition to other restructuring operations. E.g. for the purpose of private international law, the Civil Code states that,in Lithuania, a cross-border merger or transfer of corporate seat shall have effect on the civil capacity of legal entities participating in such proceedings only if the operations were performed in compliance with the laws of both states involved (4 Part of Article 1.19). Another example is the Law on Stock Companies, providing that the Register of Legal Persons records changes in the legal status of a company governed by law of another Member State with respect to their branches registered in Lithuania. This,*inter alia*,includes information related to a company's conversion, a reorganization or a cross-border transfer of the corporate seat in the internal market (Part 11 of Article 75 the Law on Stock Companies, which implemented the Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers; currently it is codified in the directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification)).

[6]For the direct effect, direct application of the EU and supremacy of the EU law over the domestic law, including in the Lithuanian context, see: Jarukaitis, I., 2011, p. 309-351, 473-540.

[7]LSE Enterprise, 2016, p. 229, 236, 241; *Per contra*, it is provided in the Study that Lithuania does not allow both voluntary inbound and outbound conversions within the EU, *inter alia* explaining that an operation to reincorporate abroad would lead to a liquidation of a Lithuanian company.

either as a Member State of arrival (i.e. inbound conversion) or as a Member State of incorporation (i.e. outbound conversion).

Inbound Conversion

According to the case law of the Court of Justice, Member States should permit an inbound cross-border conversion similar to the domestic one. This means that when national law of a Member State does not foresee, however, an equivalent domestic conversion, the freedom of establishment does not guarantee a cross-border conversion either (Van Eck and Roelofs, 2012, p. 322-323)[8]. Therefore, aconcept of the conversion under the Lithuanian law is at stake[9].

The Civil Code of the Republic of Lithuania (hereafter the Civil Code) provides general rules on conversion of legal entities. A conversion means a change in the entity's legal form (Article 2.104 of the Civil Code). A conversion does not lead to a liquidation or dissolution of the legal entity (Article 2.95 of the Civil Code).As a result, aconverted legal entitycontinues to exist with all its business, assets and liabilities. The legal effect is that the legal entity retains its legal personality, but, after the conversion, it has a different legal form.

In addition to the general framework, special laws regulating appropriate types of national companies govern the peculiarities of domestic conversions. For instance, the Law on Stock Companies provides rules for a domestic conversion when a public stock company or a closed stock company convertsitself to a different type of a legal entity and, in addition, contains few rules designed for a conversion of another type of legal entity to a public stock company or a closed stock company. A company limited by shares may convert to different types of legal entities listed in the law. The Law on Stock Companies enumerates ten legal forms of entities available for the conversion. A public stock company may convert itself to a closed stock company and *vice versa*. A company limited by shares may convert to a general partnership, a limited partnership, a small partnership, a cooperative, an agricultural company, a single member unlimited liability company, state company, municipal company or public organization (Parts1-2 of Article 72 of the Law on Stock Companies). Companies of certain types may also covert to a public stock company or a closed stock company. For instance, the following legal entities may convert itself to a company limited by shares: a general partnership, a limited partnership, a small partnership and a single member unlimited liability company (Parts 1-2 of Article 15 of the Law on Partnerships; Part 2 of Article 29 of the Law on Small Partnerships; Part 1 of Article 11 of the Law on single member unlimited liability companies).The Register of Legal Personshas to recordchanges in a legal status of the company. Registration of incorporation documents of a new type of the entity completes the conversion (e.g. Part 26 of Article 72 of the Law on Stock Companies).

Having in mind the above case law of the Court of Justice, a changeof a legal form of a company incorporated in one Member State, that complies with the criteria

[8]The freedom of establishment has a 'negative effect' as it does not create a new method of restructuring of the companies (Van Eck and Roelofs, 2012, p. 322-323).

[9]There is no an autonomous legislative EU definition of a cross-border company conversion (Rammeloo, 2017, p. 177).

established under Article 54 TFEU, to a different legal form of the Lithuanianentity, should beallowed, if the same werepermitted for the local companies.For example, a limited partnership, which is a national company of another Member State, should be able to covert itself to a Lithuanian closed stock company.

