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The Future of the EU' s Cross-border Conversions—— With the Application of the Directive 2019/2121

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ABSTRACT

With the adoption of the Directive 2019/2121, Cross-border conversion with the meaning that transfer at least the company's registered office from the home Member State to the host Member State while maintaining the company's legal personality has became a hot topic in recent years. This thesis is devoted to examining the present status of cross-border conversions and the EU company law.

This thesis began with the current situations of EU enterprises, and mainly analyzed the concept of cross-border conversion, how EU company law developed. Furthermore, legal backgrounds regard to the conversion have been introduced, the typical case law of the Court of Justice related to the cross-border operations detailed examined. Also, specific introductions of the Directive 2019/2121 adoption proceedings and the newly adopted directive itself have been indicated and questioned in the thesis.

Keywords: cross-border conversion, free movement of establishment, registered office, stakeholders, legal personality, real seat doctrine, incorporation doctrine.

PREFACE

After several months of collecting materials, writing, and revising the thesis, I have to thank everyone around me.

First of all, I would like to thank my supervisor Eduardo Gill-Pedro for his serious and responsible attitude to work. He actively solved the problems encountered in the thesis for me and pointed out the shortcomings of the thesis. During the stage of topic selection, data collection, writing, and revision, my supervisor invested a lot of effort.

Secondly, I want to express my gratitude to my dear mother Jingru Zhang who always encourages me and gives me support in my life. During the COVID-19 epidemic, I had online lessons at home. Sometimes I was in a bad mood, but she was always patient with me and helped me out.

Finally, I want to say thank you to myself. I hope I can be more diligent and earnest in the future and keep my passion for law.

ABBREVIATIONS

BCCA	Belgian Code on Companies and Associations
BRIS	pan-European Business Register Interconnection System
CJEU	Court of Justice of the European Union
Directive 2019/2121	Directive 2019/2121 on Cross-Border Conversions, Mergers and Divisions
DCA	Danish Company Act
EEA	European Economic Area
EEIG	European Economic Interest Grouping
EAVA	European Add Value Assessment
ECJ	Court of Justice
EP	European Parliament
EU	European Union
ECLE	European Company Law Experts
LLC	limited liability company
LMESM	Law 3/2009 of 3 April 2009 on Structural Modifications of Commercial Companies
MS	Member State
SE	Societas Europaea
SME	small and medium-sized enterprise
TFEU	Treaty on the Functioning of the European Union
JURI	Committee on Legal Affairs

CONTENS

1. Introduction

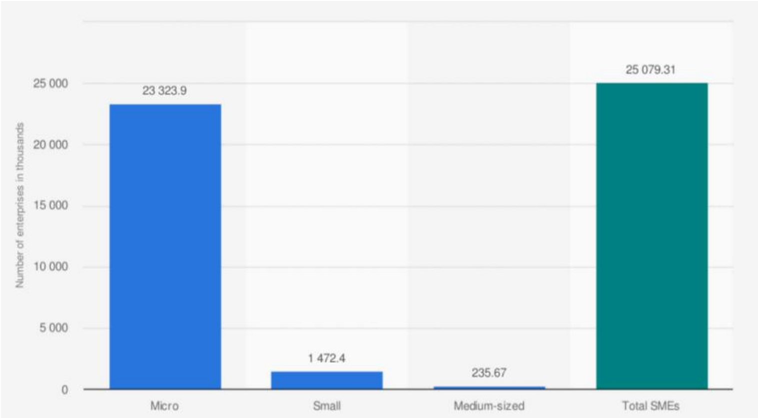
1.1 Introduction

Companies, firms, and enterprises are indispensable components of the single market within the European Union (hereinafter ‘EU’), they are contributing to the economic and employment growth. Recourse to the statistics, in 2018, there were estimated to be approximately 25.1 million small and medium-sized enterprises (hereinafter ‘SMEs’) in the EU.[1] And under the development of trade and globalization, the cross-border mobility of the EU companies has been facilitated. In this thesis, the analysis shall mainly focus on cross-border conversions. Reasons for a company to carry out the cross-border conversions are commonly for a more favourable economic and investment environment, or a more suitable legal framework, etc. However, the progress of harmonized EU company law is sluggish, the domestic company laws of the Member States have barely caught up with the speedy changing of the cross-border conversions. This situation has enlarged the legal uncertainty in the cross-border operations of EU companies domain. A large of amount companies, especially SMEs establish every day with the an average number of 3000.[2] Thus a more stable and certainty legislation is desired by the Member States (hereinafter ‘MSs’), companies, trad unions, and stakeholders.

[1] D. Clark, ‘Number of small and medium-sized enterprises (SMEs) in the European Union in 2018, by size’, [2019] <https://www-statista-com.ludwig.lub.lu.se/statistics/878412/number-of-smes-in-europe-by-size/> a ccessed 16th February 2021

[2] European Trade Union Institute, European Company (SE) Datebase-ECDB, [2021] <http://ecdb.worker-par ticipation.eu/index.php>accessed 17th February 2021

Scheme 1. Number of small and medium-sized enterprises (SMEs) in the European Union in 2018, by size



Source："Statista economy, published by D.Clark"[3]

With the interpretation of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), an internal market without barriers shall be built, which specifically stressed in Article 26 (2) "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*".[4] The cross-border mobility of EU companies corresponds to the principle of the free movement of establishment, which could accelerate the harmonization of the EU internal market.

As mentioned above, the EU company law changed slightly compared to the economic development and the facilitation of cross-border conversions. For instance, the conversion of the companies' register offices relies on the national law of the MSs. The cross-border mobility of the EU companies has been hindered by the national laws because the operation and functioning of the EU companies depend on those national laws. The lack of a clear and uniform EU legal framework for the cross-border operations of EU companies leads to legal fragmentation and legal uncertainty, thus creating barriers to cross-border operations,[5] the harmonization of

[3] D. Clark, 'Number of small and medium-sized enterprises (SMEs) in the European Union in 2018, by size', [2019] <https://www-statista-com.ludwig.lub.lu.se/statistics/878412/number-of-smes-in-europe-by-size/>accessed 17th February 2021
[4] Art. 26 of the Consolidated Version of the Treaty on the Functioning of the European Union, [2016] OJ C202/07
[5] KINANIS Law Firm, 'New Rules Expanding The Cross-border Mobility Of EU Companies Within EU - Directive (EU) 2019/2121',[2021]<https://www.legal500.com/developments/thought-leadership/new-rules-expanding-the-cross-border-mobility-of-eu-companies-within-eu-directive-eu-2019-2121/> accessed 28th January 2021

the EU market aim could be impeded and the interests of companies' stakeholders, including creditors, employees, etc would be impaired. From the earliest *Daily Mail* case to the recent *Polbud* case, the Court sought to undermine the impacts of the MSs' restrictions/prohibitions on the free movement of establishment and companies. However, without a unified EU-level legal mechanism, the legislation of the MSs is diverse, some of them abide by the 'Incorporate doctrine', others by the 'Real seat doctrine'. The conflicting legislation would have repercussions for the cross-border conversion of the EU companies.

For the purpose of integrating the EU internal market, increase the legal certainty of cross-border mobility, and benefit the stakeholders, the conduction of the EU level cross-border conversions legislation is necessary. A new Directive, the Directive (EU) 2019/2121 on Cross-Border Conversions, Mergers and Divisions (hereinafter 'Directive 2019/2121') has been adopted by the European Parliament and the Council on 27 November 2019, and MSs should implement it into their national legislation by 31 January, 2023. The Directive 2019/2121 might tackle the legal uncertainty problem and harmonize the cross-border conversions rules within the EU level, since there exists the EU Directive law for MSs to follow, EU companies can transfer their registered offices from the departure MS to the destination MS with certainty legislation and the free movement of establishment also be guaranteed.

1.2 Research Question and Aims

The thesis will ask and answer the following question:

1. Are the cross borders conversion rules in Directive 2019/2121 suitable for achieving that Directive's objectives?

Pursuant to the research question, this thesis will set about from the general introduction of current EU companies situations. Then the birth story of the Directive 2019/2121 was given, which dissected the history and legal background of cross-border conversions to assist with the interpretation of the Directive 2019/2121, for instance, the indicated legislation foundation, the Article 49 and Article 54 of TFEU, in addition, case laws involved in the free movement of establishment and cross-border conversions, including the *Polbud* case, will be examined accompany by the spirits of the Directive 2019/2121 (Chapter 2). Generally development of EU company law and the proceedings to adopt the Directive 2019/2121 would simply introduce in Chapter 3. Then, the insightful introduction and analysis of contents of the Directive 2019/2121 presented in Chapter 4, for instance, concepts addressed in the Directive, procedures to conduct a cross-border conversion, ways to protect the rights of stakeholders, etc will be brought about. With the detailed analysis of the Directive 2019/2121 and typical cases, deficiencies of the Directive 2019/2121 could be pointed out to replenish more critical analysis for the understanding of the Directive 2019/2121. For the sake of strengthening the free movement of establishment and facilitate cross-border conversions, the thesis will propose some recommendations within the Directive 2019/2121.

