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MASTER THESIS

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„*Impact of the Directive 2019/2121 on protection of company's creditors in cross-border mergers, divisions and conversions*"

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ABSTRACT

The thesis discusses the development of the protection of creditors within the European Union States in regard to cross-border operations. The protection of their interests is an important part of the European Company Law as the existence of limited liability companies definitely protects the interests of the members, and in contrary weakness the position of creditors, who are forced to bare the risk. Until recently, the legislation of the EU provided Member States with minimum harmonisation and as a consequence, it gave the national legislators certain freedom and elasticity regarding the provisions safeguarding the creditors' interest. The laws on corporate mobility differed from state to state, resulting in certain obstacles regarding the smoothness of transborder operation, as well as protection of creditors or minority shareholders. Therefore, the aim of the Thesis is to compare the former regime, containing the ambiguity of application of Article 49 TFEU, as well as the Directive 2017/1132 with the new, complex legal framework in the Directive 2019/2121. The new legal regime undoubtedly permits and simplifies the use of freedom of establishment by the companies, and at the same time provides an adequate level of protection to the creditors, which was not present before. Albeit the Directive 2019/2121 appears to be a positive development of the current EU legal framework, the thesis discusses the challenges in implementation of the provisions to the national laws and evaluates the Directive with a critical eye.

ZUSAMMENFASSUNG

Diese Arbeit behandelt die Entwicklung des Schutzes von Kreditoren in Staaten der Europäischen Union, in Hinblick auf grenzübergreifende Operationen. Der Schutz ihrer Interessen ist ein wichtiger Teil des Europäischen Unternehmensrechtes, da das Vorliegen von Gesellschaften mit beschränkter Haftung ausschließlich die Interessen der Mitglieder wahrt und im Gegensatz dazu, die Position der Gläubiger, welche dem vollen Risiko ausgesetzt sind, schwächt. Bis kürzlich, sorgte die Legislatur der EU bei ihren Mitgliedsstaaten für ein Mindestmaß an Harmonisierung, als Konsequenz genossen nationale Gesetzgeber eine gewisse Freiheit und Flexibilität in Bezug auf Bestimmungen zur Sicherung der Interessen von Kreditoren. Die Gesetze bezüglich grenzübergreifender Operationen von Unternehmen unterschieden sich von Staat zu Staat, das resultierte in Hindernissen in Hinblick auf den reibungslosen Ablauf dieser, sowie dem Schutz der Gläubiger und Minderheitsanteileignern. Daher ist das Ziel dieser Arbeit die vorherige Regelung, die Anwendung von Artikel 49 AEUV und Richtlinie 2017/1132 beinhaltend, mit dem neuen gesetzlichen Rahmen in der Richtlinie 2019/2121 zu vergleichen. Die neue Rechtsordnung erlaubt und erleichtert zweifelsohne die Nutzung von freier Niederlassung für Unternehmen und bietet zeitgleich adäquate Sicherheit für Kreditoren, welche zuvor nicht gegeben war. Obgleich die Richtlinie 2019/2121 eine positive Entwicklung der aktuellen EU Legislatur zu sein scheint, beleuchtet diese Arbeit die Herausforderungen in der Implementierung der Bestimmung in nationales Recht und evaluiert die Richtlinie mit kritischem Blick.

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LIST OF ABBREVIATIONS

- **Article:** Art.
- **Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE):** Council Regulation (EC) No 2157/2001
- **Court of Justice of the European Union**: CJEU
- **Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) OJ L 169:** Directive 2017/1132
- **Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions OJ L 32:** Directive 2019/2121
- **European Commission**: EU Commission
- **European Cooperative Society:** SCE
- **European Court of Justice:** ECJ
- **European Union**: EU
- **First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community:** First Company Law Directive
- **General Federal Ministry of Justice:** BMJ
- **Member State**: MS
- **Paragraph:** para.
- **Polish Register of Entrepreneurs of the National Court Registry**: ROE
- **Societas Europaea**: SE
- **Treaty establishing the European Community**: EC
- **Treaty on the Functioning of the European Union**: TFEU
- **Umwandlungsgesetz**: UmwG
- **United Kingdom:** UK

1. INTRODUCTION

Limited liability operates as a protective barrier for shareholders, but it poses a significant risk to other investors and creditors. However, who exactly are the creditors of the company and why protection of their interests shall be a priority? In accordance with the legal dictionary, a creditor "[…] *is a person who is owed money or has a financial claim against a debtor*." The definition also distinguishes four sorts of creditors: trust, secured, preferred and unsecured creditors.[1] The protection of their interests is significant as it is one of the fundaments for harmonious functioning of the free market economy. Creditor-debtor relations occur in numerous situations in everyday life. The widespread and everyday occurrence of these relationships also means, that irregularities in this sphere pose a threat to the social and economic system, undermining trust in the state and the law, as well as the mutual trust of natural and legal persons who cooperate with one another, which increases the risk of social anomie, or chaos in the system of values. Trust is an indispensable foundation of social, economic and legal relations, it is a kind of lubricant necessary for proper functioning of every organization and business.[2]

This thesis focuses on security of creditors in relation to the cross-border operations. This is particularly crucial and relevant, as a complete cross-border mobility legal regime has been one of the main aims in order to create "European dream".[3] Until recently, the legal framework of transborder operations has been regulated by Article 49 Treaty on the Functioning of the European Union (hereinafter "TFEU") and case law, as well as Directive 2017/1132. The former one provided company with one of the main significant rights - freedom of establishment, whereas the latter one harmonized certain issues related to company law, including cross-border mergers and divisions. Unfortunately, the vagueness of Court of Justice of the European Union's judgements (hereinafter: CJEU) on applicability of Article 49, as well as minimum harmonisation of the Directive 2017/1332 and therefore, inconsistency in relation to the protection of creditors, undoubtedly called the European Union (hereinafter: EU) Legislator to make so changes.

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[1] Thomson Reuters: Practical Law <https://uk.practicallaw.thomsonreuters.com/9-570-3910?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed on 22/06/2022

[2] Jacek Gołaczyński and Elżbieta Mączyńska „Ochrona Wierzycieli w Polsce", Polskie Towarzystwo Ekonomiczne, issue 1, 2017, p.11

[3] Jessica Schmidt "Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package" in *European Company and Financial Law Review*, vol. 16, no. 1-2, 2019, p. 223

In response to unclarity mentioned above, in April 2018, the European Commission (hereinafter: EU Commission) presented the Proposal amending the Directive 2017/1132. Without doubts, the new Directive 2019/2121, which is yet to be implemented by 31 January 2023, brings certain changes in relation to cross-border operations, but first and foremost, provides creditors with a higher level of security. This thesis focuses on presenting the new legal provisions regulating creditors' protection. It examines and evaluates their impact on creditors security, as well as demonstrates challenges in implementation and criticism regarding the new legal framework.
The scrutiny of the thesis is as following, chapter I puts focus on Article 49 TFEU, as well as its application in CJEU's judgements, what clarifies the ambiguity of law in areas of freedom of establishment. Furthermore, Chapter II evaluates the Directive 2017/1132, presents threat to the creditors' protection and calls for improvements to the Directive. Whereas Chapter III introduces the legal regime in terms of cross-border operations, as well as protection of creditors and compare previous and current legal framework. Lastly, the epilog touches upon English legal system, enlightening the reader in terms of impact, that Brexit has on British-European cross-border operation. At the end of each section, there is a brief summary and assessment, with an overall general conclusion at the very end.

2. CHAPTER I: FREEDOM OF ESTABLISHEMENT

2.1. Article 49 TFEU

One of the two most important treaties within the EU is undoubtedly Treaty on the Functioning of the European Union (TFEU), which provides rules, rights and obligations in terms of organization and functioning of the European Union.[4] Article 49 TFEU[5] guarantees companies the freedom of establishment, which has been further elaborated by the CJEU's judgements. More specifically, this provision provides corporations established in Member State (hereinafter: MS) A, a right to transform into a corporation of Member State B. That sort of a company would not lose its legal personality, however, certain requirements shall be met,

[4] Thomson Reuters: Practical Law <https://uk.practicallaw.thomsonreuters.com/2-107-6192?transitionType=Default&contextData=(sc.Default)> accessed on 22/06/2022
[5] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU), art. 49

which may be mandated by Member State B's law.[6] They may include, as it was presented in *Polbud*[7] CJEU judgement, position of the real seat within its borders. Similarly, Article 49 TFEU maintain the freedom of establishment in relation to international mergers and divisions. As a result, in case the fundamental right is restricted, that restraint has to be secured by the proportionality test.[8] That mentioned test, also called *Gebhard* test[9], was initially concerning free movement of goods, albeit, further extended to the application of Article 49 TFEU.[10] It declares that, any restriction (i) has to be appropriate in order to secure the accomplishment of the desired objective, (ii) cannot exceed the necessity that is required to fulfil that objective; and (iii) is irreplaceable with less restrictive measure that would accomplish the same result.[11]

Nevertheless, although cross border mergers and divisions are endorsed by TFEU, those operations face several obstacles in practical application. First and foremost, some of the Member States do not provide rules on how those processes shall be perused and secondly, laws of Member States diverse from state to state and as a result, rules are not uniform.[12]

2.2. Transfer of seat within European Union

The transfer of seat of corporation has never been an easy process – the ambiguity derives from the CJEU's rulings as there are many various interpretations of the Article 49.[13] In order to fully understand how both CJEU and EU legislators operate in terms of movement of companies, it is worth analyzing the way the host states react on the entrance of the corporation, as well as on the departure from their jurisdiction. At first glance, the analysis seems to be straightforward and the Member States shall mutually recognize each national company law. However, in practice this is not that smooth as there are two established theories, which refer to the applicable law, and they are called *incorporation* and *real seat* dogmas.[14]

As far as the former one is concerned, this doctrine states that the company is an entity which falls under the law of the state in which it was incorporated. This means, that issues such as

[6] Francisco Garcimartin and Enrique Gandia "Cross-Border Conversions in the EU: The EU Commission Proposal" in *European Company and Financial Law Review,* vol. 16, no. 1-2, 2019, p. 18-19
[7] Case C-106/16, *Polbud - Wykonawstwo sp. z o.o*. EU:C:2017:804.
[8] *Supra* at note 6
[9] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* EU:C:1979:42
[10] Garcimartin and Gandia (n6), p. 19
[11] *Id.*
[12] *Id.*
[13] Ovidiu Ioan Dumitru „The Transfer of Seat of Companies within European Union. The latest developments on cross-border conversions, mergers and divisions of companies" in *Proceedings of the International Conference on Business Excellence*, Vol.15, issue 1, 2021, < https://sciendo.com/de/article/10.2478/picbe-2021-0085>, accessed 22/06/2022, p. 917
[14] *Ibid*, p.919

legal personality, formation or functioning are regulated by the legal system of the state, that is the most connected to the corporation and the company declares it as a place of incorporation. It is commonly commented that such doctrine does create many issues or controversy as it provides straightforward criteria as far as applicable law is concerned. Countries who are in favour of incorporation doctrine are United Kingdom and Ireland, Nordic countries, Malta as well as some East European States, especially Balkan countries.[15]

As far as the latter one is concerned, the previously mentioned *real seat* doctrine involved more complication and controversy, particularly when the company is moving from the state where the incorporation theory applies, and the host state does not recognize the legal system of that company as its place of unification. The most significant example is Germany as it issued many judgements in relation to such legal issue. However, there are also other states who operate in favour of real seat doctrine and include Middle and West Europe, e.g. Austria or Portugal, as well Greece and Northern Eastern countries like Lithuania, Latvia and Estonia.[16]

The real seat doctrine creates some issues in relation to company migration from one Member State to different country. The reasoning behind it is the fact that if the company, which decides to move into a new jurisdiction, and in the same time to change its real seat as a result of existence of more connecting factors with that new jurisdiction, such corporation is forced to terminate its activity or even the existence, if it does not comply with current standards.