However, it may be also situations when a company seeks to change its nationality through a cross-border conversion and re-incorporate in a legal form comparable with the one it had before the re-incorporation. For instance, when a company limited by shares incorporated in another Member State and governed under law of that Stateintends to convert itself to a Lithuanian closed stock company, both types of the companies are private companies limited by shares, their legal forms are thus comparable and similar. When a national company of another Member State intends to convert into a legal form of the Lithuanian company, which is equivalent to the existing legal form, the Lithuanian legislation does not provide for a similar domestic situation.

The comparative research reveals that some jurisdictions may differentiate operations when acompany changes its legal form and becomes a different type of company, on the one hand, and a company re-incorporates in another jurisdiction byobtaining a similar legal form of a company, on another hand, i.e. conversion and domestication. The distinction is known, for example, in the United States of America under theUniform Limited Liability Company Act (hereafter ULLCA)[10].

According to ULLCA, a conversion covers anoperation when a limited liability company becomes a different type of entity. A concept of the conversion includes both domestic and inter-jurisdiction conversions (ULLCA, Section 1041 (a)), i.e. "a *domestic limited liability company may become: (1) a domestic entity that is different type of entity; or (2) a foreign entity that is a different type of entity, if the conversion is authorised by the law of the foreign entity's jurisdiction of formation*." While (ULLCA, Section 1041 (b)) "*a foreign entity that is not a foreign limited liability company may become a domestic limited liability company if the conversion is authorised by the law of the foreign entity's jurisdiction of formation*."After conversion, the entity continues to exist, butin a different form (ULLCA with prefatory note and comments, ULLCA Section 1046 (a), (b), (g)).

According to ULLCA, a transaction when the entity changes its jurisdiction of formation without a change in the type of entity is domestication (ULLCA with prefatory note and comments; ULLCA Sections 1041 and 1051). The following conditions are established for adomestication (ULLCA Section 1051 (a), (b)): "a *domestic limited liability company may become a foreign limited liability company if the domestication is authorised by the law of the foreign jurisdiction";* and *"a foreign limited liability company may become a domestic limited liability company if the domestication is authorised by the law of the foreign limited liability company's jurisdiction of formation*." Like under conversion, the domesticated entity continues

[10]The article relies on the latest version of the Uniform Limited Liability Company Act (2006, with the last amendments as of 2013), which, as the uniform entity law in the USA, is prepared by NCCUSL (National Conference of Commissioners on Uniform State Laws, 2015) (hereafter ULLCA with prefatory note and comments). Each state regulates legal entities and NCCUSL promotes enactment of uniform laws in the USA, including unincorporated entity laws (Grossman, 2015, p. 319-320).

its existence without winding up procedures or dissolution of the company (ULLCA Section 1056).

In the Lithuanian context, the legislation does not specifically address domestication. Nevertheless, in my view, interpretation of aconcept oftheconversion, as provided by the Civil Code, should be in the broader sense, *inter alia* includinga re-incorporation of a company in a legal form comparable with the one the company had before the re-incorporation in a Member State of incorporation. There is no change in a type of the company*stricto sensu*, but in cross-border context the legal form of the company changes. A foreign company seeks to re-incorporate by a transfer of its corporate seat to Lithuania and, as a consequence, to become a Lithuanian company, at the same time retaining its legal personality, must comply with the requirements applicable to a particular type of a Lithuanian company. Therefore, a change in the company's nationality, in my view, is a sufficient base to consider such an operation as aconversion under Article 2.104 of the Civil Code. Such operation essentially being the same as a conversion should be treateda sub-type of the conversion[11].

Inthe *VALE* and *Polbud* cases, the Court of Justice confirmed a right for a limited liability company of one Member State to re-incorporate into a similar type of alimited liability company in another Member State, albeita nature of the operation as a cross-border conversion as to a change to the comparable legal form has not been contested.

Lithuania generally permits such operation asa conversion of a local company. Lithuania should thus enable an inbound conversion of a company incorporated in another Member State (*VALE*, paras 33, 36, 38).

Following provisions of the Lithuanian private international law, a cross-border transfer of corporate seat shouldcomply with laws of both jurisdictions (Part 4 of Article 1.19 of the Civil Code). In the light of the case law of the Court of Justice confirming a consecutive application of laws of both Member States, a company converting itself to a public stock company or a closed stock company has to comply with the formation and registrationrules under the Lithuanian law[12]. For example, a minimum share capital must be at least 2,500 euros for a converted closed stock company and 25,000 eurosfor a converted public stock company, professionals have to evaluate in kind contributions, save for few exceptions (Paragraph 22 of Part 2 of Article 20 of the Law on Stock Companies).A cross-border nature of the operation remains, however, unregulatedand procedures in that respect are unclear. This is in particular true with respect to the evidences that a foreign company converting itself to a Lithuanian company has complied with the mandatory requirements and formalities in a Member State of incorporation; and to a possible application of domestic requirements without hindering the corporate mobility[13].