The aim of the thesis is to explore and evaluate core issues relate to the cross-border conversions within the EU scope. The present case laws interpreted by the Court of Justice of the European Union (hereinafter 'CJEU') would also be estimated with the propose of facilitating the cross-border mobility of the EU companies. And the thesis also aims to analyze and interpret the Directive 2019/2121 thoroughly via introducing the Directive itself, the background of its adoption, and so on, find out whether the directive is a suitable one for the operations of cross-border conversions.

1.3 Research Methodologies

A typical method used in the thesis is called the *doctrinal analysis (methodology)* . It involves locating and interpreting relevant primary and secondary sources of law and combining these sources to form one or more legal rules. The thesis composing a descriptive and detailed analysis of Article 49 TFEU of the free movement of establishment and also the new adopted Directive 2019/2121, interpreted those legal rules' contents intensively.

Furthermore, undertaking doctrinal methodology typically involves the *data collection and analysis*. Collected approximately data about numbers of EU companies, subdivided those companies into different types, for instance, SMEs, limited liability companies (hereinafter 'LLCs'). The case law, scientific articles, legislation, proposals related to the topic of this thesis were collected, analyzed, and examined in detail.

Through the doctrinal methodology, the thesis has analyzed the *history of law*. Without comprehend the history of the EU and the evolution of EU company law, the reasons why this thesis has to interpret the Directive 2019/2121 could not be figured out precisely. The methodology could help with the expound understanding of changes in the EU legislation level and why cross-border conversions of EU companies have an intimate connection with the aims of the EU.

In addition, the *comparative analysis* which be included in doctrinal methodology is utilized in this thesis. The approach involves a critical analysis of different legal systems to examine how the outcome of a legal issue differs under each set of laws.[6] The Directive 2019/2121 has been compared to the former legislation and some MSs' national legislation.

1.4 Delimitations

The main contents of this thesis are related to the cross-border conversion of companies in the EU which is based on Article 49 and Article 54 of the TFEU. The reason to choose this topic is that the newly adopted Directive 2019/2121 is the first time to harmonize cross-border conversion at the EU level, thus it is worth studying whether the Directive 2019/2121 could perfectly achieve its objectives. A multifaceted approach should be used to addressing the problem. This thesis is primarily concerned with the legal background and provisions of Directive 2019/2121.

The limitations of this thesis are that firstly it solely concerned the cross-border conversions, no other cross-border operations which are equally important be presented. For instance, similar to the cross-border conversions, the cross-border divisions have also be regulated at the EU level for the first time, however, no introduction of the cross-border divisions in this thesis. Because the thesis holds that the cross-border conversion is the most controversial issue, compared to the other two cross-border operations

Secondly, the thesis lacks a detail analysis about the formerly Directive 2017/1132, the author deems that the thesis is only focused on the cross-border conversion, however, the Directive 2017/1132 contains solely the cross-border mergers contents. It is difficult to compare two different transactions, this thesis only mentioned the new

[6] Jerome Hall Law Library, 'Legal Dissertation: Research and Writing Guide', [2019] <https://law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal%20legal%20research%20methodology%2C%20also,%2C%20statutes%2C%20or%20regulations> accessed 29th January 2021

amendments, especially the conversion chapter, of the Directive 2019/2121. However, the procedures for conduction of cross-border mergers are almost in compliance with the cross-border conversions in the new directive, thus theoretically speaking, it is worth indicating the contents of Directive 2017/1132 and comparing the procedures in the two Directives, which could assist conclude how the newly adopted Directive 2019/2121 strengthens the development of cross-border conversions.

Lastly, the recommendations in this thesis which solely proposed on the basis of the theory are not comprehensive. All suggestions have relied on logic, jurisprudence ,and theoretical inferences but no practical data to support the suggestions. It may because Directive 2019/2121 has adopted in 2019 and MSs should bring it in line with their national laws in 2023, so there is not a lot of data to display how is the directive working. The new recommendations are expected after 2023 when some companies have utilized the Directive 2019/2121 to operate the cross-border conversions.

2. Cross border conversion—A significant element for internal market and free movement of establishment

2.1 Outline and purposes for the Chapter

This Chapter will firstly demonstrate the history and legal background of the cross-border conversions under the TEU and TFEU, then will elaborately explain the meaning of cross-border conversions within the development of the EU company law. Also, two crucial doctrines (the real seat doctrine and the incorporation doctrine) in the company laws will be precisely introduced, additionally, specific MSs national legislation related to the cross-border conversions are presented, for instance, France, Italy etc. Finally, as presented in the Introduction Chapter, the operation of cross-border conversions in the EU mainly rely on the interpretation of the ECJ, in this Chapter typical cases which deal with the problematic cross-border conversions will be putted forward.

Currently, with the speedy development of the economy and technology, the desire for EU companies to operate cross-border conversions has enhanced. Transfer one company’s registered office from one MS to another one will provide the company more opportunities to seek better development. With the interpretation of the internal market based on the TFEU, the free movement of establishment is a crucial component to strengthen the single market, and the EU company law is grounded on the free movement of establishment.

The Treaty envisages two forms of establishment, one is the right to establish and administer undertakings, the primary establishment, and the other is the right to establish branches, agencies, or subsidiaries in any MS by nationals of any MS (secondary establishment).[7] The cross-border conversions which without wind-up or liquidate are contained by the free movement of establishment. Thus eliminating the barriers to the cross-border mobility of EU companies could help with pursuing the harmonization of the internal market, stimulation of market competition, and the protection of stakeholders. It is crucial to introduce relevant EU and MSs legislation of the cross-border conversions for the purpose to solve the research question.

As the scholar, Charlotte Ene stated "Although the treaty provides a foundation for freedom of establishment, in practice, the converting companies which pursue the freedom to transfer their seats from one MS to another need to follow specific procedures. Therefore, the solution is the adoption of the EU Company Law Package, which is mainly aimed at establishing common procedural standards for EU cross-border operations and providing adequate protection for converting companies' stakeholders".[8] Accordingly, it is worth researching the guarantee and operation of the cross-border mobility of EU companies in practice, this Chapter presents specific MSs' national laws and their legal doctrine related to the cross-border conversions. Since some scholars affirmed and proved that currently, legislation could not deal with the cross-border conversions well.

2.2 Legislation foundation of the cross-border conversions

The harmonization of the EU company law, including the cross-border conversions developing in a specific background. It was not only a theory but was also born and built on the history, legal, economic, and political foundations. The history of the EU is an integration process, and the EU company law harmonized based on the European unity background. The EU integration is not an accidental result, it has both external as well as internal factors within the particular history and legal conditions.

[7] Paul Craig, Gráinne De Búrca, *EU law: text, cases, and materials* (6th edn, 2015), p. 405
[8] Charlotte Ene, 'The Cross-border conversion-A possible solution for the mobility of companies in European Union', Perspectives of Law and Public Administration Volume 9, Issue 1 [2020], p. 55

This section first set out the TEU and TFEU Articles in subsection 2.2.1 which involved in free movement theme and EU objectives for the internal market. As there is no harmonized EU cross-border conversions laws before the enforcement of the Directive 2019/2121, operate the conversion between different MSs were mainly rely on departure MS or destination MS laws, thus different legal doctrines adopted by MSs are displayed in the next subsection. Also, the CJEU has added a thick and heavy color in the long history of EU company law. The ECJ plays the crucial role in the interpretation of EU law, and case laws could affect EU laws and safeguard the established principles in EU laws. To be aware of foundations of the cross-border conversion, section for case laws dissections is necessity.

2.2.1 The EU aspect——The TEU &TFEU

The Single European Act signed in 1986 launched the single market. The introduction of The Maastricht Treaty (The TEU) in 1986 marked the EU constructed formally. The Maastricht Treaty is a new step in the process of building an ever closer union among the peoples of Europe.[9] The TFEU originated as the Treaty of Rome formed the constitutional basis of the EU, and it concerns how to operate the single market as it regards the free movement of goods, services, people, establishment, and capital. This section only concerns the integration of the internal market, the free movement of establishment related to the cross-border mobility of EU companies. Treaties are also the benchmarks for the Directive 2019/2121, they are the general rules for MSs to obey for the purpose of integrating the single market. In light of evaluating the Directive 2019/2121 objectives, the analysis of Articles in Treaties are indispensable.