Another consequence of the real seat theory has a direct impact on the company's owners as it prohibits them from choosing the national legislation applicable for their business.[17]

Jurisdictions based on the incorporation theory are considered as too accessible to "law shopping," because they permit the company's owners to set the legislative framework depending on frequency of firm's operating environment changes. The real seat doctrine, on the other hand, precludes this potentiality, being depended more on public policy than the participants' wishes and aligning the enterprise with the system of justice with which it is most closely associated, but it may also raise concerns about recognizing a distinctive jurisdiction, — particularly now a day, when decision-making is increasingly moving online and operations are occurring in more states, necessitating the use of adjustable company activities.[18]

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[15] *Id*.
[16] *Id.*
[17] *Id.*
[18] *Id.*

The application of the real seat doctrine, regardless of how the linking factors are defined, restricts the ability of company owners and managers to operate freely within the Single European Market, but there has been a weird dynamic in the progression of court precedent in the field in regard to states' responses to provisions from the TFEU.[19]

2.3. Case Law

As far as interpretation of freedom of establishment is concerned, European Court of Justice (hereinafter: ECJ) has developed European company law with a particular focus on cross-border mobility of companies. *Sevic C-411/03*[20]*, Vale C-378/10*[21] and *Polbud C-106/1642*[22] are three excellent examples which, although provided more certainty in regards cross-border transformation, they illustrate that their decisions also result in legal uncertainty in requirements procedures and stakeholders' protection.[23]

2.3.1. Sevic C-411/03

A Sevic System AG ("Sevic") was a company registered in a Germany, while Security Vision Concept SA ("SVC") was a firm registered in Luxembourg. Both corporates agreed to merge, seeking Sevic to be the acquiring company and therefore dissolve SVC without liquidation.[24] However, the Amtsgericht Neuwied, which is a competent authority, on the ground of para 1(1) of the UmwG, which allows mergers solely among legal entities set up in Germany, clearly refused the registration of the operation in the German register of corporation. However, the language of the legislation is undoubtedly very confusing as it was unclear whether the provisions refer to the mergers between domestic and foreign corporations or does not regulate such mergers at all.[25] Therefore, it is worth emphasizing here, that this merger concerned a Germany company and a company incorporated under Luxembourg law.[26] As a result, Sevic decided to appeal that decision with the Landgericht (High Court) Koblenz, which concluded that the question shall be referred to the Court for a preliminary ruling, as it was

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[19] *Id.*
[20] Case C-411/03, *SEVIC Systems AG* [2005] ECR I-10805
[21] Case C-378/10 *Vale* EU:C:2012:440
[22] Case C-106/16, *Polbud - Wykonawstwo sp. z o.o*. EU:C:2017:804
[23] Antigoni Alexandropoulou, and Martin Winner "Creditor Protection and Divisions – Did the CJEU Get It Right?" in *European Company and Financial Law Review*, vol. 18, no. 4, 2021, pp. 603-604.
[24] Adriaan .F.M, Dorresteijn, Christoph Teichmann, Erik Werlauff, Tiago Monteiro, Nadia Pocher, *European Corporate Law* (3rd edn, Wolters Kluwer, 2017), p.76-77
[25] Peter Behrens 'Case C-411/03, SEVIC Systems AG, Judgment of the Grand Chamber of the Court of Justice of 13 December 2005, [2005] ECR I-10805', (2006)" in *Common Market Law Review*, vol. 43, Issue 6, pp. 1673
[26] British Institute of International and Comparative Law, *Sevic Systems AG (Case C-441/03),* <https://www.biicl.org/files/2109_c-441-03.pdf> accessed 23/06/2022

unclear and uncertain what a correct interpretation of the Articles 43 and 48 is.[27] As a result, certain questions were raised: first of all, can a cross-border merger be considered as established within the meaning of Article 43 of the Treaty establishing the European Community (hereinafter: EC)? If the answer is positive then the second question arises, meaning, can the error of German legislation, which does not allow for cross-borders mergers, be regarded as a "restriction" on the freedom of establishment. Finally, if the answer is positive as well, the third question would be whether it is possible to find any potential rationalization to justify such a restriction. The answers to those questions, have been developed by the judgement of the Court of Justice, opinion of the Advocate General and the observations made before the court.[28]

As far as the ruling of the ECJ in concerned, the court concluded that both Articles 43 and 48 EC are applicable to cross-border mergers. The ECJ emphasized the fact that "*cross-border mergers constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market*."[29] Furthermore, the Court found a distinction in the treatment of internal and cross-border mergers in terms of the existence of a constraint. However, such discriminatory treatment can only be permitted if specific conditions are met, such as pursuing a legal objective justified by critical and crucial reasons in the public interest, such as creditors', minority shareholders', and employees' interests, or fairness in commercial transactions. Moreover, it is also required that its application do not go any further than is required to attain that desired result.[30] As far as proportionality is concerned, both the Advocate General and the ECJ concluded that the German law on transformation, which prevented cross-border mergers, did not meet the proportionality test. German law on transformations shall include less restrictive measures, as the prohibition of the cross-border mergers was absolute and inevitable, irrespective of whether the public interest could be potentially threated and as a result required protection.[31]

The Sevic case demonstrates that Member States are not allowed to limit the possibility to internal mergers, obviously taking into the consideration the extent that they make them achievable, in such a way as to restrict cross-border mergers in most cases. Howbeit, the judgement in Sevic did not require the Member States to ratify laws regarding mergers which

[27] *id*
[28] Behrens (n25), pp. 1673-1674
[29] Case C-411/03, *SEVIC Systems AG*, Judgment of the Grand Chamber of the Court of Justice of 13 December 2005, [2005] ECR I-10805, para 19
[30] *Ibid*, para 23
[31] Behrens (n25), pp.1685-1686

would enable mergers to be concluded in the first place.[32] The First Company Law Directive (all companies with limited liability), Societas Europaea (hereinafter: SE) Regulation and the European Cooperative Society (hereinafter: SCE) Regulation do not apply to cross-border mergers.[33]

2.3.2. Vale C-378/10

The case of Vale concerns a limited liability company based in Italy, specializing in constructions, which sought transferring its business activities to Hungary. Vale decided to bring to an end its entire operation in Italy and transform into limited liability company based in Hungary, even though it had two other solutions: either open a new branch in Hungary or establish only an administrative seat in Hungary. The authorities of Italy successfully accepted the decision of Vale and therefore removed the corporation from Italian commercial record; however, Hungarian authorities declined Vale's application for the following reason: Hungarian legal system enables companies to convert, but this provision is applicable only to Hungarian companies and does not include cross-border conversions.[34] Hungarian Supreme Court had to eventually refer the case to CJEU for a preliminary ruling which reduced four questions, referring to Article 49 and 54 TFEU, to two questions: 1) whether the provisions impede the national regulation which - providing the possibility to convert in terms of domestic company law - does not provide the possibility to convert the company, formed within foreign jurisdiction, into the domestic company - through its new establishment and; 2) whether the hosting state shall be entitled to apply the provisions of its national law relating to internal conversions, and in particular, whether, in the case of a cross-border conversion, the host state may refuse to include in its register of companies the mention "legal predecessor", since such a reference is possible in the case of conversions internal? and also in the course of the proceedings on the registration of the corporation, is this state obliged to take into account the documents issued by the authorities of the company's Member State of origin, and if so, to what extent?[35]

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[32] *Ibid*, p. 1688
[33] Petri Mantysaari "The Law of Corporate Finance: General Principles and EU Law" (Volume III, Springer, 2009), p. 254
[34] Gibson Dunn "”European Court of Justice Permits Cross-Border Movements of National Companies into Other EU Member States by Way of Conversion of Company Form", 2012 <https://www.gibsondunn.com/european-court-of-justice-permits-cross-border-movement-of-national-companies-into-other-eu-member-states-by-way-of-conversion-of-company-form/> accessed 22/06/2-22
[35] Jacek Napierała „Przekształcenie Spółki Zagranicznej w Spółkę Krajową w Świetle Wyroku Trybunału Sprawiedliwości Unii Europejskiej w Sprawie Vale" in *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 75, issue 1, 2013, pp.5-6

The CJEU did not rule in favour of Hungary as it held that Hungarian law, by restricting cross-border conversions, operated in contrary to the Articles 49 and 54 TFEU. Therefore, the Court concluded that Hungarian legal system discriminates foreign companies and does not enable them to establish within Hungarian territory and as a result exercise the fundamental freedom of establishment. Certainly, taking into account previously mentioned *Sevic* case, in which the CJEU ruled that cross-border mergers shall be legal and admissible among EU countries, the Court emphasized that cross-border conversions face a bunch of legal obstacles, difficulties and uncertainties as two different national legal provisions are applicable. However, the CJEU indicated that this not a sufficient ground which shall restrain such operation and limit free movement disproportionally and highlighted that it would be satisfactory and adequate if Hungarian legal system provides companies with suitable procedural and substantive provisions. Those criteria shall ensure an adequate level of protection for consumers, employees and most importantly – creditors.[36]

2.3.3. Polbud C-106/1642

CJEU's jurisprudence in terms of company law has been definitely a very complex, wide, and unclear legal matter within European Union. Firstly, the Grand Chamber of the Court ruled in *Sevic* case, that freedom of establishment shall be applicable to the cross-border merger, whereas the Third Chamber of the Court in the case of *Vale*, applied the fundamental freedom to the cross-border conversions. As the Grand Chamber of the Court in the latter case was not entirely convinced, *Polbud* case allowed the Grand Chamber to elaborate current legal framework regarding cross-border conversions.[37] As a consequence, the ruling of the CJEU in *Polbud* case is definitely one of the most significant and landmark decisions in regard to freedom of establishment.[38]

The case concerns Polbud-Wykonawstwo sp. z.o.o. which is a private limited company, incorporated in Poland and admitted into the Polish Register of Entrepreneurs of the National Court Registry (hereinafter: ROE). The company sought to convert into *société à responsabilité limitée*, which is its Luxembourgish equivalent. Therefore, an extra ordinary meeting of

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[36] European Law Blog, "VALE: a never ending story on free movement of companies within the EU finally ended?", 2012 < https://europeanlawblog.eu/2012/07/19/vale-a-never-ending-story-on-free-movement-of-companies-within-the-eu-finally-ended/> accessed 22/06/2022

[37] Aleksandrs Fillers „Free Movement of Companies After *Polbud* Case" in *European Business Organization Law Review*, vol 21, 2020 < https://doi.org/10.1007/s40804-020-00178-9 > accessed 22/06/2022, pp. 573-574

[38] European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs "The Polbud judgment and the freedom of establishment for companies in the European Union: problems and perspectives", 2018 < https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608833/IPOL_STU(2018)608833_EN.pdf > accessed 22/06/2022, p.8

the company happened to take place in order to move the statutory office to the Luxembourg, under Luxembourgish law – moreover, there would be no extinguishment of legal personality and no creation of a new legal entity. The operation was declared to be legal in accordance with Polish law and as a result the corporation adopted a new name *Consoil Geotechnic S.à r.l.*, plus it was admitted into the Luxembourg Public Register.[39] However, the process of converting was not initially successful and Polbud had to face certain difficulties which Advocate General Kokott briefly and aptly presented as following: "[…] *a Polish private limited liability company wishes to assume the legal form of a company governed by Luxembourg law while at the same time retaining its legal identity. However, the removal of the company from the Polish commercial register, a condition of completion of the aforementioned endeavour, is precluded by the fact that, under the law of that Member State, removal from the commercial register is subject to the requirement that the company must first be liquidated and wound up*".[40]

Therefore, the Sąd Najwyższy (Supreme Court of Poland) decided to refer the case to the CJEU for the preliminary ruling and three question were sought to be answered: 1) whether the state of incorporation shall demand, the company which plans to be re-incorporated in foreign State, to be first liquidated and if the answer is negative; 2) whether the liquidation, with all the outcomes in accordance with polish legal system, was essential and proportionate to the interests of company's stakeholders: creditors, minority shareholders etc.; 3) shall the freedom of establishment be applicable if the corporation leaves head office in the domestic state and only transfer its registered office aboard? [41]

The CJEU in its judgment first answered the last question and ruled that as Polbud was a legal established company in Poland, it was therefore, entitled to exercise its freedom of establishment, in accordance with Article 49 and 54 TFEU. The court stated that, even though the company, which is moving its operation abroad and does not relocate its establishment, falls under the scope of Article 49 as that fundamental freedom is applicable to companies' cross-border reincorporation. As far as first and second questions are concerned, the obligation on conducting the process of liquidation, which is imposed by the polish legislation, definitely obstruct or even almost completely prevent companies to commence cross-border conversion of a corporation. This results in limitation on exercising establishment freedom. Mandatory

[39] Ariel Mucha "Case C-106/16, Polbud-Wykonawstwo: The Polish Supreme Court Requests the CJEU for a Preliminary Ruling on the Outbound Limited Company Seat Transfer", 2017, pp.8-9
[40] Opinion of Advocate General Kokott in case: 25 October 2017, C-106/16 Polbud, EU:C:2017:351, para. 2.
[41] Fillers (n37), p.574

general liquidation is not only undoubtedly beyond what is significant and required to safeguard interests of the creditors and members, but it also could be easily substituted with less limiting measures which would not operate in contrary to the Article 49 TFEU.[42]
The case of Polbud definitely helped to clarify the area of law which is the operation of cross-border conversions; However, as Directive 2017/1132 has been in force back then, it did not provide adequate level of harmonisation in terms of cross-border conversions. ECJ is a judiciary body and therefore it might neither establish procedures which would allow for enabling such conversions, nor draft essential conditions. In such scenario, Member States introduced their own rules on both cross-border conversions, as well as security of creditors, shareholders etc. However, one of the consequences of such individual approach by the state was legal uncertainty what might have resulted in unsuccessful or insufficient protection of stakeholders. In an event of transborder operation, laws of different Member States might have been incompatible, impossible to be combined or overlapping.[43]