[11]For example, according to the Uniform Limited Partnership Act of 2001 in the USA, a conversion also included a domestication (Kleinberger and Bishop, 2006-2007, p. 540; Uniform Limited Partnership Act (2001) with prefatory note and comments, Section 1102).

[12]It is a settled case law of the Court of Justice that companies are products of national law and national law thus determines connecting factor for incorporation and functioning ofthe local companies (*Polbud*, para 34, *VALE* paras 27, 29, *Cartesio* paras 104, 109-110, DailyMailparas 19-20).

[13]National rules governing a domestic conversion and applied to a cross-border conversion should be compatible with Articles 49 and 54 TFEU (*VALE*, paras 45, 50).

Outbound Conversion

Lithuania does not regulate a transfer of the company's registered office through a cross-border conversion when a local company carrying out such an operation intends to become a foreign company and change applicable company law, albeit without ceasing to exist. Nevertheless, there are rules governing both a change of the corporate seat within Lithuania and a domestic conversion.

The Lithuanian legislation requires a local company to maintain itscorporate seat in Lithuania (Part 2 Art of 7 of the Law on Stock Companies). A corporate seat is a place where its permanent management organ is located and it should coincide with the address of the company (registered office) (Part 1 of Art 2.49 of the Civil Code). When the company's registeredoffice does not correspond with the location of its permanent management organ, third party has a right to rely upon the place where its permanent management organ is situated (Part 2 of Art 2.49 of Civil Code).

Data onthe corporate seat is a part of a company'sincorporation document, which is separate from its articles of association (Part 2 of Article 7, Article 4 of the Law on Stock Companies). Articles of associationdo not compulsory include information on the corporate seat (Part 1 of Article 2.47 of the Civil Code; Part 2 of Article 4 of the Law on Stock Companies). Asubsequent change of the corporate seat does not thusentailamendingthe articles of association[14]. However, the corporate seat (address)shouldbemandatorydisclosed in the public register – the Register of Legal Persons (Item 4 Part 1 of 2.66 of Civil Code).In addition, a company has an obligation to disclose its corporate seat in the documents issued in communication with third parties (Paragraph 3 of Part 1 of Article 2.44 of the Civil Code).

A change of the corporate seat within Lithuania is a rather simple procedure. Shareholders' general meeting has an exclusive authority to decide on a change of the corporate seat (Paragraph 2 of Part 1 of Article 20 of the Law on Stock Companies). Simple majority of participants' votes decides on a domestic transfer of the corporate seat, save to the higher majority established in articles of association (Parts 1, 8 of Article 8, 28 Article of the Law on Stock Companies). Based on the decision of a shareholders' general meeting, a company has to file data related tothe changes on the corporate seat with the Register of Legal Persons (Regulations of the Register of Legal Persons, para 148). There are no other requirements specifically related toa change of the corporate seat (no safeguards for interested persons, etc.).

It is obvious that the mechanism designed fora transfer of the corporate seat within Lithuania is essentially different from a transfer in cross-border context. After a domestic transfer of the corporate seat, data related to the identity of the company changes, but the company remainsregistered with the Register of Legal Persons as a Lithuanian company, i.e. it complies with the connecting factor required to maintain the company's status as incorporated under the Lithuanian law. Further, a transfer of

[14]*Travaux prepatories* (Explanatory note No. XIP-908 of 2009) stated that before the change in the law, data about a corporate seat was compulsory stated in articles of association. By amending the law, lawmakers attempted to reduce administrative burden and related costs since a change of the corporate seat was often the case in the practice.

the corporate seat within Lithuania does not mean a change of the company's legal form or any other change inits legal status. The purpose of this mechanism is different from adomestic conversion that is regulatedseparately and in its own way.A simplified procedure designed for a domestic transfer of the corporate seat cannot thus be applicable to a cross-border transfer of the company's registered office.A transfer of the company's registered office abroad through a cross-border conversion should followrules on a domestic conversion[15].