Article 3 (3) of the TEU underlined that the Union shall establish an internal market which works for the sustainable development of Europe based on balanced economic growth and price stability. And it shall promote social, economic and territorial cohesion, and solidarity among MSs.[10] Pursuant to the Treaty, it is being a long history for the EU to pursue economic cohesion between the MSs. As analyzed above, the cross-border conversions could stimulate economic development which corresponds to the aims settled in the TEU.

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[9] European Parliament, 'The Maastricht and Amsterdam Treaties', [2018] <https://www.europarl.europa.eu/factsheets/en/sheet/3/the-maastricht-and-amsterdam-treaties>accessed 1st February 2021

[10] Article 3 of the Consolidated Version of the Treaty on European Union [2016] OJ C202/1

The conception of the free movement of companies is not an innovation but exists several decades. Article 49, 50 and 54 of the TFEU indicate that companies or firms in the EU shall be treated liked the natural person which enjoyed the right of free movement of establishment, and restrictions stipulated by MSs on the free movement of establishment shall be prohibited.[11] And The European Parliament (hereinafter 'EP'), the Council, and the Commission shall carry out the duties devolving upon them, in particular, by according, as a general rule, priority treatment to activities where freedom of establishment.[12] Article 54 of the TFEU confirmed that companies or firms within the EU are entitled to the same treatment with the natural persons of MSs in the right of establishment Chapter.[13]

According to Articles of the TFEU, the free movement of establishment has included the free movement of companies, thus the cross-border conversions of EU companies could be also assurance by the free movement of establishment principle. In the *Cartesio* case, the Court brought up that "the national legislation which requires the liquidation of the company is liable to hamper the cross-border conversion of a company"[14]. However, Some scholars affirmed that the CJEU's statements in *Cartesio* suggesting that cross-border conversions were protected by Articles 49 and 54 TFEU were merely *obiter dicta*. Some commentators and scholars questioned whether the *Cartesio* suggesting were in fact binding since they were not required for deciding the case.[15] Although the sole interpretation of Articles of the TFEU could not directly implement as a legal provision, some scholars and the Court alleged the cross-border conversions had fallen into the scope of the free movement of establishment which regulated in the TFEU.

The TEU and the TFEU are the macro-level guidance for the assurance and maintenance of the cross-border conversions of EU companies, however, it is difficult to accomplish the freedom of establishment of companies in practice, due to the lack of harmonization of the national company laws (MSs comply with different legal

[11] Article 49, Article 54 of the Consolidated Version of the Treaty on the Functioning of the European U nion [2016] OJ C202/07
[12] Article 50 of the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/07
[13] Article 54 of the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/07
[14] Case C-210/06 Cartesio Oktató és Szolgáltató bt, [2008] EU:C:2008:723 paras. 109-110
[15] Gerner-Beuerle, Mucciarelli, Schuster and Siems, 'Study on the Law Applicable to Companies: Final R eport' Publications Office of the EU, [2016] p. 218

doctrines, some MSs haven't ruled cross-border conversions) and provisions for the protections of the companies' stakeholders.[16] Therefore, a harmonized legislation is desired for the purposes of promoting cross-border conversions, stimulate the economy, and intrinsically maintain the internal market.

Even Article 49 and Article 54 of the TFEU have ensured the free movement of establishment for companies and firms, rules for the transfer of companies' seats between MSs were imperfect. Before the Directive 2019/2121 came into effect, EU has not adopted specific legislative instrument to regulate cross-border conversions, converting companies were basically comply with MSs' national company laws to operate cross-border conversions. Without harmonized EU law, it is the national approaches to determine laws applicable to companies[17]which desire to operate cross-border conversions. However, different MSs may opt divergent laws and principles to regulate cross-border conversions. Next section will examine national doctrines for the cross-border conversions, infer whether diversity of national laws impedes the cross-border conversions operations.

2.2.2 Member States aspects——Real Seat & Incorporation Doctrine

As introduced in Chapter 1, MSs have to bring their national laws in line with the newly Directive 2019/2121 by 31st January 2023, before implementing the Directive 2019/2121 into national laws, operations of cross-border conversions mainly depend on national laws. Although TFEU has ruled on the free movement of establishment, and confirmed the necessity of free movement of companies, for economic reasons and internal market objectives. National legislators commonly repel laws harmonization within the cross-border conversions, since the transference of one company's seat happened, the law that converting company followed has to covert into another MS law, and the home MS legislators have no confidence on the coherent to other MSs' laws and doubt whether the host MS law could effectively protect company's stakeholders (shareholders, creditors, employees, etc.) as the former standards in the home MS.

However, the resistance to cross-border conversions law integration by MSs did not

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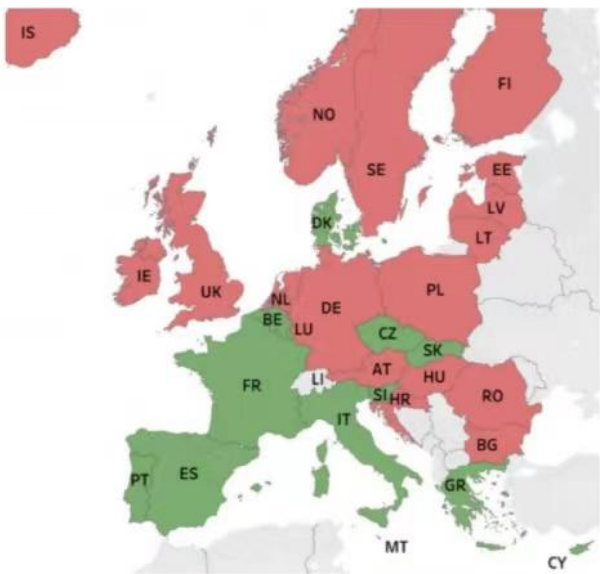
[16] F.C. Stoica, 'Recent developments regarding corporate mobility within EU' s internal market' [2016] p. 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783809>accessed 3rd February 2021

[17] European Parliament, 'Cross-border transfer of company seats', [2017] p.2 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf>accessed 3rd February 2021

purport to impede the companies’ cross-border mobility. Some MS have adopted positive legislation to assist companies’ registered offices convert from the departure MS to the destination MS while others have not offered any legislation for the transfer of company’s seat (see Scheme 2). Currently, the cross-border conversions operations comply with national laws since there are still two years for MSs to bring their laws in line with the Directive 2019/2121, so it is imperative to analyze different MSs’ legal doctrines and provisions, the researcher Jeantet Associés states that “In practice, lacking a common definition between MSs for what constitutes the necessary link between companies and its home MS has made the cross-border transfers situations complicated .”[18]

Scheme 2 Overview of EU Member States which provide for cross-border seat transfers on the basis of national law (green) and EU Member States that do not allow cross-border seat transfers (red)



Source “Cross-border Corporate Mobility in the EU" Empirical Findings 2020 (Ed.1)[19]

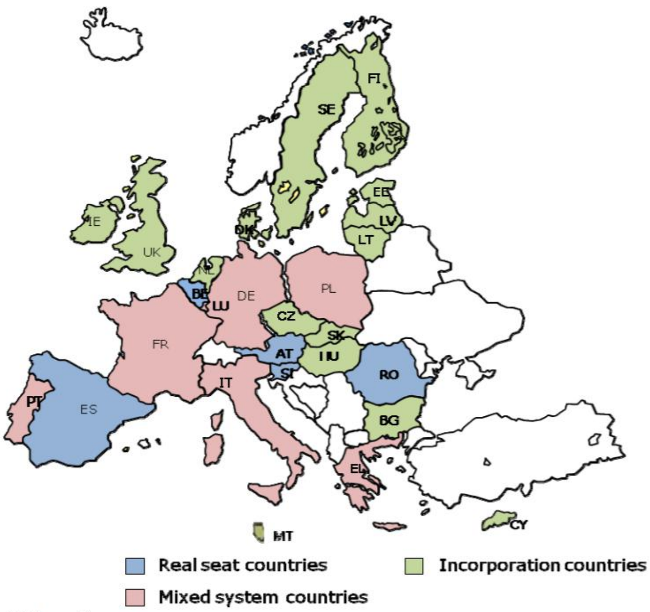
There are two main doctrines for MSs to apply in national company law, one doctrine is the real seat doctrine, another one is the incorporation doctrine, so-called the statutory doctrine (theory). Since no applicable harmonized EU legislation exist, doctrines play indispensable roles in cross-border conversions. ‘Real seat’ MSs are less numerous than ‘Incorporation’ MSs (see Scheme 2). This section would precisely

[18] Jeantet Associés Aarpi, ‘European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) ANNEX I’, [2012] p. 35 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN01)_EN.pdf> accessed 5th Februar y 2021

[19] Thomas Biermeyer, Marcus Meyer, "Cross-border Corporate Mobility in the EU" Empirical Findings 20 20 (Ed.1), [2019] p. 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674089>accessed on 10th Febr uary 2021

introduce and examine MSs' legal doctrines on the transfer of company's seat, analyze doctrines' definition, features, and the relationships between MSs' legal doctrines and Directive 2019/2121.