2.3.3.1. Polbud and Creditors Protection

Company's creditors are mainly secured by the operation of two doctrines: capital requirements and capital maintenance; however, the provisions and rules differentiate across Member State and as a result, if the applicable *lex societatis* is changed, this directly influences creditors protection. Therefore, the Court emphasized that in case of transferring registered/administrative office by company, there is a greater need for protection of company's creditors and thus, further restriction shall be imposed. Nevertheless, in accordance with Advocate General, the only interests which shall be relevant are those referring to company's current creditors – those who already exist when the company enters into contract with another company. As noted by the Advocate General, in their opinion regarding *Polbud* case, potential future creditors will be notified that, following the cross-border conversion, company's business will not be further subject to the Polish law. As far as current creditors are concerned, if they are able to prove that their claims are strongly related to the conversion and their experienced detriment of their interests as the effect of cross-border conversions, they shall be provided with appropriate, further safeguards – for instance bank guarantees or other equivalent protection.[44]

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[42] European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs (n38), p.12
[43] Proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions COM (2018) 241,<http://wko.at/ooe/Branchen/Industrie/Zusendungen/RL_Umwandlung,Verschmelzung,Spaltung.pdf> accessed 22/06/2022, p.3
[44] European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs (n38), pp. 19-20

Furthermore, it is also worth mentioning here the case of *Inspire Art*[45], in which the CJEU held that potential creditors were appropriately noticed that the corporation has become governed by different legal provisions than current Dutch ones in regard to forming limited lability company in Netherlands – in particular rules regarding directors' duties and minimum capital requirements. In addition, the Court emphasized that the creditors can also rely on provisions in Directives Fourth and Eleventh which may provide further safeguards in terms of their interests.[46]

In conclusion, although cross-border transformation may be a threat to the interests of the creditors, they can still rely on insolvency provisions and a bunch of secondary legislation. As *Inspire Art* case emphasized, disclosure of obligation constitutes an adequate protection for future creditors and they will be provided with relevant information regarding changing the governing law; and as *Polbud* case showed, even if the governing law is changed, current creditors can still be protected by additional adequate safeguards in order to make sure that their existing rights are granted.[47]

2.3.4. Conclusion

All of the cases mentioned above: *Sevic, Vale* and *Polbud* have attempted to clarify the legal framework regarding freedom of establishment, in the last thirty years.[48] As far as the former case is concerned, *Sevic's* judgments established that if there is a lack of uniformity of a company's transborder operation, this is not a prohibition for the company, more specifically its freedom, to conduct the business activity using a variety of means across EU Member States.[49] Furthermore, the Court in *Vale,* unprecedently *and* clearly acknowledged the company's freedom to pursue a cross-border operation, as well as unequivocally determined that such conversion falls within the fundamental treaty freedoms.[50] The last introduced case, *Polbud*, could be viewed as a step forward. The case sheds further light on the current situation of establishment freedom, even if it does so while also appearing to counter some previous rulings.[51] Moreover, in regard to creditors' protection, the decision in *Polbud* emphasized that,

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[45] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd,* E-CLI:EU:C:2003:512
[46] European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs (n38), p. 20
[47] *Id.*
[48] 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" in *European Company and Financial Law Review*, vol 15, issue 2, 2018, p. 271
[49] *Ibid*, p. 288
[50] *Ibid*, p. 281
[51] Fillers (n37), p. 589

even if the governing law is modified, creditors can still be granted additional suitable protections of their interests, ensuring that their current rights are guaranteed.[52]

3. CHAPTER II: CREDITORS'S PROTECTION UNDER DIRECTIVE (EU) 2017/1132

3.1. Cross Border Mergers & Divisions: Theory and Scope

In accordance with Article 86(b)(2) of the Directive 2019/2121, cross border conversion 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*".[53] Additionally, "[company] *transfers at least its registered office to the destination Member State, while retaining its legal personality*".[54]
This definition includes two key essential features: first of all, corporation does not lose its legal personality during cross-border transformation what results in change of *lex societatis*. Secondly, cross-border conversion takes place when a company relocates its registered office, what is required by the national law of Member State B, in order for the incorporation to take place. [55] Hence, as Recital 2[56] introduces, only transfer is required, and relocation of the real seat is not demanded anymore in accordance with the law of Member State B.[57]
As far as the merger is concerned, the definition can be found in Article 119(2) of the Directive 2017/1132 which states that it is an operation whereby either "whereby: (a) *one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares* "; or (b) "*two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company*

[52] European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs (n38), p. 20
[53] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions OJ L 32 (Directive (EU) 2019/2121) Article 86(b)(2)
[54] *Id*.
[55] Garcimartin and Gandia (n6), p. 21
[56] Directive (EU) 2019/2121, recital 2
[57] Garcimartin and Gandia (n6), p. 21

that they form, the new company" in exchange with the same condition set in para(a); or finally (c) "*a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital*."[58] Meanwhile, the definition of the division is introduced in the new Directive 2019/2121 in the Article 160b(4) which distinguishes three types of division: full division (para a), partial division (para b) and division by separation (para c). the former one is an operation whereby "*a company being divided, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more recipient companies in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of those securities or shares*". Furthermore, partial division is a procedure during which "*a company being divided transfers part of its assets and liabilities to one or more recipient companies*" with the same conditions stated in para (a), whereas division by separation is an operation whereby "*a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the company being divided of securities or shares in the recipient companies*"[59]

3.2. General Overview of the Directive

Directive 2017/1132[60] concerns various aspects of company law and refers to the limited liability corporations. The significance of this Directive lays in its scope as it codifies a bundle of prior European Union directives. Likewise, it harmonizes areas of law which include: information regarding companies in the business register that shall be disclosed, matters regarding capital maintenance, as well as divisions, mergers and cross-border mergers of companies. [61]

Directive 2019/1132 has been applicable since 20 July 2017. There was no deadline imposed on EU Member States by which the Directive shall be implemented as it brought together existing legislation and codified it.[62]

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[58] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) OJ L 169 (Directive (EU) 2017/1132) Article 119(2)
[59] Directive (EU) 2019/2121, Article 160(b)(4)
[60] Directive (EU) 2017/1132
[61] Parlementaire Monitor "Directive 2017/1132 – Aspects of company law" < https://www.parlementairemonitor.nl/9353000/1/j4nvk6yhcbpeywk_j9tvgajcor7dxyk_j9vvij5epmj1ey0/vkfqait8jqy6> accessed 22/06/2022
[62] *Id.*

3.2.1. Minimum Harmonisation

In accordance with European Company Law Experts' approach, Directive 2017/1132 imposes minimum harmonisation[63], what means that there are only minimum standards demanded. It is a consequence of already existing higher and stronger standards within the legislations of EU Member States.[64] Recitals 20[65] and 21[66] of the Presidency Compromise proposal for a Directive amending Directive 2017/1132 clearly present that approach in terms of protection of shareholders and members, however makes it vaguer for creditors protection[67]. In accordance with Recital 26[68], there is a factor that successfully complicates cross border mergers and therefore following the approach of full harmonisation, that complexity would be simplified. That factor is the variation of rules of creditors' protection across EU Member States. Certainly, Member States are still allowed to impose additional safeguards or measures which would provide protection, however they have to obey provisions relating to the freedom of establishment. [69] The rules are affirmed in previously mentioned Article 49 TFEU[70] and *Gebhard*[71] case.

Taking the above-mentioned facts into consideration, minimum harmonisation enables to maintain only reasonable and balanced level of protection which in practice refrains Member States to provide additional safeguards. As practical experience presents, EU countries are not keen on modifying or abolishing an already existing well-established procedure or arrangement. Hence, there is a need for full harmonisation which enables to efficiently and successfully coordinate cross-border mergers and divisions.[72]

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[63] European Company Law Experts (ECLE), "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment", in *European Company and Financial Law Review*, vol.16, issue 1-2

[64] EUR-Lex "European Union directives" <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=URISERV%3Al14527> accessed 22/06/2022

[65] 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 2018/0114 (COD), recital 20

[66] *Ibid*, recital 21

[67] Martin Winner „Protection of Creditors and Minority Shareholders in Cross-border Transactions" in European Company and Financial Review, vol.16, issue 1-2, 2019, p.47

[68] 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 2018/0114 (COD), recital 26

[69] Winner (n67), p. 47

[70] TFEU Article 49

[71] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165

[72] Winner (n67), p.48

3.3. Creditors Protection

Having discussed the general overview, as well as minimum harmonisation provided by the Directive, it shall now be discussed how EU legislator decided to handle the situation with creditors, meaning, to what extent their interests are protected by the Directive 2017/1132.
In conformity with Article 121 Directive 2017/1132[73], which deals with cross-border mergers, Member States are provided with a fair share of freedom in relation to key aspects of creditors' protection. Each Member State is allowed to introduce its own method of protection of creditors in case the mergers take place within the country, however, requirements set in Article 99[74], shall be met. [75] The Article 99 states that Member States are obliged to provide creditors an adequate level of protection of their interests.[76] However, as far as cross-border merger is concerned, the case gets more complicated as there are different Member States involved - which have non-identical national provisions and measures. That diversity can refer to, for instance, the system of creditors' protection itself or time frame which establishes when that protection shall apply (*ex ante* / *ex post* concept). As a result, those kinds of inconsistency unable to properly coordinate system of protection of creditors within various legal systems. [77]

3.3.1. Threats to creditors protection

There are three main central consequences of cross-border companies' mobility that might have negative impact on creditors.
First and foremost, the most obvious perils to creditors is either merger, conversion or division being an unsuccessful and worthless business project. The indisputable result would be a drastically reduced worth of the transaction. The risk is, in the normal course of event, carried by the company's members; albeit a badly planned transaction might negatively affect interests of the creditors. It would certainly be the case, if the losses exhausted equity.[78]
Secondly, another central issue which threatens the protection of creditors as an outcome of cross-border or domestic merger is possible changing of asset center and the configuration of the creditors involved. This issue does not directly impact cross-border mergers for the reasons that those transactions do not change neither of the corporation's wealth nor creditors. However, this matter is still significant and applicable for mergers and divisions. As far as

[73] Directive (EU) 2017/1132, Article 121
[74] *Ibid*, Article 99
[75] Winner (n67), pp. 48-49
[76] *Supra at note* 74
[77] Winner (n67), p.48
[78] *Ibid*, p.50

mergers are concerned, typically in such transaction, the assets will grow, but in case if there is a merge where one corporation is substantially over-indebted, asset base may also drastically diminish. Before the merger, both creditors, of company to be acquired, as well as those which company acquires, dealt with separate unconnected batch of assets, which after the transaction become one unit of assets. As discussed, merging of companies, which are sound entities usually improves the company's situation and increasing of asset base seem to be strongly in favour to company's creditors. On the other hand, in most scenarios, merging the asset bases will be profitable to the creditors of one of the corporations but have negative impact to the other group and result in loss of assets. For instance, if a corporation with a conservative approach merges with leveraged one, creditors of the former one might be confronted with their risk being raised as a result of the transaction and left with no corresponding increase in return. Furthermore, in case of divisions, although the asset batch reduces, the quantity of creditors does as well. Similarly, to the merger transactions, in order to examine whether this is a plus, it shall be taken into account both proportion between assets and debts, as well as situation of the company in relation to their liquidity. Whilst it might be seemed that mergers and divisions face the same core issue, there are no specific legal restraint provided for divisions and as a result, promoters of such a transaction are allowed to distribute resources and liabilities without restrictions.[79]

The third point refers directly to the cross-border transactions as they undoubtedly impose further risks on creditors.[80] One the one hand, as *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group* confirms, that the company which is subject to cross-border merger "*remains subject [...] to the provisions and formalities of the national law which would be applicable in the case of a national merger*.[81] However, on the other hand, as far as obligations and liabilities of the company to be acquired are concerned, they are transferred to an acquiring company, meaning a new debtor, whose governing law diverse. Equivalently, the applicable legal system shifts for creditors in case of mergers, and similarly in divisions for those whose interests are now relocated within a company in other jurisdiction. It is therefore worth mentioning that it is possible that new governing law does not need to be as friendly to the creditors as the former one, for example by imposing more strict rules on distribution.[82]

[79] *Ibid*, pp. 50-51
[80] *Ibid*,, p.51
[81] Case C-483/14 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group,* ECLI:EU:C:2016:205, para. 60–62.
[82] Winner (n67), pp.51-52

3.3.2. Improvements to the Directive 2017/1132

It has now been discussed, what measures the Directive implemented in order to provide certain level of protection to the creditors. However, there were also presented three potential threats that may have negative impact on their interests. Therefore, in order to minimize their loss, as well as enhance and improve cross-border operations, the following sections present the improvements to the Directive regarding to cross-border mergers, divisions and conversions.