Like in adomestic transfer of the corporate seat, a shareholders' general meeting has an exclusive authority to decide on a domesticconversion (Paragraph 22 of Part 2 of Article 20 of the Law on Stock Companies). Adecision should, however, be made by a qualified majority of shareholders' votes. The Law states that at least 2/3 of the participants' votes are required to decide on the conversion (Paragraph 14 of Part 1 of Article 28 of the Law on Stock Companies). In addition, there are certain other safeguards designed to protect different interests involved in the company's conversion proceedings. For instance, a decision on aconversion has to be publicized (Part 7 of Article 72 of the Law on Stock Companies). When a public stock company converts itself to a different type of entity, shareholders' who voted in favour of the conversion should make a mandatory bid to buy out the shares of shareholderswho voted against the conversion or have not participated in the voting (Parts 8-9 of Article 72 of the Law on Stock Companies). Seeking to protect interests of creditors, an insolvent public stock company or a closed stock company cannot convert itself to another entity (Part 4 of Article 72 of the Law on Stock Companies). Creditors of a converting company may demand to terminate their contracts, require that the company fulfils obligations in advance,or compensates losses,ifthe contract provides for such a right of the creditor, or a conversion worsens performance of the obligation and upon demand of the creditor theconverting company failed to provideadditional safeguards (Part 2 of Article 2.101, Part 4 of Article 2.104 of the Civil Code).

Having said that, in general, the national legal framework related to a conversion is rather light and concise. Due to the domestic nature of a conversion, the legislation does not addressnumber of issuesthat can be important in cross-border context, including those related toprotection of interests of shareholders dissenting with the cross-border conversion, some interests of creditors. The current legal framework on domestic conversions does not either explicitly include coordination measures designed toensure legality of the operation and its validity.

To sum up the analysis of the Lithuanian lawthat, in my view, should apply to cross-border conversionsbeing implemented on the basis of the case law of the Court of Justice, the following conclusions can be drawn. In the absence of the Lithuanian

[15]The Civil Code provides an exhaustive list of basis for the company‘s liquidation (Article 2.106). Unlike in the *Polbud* case when under the Polish law a company had to be wound up following a resolution of the shareholders‘ to transfer company‘s registered office abroad, in Lithuania, the Civil Code does not in particular provide for the same base for the company‘s liquidation. However, acompany's decision to leave Lithuania and no longer maintain a connecting factor with the Lithuanian legal system (i.e. registered office) might have been potentially equalized to a decision to terminate activities of a company, which is a basis to liquidate the company. In my view, a qualification of a cross-border transfer of the company‘s registered office at the same time retaining corporate existence as a conversion precludes aninterpretation to deem a decision of shareholders‘ general meeting to transfer the registered office abroad as a decision to liquidate the company voluntary.

law specifically regulatingcross-border conversions, inbound and outbound conversions of companies exercising the freedom of establishment under Articles 49 and 54 TFEU both to and out of Lithuania may be equally problematic as to qualifying the operation itself and determining the applicable substantive law. Further, difficulties to carry out cross-border conversionsarise becausethe rules ondomestic conversions do not cover cross-border aspects of the operation.In that context, implementation of a cross-border conversion might followthe rules ona cross-border mergerora cross-border transfer of corporate seat of the European Company (SE) while retaining its corporate continuityto the extent necessary to fill the gaps related to a cross-border nature of the operation. However, it remains questionable which type of rules could applyby analogy and as to thescopeof the rulesto govern the cross-border conversion[16].

Lack of legal certainty and predictability as to cross-border conversions both to and out of Lithuania that are implemented relying on the case law of the Court of Justicemay hinder such operations. Other alternatives would be likely sought to achieve a similar result (e.g. a transfer of the corporate seat and a change of applicable company law through a cross-border merger within the EU, which, unlike a cross-border conversion, is harmonized by secondary EU law (Directive (EU) 2017/1132, Articles 118-134)).