Scheme 2 The application of Real seat doctrine and Incorporation doctrine by EU MSs



[20]

Source "European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex 1"

2.2.2.1 Member States applying Real seat doctrine

The Real seat doctrine was formed in the middle of the 19th century's Europe,[21] which regards the real seat of a company as a decisive connecting factor. The so-called real seat refers to the central management place of a company, which corresponds to the location of the registered office/head office, and is the place where a company performs its legal, financial, administrative, and technical management.[22] This doctrine states that the MS in which the company conducts its principal activities should has the right to regulate the company, because this MS is most likely to be affected by the company, and in principle, the company has to locate on the main administrative and control center correspond to the registered office. Conceptually,

[20] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p 35 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN01)_EN.pdf> accessed 5th February 2021

[21] Matthew G. Dore, 'The Internal Affairs Rule and Entity Law convergence patterns in Europe and the United States',8 Brook.J.Corp.Fin.&Com.L.323 [2014] p. 320

[22] A Khan, 'Corporate Mobility under Article 49 TFEU', EBLR, [2011] p.854; J Lowry, 'Eliminating obstacles to freedom of establishment: The competitive edge of UK company law', CLJ, [2004] p.332

this approach is known as the Objective Proper Law Test, which states that managers of a company are limited to choose the laws that govern the legal relationships of the company.[23] In short, the **real seat doctrine concept** can be explained as "The real seat doctrine basis for choosing the applicable company law in which that the company has its actual real seat (registered office) in the MS.[24]

The MS with the real seat doctrine was inspired by the goal of maintaining the one company's management on its territory, and also the purposes to protect stakeholders, including the members, creditors, employees.[25] As shown in Scheme 2, in fact, today the mixed system (mix both real seat and incorporate doctrine) adopted by many MSs which includes France, Czech, Italy, Germany etc.

What is the meaning of the mixed system? One scenario is that, for instance, in some MSs, as a general principle, the presumption that a registered office should correspond to an actual location (real seat), but it can be refuted by proving that the registered office of a company is not in the same place as the real seat of the company.[26] To infer and determine where the real seat located is more complicated than that of the registered office, as the real seat bank on the place where the company's daily affairs, administrative and economic decisions are made.[27] In respect of protecting the third parties, the third parties can assert the real seat of the company under the conditions that the registered office address has not changed or no one at the address of the registered office.[28] In fact, national legislators have concerned about the situations in which the real seat does not correspond to the registered office, how to define the real seat. Virtually, this kind of mixed system complies with the real seat doctrine.

Accordingly, **the France Republic** could be an example of the MS follows real seat

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[23] European personnel selection office, 'Unjustified enrichment and contract law' [2018] p.1 <https://europa.eu/epso/doc/en_lawyling.pdf> accessed 6th February 2021

[24] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p. 34 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN01)_EN.pdf> accessed 5th February 2021

[25] Ibid.

[26] J .DELVAUX, 'Cours de droit des sociétés', [2007] p. 88 ; cf Article 1837 of French civil Code, [2016]

[27] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p. 35 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN01)_EN.pdf> accessed 5th February 2021

[28] Ibid, p 36

doctrine. Combining with Scheme 1, France also allows both the inbound and outbound cross-border transfer of seats for companies. A brief introduction of how the cross-border transfers operate in France within the real seat doctrine presents below.

Companies' outbound transfers of the registered office are allowed in France which not is explicitly regulated.[29] The French law requires the transfer of real seat (registered office) to be conducted by the public and unanimously adopted at the shareholders meeting.[30] The majority view was that, without the liquidation or dissolution of the company, the real seat/registered office could be transferred smoothly.[31] Under Art.L.225-97 and Art.L.226-2 of the Commercial Code, a company wish to conduct an outbound conversion and has made the decision, the decision could be accepted by the general meeting with a two-thirds majority.[32] However, the agreement of the general meeting is not adequate to complete the transfer of seat, there are further procedures to be satisfied with the French registry to conduct the transfer.

Firstly, procedures are related to the French commercial registry, the transfer of the real seat proposal should be submitted to the commercial registry. As concerns, several documents are required. For instance, 1) a copy of the action that all shareholders have unanimously agreed to transfer the seats, as certified by the legal representative; 2) A original signed specific form and two copies which called M2, one copy should be submitted to the Business Formalities Centre, another one has to provide to the commercial register; 3) An original power of the legal representative if the representatives have not signed the M2 form by themselves; 4) A statement of notice for the amendment in a gazette; 5) Two original examples of requests made to a judge observing in the commercial registry to be allowed to proceed with the transfer of the company's seat to another MS, and to remove the company from the registry, but still to retain the legal personality of the company; 6) A regulation including

[29] Thomas Biermeyer, '"Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU' WLP [2015] p. 107 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105>accessed 15th February 20 21

[30] Ibid, p 7

[31] Eddy Wymeersch, 'The Transfer of the Company' s Seat in European Company Law', ECGI Working Paper Series in Law, [2003] p. 11 <https://ecgi.global/sites/default/files/working_papers/documents/ssrn-id384802.pdf>accessed 18th February 202 1

[32] Martha Fillastre, Amma Kyeremeh, Miriam Watchorn, 'Translation of "Commercial code", as of 1st Jul y 2013', [2014] <https://world.moleg.go.kr› cms commonDown> accessed 15th February 2021

transfer of seat costs and the request fee.[33] If the company has fulfilled those required procedures, the outbound transfer of the seat could operate successfully.

Secondly, concerns are related to the inbound of the transfers in French. No specific provisions for the inbound transfer of registered office in French which means the inbound transfers are supposed to be possible. Similarly, as the outbound transfers, several documents should be submitted at the French commercial registry. Such as 1) A certificate that the legislation of departure MS permits the cross-border seat transfers while maintaining the company's legal personality; 2) A copy of the decision that the shareholders unanimous agreed to turn the company applicable to French law and transfer its registered office; 3) A documents proving that the procedure has been duly performed in the departure MS (published and archived); 4) An original copy of the registration of the company in the public register of the departure MS.[34] As the document requirements displayed, the inbound policy is very loose, so long as the procedures of departure MS are met, the maintenance of legal personality of the departure MS is approved, the cross-border conversions permission are gained from the shareholders.

Thirdly, the French national laws certainly protect the stakeholders rights in outbound transfers. For instance, as introduced in the outbound transfer procedures paragraph, the cross-border transfer of the seat should be approved unanimously by shareholders. And for the creditors, the commercial registry would do its legal scrutiny liability, the transfer will not binding on the third parties if the publication requirements are not achieved.[35] However, no specific provisions rule the protection of employees.[36]

In summary, the legislation for cross-border transfer of registered office under the mixed system (essentially the real seat doctrine) in French has been well regulated, the rule of procedures has been well established which are in harmony with the

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[33] Thomas Biermeyer, '"Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU' WLP [2015] p. 108 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105>accessed 15th February 2021

[34] Greffe du Tribunal de Commerce de Paris, Transfert à Paris du siège social d'une socété étrangère (n. d.), [2018] <http://www.greffe-tc-paris.fr/myfiles/files/rcs/pdf_fiches _pratiques/ transfert _soci%C3%A9t%C3%A9_etrangere_vers_france.pdf> accessed 16th February 2021

[35] Thomas Biermeyer, '"Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU' WLP [2015] p. 124 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105>accessed 15th February 2021

[36] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p. 41

Directive 2019/2121, however, the national legislation is not completely coherent to the newly adopted directive, for example, French law has not regulated any provisions for the protection of employees within the transfers, thus several amendments have to be made by French to in line with the EU cross-border conversions directive.