3.3.2.1. Cross-Border Mergers

The number of cross-border transactions increases every year what helps to identify possible areas and provisions of the Directive 2017/1132 that shall be improved.[83]

To start with, as mentioned above, Article 121(2) provides Member State a discretion to imply provisions regarding creditors' protection through its national legal instruments. Undoubtedly, that results in uncertainty in successful conducting of cross-border merger. Grey areas might include differences in corporations' credit risks, legal provisions as a result of dissimilar governing law or the definition of creditor itself. The practice shows that EU Member States have very distinctive approach to the creditors protection. A useful example would be establishing the date which initiates their security. Some States choose the date that is preliminary to the shareholder meeting, and the other decide to set the date after the meeting takes place. Moreover, time framework of such protection, as well as the procedure itself varies in different countries, what results in confusion and problems during merging process. Amending the Directive 2017/1132 in order to provide a common approach to the creditor protection would definitely impose more certainty in this regard and simplify the process. Amended legal instrument, can clarify who is perceived as a company's creditor, what procedures shall the creditor follow in order to guarantee themselves a protection, timeframe within which particular course of action shall be taken and finally remedies accessible to the creditor.[84]

Deeping into details, the first question which shall be answered is who should be perceived as creditor. Initially simple question gets more complex when the draft of merger terms includes accounts out of date. That draft has to declare the date of the accounts belonging to the merger companies which are necessary to set up the conditions of the cross-border transaction. Therefore, if those accounts are no longer valid, and corporation will still incur obligations, there is

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[83] Vanessa Knapp „Cross border mobility: what do we need in practice?" in ERA Forum, vol. 19, 2018 <https://doi.org/10.1007/s12027-018-0495-6> accessed 22/06/2022, p.65

[84] Knapp (n83), p.65

an urge to set the date the earliest when protection system is invoked. It is also worth mentioning about future or contingent creditors. The former ones appear when the debt is to be paid after the system of creditor protection has been launched. The latter ones are relevant, for instance, when the case has been brought against corporation, meaning the proceedings have been initiated, however there has been no hearing in front of the court yet. Both kinds of creditors shall be offered an adequate level of protection.[85]

Second issue that shall be clarified is time framework of initiating creditor protection mechanism. In order to simplify the process of merging, both companies and shareholders, who are responsible for approving the mergers, shall be provided with information of when the period allowing to invoke creditors security can be invoked. As far as creditor interest protection is concerned, that period should not be initiated before the draft of merger contract is issued. This is certainly dependent on the domestic legislation of Member States as every law regulates the application of protection and time frames in accordance with its own provisions. Although in many states, that probably results in a delay in the process of merging, but also might provide creditors a certainty regards their position during the merger.[86]

Lastly, it is worth clarifying scenarios which establish when creditor is not detriment as a result of proposed merger. That would certainly provide them more protection as companies will be granted certainty, that if the criteria are met, creditors will not be entitled to receive further protection. The conditions shall meet requirements of "reasonable test": is the creditor reasonably expected to be harmed by the merger? There are two alternative approaches: on the one hand, independent specialist expected shall be elected who would examine whether there is a high probability that the creditor will be prejudiced as a result of the proposed merger. However, on the other hand, the second approach would concern the creditor's claim: whether the one brought after the merger would be equivalently valuable as the original one. Furthermore, as far as claims are concerned, creditors shall be allowed to make a claim within the jurisdictions that was applicable before the merger as well. Thus, the value of the claim definitely should not be lower than the one brought before the merger. To conclude, companies taking part in a merger should be provided with a free will whether they want to follow one of the above approaches or both of them combined.[87]

[85] *Ibid*, p. 66
[86] *Id*.
[87] *Id*.

3.3.2.2. Cross-Border Divisions

Some studies suggest that cross-border divisions and merger are just "mirror image" processes and therefore, the former ones shall be governed by the reflected rules as those established for cross-border mergers. Notwithstanding, there are several differences between those processes and for that reason, cross-border divisions shall be provided with further extended provisions which would improve the process and most importantly, guarantee a balance between interests and needs of company and its creditors.[88]

The first issue which shall be considered is already existing creditor protection during public limited liability divisions introduced in Articles 135-160 of the Directive 2017/1132.[89]

In accordance with Article 146, Member States are required to '*provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication'*.[90] Paragraph (2) emphasizes the importance of creditor protection. It clarifies that in the circumstances, when financial situations of both companies participating in a process of division, make the protection of creditor essential and creditor did not receive such security beforehand, Member States are obliged to provide creditor right to acquire sufficient protection.[91] However, if the above scenario is not satisfied and as a result creditor does not receive satisfaction, para (3) of the Directive states that the recipient company has to be jointly and severally responsible, therefore liable for that duty. However, Member States are allowed to not apply para (3) if two condition are satisfied: 1) process of division is subject to judicial control in accordance with Article 157 and; 2) the majority of creditors, representing ¾ of creditors' value or any category of creditors' value of corporation that is divided agreed to rescind the liability at the meeting convened in accordance with Article 157(1)(c).[92]

Nonetheless, there is alternative approach possible which, if adopted, would disregard the conditions mentioned above. Member States can provide the company, which is a recipient one, to be liable for responsibilities and duties of the company that is being divided. As a result, if such approach would be adopted, creditors would be provided with substantial safeguarding. The above approaches might require directors, of the company that is being divid-

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[88] Knapp (n83), p.69
[89] Directive (EU) 2017/1132, Articles 135-160
[90] Directive (EU) 2017/1132, Article 146(1)
[91] *Ibid*, Article 146(2)
[92] *Ibid*, 146(3)

ing, to issue a declaration. Such document would confirm that they are not aware of any reasons, which would have an impact on both companies participating in division, regarding meeting their liabilities when they become due.[93]

Furthermore, one of the obstacles in the process of division lays in the draft of the division terms. There might be committed a failure of the corporation's liability to be allocated. A possible solution to that problem can be setting out provisions which explain how the unknown liabilities shall be allocated. Unknown liabilities are those that are not present at the date when the terms are drafted, for instance, they arise as a consequence of compensations or random events appears afterwards. Therefore, if the company, on which the obligation is transferred, was jointly and severally liable for the liabilities that are yet unidentified, and the obligations were restricted to the net assets assigned to them, creditors would be offer a reasonable protection.[94]

3.3.2.3. Cross Border Conversions

As far as cross-border conversions are concerned, the first and main concern that has been raised is feasible avoidance of responsibilities regards creditors by a company when they convert to a different EU Member State. That concern would be possible to be overcome if the same solution, as it was the case in cross-border divisions, would be applied. It means that directors of the company, that aims in conducting a conversion, would be expected to issue a similar declaration. Similarly, to cross-border division, that document shall be issued after conducting answering important enquiries and made before or on the date the conversion provisions are made available to the public.[95]

Second concern regarding cross-border conversions refers to future and contingent creditors as it is in the case of cross-border mergers. In order to guarantee them adequate level of protection, original Member State, and more specifically its courts or other authorities, shall allow creditors to seek safeguards from them if they can prove that their interests might be prejudiced by the process of converting. Furthermore, a fixed time frame shall be introduced, within which the claim can be brought, as more certainty would benefit both, creditors and the corporation. Moreover, likewise the process of cross-border mergers and divisions, for the sake of company's protection, it shall be obvious that creditor will not be perceived aggrieved

[93] Knapp (n83), p. 70
[94] *Id.*
[95] Knapp (n83), pp. 74-75

if one of the two scenarios is fulfilled. One of them refers to the independent expert will confirm that no rational likeliness, that the creditor would be prejudiced occurred. Whereas the second one requires creditor to be provided with a possibility to issue a claim with comparable value which can be proceed in the same jurisdiction, in which the initial claim was brought. However, the latter scenario would result in additional costs and obstacles as the creditor would not be obliged to initiate proceeding in another Member State.[96]

3.4. CJEU'S Decision on Creditor Protection and Divisions

3.4.1. Preliminary Remarks

The following chapter focuses on the *I.G.I v Cicenia* case[97], in which the court examined impact of divisions on creditors under Italian jurisdiction. As already discussed above, process of division can be a bullet into creditor interests.**[98]** Although Article 146 Directive provides provisions regarding divisions, which aims to protect the company's creditors, it also supplies with minimum level of such security and as a result Member States are provided with leeway of how to introduce those provisions into national legislation. Moreover, the rules provided by the Directive can operate in contrary to the other principles of the Directive. [99] One of the examples is Article 153 which refers to the conditions for nullity of a division[100], and states that divisions and mergers can only be revoked in a very limited case. The judgement of the *I.G.I v Cicenia* case, for the first time in history, examined and clarified all of the above matters.[101]

3.4.2. The CJEU's I.G.I. Decision

Parties of the case of *IGI v Cicenia* are, on one hand, limited liability company based in Italy – called I.G.I. Srl and on the other hand, Maria Grazia Cicenia and others.[102] The former party is a company created, in order for building corporation called Cosruzioni Ing. G Iandolo Srl, to hand over some parts of assets to I.G.I and therefore to conduct the process of a division by establishing the new company.[103] Creditors decided to bring actions against those two Italian companies for the following reason: the division had a negative impact on the company's assets as a big part of them was lost and moreover, the corporation is now in possession of only

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[96] *Id.*
[97] Case C-394/18, *I.G.I. Srl v Maria Grazia Cicenia et al.*, ECLI:EU: C.2020:56
[98] Alexandropoulou, and Winner (n23), p. 589
[99] Directive (EU) 2017/1132, Article 146
[100] *Ibid,* Article 153
[101] Alexandropoulou, and Winner (n23), p.589
[102] Nicola de Luca „European Company Law" (Cambridge University Press, 2nd edn, 2021), p.508
[103] Alexandropoulou, and Winner (n23), p.592

low-value land plots. Generally speaking, creditors sought *actio pauliana* – to declare the assets, that had been passed on as a result of division, to have legal effects in relation to companies' creditors. Furthermore, they claimed that joint and several liability should be imposed on both corporations in regards the debts of the one that is being split.[104]

Although the first instance court allowed the claim, companies decided to bring an appeal. They argued that first of all, in accordance with both EU and Italian law, creditors of company, taking part in a division process, are entitled to sole judicial remedy and secondly, that under Italian insolvency law, declaring the division to be invalid after it is s formally published, is impossible. The Court of Appeal decided to refer the case to CJEU and requested preliminary ruling.[105] Nevertheless, as past showed and CJEU agreed in *IGI v Cicenia* as well, if the company did not transfer all of its assets, the Directive shall not cover such cases. Besides, it is worth mentioning that this case deals with private limited company and not public one which is not covered by the Article 135 and Annex I of the Directive 2017/1132. Nonetheless, the CJEU stated that if national law, which adopted Directive provisions, refers to internal cases and if those legal provisions shall be applicable in both types of cases, the CJEU has a jurisdiction to address those instances.[106] Preliminary ruling inquiry concerns two following issues:[107]

1) <u>Interpretation of Article 146 Directive 2017/1132 (former Article 12 Directive 82/891/EEC)</u>

   Article 146 has already been elaborated above and refers to the satisfactory level of protection that shall be guaranteed, by Member States, to creditors of corporation which participates in the process of division. The question, concerning the Article 146, is whether it is possible for creditors of the company that is being divided ("*whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article*"[108]) to bring "*an actio pauliana after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the recipient company.*"[109]

[104] de Luca (n102), p.508
[105] *Id.*
[106] Alexandropoulou, and Winner (n23), p. 594
[107] *Ibid*, p. 595
[108] Case C-394/18, *I.G.I. Srl v Maria Grazia Cicenia et al.*, ECLI:EU: C.2020:56, para 61
[109] *Id.*

The response of the CJEU allows creditors to bring *actio pauliana* what the three following arguments justify: (1) as wording of Article 146(2) implies, the Directive provides creditors protection to very limited extent and therefore, Member States are welcome to introduce further safeguards, as well those allowing for activities such *actio pauliana*; (2) it is not mentioned anywhere that creditors shall first exhaust all possibilities included in national legislation with the aim of implementing Article 146 before reaching for generic remedies and; (3) the purpose of the Article 146 is to protect not the creditors of taking over company but those of the company that is being divided. In accordance with CJEU, it means that if the latter one is given the priority in regards the assets the former one obtained during division, that principle does not operate in contrary to the provisions of the Directive.[110]

2) Interpretation of Article 153 Directive 2017/1132 (former Article 19 Directive 82/891/EEC)

Article 153 refers to the conditions for nullity of a division. The most crucial requirement is stated in para (1)(b) which states that division can be perceived void if "*there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law*".[111] Moreover, it is also worth mentioning paragraphs (1)(g)-(h) as they specify that any obligations, which are contracted by the company on which the obligations are being transferable, continue to be persuasive even if the division is nullified and moreover, those corporations remain being accountable for these obligation.[112]