After the *Cartesio* case, the Lithuanian lawmakers should have been much more proactive by proposing a national legal framework for cross-border conversions within the Single Market. Comparative legal sources, including the European Model Company Act[17], offereduseful guidelines for drafting. Today, a proposal of the European Commission as of 25 April 2018 to amend the directive No. 2017/1132 and introduce a legal framework on cross-border conversions of limited liability companieswithin the EUis at stake. The proposed rulesfocus onharmonization of substantive and procedural aspects of the operation. Adraft directive endorses the broad concept of a cross-borderconversion as an operation involving a change of the

[16]When governing a conversion, the Civil Code, *mutatis mutandis,* refers to some provisions regulating reorganizations. For example, the Civil Code provides that requirements to invalidate a conversion are the same as for a domestic reorganization (Part 4 of Article 2.104; Article 2.102 of the Civil Code). Having in mind the above-mentioned regulatory technic, it is, however, not clear, whether provisions of the law concerning a cross-border merger involving limited liability companies apply to a cross-border conversion when the legislation does not explicitly refer a cross-border merger. For example, there is a special safeguard for a cross-border merger operation since the completed cross-border merger cannot be invalidated (the Law on Cross-Border Mergers of Limited Liability Companies, Part 3 of Article 9).Further, a cross-border conversion has echoes in a transfer of the corporate seat of European Company (SE), but, *firstly*, a cross-border transfer of the corporate seat of SE seems to be a special case designed for a particular type of company, i.e. supranational company and not national company. *Secondly*, a cross-border transfer of corporate seat of SE is a specific operation rather than a conversion since the company remains to be SE. While law regulating similar civil relationships apply by analogy to not regulated situations, special laws may not be applied by analogy (Part 1, 3 of Article 1.8 of the Civil Code). In comparative context, Member States may also face difficulties in determining rules applicable to cross-border conversions. For instance, in Germany, there are views shared against an analogous application of the SE Regulation for cross-border conversions of private limited liability companies (Rammeloo, 2017, p. 180-181).

[17]Member State may use EMCA as a benchmark to modernize their company law (Teichmann, 2016).

legal form for a company without losing its legal personality[18]. The suggested legal framework coverskey aspects of a cross-border conversion, including protection of shareholders, creditors and employees, andscrutiny procedures (Proposal for a Directive, 2018, Articles 86a-86u). However, until adoption of the EU instrument (directive) governing cross-border conversions and its transposition to national laws of Member States, business anyway needs to have legal certainty and predictability when exercising the freedom of establishment through a cross-border conversion. Therefore, in the Lithuanian context, the Lithuanian lawmakers might initiate a national legislative proposal for cross-border conversions relying on the European draft directive for cross-border conversions within the EU. This legal framework, potentially being expanded towards other types of companies (and not only to limited liability companies), could also improve national legal environment for investors and contribute to a promotion of the competitiveness of the Lithuanian companies within the SingleMarket[19].

Conclusions

Recently, the European Commission announced its proposal as of 25 April 2018 to harmonize cross-border conversions within the EU by changing the directive No. 2017/1132. Harmonized rules on cross-border conversions are indisputably welcome and necessary, yet adoption of the changes to the directive and its implementation will need to count for a certain time. In the absence of valid secondary law of the EU governing a cross-border conversion in the internal market, national legal framework should anywayensure effective enjoyment of the company’s right to convert which falls within the scope of freedom of establishment guaranteed by Articles 49 and 54 TFEU. Therefore, a situation when the Lithuanian legal frameworkdoes not specifically regulate voluntary cross-border conversions within the EUand does not thus guarantee a smooth corporate mobility when Lithuania is involved as a Member State of incorporation or a Member State of arrival is far from satisfactory. Relying on the proposal of the European Commission as of 25 April 2018 to amend the directive No. 2017/1132 by introducing a legal framework designed for cross-border conversions within the EU, the Lithuanian lawmakers should be more proactive and

[18]E.g.see: the Explanatory memorandum of the proposal for a directive to change the directive No.2017/1132 states:„*The proposal would enable companies to convert cross-border by changing their legal form of one Member State into a similar legal form of another Member State*”. Recital 8 of the draft directive: „*A company may convert into any legal form which exists in the destination Member State, in accordance with Article 49 of the TFEU* Article 86b (2) of the draft directive: “*'cross-border conversion' means an operation whereby a company, without being dissolved, 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 a company of a destination Member State and transfers at least its registered office into the destination Member State whilst retaining its legal personality*”.

[19]According to the study as of 2017 prepared by the group of the Lithuanian experts,who made a review of the Lithuanian company law in comparative context with the purpose to provide recommendations on its modernization, there is a potential to improve the Lithuanian legal framework related to mobility of companies (the research was funded by a grant (No. MIP-020/2015) from the Research Council of Lithuania) (Mikaloniene, L.et.al., 2017, p. 104, 107, 322, 419).

already now suggest a national legal framework for both inbound and outbound conversions.

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