Another country which worth examining for this subject of matter is the **Kingdom of Spain**, Law 3/2009 of 3 April 2009 on Structural Modifications of Commercial Companies (hereinafter 'LMESM') regulates the cross-border transfer of seats in Spain. The LMESM legislation initially implemented the Directive 2017/1132 into the Spanish law, then it was enlarged into other forms of company transfers, for example, the transfers of registered office without liquidation of the converting company.[37]

To operate the outbound transfer of the real seat, the company has to sign a transfer proposal and given an explanatory report. The two documents should be filed at the commercial registry and published on the gazette.[38] A copy of the proposal must be deposited with the registry, the notice in the gazette must state the name of the company, the form of the company, the address of the company, the date of entry into the register, the conditions under which shareholders and creditors will exercise their rights, among other things.[39] The explanatory report must include the consequences for the stakeholders (shareholders, creditors, employees), law and economy.[40] Then the transfer proposal has to be approved by shareholders at the General Meeting.[41] The call should be published 2 months before the date of the general meeting, which includes location information of the registered office (current and planned location), proposal and explanatory report examination rights for shareholders and creditors, withdraw information for shareholders, and opposition of the transfer information for creditors.[42] To transfer the registered office in Spain, supports of a two-thirds majority of shareholders is needed.[43] The commercial registry will prove a certification for the transfers if all legal conditions are fulfilled, and the company information will be deleted in the registry as soon as it has bee published in the

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[37] Thomas Biermeyer, '"Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU' WLP [2015] p. 111 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105>accessed 15th February 20 21

[38] Ibid, p. 112

[39] Section 95, para. 3 of Law 3/2009 of 3 April 2009 on Structural Modifications of Commercial Compa nies,[2009] ID 3905

[40] Ibid, Section 96

[41] Ibid, Section 97

[42] Ibid, Section 98

[43] Section 199 of Spanish Corporate Enterprises Act (LSC),[2017] RD 1/2010

destination MS.[44]

For the inbound transfer of registered office, the Spanish law regulated differently between the EU MSs, the European Economic Area (hereinafter 'EEA') and the non-EU/EEA countries. If a company originated from EU/EEA, its legal personality will maintain while operating the cross-transfer of registered office. However, the non-EU/EEA companies could not enjoy this rule, only with the permission of the departure state, companies could maintain their legal personality while converting their registered offices to Spain. Furthermore, the converting company must provide a report which proves that the net worth reached the Spanish standard from an independent expert.[45] Also, documents to confirm that the company has already accomplished the transfer process with its state's law are required by the Spanish registry.[46] According to the real seat doctrine, one company is forbidden to register both in the departure MS and the destination MS, if that company desire to operate inbound transfer, it has to delete its registered information in the departure MS before it registers in the Spain registry.

For the stakeholders' protection, according to the Spanish national law, the transfer proposal has to be permitted unanimously or two-thirds majority of the company's shareholders in the general meeting.[47] Shareholders who objected to the transaction are entitled to the right to withdraw from the company and receive compensation.[48] Also, the creditors have the right to against the transfer proposal, and if no safeguard is provided, the objection will be recorded.[49] However, no specific provisions for the protection of employees.

The national law of Spain is the closest law to the newly adopted Directive 2019/2121 since the transfer procedures have complied with the EU directive. Spain could make very few amendments to bring its cross-border transfer law in line with the Directive 2019/2121, even though there are the needs for the legislators to enhance the

[44] Section 101,102 of Law 3/2009 of 3 April 2009 on Structural Modifications of Commercial Companies, [2009] ID 3905
[45] Ibid, Section 94
[46] Ibid.
[47] Section 199 of Spanish Corporate Enterprises Act (LSC),[2017] RD 1/2010
[48] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p 41
[49] Section 44 of Law 3/2009 of 3 April 2009 on Structural Modifications of Commercial Companies,[200 9] ID 3905

protection of employees.

2.2.2.2 Member States applying Incorporation doctrine

This doctrine is indeed different from the approach of the real seat doctrine. It represents a Subjective Proper Law Test in which companies are subject to the laws of the state where they are formally established. In other words, the managers of one company are free to choose the law which applies to the company. And the theory was developed in the 18th-century's England, the original purpose is to make British law applicable to British companies overseas.[50] Generally speaking, the **Incorporation doctrine** refers to the applicable company law chosen by the company where the company is established (registered in the national business registry where the company operates).[51]

In order to have a deep understanding of how the company's cross-border of registered office operates based on the incorporation doctrine, national legislation is inevitable to introduce. The MSs in which allow the cross-border transfer of registered office and apply the incorporation doctrine are worth examining. The first MS to reviewing is the **Kingdom of Belgium**.

According to the new Belgian Code on Companies and Associations (hereinafter 'BCCA'), the Belgian legislators have decided to modify the real seat doctrine into the incorporation (statutory seat) doctrine.[52] The newly established and existing companies are affected by the new doctrine from 1st May 2019 in which the doctrine came into effect. This principle directly affects the nationality of the company and its applicable law[53] The majority of scholars have positive attitudes toward the incorporation doctrine, one opinion is that this doctrine would permit the more extensive exercise of the freedom of establishment. Also, here is the standpoint that "by using a clear and transparent link element (incorporation doctrine), it reduces legal uncertainty in the application of corporate law."[54]

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[50] Karsten Engsig Sorensen, Mette Neville, 'Corporate Migration in the European Union', The Parker School of Foreign and Comparative Law, Columbia University, [2000] p. 2

[51] Jeantet Associés Aarpi, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive) Annex I' , [2012] p. 41

[52] Laura Dermine, Peter Suykens, Ann-Sophie Haghedooren, ' From the real seat theory to the statutory seat theory: important implications for your company', EY Law [2019] <https://www.eylaw.be/2019/12/17/from-the-real-seat-theory-to-the-statutory-seat-theory-important-implications-for-your-company/> accessed 19th February 2021

[53] Ibid.

[54] Marc Van de Looverbosch, 'Real seat theory vs incorporation theory: the Belgian case for reform' , Corporate Fiance Lab [2017] <https://corporatefinancelab.org/2017/02/21/real-seat-theory-vs-incorporation-theo

In the BCCA, legislators enforced new procedures for the cross-border transfer of seat, for the stake of maintaining companies' legal personality, protect the stakeholders' rights and exercise the EU's free movement of establishment principle. The conversion procedure can be applied worldwide, provided that the host state accepts the procedure if a Belgian company loses contact with Belgium as a result of relocation, or a foreign company migrates to Belgium.[55]

For the outbound transfer of seat, the BCCA has presented the required documents and procedures in detail. Firstly, the managers of the preparing convert company have to make a report to present reasons, legal and economic consequences for the cross-border conversions. Then the auditor should prepare a report on the financial statements of the emigrant company. And similarly as introduced MSs in the real seat section, a special shareholders' meeting of the company has to hold in the presence of the Belgian notary public to pass a resolution on the transfer of seats. And after the company is registered in the host state's register, it will be deleted from the Crossroads Bank of Enterprises.[56]

According to Belgian law, if a company wishes to conduct an inbound transfer of seat to Belgium, it has to adjust its legal form in compliance with the Belgian one and fulfill the procedures in the BCCA. The recent financial statements and confirmation that the foreign company had already reached its home state' requirements for the transfer have to provide to the Belgian notary public, according to these documents, the Belgian notary public will, as needed, amend the articles of association of the company to meet the requirements of Belgian law. In the end, it is similar to the outbound transfer, the immigrating companies should be registered with the Crossroads Bank for Enterprises before the cross-border conversion comes into effect.[57]

The BCCA certainly protects the shareholders' rights, as the shareholders could vote

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ry-the-belgian-case-for-reform/>accessed 20th February 2021

[55] Laura Dermine, Peter Suykens, Ann-Sophie Haghedooren, ' From the real seat theory to the statutory seat theory: important implications for your company', EY Law [2019] <https://www.eylaw.be/2019/12/17/from-the-real-seat-theory-to-the-statutory-seat-theory-important-implications-for-your-company/> accessed 19th February 2021

[56] Osborne Clarke, 'Restructurings under the new Belgian Code on Companies and Associations', [2018] <https://www.osborneclarke.com/insights/restructurings-new-belgian-code-companies-associations/>accessed 23rd February 2021

[57] Ibid.

at the general meeting for the resolution of the convert of seat.[58] Except that, there are no specific provisions in BCCA to regulate how to protect the shareholders who voted against the transfer of seat. Furthermore, no provisions exist for the protection of the creditors and employees.

The BCCA has taken into effect on 1st May 2019, and it explicitly sharped the procedures for the cross-border conversions which comply with the Directive 2019/2121, however, several additions and revisions might be needed since the BCCA are not entirely in line with the provisions for the cross-border conversions in the Directive 2019/2121.

Another example of MS in which implement the incorporation doctrine as well as allow the cross-border transfer of seat is the **Kingdom of Denmark**. The Danish legislation for the transfer of company's seat will be accessed in detail. Danish legislation on cross-border conversions is based on the Directive 2017/1123 which came into effect on 1st Jan 2014, named the Danish Company Act (hereinafter 'DCA').