At first sight, it is obvious that *actio pauliana* does not comply with the principles in Article 153, but nevertheless, CJEU decided to approach the concept of nullity more specifically, meaning it distinguished absolute and relative nullity. Indeed, the court demonstrates that nullity, in accordance with Article 153, concerns conducts which disqualify the act with aftermath *erga omnes*. As a result, CJEU ruled that *actio pauliana*, does not fall under the scope of Article 153, for two following reasons: this remedy has no impact on the process of division itself and does not imply *erga omnes* effect; The provision rather

[110] Alexandropoulou, and Winner (n23), p. 595
[111] Directive (EU) 2017/1132, Article 153(1)(b)
[112] Alexandropoulou, and Winner (n23), p. 596

affirms that transferring of assets during division does not result in having an effect on applicants, for instance, various creditors.[113]

The next two sections critically assess the judgement of the CJEU as the ruling definitely brought into question two issues. First and foremost, whether the verdict is actually correct and secondly, whether it shall be possible under national law, for creditors to be permitted to bring an *actio pauliana* even when the division has already been executed.[114]

3.4.3. Critical Evaluation

As already mentioned above, CJEU established that Member States are welcome to add provisions into national legislation which would provide creditors with more protection, in comparison with those provisions already included in paragraphs 2-7 of the Article 146. The reason behind it is that the satisfactory system for protection of creditors should "at least" cover the obligation set in para (2). Therefore, as far as divisions are concerned, it shall be concluded that, CJEU actually allows Member States to bring *actio pauliana*. The question which arises is whether this is a right interpretation of the law. Although Article 146(2) implements two ways for creditors protection – ought Member States to impose further rules *ex post*? Assuming that CJEU's judgement was reasonable, it is unclear why paragraph (7) clearly states that combining those approaches is permitted? Hence, one could think that as concept of liability during divisions is determined, two ways which are introduced in Article 146 provide with full harmonisation. Therefore, in contrary to CJEU, one can assume that the phrase "at least" refers instead to, for instance, that Member States can impose supplementary measures which would have *ex antie* effect. The practice shows that the way of thinking of some Member States follows that approach and an excellent example is Austria. Austrian legal system distinguishes particularly dangerous divisions from the creditors perspective which will not be filed in court-kept record. Therefore, it is imposed *ex officio* by the registering authority in the process of registration (however, individual creditors are not provided with remedies as a result of those proceedings). The first paragraph of this section concludes that CJEU might be wrong in its judgement. The reasoning behind that criticism is as following: *action pauliana* shall not be perceived as *ex ante* security as the assets are demanded to be already transferred, for example, the division has already been in force. On the other hand, *ex post* protection is very well harmonized in scope of the Directive and therefore, such protection including e.g.

[113] *Id.*
[114] *Id.*

actio pauliana, is not available as the Directive excludes imposing supplementary or different measures.[115]

As far as Article 153, on the nullity of a division, is concerned, studies showed that there are two reasons which confirms that CJEU should have ruled otherwise. [116] First of all, the Article 151(1) of the Directive 2017/1132 shall be examined which refers to the consequences of a division. Paragraph (1)(a) states that "*A division shall have the following consequences ipso jure and simultaneously: (a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided*".[117] Undoubtedly, the consequence of *actio pauliana* is not revocation of a division, what was also the case in *I.G.I v Cicenia*; however, it might result in deprivation of assets that are received in the process of the division, what definitely detriments the company, which the obligation are being transferable on. Hence, the consequences of the division remain not possible to be enforceable in regard to the new creditors ("third parties"). What does it mean in practice? This aftermath causes that Article 151(1) is strongly problematic to the extent that it corresponds the nullity. Therefore, that operates against the aim of Article 153 when read together with Article 151 – to provide legal assurance that the operation shall not be questioned once it is concluded.[118]

In conclusion, neither the substance nor the reasoning of the CJEU does convince and satisfy. Its statement towards *actio pauliana* properly declares that "*the effects of such an action must not run counter to the purpose of that provision*." However, the Judiciary's concern is solely Article 146, which's position on it is wrong and moreover, its approach to Article 153 is not thorough enough. As a consequence, CJEU is taking the side of creditors of the company that is being divided and protects them at the cost of new creditors of a corporation on which the obligations are transferred. This is the outcome of the *actio pauliana* when new creditors' interest depends on the assets that are contained in balance sheet. This operation is an effect that Article 153 was constructed to avoid.[119]

After all, CJEU shall have taken into consideration the Advocate General's approach which emphasized that bringing an *action pauliana* is still possible for companies' creditors, under

[115] Alexandropoulou, and Winner (n23), p. 598
[116] *Ibid*, p. 600
[117] Directive (EU) 2017/1132, Article 151(1)
[118] Alexandropoulou, and Winner (n23), pp.600-601
[119] *Ibid*, p. 601

Article 146 but only if such an activity does not have a detriment impact on the other creditors' protection referred to in that provision, what shall be examined and determined by the referring court. Regrettably, CJEU decided to ignore that last part in its judgement.[120]

3.4.4. The Implications for National Legislators and Judiciary

An answer to the second raised concern – to what extent CJEU's decision shall have an impact on national legislation – seem to be pretty clear. CJEU in its *I.G.I v Cicenia* judgement confirmed that creditors shall have a right to bring an *actio pauliana* even when the division is already operating. Obvious consequence is that Member States (both legislators and courts) will have to make a decision whether in their opinion creditors shall be granted such a right or not. The following paragraphs illustrate advantages and disadvantages regarding introducing *actio pauliana* right to the national legislation.

First of all, introducing the right to *actio pauliana* during divisions would cause legal uncertainty and creditors would be tempted secure advantageous treatment and therefore bring abusive claims. That approach obviously operates in contrary with the goals and objectives of the Directive. Moreover, new creditors shall not face a danger that creditors of the company, that is being divided, would apply *actio pauliana*, and as a result decrease the asset base which would be accessible to those new creditors. It is also worth mentioning that Directive 2017/1132 already provides creditors with *ex ante* remedies (Article 146) and therefore, allowing them to access additional right – to challenge the transaction – could be disproportionate and unreasonable. However, an argument which favours *actio pauliana* is that the debtor company's creditors, whose pleas are being brought after the conditions of the draft terms are disclosed and are not included in the category of protected creditors in accordance with Article 146, could still bring *actio pauliana*. [121]

Secondly, *actio pauliana* could be available to the creditors if Member States, in addition to their general demands allowing to bring the claim (for instance damages), can prove that new information, which might rationalize such action, have become apparent after the operation was completed. Examples of such information can include financial statements which have been falsified or draft terms that contain dishonest facts regarding economic position of the corporation. Thereby EU Member Countries would impose supplementary methods, which would protect creditors against fraudulent operation, but nevertheless, they shall prioritize *ex*

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[120] *Id.*

[121] Alexandropoulou, and Winner (n23), p. 602

ante protection. On the other hand, this approach does not seem to be convincing as new creditors of the corporation being divided would suffer consequences, even though it would not be their fault. Therefore, one could think that the national legislator shall take more restrictive actions and not allow for *actio pauliana* or other similar remedies.[122]

3.4.5. Conclusion

The CJEU's judgements focuses on application of the Articles 146 and 153 and clarifies that Member States are not forbidden to impose additional safeguards into national legislation. An example would be *actio pauliana* which shall be allowed for creditors who brought claim before the draft terms of the division had been published.[123]

Despite the fact, that Directive 2017/1132 sets a minimum level of harmonisation regarding *ex ante* proactive measures for Member States, in terms of *ex post*, those provisions shall be perceived as full harmonisation ones. This approach allows, on one hand to protect creditors, and on the other one to guarantee legal certainty and provide security of the interests of all stakeholders as soon as the process of division is concluded. This mechanism is put in danger if both national legislators and courts permit activating *ex post* protection, for instance *actio pauliana*. That result in disrupting the balance between the all involved stakeholders' interests.[124]

This CJEU's ruling in *I.G.I v Cicenia* could be transferred into the new Directive 2019/2121, and the next chapter clarifies whether this approach has been actually followed in practice or disregarded.

4. CHAPTER III: DIRECTIVE 2019/2121

4.1. The Directive

4.1.1. Preliminary remarks

As already mentioned in the previous chapters, in the past 15 years, the ECJ did elaborate the issue of cross-border mobility referring to the Article 49 TFEU. The decisions in *Vale* case clearly questioned whether the freedom of establishment shall be applied in situations where

[122] *Ibid*, p.602-603
[123] *Ibid*, p. 606-607
[124] Ibid, p. 607

the actual economic activity is pursued by virtue of a fixed formation in the host Member State. On the other hand, the Court in the *Polbud* case adopted a wider approach and ruled that an economic link with the host EU State is not required, and therefore if a company converts into a corporation with legal system of another Member State – that conversion is protected under Article 49 TFEU even in situations when the real seat of the company does not transfer. Whether the ECJ did correctly read and apply the law remains a sticking point what emphasizes the importance of the matter. [125]

The need for the new Directive 2019/2121 has been introduced by the EU Commission in April 2018. The initial proposal consisted of numerous and diverse issues connected with cross-border mobility. The main goal of the Directive 2019/2121 is therefore to establish specific framework regarding transborder conversions and divisions, as well as make adjustment in terms of cross-border mergers.[126] Generally speaking, the Directive primarily focuses on rights of merging companies' associates, employees and most importantly creditors. Moreover, it emphasizes the significance of cross-border communication which shall be created by the Member Countries, in order for trade registry and other important documents, which shall be passed on to interested parties, to be easier accessible – also without the presence of the party.[127]

4.1.2. Overview

All the provisions introduced in the Directive 2019/2121 refer to a certain extent to the freedom of establishment. As already mentioned above, such right derives from Article 49 TFEU, as well as from ECJ case law which delivered several judgements on interpretation of this provision. The former source guarantees companies the freedom of establishments and consequently, if there is any limitation to that freedom, such restriction shall be depended on the proportionality test.[128] Such test has been already mentioned and elaborated above as *Gebhard* test and it is reasonable to assume that such proportionality should be also applicable to EU lawmakers. Therefore, the Directive 2019/2121 somehow supplements the role of the ECJ as a "negative legislator". Although cross-border conversions are legal and allowed as a consequence of TFEU provisions, the fact that there is lack of rules which govern such procedures in some EU States and, what is more important, some laws of Member States strongly differ,

[125] European Company Law Experts (ECLE) (n63), p. 198
[126] *Ibid*, p. 197
[127] Roxana Chirieac. "The future of cross border mergers in the light of the new European Union provisions. Their implementation in Romania" in *Tribuna Juridică*, vol.10, issue 2, 2020, p.4
[128] Garcimartin and Gandia (n6), pp. 18-19

there are several substantial barriers to smooth operation of such conversions realistically.[129] As a result, it is worth emphasizing that cross-border operations, due to their nature, demand establishing common rules and processes, which might simplify such conversions across the European Union. Thus, taking all into account, the importance of the Directive 2019/2121 lies in its objectives, which shall now be presented.

4.1.3. Objectives

First and foremost, the Directive's general objectives are: on the one hand to allow and facilitate the use of freedom of establishment by the companies; moreover, at the same time to provide an adequate level of protection to the creditors that was not present before. Creditors of the company bare certain risk on their shoulders which is linked to cross-border operations as their claims are strongly touched by such processes. The reasons behind it is the fact that legislation of various Member States may vary, for example pertaining to redemption or settlement of claims, what is elaborated in recital 22. Moreover, the second reason of why their rights can be affected are changes of creditors and distribution of assets after the cross-border operation. In practice this means that there is a possibility that the operation is an unfortunate bad business decision. Additionally, the fact that the company's seat has changed can cause a switch of jurisdiction and insolvency law, that shall be applied in case of company, which goes insolvent.[130]

4.2. Main provisions

The Directive 2019/2121 introduced new Articles which amended the Directive 2017/1132. The aims of the following sections of the Thesis are to, first of all, present and assess new general rules of the Directive, whereas the second part focuses on and evaluates newly brought in provisions regarding creditor protection.