According to Article 318(a) of the Danish Company Act, it allows the outbound transfer of company's seat in the EU/EEA MSs, with the conditions that the destination MS should also allow the seat transfer, and the Danish company's employees rights should be guaranteed by the destination MS.[59] If the outbound transfer of the registered office fulfilled the conditions in Article 318(a) of DCA, it can proceed with the transfer procedures. First, the transfer proposal should be provided and signed by the company managers with following contains: the company form, the name, and the location of its registered office; the draft statutes of the company after the transfer of the registered office; the potential impacts on the employment situation of the company, etc.[60] Then, with the transfer proposal, the management board of the company has to give a management report to explain and justify the transfer proposal and analyze possible consequences to the stakeholders.[61] An evaluation for the comparison of whether there exist differences between creditors' protections before the transfer and the protections after the transfer of

[58] Thomas Biermeyer, "Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU (WLP, 2015), p 121

[59]§318(a) of the Danish Company Act (original language: 'Lov om aktie- og anpartsselskaber or Selskabsl oven'). Nr. 1089 [2015]

[60] Ibid,§318(b)

[61] Ibid,§318(c)

registered office should be prepared by one or two independent experts.[62] A copy of the transfer proposal must be submitted to Danish Economy and Business Office within 4 weeks of the presentation of the management board's signature, if the deadline has expired, it means the transfer of seat could not be carried out.[63] After another 4 weeks within the publishing of the transfer proposal via Danish authority, the decision to conduct the transfer is valid, and before the 4 weeks, shareholders will receive several documents which include the transfer proposal and management report; the capital company's certified annual reports for the last three financial years; the statement of the independent experts on the creditors' position (the aforementioned evaluation).[64] And the decision to conduct the transfer of seat shall be agreed upon by two-thirds majority of shareholders, according to Article 318(j) of DCA.[65] Lastly, the Danish authority would verify a certification if all steps required for the transfer had finished, and register the transfer as soon as it has received destination MS's information that the company has been registered there.[66]

For the inbound transfer of seat to Denmark, if all necessary formalities and procedures have accomplished in the departure MS of the EU/EEA, and the authority of the departure MS provided certification for the transfer, the Danish authority will then register the company and inform the foreign competent authority about the registration.[67] And cross-border conversions in Denmark shall take effect from the date of registration of the movement of the registered office.[68]

Furthermore, the Danish legislation indeed protects the stakeholders' rights of the transfer Danish company. The shareholders have the information rights to be aware of the transfer proposal and management report contents, and the shareholders who opposed the transfer of registered office are allowed exit from the company and can require compensation for the shares.[69] The creditors also enjoy the right to monitoring the transfer proposal, and as introduced above, the auditor's statement

[62] Ibid,§318(d)
[63] Ibid,§318(f)
[64] Ibid,§318(g), para. 5
[65] Ibid,§318(j)
[66] Ibid,§318(m), para. 3
[67] Ibid,§318(n)
[68] Ibid,§318(n), para. 3.
[69] Thomas Biermeyer,'"Chapter 4: Current Regulation of Cross-Border Transfers of the Registered Office at the Domestic and European Level", Stakeholder Protection in Cross-Border Seat Transfers in the EU' WLP [2015] p. 121 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747105>accessed 15th February 2021

represent and safeguard creditors.[70] Unlike the majority of national legislators who have not valued the protection of employees, the Danish legislation has stipulated information right for employees, and the outbound transfer of registered office could solely be conducted in the situation that the destination MS can guarantee to protect employees' rights.[71] All the procedures and methods to protect stakeholders are within the legal scrutiny of the Danish authority, the commercial register.

From the above analysis, it can be concluded that the Danish law for the transfer of registered offices complies with the Directive 2019/2121 since transfer procedures and stakeholders' protections provisions which resemble the Directive 2019/2121 Articles of cross-border conversions have been fully defined by the DCA, so Denmark does not have too much pressure to bring its law in line with the Directive 2019/2121.

Considering the above-analyzed MSs which allow cross-border conversions, whether the MSs following the real seat doctrine or the incorporation, they will stipulate relevant legislation. However, due to the diversities of provisions for the cross-border transfer of seat, without a harmonized legislation, the transfer of seat between different MS is an arduous task. For instance, Danish law has explicitly regulated the employees' protection, and in the outbound transfer scenario, if the departure MS, such as the France in which not regulate the employees protection with specific provisions, could not achieve the employees' protection standards as the DCA expected, the transfer would not be allowed by the Danish authority. In this scenario, cross-border conversions might be hindered because of the Danish high standards for the employees protection.

Comparing the legislation of the four mentioned MSs, Belgium has very lightly regulated the transfer of seat procedures, the conversion mainly relies on the company itself, it can be named as lightly regulated MS. But France, Spain, Denmark have precisely regulated the procedures which can be called heavily regulated MSs. This would also impede the cross-border transfer of seat. Thus, it can be concluded that, with the development of EU legislation and the national laws, MSs, for example, Denmark has based on the Directive 2017/1123 extend the provisions of the cross-border mergers to the transfer of registered office provisions, have mastered the

[70] Ibid.
[71] Ibid.

mature methods to manage the cross-border transfer of seats. However, MSs following different doctrines, and some of them have diverse procedures to conduct transfers, without the integrated EU level law, the transformations have been hampered to some extent, the free movement of establishment principle could not be implemented well. Especially, the MSs which following the real seat doctrine require the registered office and the administration center is the same place, however, according to Article 49 and 54 of the TFEU, as long as there is a registered office or central administration in the EU, the company could entitle to the free movement of establishment right, the real seat doctrine impedes the free movement.

2.3 The Development of cross-border conversions case laws

To solve the problem that the MSs' law might hamper the free movement of establishment, moreover hinder the cross-border mobility of companies, questions are raised "which is superior between the conflict of law rules in MSs and the free movement of establishment principle? Can MSs restrict the principle of free movement of establishment that companies entitled, for reasons that the principle conflicts with the national laws? " Thus, it is necessary to examine the case laws interpretation of the ECJ for the free movement of establishment, since the ECJ indisputable rendered assistance to the implementation of free movement of establishment, especially cross-border conversions of companies by the way that explain Treaties in the proper methods. And the case laws of ECJ also offer guidance for the cross-border transfer of seat within the EU scope.[72] In this section, the functions of ECJ and some landmark cases will be introduced to display how case laws work on problematic cross-border mobility issues.

2.3.1 General background of the European Court of Justice

The CJEU interprets EU law to ensure its application in all EU MSs and resolves legal disputes between national governments and EU institutions.[73] The CJEU is divided into two courts: one is the Court of Justice (ECJ), another one is the General Court, in practice, it mainly tackles trade, agriculture, trade marks, competition law,

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[72] European Parliament, 'Cross-border transfer of company seats', [2017] p.2 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf>accessed 3rd Februart 2021

[73] European Union, 'Overview of the Court of Justice of the European Union (CJEU)', [2020] <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#:~:text=The%20Court%20of%20Justice%20of,national%20governments%20and%20EU%20institutions.> accessed 26th February 2021

State aid[74] which is not the target of this section. From the section about the European Commission, it could be drawn that the main function of the ECJ is to ensure that the law is complied with in the interpretation and application of treaties.[75]

The ECJ mainly deals with the requests for a preliminary ruling since the national courts of EU MSs are required to ensure the correct application of EU law, but courts in different MSs may interpret EU law differently, and if a court in a MS has a question about the interpretation or validity of EU law, it can ask the ECJ to clarify.[76] ECJ could replenish or limit the relevant EU legislation, it was made in response to a case submitted by the court of MS, the rulings are binding on that MS to guarantee that the EU law could be applied and interpreted precisely within the EU. And as the EP indicates, 'There is no binding precedent principle in EU law, as in common law countries. Strictly saying, CJEU' s decision in the preliminary reference procedure is binding only on the national court in which the issue was raised and on other courts in the same domestic procedure. Nonetheless, ECJ judgments interpreting EU law enjoy similar authority as the civil law countries' national supreme courts, MSs courts should take those ECJ judgments into consideration when they interpreting EU law.'[77] The preliminary adjudications indirectly affect the rights and obligations of the relevant EU laws. Thus, with the analysis of the typical cases, how the ECJ enhanced the mobility of companies for cross-border conversions with the development of EU corporate law could be precisely demonstrated.

2.3.2 The evolution of the cross-border conversions with the ECJ

The first case worth discussing is the ***Daily Mail*** case[78] in 1988, here are the simple facts: in 1984, an investment holding company of the United Kingdom, the Daily Mail, applied to the British Treasury to transfer its management and control centers to the Netherlands, because Dutch law allowed foreign companies to maintain their legal personality while headquartered there, and the company's main motivation for moving

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[74] Ibid.
[75] Shuibhne,European study, 'The Function of Court of Justice of the European Union' [2012] p.152 <http://hum.port.ac.uk/europeanstudieshub/learning/module-1-understanding-eu-institutions/the-european-courts/functions/>accessed 27th February 2021
[76] European Union, 'Overview of the Court of Justice of the European Union (CJEU)', [2020] <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#:~:text=The%20Court%20of%20Justice%20of,national%20governments%20and%20EU%20institutions.> accessed 26th February 2021
[77] European Parliament, 'Briefing-Preliminary reference procedure', [2017] p.1 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf> accessed 28th February 2021
[78] Case 81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, [1988] EU:C:1988:456

its headquarter is to avoid the UK taxes, as it planned to sell most of its non-permanent assets and then used the proceeds to buy its own shares. The UK law regulated that if one company sold its assets, it should subject to the capital gains tax. Although the Dutch authority also entitled the right to tax the Daily Mail, it only happened after Daily Mail converted its headquarter to the Netherlands. And the UK refused the transfer, the company initiated legal proceedings. As both the UK and the Netherlands adhered to the incorporation doctrine, the case had not revealed any problems in either the UK or the Netherlands.