4.2.1. General Rules

4.2.1.1. Publication of draft terms – Articles 86(g), 123(1), 160(g)(1)

One of the key provisions implemented in the Directive 2019/2121 is 'Disclosure' – introduced in Article 86(g)[131] for converting companies, Article 123[132] for merging companies and

[129] *Ibid*, p. 19
[130] European Company Law Experts (ECLE) (n63), p. 199
[131] Directive (EU) 2019/2121, Article 86(g)
[132] *Ibid*, Article 123

Article 160(g)[133] for companies that are being divided. Taking cross-border conversions as an example, Article 86(g)(1) states that there are two such documents which shall be disclosed and available: (a) the draft terms of the cross-border operation; and (b) a notice which objective is to inform members, creditor and relevant employees of the company that they have a right to submit their comments and concerns regarding the draft terms. However, such claim shall be made, five working days before the general meeting, the latest.[134] In accordance to the provision, such corporations are obliged to, first of all, disclose and secondly, make available to the public the draft terms and a notice. The latter one indicates that at least one month previous to the date of the general meeting referred to in Article 86h, the company must be allowed entry in the register of the Member State from which it is moving away from.[135]
The Directive 2019/2121 definitely simplified the process of publishing in the register – it is now possible that representatives of the company do not need to show up physically before the registrar and therefore the publication can be completed entirely online. The legislative organs in MS can introduce the provision that such documents may be released on the company's website which is easily accessible to the public. However, in accordance with Articles 86(g)(2), 123(2) and 160g(2), the publication shall be in place for perpetual – starting at least one month before the general meeting is to be scheduled and ending not before the meeting is actually concluded. The fact that such documents are allowed to be published online certainly has a beneficial effect as the process of publication is easier and moreover, free of charge. On the other hand, such solution does not grant adequate safeguards to the third parties, as it would be the case if the documents are published in the register. Hence, according to the Articles 86(g)(3), 123(3) and 160(g), the Directive 2019/2121 states that in such circumstances, the company is obliged to submit additional, relevant information, at least one full month before the general assembly meeting, to the adequate register of the Member State.[136]
To conclude, introducing compulsory publication of draft terms definitely provides a certain level of security for the members and creditors. It enables them to get familiar and evaluate the terms of the conversion, merger or division before the general meeting takes please, as well the impact of the operation on their rights and if necessary take appropriate action to secure their position.[137]

[133] *Ibid*, Article 160(g)
[134] *Ibid*, Article 86(g)(1)
[135] Antigoni Alexandropoulou "Protection of members and creditors after the Mobility Directive: challenges in the implementation" in *ERA Forum*, vol.22, 2021, p. 11
[136] *Id*.
[137] *Id*.

4.2.1.2. Pre-operation certificate – Articles 86(m), 127 and 160(m)

The Articles 86(m)[138], 127[139] and 160(m)[140] of the Directive 2019/2121 introduced another new provision – pre-operation certificate. They state that there needs to be a pre-conversion, pre-merger or pre-division certificate which are necessary to be obtained if we want to proceed with the operation. The Directive lists number of other documents which shall be included in the application to obtain a pre-operation certificate – taking mergers as an example they are as following: draft terms of the cross-border merger, the report and opinion in accordance with Article 124, any comments related to the Article 123(1), as well as confirmation of approval by the general meeting what is stated in Article 126.[141]

What exactly is pre-operation certificate? Simply speaking it is a document which confirms and proofs the compliance with the legal conditions of home Member State, together with the policy governed by the MS via courts, notaries, financial, tax authorities and other various legal entities.[142] The mentioned authorities are obliged to verify and guarantee that the procedure of conversion, merger or division is performed with compliance of the legal system of Member State and most importantly, there are is not thread of undisclosed fraud, abuse or crime. As a result, not only the public interest in protected, but especially the shareholders and creditors are. The competent authorities are provided with indicative list of elements that shall be taken into account during assessment of the lawfulness of cross-border operation. It can be assumed that The Directive 2019/2121 introduces a little bit different approach than e.g. Article 54 TFEU, as it more focuses, not on the statutory seat of a corporation, but rather on its real seat. The Directive guides the state entities to assume the lawfulness of cross-border activities if the real and statutory seats are the same, suggesting therefore that if they are not, this might rise suspicious for the contrary.[143]

4.2.1.3. Applicable law – Articles 86(c), 121 and 160(c)(1)

The applicable law in regard to proceeding and overall formalities, in case of cross-border operations, can bring confusion and ambiguity. In order to provide a certain level of clarification and consistency, the Directive contains Articles 86(c)[144], 121[145] and 160(c)(1).[146]

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[138] Directive (EU) 2019/2121, Article 86(m)
[139] *Ibid*, Article 127
[140] *Ibid*, Article 160(m)
[141] *Ibid*, Article 127(2)
[142] Dumitru (n13), p. 11
[143] Alexandropoulou (n135), p. 12
[144] Directive (EU) 2019/2121, Article 86(c)
[145] *Ibid*, Article 121
[146] *Ibid*, 160(c)(1)

Taking division as an example, as far as obtaining of pre-division certificate is concerned, the law which shall govern that part of the operation is the law of the departure Member State. Conversely, the parts acquired after obtaining the pre-operation certificate will be regulated by the legislation of the recipient companies' Member States.[147]

Generally speaking, the above-mentioned articles introduce the universal principle which shall be applied in conflict of laws – the applicable law is the national law of the company. Therefore, the same scenario shall apply to conflicts of laws which refer to shareholders' and creditors' prerogatives which are derived from the company law.[148]

4.2.1.4. Summary

To conclude, Directive 2019/2121 amends Directive 2017/1132 in relation to certificates confirming the admissibility of operations, introducing digital tools and processes to ensure online application procedures and the transmission of all information and documents. Furthermore, a new idea of cross-border transformation is introduced by the Directive. Cross-border transformation is an operation in which a corporation converts its legal form from the initial state to the legal structure of the hosting country to which it seeks to transfer (i.e. the destination Member State) as well as shifts at least the corporate headquarters to the target hosting country whilst still keeping its legal identity.[149]

The next section of the Thesis puts focus on creditors protection as the Directive also aims to introduce stronger protection for creditors and minority shareholders and significantly simplify all cross-border operations.[150]

4.2.2. Rules regarding creditors' protection

As already mentioned above, in situations when company's seat is transferred, correspondingly *lex societatis* is also altered, what can eventually affect the creditors of the company's interests. The laws of Member States may vary in terms of capital requirements, administration or members' liability. Hence, through Articles 86(j), 126(b) and 160(j), the Directive 2019/2121 introduced several safeguards which aim to protect creditors, as well as unable to

[147] *Id.*
[148] Alexandropoulou (n135), p. 12
[149] Russell Bedford "Dyrektywa 2019/2121, czyli nowa droga do transgranicznej mobilności spółek państw członkowskich UE", 2020 <http://www.russellbedford.pl/aktualnosci/zmiany-w-prawie/item/1678-dyrektywa-2019-2121-czyli-nowa-droga-do-transgranicznej-mobilnosci-spolek-panstw-czlonkowskich-ue.html> accessed 22/06/2022
[150] *Id.*

use a cross-border operation as a hidden tool which benefits shareholders and detriment shareholders.[151]

However, it is worth mentioning the scope of the Directive – in accordance with recital 9, it does not apply to scenarios whre the companies already started distributing of assets. Moreover, the Member States are provided with power to choose companies which they want to exclude, if they are bound by other insolvency, liquidation proceedings, as well crisis precaution procedures.[152]

4.2.2.1. Adequate Safeguards – Articles 86(j)(1), 126(b)(1), 160(j)(1)

In accordance with Articles 86(j)(1) for conversions[153], 126(b)(1) for mergers[154] and 160(j)(1) for divisions[155], of the Directive 2019/2121, Member States are required to supply creditors with an "adequate system of protection" for their interests. This is especially relevant for those creditors whose claims are dated before the draft terms are released and are not yet due payable at the time of the publishing. Ultimately the decision regarding entering the cross-border operation does not lay in creditors' hands but, it is fully on the members' side. Creditors who develop a relationship with the corporation after such a revelation of draft terms, are given an opportunity to assess the proposed conditions and evaluate to what extent their interests can be affected by such cross-border activity, so no parallel security is required.[156]

Moreover, taking transborder conversion as an example, the Article 86(j)(1) states, that if the creditors are not satisfied with the level of protection which is included in the draft terms of such operation, Member States shall guarantee that creditors have three months, after disclosure of the draft terms, to request the relevant administrative or judicial entity for other appropriate and sufficient safeguards.[157] Each individual creditor is allowed to raise such claim and such protective measures can contain, for instance, a guarantee or a pledge to satisfy their claim before the operation is completed. However, it is worth mentioning that such a safeguard can only be grant by the authority if the creditor is able to proof that the restitution of their interest is at risk, and moreover, the they are not provided with appropriate security measures by the company. In accordance with the recital 23 of the Directive, the competent

[151] Schmidt (n3), pp. 32-33
[152] Alexandropoulou (n135), p.11
[153] Directive (EU) 2019/2121, Article 86(j)(1)
[154] *Ibid*, Article 126(b)(1)
[155] *Ibid*, Article 160(j)(1)
[156] Alexandropoulou (n135), p. 17
[157] Directive (EU) 2019/2121, Article 86(j)(1)

authority or court would have to evaluate their claim's value prior and following the cross-border operation, credit nature, and applicable jurisdiction. The Directive enables Member State to introduce the provision which states, that if the company refuses to implement appropriate safeguards to its creditors, the whole operation is at risk of blocking.[158]

4.2.2.1.1. Challenges in implementation

First of all, in contrary to the Directive 2017/1132, the Directive 2019/2121 does not directly introduce any specific provision regulating the rights of holders of debentures or securities with special rights, and the former one does through Articles 100 and 101, 146(5) and 147.[159] In accordance with Article 100 of the Directive 2017/1132 debenture holders of the merging companies shall be supplied with same level or protection as the creditors.[160] As far as Article 101 is concerned, "*Holders of securities, other than shares, to which special rights are attached shall be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired*[…]".[161] The consequence of such omissions means that there is certain ambiguity whether such creditors' rights shall fall under the umbrella of all creditors and are consequently entitled to general protection or whether the provisions of national legislation apply to them.[162] Therefore, it is worth mentioning the case of *KA Finanz AG*[163], as it refers to a cross-border merger operation, regulated by the Directive 2005/54/EC. The court ruled that if a corporation is a part of a cross-border merger, in terms of creditor protection, it shall be subject to national legislation, as it was a domestic merger.[164] Accordingly, it can be assumed that, as far as debenture and security holders of public limited liability companies participating in cross-border mergers are concerned, they shall be given the same level of security, provided in Articles 100 and 101. Moving on the cross-border division it might be presumed that CJEU's reasoning can also apply.[165]

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[158] Alexandropoulou (n135), p. 17
[159] *Id*.
[160] Directive (EU) 2017/1132, Article 100
[161] *Ibid*, Article 101
[162] Alexandropoulou (n135), p. 17
[163] Case C-483/14 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group,* E-CLI:EU:C:2016:205
[164] Ibid, para. 60
[165] Alexandropoulou (n135), p. 18

Secondly, continuing the topic of divisions - the Directive 2017/1132 introduced a special provision regarding the assets of the corporation, which during the process of division, are being divided and therefore the liability is lifted to another company.[166] In accordance with Article 146(3), if the draft terms are not completely satisfied by a creditor of the company, on which the obligation are relocated to, liability for such obligation lies within the recipient company.[167] However, it is worth emphasizing the size of such liability as it will be capped to the worth of their designated net assets when the operation come into force. This solution seems to be fair towards the creditors as they do not have the power to control the division of assets and liabilities to the recipient company and hence, they are not able to evaluate whether such distribution is justified in relation to their protection.[168]

Lastly, in terms of implementation, the national legislators should consider whether they want to introduce provisions regarding *actio pauliana* for the security of creditors.[169] This issue has been previously considered in *"I.G.I" case*[170] and it referred to Italian, national divisions under the 6th Directive.[171] The Court allowed creditors of the corporation, which was in a process of division, to claim an *actio pauliana* after the operation was concluded, even if they did not demand additional safeguards. The ruling was as following: The article 12 of the 6th Directive provides for a minimum harmonisation and therefore, Member States can implement additional protection for creditors. Moreover, the Article 19, which contains the term "nullity", shall be read in a strict way and hence, does not rule out *actio pauliana*, which executes the national division ineffectual in comparison with the creditors who have already successfully requested such a measure.[172]

4.2.2.2. Solvency declaration – Articles 86(j)(2), 126(b)(2), 160(j)(3)

The EU legislators decided to introduce another mechanism, aiming in protecting the creditors' interest, via provision called solvency declaration. Conversions are regulated via Article 86(j)(2)[173], mergers through Article 126(b)(2)[174] and divisions in Article 160(j)(3)[175]. Taking

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[166] *Id.*
[167] Directive (EU) 2017/1132 (n58), Article 146(3)
[168] Alexandropoulou (n135), p. 18
[169] *Ibid*, p. 19
[170] Case C-394/18, *I.G.I. Srl v Maria Grazia Cicenia et al.*, ECLI:EU: C.2020:56
[171] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies OJ L 378
[172] Alexandropoulou (n135), pp. 18-19
[173] Directive (EU) 2019/2121, Article 86(j)(2)
[174] *Ibid*, Article 126(b)(2)
[175] *Ibid*, Article 160(j)(3)

mergers as an example, in accordance with Article 126(b)(2), Member States have a possibility to request the adequate administrative or management body of the corporation to issue a specific declaration, which contains the information regarding financial status of such company, at a date no later than one month before the disclosure of such document.[176] A declaration shall be signed by previously mentioned administrative or management body and the content of it shall be as following: in accordance with the current available information, and in addition to submitted reasonable enquiries, the body is uninformed about any liabilities that a company would be unable to fulfill after the cross-border mergers is effective. Furthermore, the declaration and the draft terms of cross-border operation shall be issued jointly. Lastly, it should be acknowledged that, the legal provisions which would govern above-mentioned administrative or management body's accountability for the validity of such declaration, shall be regulated by the departing country's national legislation.[177]