The Court ruled that Article 43 and Article 48[79] did not endow a company incorporated under the law of a MS and with its registered office established in that State, the right to transfer its management and control center to another MS. The ECJ stated that "Unlike natural persons, enterprises are products of the law, and in the current EU law, they are products of national law and they exist only because diverse national legislation determine how they are incorporated and how they operate."[80] This means that Companies could not maintain their legal personality in home MS which transfer its headquarter into host MS since enterprises are controlled by their incorporated MSs. The Court accepts the MSs apply different conflict-of-law rules, even the rule would hamper the freedom of establishment of a company, for example, the MS which follows the real seat doctrine could require the company's register office and its central administration are coherent to each other, the national rules were given priority over the free movement of establishment. It shows the *Daily Mail* judgement at the time had great limitations.

After 1988, there is no dispute on whether the real seat doctrine complies with the free movement of establishment principle, the priority of national law is recognized for more than 10 years. Until the year of 1999, the ***Centros*** case brought the issue of corporate mobility back to the forefront of public. The decision, in this case was widely discussed in Europe and had a profound impact on company law. The case dealt with the situation that in 1992, a couple established a private limited liability company, the Centros which is located in the UK. But the company had no intention of exercising business in the UK, its shareholders want to conduct business in Denmark. Therefore, the company applies to establishing a branch in Denmark while

[79] Now Article 49 and Article 54 of TFEU
[80] Case C-81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Ma il and General Trust plc, [1988] EU:C:1988:456, para. 19

continuing governed by British law.[81] The Danish authorities refused Centros' application to establish a branch in Denmark because the company did not exercise any business in the UK, it solely desired to take advantage of EU law, to evaded Danish law which required a minimum capital requirement.[82] Hence, the Danish authorities stated that the economic activities of the company were conducted in Denmark, the Centros' desire was not to establish a branch in Denmark, but to established firstly in Denmark.

The ECJ recognized that there were no abuses of rights in this case. Catherine Barnard in his book states that the Court concluded in the *Centros* case that, it is not an abusive or fraudulent activity to take advantage of EU laws to firstly establish a company in MS A which has lenient incorporation rules and then, relying on Article 43 and Article 48 of TFEU (now Articles 49 and 54 of TFEU), set up a branch or agency in MS B, thereby avoiding State B's more onerous rules of incorporation.[83] The Court ruling that "In any case, combating fraud could not be a justification to reject a registration of a company's branch in another MS."[84]

The decision reveals that with the precondition that the host MS approved a company's legal personality, the company established according to one MS's company law could secondary establish a branch or agency in the host MS, even all business of this company would conduct in the host MS, and its sole purpose was to circumvent the stricter law in the incorporated MS. With this judgment, the doctrine of one MS is not important, the same result can be drawn, even the company's branch is in a MS adopting the real seat doctrine. The decision of the *Centros* seemed in contrast with the rulings of *Daily Mail*, however, the Court had not involved the *Daily Mail* case in the *Centros*, which meant rulings in *Daily Mail* did not be overturned. Some scholars deem that imposing obligations on MS for mutual recognition of foreign companies could lead to dangerous competition the "race to bottom" between national corporate laws.[85]

Disputes continued in the MSs and academia until the ECJ ruled in 2002 ***Überseering***

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[81] Daniele Fabris, 'European Companies' "Mutilated Freedom". From the Freedom of Establishment to the Right of Cross-Border Conversion', European Company Law Volume 16, Issue 4 [2019] p. 111
[82] Ibid.
[83] Catherine Barnard, *The substantive law of the EU: the four freedoms*, sixth edn [2019] p.508
[84] Case-C 212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen, [1999] EU:C:1999:126 para. 38
[85] Andrea Perrone, 'Dalla libertà di stabilimento alla competizione fra gli ordinamenti? Riflessioni sul cas o Centros, in 46 RIVISTA DELLE SOCIETÀ 1292', [2001] p.3

case.[86] The facts were that the company Überseering located its central administration in the Netherlands, which was originally established based on Danish law, had all its shares acquired by two German. Überseering had prosecuted a German company for a project disputation. The German Court held that the plaintiff, Überseering, as a company incorporated under Danish law, had its real seat in Germany, and that the company had not been re-established under German law, so it had no legal capacity and grounds for action to proceed under German law.

The ECJ in its decision stated that "A company can only exist by relying on national legislation, which determines its establishment and operation. The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment."[87] Restrictions on the free movement of establishment in home MS could be justified under certain conditions, for example, for the protection of stakeholders, taxation authorities, etc which are related to general interests. However, the deny of the company's legal capacity of inbound transfer could not be justified with the general interests.[88] The Court emphasized that a company established in accordance with MS A's law and has its registered office in MS A, moved its actual central administration to MS B, with the free movement of establishment principle, MS B should admit the legal capacity of the company.[89]

As aforementioned, *Daily Mail* and *Centros* cases rulings deem to contradict each other. The *Überseering* case is a major development for the *Centros* case, and seems a compromise for the two former contradictory ECJ rulings. In the scenario that a company conducts an inbound transfer of seat, the *Centros* rulings applied, similarly to the *Überseering* ruling that the restrictions on the free movement of establishment are invalid. However, in the moving abroad, the outbound scenario, the *Daily Mail* ruling could be utilized since it was the national legislation that determined the function of one company, MS could impose restrictions on its companies, thus the restrictions on the free movement of establishment for the outbound transfer is permitted.

[86] Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), [2002] EU:C:2002:632
[87] Ibid, para. 81
[88] Ibid, para. 92
[89] Ibid, para. 94

After the *Überseering* case, In 2003, ***Inspire Art*** case[90] replenished the *Centro* and *Überseering* cases formulas, that it is not an abuse of freedom of establishment principle for a letter-box company to incorporate under the law of a MS to circumvent the company law requirements of MS where it is established and in which it conducts its entire business.[91] And the ECJ did also displayed the desires to give the MSs' companies more rights to freely establish their companies in the 2005 ***SEVIC*** case[92], this case dealt with issue of the cross-border mergers, the Court addressed that it is necessary to conduct cross-border mergers for purposes to exercising free movement of establishment and facilitating the integration of internal market Cross-border merger operations.[93] The AG Tizzano of the *SEVIC* case pointed out that "the cross-border merger could not only be exercised in the primary establishment, but also in the secondary establishment."[94] According to the case laws, the ECJ is definitely attempting to provide EU companies with the full freedom to conduct the movement of establishment.

Then came the year 2008, one case has a far-reaching impact on the cross-border conversion within the EU area, it is the ***Cartesio*** case.[95] The fact is that Cartesio is a limited partnership, established under Hungarian law. And the Cartesio desired to transfer its registered office into Italy, while continuing to operate following Hungarian company law,[96] however, the Hungarian Court of Registration had rejected the company's application with the *Dail Mail* formula. Then the cross-border conversion question was referred to the ECJ.

The Court reaffirmed in the *Cartesio* case that "a MS is entitled to define the linkage factors required for a company incorporated under MS law, that power includes the possibility for that MS refuses the company established under its law to convert its head office to another MS while retaining its legal status in the home MS."[97] *Cartesio*'s confirmation of the previous *Daily Mail* ruling was unexpected after the

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[90] Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, [2003] ECLI: EU:C:2003:512

[91] M.Szydło, 'Cross-border conversion of companies under freedom of establishment: Polbud and beyond', 55 Common Market Law Review [2018] p. 1567

[92] Case C-411/03 SEVIC Systems, [2005] ECLI:EU:C:2005:762

[93] Ibid, para 19

[94] Opinion Advocate General Tizzano of 7th July 2005 on Case C-411/03- SEVIC Systems, ECLI:EU:C:2005:437 paras. 35-37

[95] Case C-210/06 Cartesio Oktató és Szolgáltató bt, [2008] ECLI:EU:C:2008:723

[96] Worker-participation, 'Cartesio (Case C-210/06, 16th December 2008)', [2016] <https://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Cartesio> accessed 3th March 2021

[97] Case C-210/06 Cartesio Oktató és Szolgáltató bt, [2008] ECLI:EU:C:2008:723,para. 110

series of robust rulings, from *Centros* to *Inspire Art*,[98] The *Cartesio* decision had not overruled the *Daily Mail* formula, thus the company may still be required to liquidate or dissolute before it operates the cross-border transfer of its head office. Despite the reaffirmation, there is a landmark ruling in the *Cartesio* case, the Court *obiter dictum* stated that freedom of establishment also covers the possibility of a company converting itself into a company governed by the law of another MS, in fact, it is the cross-border transfer of head office.[99]

Hence, it was the first time that the Court confirmed the company's cross-border conversions in the outbound transfer if the company did not maintain its status in the departure MS, and the transfer of head office was permitted by the destination MS, even though rules for operating cross-border conversion while maintaining company's status were still be governed by the home MS law.