4.2.2.2.1. Challenges in implementation

Moving on into implementation of Articles 86(j)(2)[178], 126(b)(2)[179] and 160(j)(3)[180], if the EU Member States aims in introducing those provisions into their national legal system, the direct impacted parties would be administrative or managements bodies. Without doubts, they would be more careful and hesitant before signing the declaration and as a result, continue with the cross-border conversion, merger or division.[181]

Lastly, the implementation of the above-mentioned provisions might result in affecting the economic aspect of the operation. Management might seek to provide themselves certain level of security against any claim which can result from the solvency declaration. Therefore, in order prevent any "inconvenience", special legal and financial consultants might be involved as well as directors and officer's insurance policies. This might cause a high increase of costs for their services.[182]

4.2.2.3. Jurisdiction – 86(j)(3)(4), 126(b)(3) 160(j)(4)

The last relevant provisions, in relation to the creditors' protection, are introduced by the Direction and refer to the issue of jurisdiction. The provisions are regulated through Articles

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[176] *Ibid*, Article 126(b)(2)
[177] Alexandropoulou (n135), p. 19
[178] Directive (EU) 2019/2121, Article 86(j)(2)
[179] *Ibid*, Article 126(b)(2)
[180] *Ibid*, Article 160(j)(3)
[181] Alexandropoulou (n135), p. 19
[182] *Id.*

86(j)(3)(4) for conversions[183], 126(b)(3) for mergers[184] and 160(j)(4) for divisions[185]. In order to evaluate the issue of applicable law, the focus should be on the cross-border conversions as the Directive introduced special rules – the creditors of the company, which decides for cross-border conversion, are allowed to take action on their claims in the departure Member State as well, but no later than two years passed since the conversion comes into effect. What impact has this provision on protecting the creditor interest? It enables them to initiate the proceedings within the same jurisdiction after the cross-border conversion takes effect and therefore, the fact that the operation is cross-border, it does not force them to change jurisdiction. If this provision did not exist, it would impact rough going and increased costs for creditors. However, it is worth emphasizing that such provision refers only to the creditors whose claim is made within certain period of time (two years).[186]

Furthermore, as previously mentioned above, the Article 86(j)(4) allows creditors to exercise their right to institute the proceedings "*in addition to other rules on the choice of jurisdiction that are applicable pursuant to Union law*".[187] In practice, this means that such choice will have no impact on jurisdiction rules derived from EU or national law, as well as from any agreement, what is confirmed in recital 24 of the Directive. [188] Hence, in relation to the private international law, this shall be an alternative solution, only in circumstances, in which the jurisdiction does not apply in light of EU Regulation No 1215/2012.[189]

In the case of cross-border mergers and divisions, the Directive 2019/2121 does not allow for such options. The only comment in Articles 126(b)(3) and 160(j)(4) is that the paragraphs 1 and 2 of those Articles are without limitation to the application of the legal provisions of the MS participating in either merger or divisions, which refer to the satisfaction or securing the monetary or non-monetary liabilities vested in public entities.[190]

4.2.2.4. Summary

As explained above, the Directive 2019/2121 introduced three main provisions which aim in guarantee creditors – the fair level of their protection. They are as following: adequate safeguards, solvency declaration and jurisdiction.

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[183] Directive (EU) 2019/2121, Article 86(j)(3)(4)
[184] *Ibid*, Article 126(b)(3)
[185] *Ibid*, Article 160(j)(4)
[186] Alexandropoulou (n135), pp. 19-20
[187] Directive (EU) 2019/2121, Article 86(j)(4)
[188] Alexandropoulou (n135), p.20
[189] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351
[190] Directive (EU) 2019/2121, Articles 126(b)(3) and 160(j)(4)

The situation of creditors of corporations participating in cross borders activities, will be reinforced as a result of the Mobility Directive, primarily because the period for challenging a deal will be prolonged from one to three months. Given the complexities of these operations, by comparing the debtor's financial situation before and after the deal, creditors must have capability of evaluating the documentation, made accessible at the company's premises, along with their credit fulfillment likelihood. Nonetheless, EU Member States' legislative bodies will soon have to decide whether to give creditors more rights or to make the transborder operation process easier, particularly if the leadership entities' duty is to prepare an accurate declaration describing the corporations' present economic positions.[191]

4.3. Implementation within EU Member States

The Directive 2019/2121 has been initially signed on 27 November 2019 and officially published in official Journal on the 12 December 2019.[192] In accordance with Article 5 of the Directive, the legislation shall enter into force after 20 days from the date of publication.[193] Furthermore, as far as transposition is concerned, Article 3 paragraph 1 states, that Member States are obliged to implement legislation by 31 January 2023 and subsequently notify the Commission about that compliance.[194] Simultaneously, as soon as Member States adopt the provisions of the Directive, they shall reveal the content of main measures of national legislation, to the EU Commission.[195]

Nevertheless, having closer look in the status of implementation in the European countries, not all of them have actually commenced the proceedings. Some of them are stacked in the middle of public debates, some initiated the thesis elaboration but most of them are still debating on the Directive itself for the sake of issuing a proposal. Therefore, before analyzing the implementation of the Directive in Poland and Germany in more details, it is worth mentioning a few European Countries and their difficulties in transposition of the Directive into national law. The reason behind is the fact that the national company law has a very complicated structure as it contains legislation, codes as well as other specific established practices regarding cross-border operations. The first good example would be Ireland which already has legal

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[191] Teresa Madeira Afonso „Cross-border mergers and EU Directive 2019/2121: the protection of creditors and noteholders" <https://www.ibanet.org/cross-border-mergers-and-eu-Directive-2019-2121-the-protection-of-creditors-and-noteholders> accessed 22/06/2022

[192] EU Monitor "Directive 2019/2121 - Amendment of Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions" <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vl4e8neramzk> accessed 22/06/2022

[193] Directive (EU) 2019/2121, Article 5

[194] *Ibid*, Article 3(1)

[195] *Ibid*, Article 3(2)

provisions regarding mergers and divisions as part of Companies Act 2014 and 157/2008 Regulation. Therefore, the proposal issued by Ireland would need to amend both documents. Secondly, similar situation is taking place in Spain as well, as they need to re-adjust the national law no. 3/2009 as it already provides us with cross-border mergers. Moreover, implementing the Directive 2019/2121 would also cause adjusting Organic Law of Judicial Power in terms of determining the judicial power. Lastly, it is worth mentioning Romania, in which Ministry of Justice has a responsibility of amending law of companies (31/1990) but not later than September 2022 if they aim in adopting the Directive in Romanian Parliament, on time.[196]

4.3.1. Poland – *de lege ferenda* remarks

As far as implementation of the Directive into Polish legal system is concerned, it could be postulated that the Polish legislator shall follow the previous approach, that has been used in the case of Directive 2005/56/WE, regarding the implementation. Poland added the provisions of the Directive into already existing Code of Commercial Companies. This solution is definitely beneficial because otherwise, there is a potential danger in fragmentation and disarranging Polish company law.[197]

There are two possible ways, which if undertaken, would successfully implement Directive into national law without having negative impact on the uniformity of company law: either Polish legislator can add provisions regarding cross-border operations next to its national equivalent or can insert all the provisions related to cross-border operation to a new chapter, called e.g. "*Cross-border reorganization of a corporation and a limited partnership*". It seems more transparent to adopt the former solution due to the fact, that national legislator, in the case of cross-border operations, has adopted the solution of referring to the regulations concerning domestic operations of companies. Therefore, although the EU legislator aims in providing legal harmonisation across Europe, some provisions adopted for cross-border operations are identical with the regulations established by the Polish legislator in Commercial Companies Code.[198]

[196] Dumitru (n13), p.926

[197] Krzysztof Opustil and Ariel Mucha "Transgraniczne Reorganizacje Spółek w Świetle Unijnej Dyrektywy 2019/2121" in Transformacje Prawa Prywatnego, vol.3, 2020 <http://www.transformacje.pl/wp-content/uploads/2020/09/TPP-3-2020-Oplustil-Mucha.pdf, > accessed 22/06/2022, p. 179

[198] Monika Łuc „Ochrona wierzycieli i wspólników mniejszościowych przy transgranicznym łączeniu się spółek kapitałowych – implementacja przepisów dyrektywy 2019/2121 do polskiego porządku prawnego" in Prawo Mediów Elektronicznych vol.3, 2021 <https://www.repozytorium.uni.wroc.pl/dlibra/publication/142786/edition/132273/content> accessed 22/06/2022, p.16

Lastly, it is worth evaluating challenges, that Polish legislator can face whilst implementing provisions of the Directive. The biggest obstacles are definitely the draft provisions which goals would be, first of all, to protect shareholders and creditors of the company, that participates in cross-border operation, and secondly, to standardize the proceedings before the judiciary authority, in order to verify the actions taken by the company, and to issue a certificate of legality.[199] To what extent Poland will manage to smoothly implement the Directive and overcome the challenges shall be discovered in third quarter of 2022.[200]

4.3.2. Germany

Germany has recently published the BMJ (General Federal Ministry of Justice) draft bill which aims in implementing the Directive 2019/2121. Quite obviously, it introduces a legal framework, aiming in unifying the law within European Union but also includes some changes in terms of domestic operations. The experts say that BMJ draft should not surprise us, however, the upcoming legislative process can still bring some changes. There are few main points which are particularly significant and will be added to the German Transformation Act (Umwandlungsgesetz – UmwG). First of all, minority shareholder rights will be unified for both cross-border and national conversion initiatives. In the event of a merger, the different treatment of minority shareholders of the transferring and acquiring firms under the German UmwG laws must be abolished. Secondly, stock corporations will have the option of paying for necessary adjustments to the value ratios of companies participating in an operation through the issue of extra shares rather than cash-based compensation. Lastly, what is particularly relevant for creditors, their legal protection will be increased in conjunction with restructuring processes and structured efficiently. This will be accomplished, among other things, by preventing the reorganization measure from being registered if creditors allege that their claims have not been appropriately collateralized. Stakeholders have to, until May 6, 2022, provide comments on the draft before it is sent to the parliament. Given that the implementation deadline is set to expire on January 31, 2023, the legislative process is expected to move quickly from then on.[201]

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[199] Opustil and Mucha (n197), p. 180

[200] GOV.pl "Projekt ustawy o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw" <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-spolek-handlowych-oraz-niektorych-innych-ustaw3> accessed 22/06/2022

[201] Deloitte „Draft bill for the implementation of the EU-Mobility Directive published" <https://www2.deloitte.com/dl/en/pages/legal/articles/umsetzung-eu-umwandlungsrichtlinie.html> accessed 22/06/2022

4.4. Criticism of the Directive

The biggest and most significant criticism arising from the Directive 2019/2121 refers to the Articles 86(m)(8)(9)[202], 127(8)(9)[203] and 160(m)(8)(9)[204]. The provisions grant the authority, which shall verify the compliance of a cross-border operation with national legislation for the purpose of issuing the certificate of legality, the competence to verify that the cross-border operation does not serve "*the purpose of committing any abuse or fraud leading, or intended to lead, to the evasion or circumvention of Union or national law or to any other criminal purpose*".[205] The new anti-abuse standards for cross-border transactions need to be scrutinized. In fact, the appropriate national standards for their implementation may expose reorganized enterprises to additional risks and transaction costs.[206]

On the one hand, those rules may not be very effective because national control authorities (registration courts or, in some countries, notaries) may lack the resources and expertise (even if independent expertise is available) required for a thorough examination of the EU legislator's "indicative benchmarks" and the detection of actual abuse by companies aided by law firms.[207]

On the other hand, contrary to the ECJ's case law, there is a risk that audit authorities in member states will adopt a kind of presumption of abuse and require the company to demonstrate that its operation serves legitimate business purposes and does not lead to the establishment of a "artificial structure," which may necessitate the company presenting (expensive) expert opinions in order to prove the "non-fraudulent" and real ("non-artificial") structure. It shall be emphasized that that situations of misuse and fraud that occur "accidentally" during cross-border transactions can be more effectively combated by employing sector restrictions, particularly those that are purely legal and fiscal in character. At the same time, it's possible that the addition of the above-mentioned elements to the company law directive served as a legal and political price for some states and political circles agreeing to a broad harmonisation of the legal framework for cross-border company restructuring.[208]

[202] Directive (EU) 2019/2121, Article 86(m)(8)(9)
[203] *Ibid*, Article 127(8)(9)
[204] *Ibid*, Article 160(m)(8)(9)
[205] Opustil and Mucha (n197), p. 173
[206] Opustil and Mucha (n197), p.178
[207] *Id.*
[208] *Id.*

4.5. Summary

The new harmonized cross-border operations framework for cross-border business is a substantial improvement from the previous regime. The former framework was based on national legislation and therefore, the legal variety was unavoidable. In terms of cross-border operations harmonization, although the Directive 2019/2121 ought to be further developed and potential modifications shall be introduced in the future, the Directive seems to be a positive milestone in regard to overall cross-border operations. Introducing these new, unified laws, aiming in better protection of creditors, demonstrate the European Union major efforts to achieve the correct balance between adequate protection of creditors, as well as the simplification of cross-border operations. All in all, the fact that the measures safeguarding an interest of the creditors in transborder operations is now harmonized, definitely makes EU legislative framework for cross-border activities more complete and solid.[209]

5. EPILOG: IMPACT OF BREXIT ON CROSS-BORDER OPERATIONS

The United Kingdom has been a member of the European Union, previously referred as European Economic Community, since the British Prime Minister, Edward Heath, signed the Treaty of Rome on January, 22 1972.[210] The Kingdom of Queen Elisabeth maintained the position of a strong economic country within the Union, until January, 31 2020, when they officially exited the EU. The Withdrawal Agreement's transition phase expired on December 31, 2020. The EU Treaties, EU open borders rights and general EU law norms will no longer be relevant for the British legal system. EU laws only continue to be enforceable under UK domestic law to the extent, that they are not modified or repealed by regulations made pursuant to the European Union (Withdrawal) Act 2018.[211]

The complete and detailed post-Brexit Trade and Collaboration Agreement, between EU and the United Kingdom, has been reached and consequently took effect on January 1, 2021.[212]

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[209] Thomas Papadopoulos „Protection of shareholders in cross-border mergers: the new harmonized rules" in *European Company and Financial Law Review*, vol. 18, issue 6, 2021, pp. 1009-1010

[210] Herbert Smith Freehills "Cross-Border Insolvencies in the UK and EU – A Post-Brexit Guide" <https://www.herbertsmithfreehills.com/insight/cross-border-insolvencies-in-the-uk-and-eu—-a-post-brexit-guide> accessed 22/06/2022

[211] Bird & Bird "Brexit: Corporate Law Implications", 2021 <https://www.twobirds.com/en/insights/2016/uk/brexit-english-corporate-law-and-transaction-implications> accessed 22/06/2022

[212] Id.

Therefore, as far as British and European cooperation is concerned, it is worth elaborating the impact, that Brexit has on cross-border corporate transactions and operations.

5.1. Current Cross-Border Corporate Mobility

5.1.1. Incorporating a new EU form of corporation and transferring UK's assets and activities

Newco is a company that is incorporated in the EU, which the existing assets and businesses are transferred from the UK to. This process is still available after Brexit and this is significant, as *Newco* would enjoy benefits as it remains an EU based corporation. This means, that it will retain all of the EU privileges that the existing business possess, as well as remain bounded to the EU legislation and rules. However, there are still some disadvantages of such process as moving the operation and assets from the United Kingdom to *Newco* might be long and money consuming. The examples are issues relating to the workers, obtainment of new facilities and disposition/transfer of existing facilities or contracts, licenses, and permits (or the acquisition of new ones), as well as relevant consents and permissions (including regulatory). Furthermore, if any of *Newco's* business operations or personnel are to remain geographically in the UK, an evaluation of whether the actual seat standards have been met would be required.[213]

5.1.2. Mergers

As far as cross-border mergers are concerned, the Companies (Cross-Border Mergers) Regulation 2007, which established a legal regime, allowing a British corporation to enter into merge operation with a corporation based in another EU country, will not be applicable after Brexit.[214] Companies, Limited Liability Partnerships and Partnerships (Amendments etc.) (EU Exit) Regulations 2019 forbid a UK company to merge with a company based in the European Union.[215]

5.1.3. Conversions

As far as conversions are concerned, there are two types of such operations which shall be evaluated: conversion to SE and cross-border conversion.

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[213] Eversheds Sutherland „Navigating Brexit Our EU cross-border reorganizations guide" <https://www.eversheds-sutherland.com/documents/services/corporate/EU-cross-border%20reorganisations-guide-FEB-2020.pdf,> accessed 22/06/2022, p. 4

[214] *Ibid*, p. 5

[215] The Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019, no. 348

As far as the former one is concerned, according to Council Regulation (EC) No 2157/2001[216] and the European Public Limited Liability Company Regulations 2004 (as modified)[217], a SE is a European public limited company ("PLC") that can be established and registered in any European Union Member State. The decisions, whether a SE can remain registered in the UK as European PLC, was evaluated in already mentioned European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018. At the end of the transition period, the documents will convert any SE registered in the UK to a United Kingdom Societas - a new variant of corporate structure formed under the Regulation.[218]

On the other hand, as far as the latter one is concerned, the questions remain whether an SE's registered office can be moved to any other EU Member State and whether companies with headquarters in more than one-member country can merge and function as a SE under a single legal and managerial structure. The answer to both points is negative, meaning, such conversions will not be available after Brexit.[219]

5.2. Recent Developments

In October 2021, the United Kingdom has started a public consultation on the creation of a UK re-domiciliation framework for businesses. The new bill would allow a foreign-incorporated corporation to shift its corporate headquarters to the United Kingdom without losing its legal identity in the process. In contrast, the British government is considering permitting a UK firm to re-domicile abroad under specific conditions. These new policy efforts aim to replace the current ban on both inbound and outbound movements of a UK business's registered office with a much more open framework for cross-border company movement. Moreover, the UK appears to be pursuing the same purpose as, previously elaborated, Directive 2019/2121, which the United Kingdom refused to apply before Brexit was finalized.[220]

One the one hand, such new policy, enabling cross-border operations, would definitely provide certain level of alignment with other Members of Commonwealth such as Australia, New

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[216] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)

[217] The European Public Limited-Liability Company Regulations 2004, no. 2326

[218] Eversheds Sutherland „Navigating Brexit Our EU cross-border reorganizations guide" <https://www.eversheds-sutherland.com/documents/services/corporate/EU-cross-border%20reorganisations-guide-FEB-2020.pdf,> accessed 22/06/2022*,* p. 6

[219] *Ibid*, p. 7

[220] Floris Mertens "United Kingdom considers the introduction of cross-border corporate mobility: testing the waters for a free choice of foreign company law after incorporation?" <https://www.law.ox.ac.uk/business-law-blog/blog/2021/12/united-kingdom-considers-introduction-cross-border-corporate-mobility> accessed 22/06/2022

Zealand or Canada. On the other hand, this would also have an impact on UK-EU relationship. Without doubts, the fundamental purpose of the discussion paper is to allow companies, with a registered office outside of the UK (prior immigration), to choose English company law. In the event of inward re-domiciliation, the immigrating corporation would, simultaneously, be subject to the same corporate governance codes and regulation just like every other UK incorporated company. In accordance with the public consultation, the consequence would result in 'greater investor protections'. Here, it is also worth emphasizing an important thought of UK: it would be enough for the company to only transfer its registered office to the Kingdom, and maintain its economic clout abroad, if they want to select an English law as applicable one. The incoming companies would still need to follow various legal requirements; however, this idea seems to be an appealing offshore solution for EU businesses.[221]
Nevertheless, one the other hand, it is uncertain if the same level of liberty will be provided in the scenario of a cross-border outbound transfer. It remains unclear whether a British company, which transfer its registered seat to another country, while keeping its economic activity or headquarter within the United Kingdom, could seek the law of the host country to govern such company. If the answer was positive, by 'officially' shifting their registered office abroad, the UK might open itself up for being able to choose, other- more suitable and softer, corporate systems.[222]
To conclude, although the initiative of corporate mobility by the United Kingdom seems to be very uncertain and so far, quite unclear, the willingness of the UK authorities to open up its company system abroad is an appreciated and positive development in English private international law.[223]

6. CONCLUSION

The thesis discussed the development of the protection of creditors in the cross-border operation within the last decades. Both Directive 2017/1132 and Directive 2019/2121 are framed within the Article 49 TFEU, which guarantees companies freedom of establishment.[224] Albeit, the Treaty enables companies to enter into mergers, as well as divisions, the practical process

[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] Garcimartin and Gandia (n6), p. 18

of executing such operation face several obstacles in practical application. The examples include lack of uniform rules within Member States or lack of rules regarding the performance of an operation.[225] Thus, several cases also developed European company law in regard to cross-border mobility. Although the list of judgement is not exhausted, this thesis puts focus on three key decisions: *Sevic C-411/03*[226]*, Vale C-378/10*[227] and *Polbud C-106/1642*[228]. The judgement of the former one showed that the absence of standardization in a company's cross-border activity does not contradict the company's freedom to conduct business among EU Member States utilizing a range of methods.[229] Furthermore, as far *Vale* case is concerned, the Court upheld the company's ability to cross-border transformation and concluded explicitly that cross-border conversion is protected under the core treaty principles.[230] Finally, in regard to the latter case, *Polbud*, definitely helped to shape the vision of how the freedom of establishment shall be interpreted. However, what is significantly relevant for creditors protection, the *Polbud* ruling clarified that, although the governing law is changed, creditors can still be awarded further appropriate protections of their interests, guaranteeing that their present rights are respected.[231]

This research aim of this thesis was to evaluate and estimate the impact that the new Directive 2019/2121 has on protection of creditors in cross-border operation. In order for the reader to understand such analysis, the thesis discussed and compared the new Directive, as well as the amended one – Directive 2017/1132. The latter one provided EU Member States with minimum harmonisation, meaning, it facilitated level of protection of creditors but only in reasonable and 'sufficient' way, what in practice discouraged the national legislators to introduce additional security.[232] Although Article 99 of the Directive 2017/1132 required Member States to maintain an adequate level of protection for credits, the issue gets drastically complicated when it comes to cross-border operation. The main reasoning behind it is a lack of unified legal provisions within European Member States, and thus, the thesis described the potential improvements in regard to cross-border mergers, divisions and conversions.[233] Whether the Directive 2019/2121 solved the above-mentioned obstacles has been evaluated in Chapter III, which put focus on the new legal regime in the European Union. The thesis introduced the

225 *Ibid*, p. 19
226 Case C-411/03, *SEVIC Systems AG*, [2005] ECR I-10805
227 Case C-378/10 *Vale*, EU:C:2012:440
228 Case C-106/16, *Polbud - Wykonawstwo sp. z o.o.*, EU:C:2017:804
229 Opustil and Mucha (n197), p. 288
230 *Ibid*, p. 281
231 European Parliament: Policy Department for Citizens' Rights and Constitutional Affairs (n38), p. 20
232 Winner (n67), p. 48
233 *Id*.

main objectives of the Directive which are as following: first of all, to facilitate enjoyment of freedom of establishment for companies; and secondly to eventually provide creditors with, a non-existing before, satisfying level of protection of their interests.[234] The new main general provisions include: publication of draft terms, pre-operation certificate, as well as applicable law, whereas the new legal regime for creditors protection contains: adequate safeguards, solvency declaration and jurisdiction. The thesis discussed the new provisions in detail and emphasized the potential challenges, as well as difficulties in implementing them within national legal systems in Member States. As far as implementation of the provisions of the Directive is concerned, Member States are obliged to incorporate them into national law by January, 31 2023 and inform the Commission about that compliance.[235] Taking Poland as an example, the thesis discussed two possible way for Polish Legislation to implement the Directive: either provisions regarding cross-border operations shall be added next to its national equivalent; or all the provisions related to cross-border operation might be inserted in a new chapter.[236] Nevertheless, the thesis discussed the challenges that Polish Legislator may face whilst implementing the Directive, and therefore, the next section of the thesis revealed the criticism of the new legislation, more specifically, in terms of Articles 86(m)(8)(9)[237], 127(8)(9)[238] and 160(m)(8)(9)[239].

The last chapter of the thesis, Epilog, touched upon current legal relationships between EU Member States and the United Kingdom. As mentioned, the UK officially left the European Union on December 31, 2020 and therefore no EU law provisions are now applicable in the UK.[240] The direct impact of Brexit on EU-UK relationship is the fact that no cross-border mergers or conversions and available to the companies. However, there might be a *light in a tunnel*, as the United Kingdom has initiated a public consultation which aims in creating a UK re-domiciliation framework for businesses. The new legal regime would replace the current ban on both inbound and outbound movements of the companies and, somehow pursue the same purpose and Directive 2019/2121, which the Kingdom of Queen Elizabeth declined to apply before Brexit came into force… [241]

[234] European Company Law Experts (ECLE) (n63), p. 199
[235] Directive (EU) 2019/2121, Article 3(1)
[236] Łuc (n198), p. 16
[237] Directive (EU) 2019/2121, Article 86(m)(8)(9)
[238] *Ibid*, Article 127(8)(9)
[239] *Ibid*, Article 160(m)(8)(9)
[240] Bird & Bird (n211)
[241] Mertens (n217)

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