After four years, a mirror image of *Cartesios* case, the ***Vale***,[100] which was dealt by the ECJ. The case concerned the operation of cross-border conversion of a LLC named Vale, Vale was established under Italian law, and wished to convert into a LLC incorporated under Hungarian law while maintaining its legal status. However, the Hungarian authority rejected the conversions for the reason that "only companies incorporated under the law of Hungary are allowed to convert".[101] The opposite of the *Cartesios* case is that in the *Vale* case, it concerned the inbound transfer.

The Court in *Vale* stated that "Articles 49 and 54 of TFEU must be regarded as obstructing national legislation which enables companies established under national law to convert, but not allowing, in a general manner, companies governed by the law of another MS to convert to companies governed by national law by incorporating such a company."[102] In other words, a MS cannot prevent a company registered in another MS to convert its head office into the host MS, as long as there exist laws for the national company's conversion in the host MS.[103] Restrictions on such freedom of establishment could only be justified via the reasons of public interests which comply

[98] Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials,*sixth edn, [2015] p. 814-815

[99] Worker-participation, 'Cartesio (Case C-210/06, 16th December 2008)', [2016] <https://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Cartesio> accessed 3th March 2021

[100] Case C-378/10 VALE Építési kft, [2012] ECLI:EU:C:2012:440

[101] Marek Zilinsky, '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 10th March

[102] Case C-378/10 VALE Építési kft, [2012] ECLI:EU:C:2012:440 para. 41

[103] Daniele Fabris, 'European Companies' "Mutilated Freedom". From the Freedom of Establishment to the Right of Cross-Border Conversion', European Company Law Volume 16, Issue 4, [2019] p. 108

with the proportionality principle, in the *Vale* case, Hungarian law gone beyond what is necessary to protect its public interests. In accordance with the statement of the ECJ that "one MS treats domestic companies and foreign companies differently which defer the inbound companies' on the cross-border conversions, violates the principle of free movement of establishment."[104]

It can conclude that in the *Vale* case, the ECJ decided the ruling based on the non-discrimination principle, Hungarian authority allowed its domestic companies to transfer the seats, however, another MS's company could not has that right, the Hungarian law is irreconcilable with the Article 49 and Article 54 of TFEU. Therefore, the Court means that an inbound transfer of seat has to be permitted by the host MS, except that MS company law does not allow the transfer of seat essentially. With this interpretation whether one MS following the real seat doctrine or incorporate doctrine is not important, because under the *Vale* formula, if there exist laws for the conversion in their national law, the inbound cross-border conversions have to be admitted by the host MS.

On 25th October 2017, the Court had a big step forward to solve the complex puzzle of the cross-border transformation of companies. In contrast to previous cases involving the transfer of head offices of companies, the ***Polbud*** case deals with the transfer of registered offices.[105] The fact is that a Polish LLC, Polbud, desired to transfer its registered office to Luxembourg after the general meeting of the shareholders in 2011, and in Polbud resolution, no mentions of transfer Polbud's central administration or the actual business place carried out. Based on the resolution, the commercial registry of Poland launched a liquidation procedure. Then, in 2013, after the unanimously agreement of the shareholders, the Polbud transferred its registered office to Luxembourg, the Polbud had changed its name into Consoil Geotechnik Sàrl and became a private LLC under the company law of Luxembourg.[106] Subsequently, Polbud lodged an application which was the request of exclusion itself from the commercial registry to the Polish registry. However, the authority had rejected Polbud's application for the reason that the Polbud had not finished the liquidation procedure. The Polbud brought an action against the decision

[104] Case C-378/10 VALE Építési kft, 2012, ECLI:EU:C:2012:440, para 36
[105] Daniele Fabris, 'European Companies' "Mutilated Freedom". From the Freedom of Establishment to th e Right of Cross-Border Conversion', European Company Law Volume 16, Issue 4, [2019] p.109
[106] Corporate Finance Lab, 'Polbud: ECJ further facilitates shopping for company law', [2017] <https://corporatefinancelab.org/2017/10/25/polbud-ecj-further-facilitates-shopping-for-company-law/>accessed 1 0th March

of registry, it argued that the liquidation procedure is dispensable since it has registered in Luxembourg and continues to exist. Then the Supreme Court of Poland referred several questions to the ECJ.

The Court noted that freedom of establishment applies to the transfer of a company's registered office without changing its real headquarters.[107] This means that the free movement of establishment has expanded to the transfer of registered office of all companies from one MS to another even if companies would not have real economic activities in the host MS. Furthermore, the ECJ affirmed that one company merely transfers its registered office to another MS could not constitute fraud and can not justify a measure that adversely affects the exercise of free movement of establishment.[108] Thus, a company's registered office or *de facto* headquarter is established in accordance with the legislation of a MS for the purpose to enjoy more favorable legislation does not in itself constitute an abuse of free movement of establishment.[109]

Also, the Court emphasized that the requirement of liquidation of a company impedes the outbound cross-border conversion, and constitutes a restriction on the free movement of establishment.[110] And all discriminatory measures that are, more restrictive measures than those applicable to the conversion of companies within a MS[111] hamper the free movement of establishment. The Court has made a further step based on the *Vale* case's non-discrimination formula, it appears that MSs rules which will prohibit, impede, or render less attractive the exercise of freedom of establishment will be caught by Article 49 and Article 54 TFEU, even these are non-discriminatory and are appropriate and necessary means of protecting the interests of creditors, employees or minority shareholders.[112]

Advocate General Kokott has an opposite view of the ECJ, Kokott stated that in order to apply Article 49 and Article 54 TFEU, actual establishment and the pursuit of genuine economic activity in the host MS are indispensable, she then affirmed "although that freedom gives economic operators within EU the right to choose the

[107] Case C-106/16 Polbud - Wykonawstwo sp. z o.o., [2017] ECLI:EU:C:2017:804 para. 44
[108] Ibid, para 63
[109] Corporate Finance Lab, 'Polbud: ECJ further facilitates shopping for company law', [2017] <https://corporatefinancelab.org/2017/10/25/polbud-ecj-further-facilitates-shopping-for-company-law/>accessed
[110] Case C-106/16 Polbud - Wykonawstwo sp. z o.o., [2017] ECLI:EU:C:2017:804 para. 51
[111] Ibid, para. 43
[112] M.Szydło, Cross-border conversion of companies under freedom of establishment: Polbud and beyond 55 Common Market Law Review [2018], p.1563

location of their economic activity, it does not give them the right to choose the law applicable to them."[113] Nevertheless, the Court had not taken her point and ruled completely different which allow the companies to conduct cross-border conversion without any genuine economic activity.

The *Polbud* case has clearly stated the scope of free movement of establishment concerning the cross-border conversions, companies have obtained more freedoms to conduct business within the EU area. With the *Polbud* formula, MSs whom alleged restrictions on the free movement of establishment are for the protection of general interest, for instance, to protect the employees' rights would violate Article 49 and 54 TFEU, which will stimulate those MSs which do not have proper legislation on the issue of cross-border conversion to bring their legislation in line with the spirit of free movement of establishment.

In conclusion, from the 1980s *Daily Mail* case to the currently *Polbud* case, the ECJ has continuously pursued the way to properly operate the free movement of establishment, even sometimes, its decisions are contradicted with each other, the ECJ did make great contributions. However, the Court seems not to distinct the specific meaning of the seat and the registered office, in the *Vale* case, the transfer of seat refers to the real seat (where the actual economic activity conduct), but in *Polbud*, the registered office has no connection with the actual economic activity place. As mentioned in the above section, MSs follow different legal doctrines, which means they would have a different interpretation of the concept of 'seat' that could impede the cross-border conversion among those MSs.

Adopt a harmonized legislation on cross-border conversions is a commendable solution for this issue. Without an EU level mechanism, solely rely on the ECJ rulings to settle the problematic cross-border conversion matter will cause lots of disputes, also the Court is only an interpretation organ that could not regulate the procedures and other laws for MSs' company to conduct cross-border conversion. However, the Court brought the issues in front of the public, and based on the judgments of the ECJ, the EU legislators have drafted and adopted the Directive 2019/2121 to deal with the cross-border conversion issue.

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[113] Opinion Advocate General Kokott of 4th May 2017 on Case C-106/16 Polbud - Wykonawstwo sp. z o. o. ECLI:EU:C:2017:351 paras. 33-38

3. How the cross-border conversions legislative instruments harmonized in EU level

After the detailed analysis about the Treaties, MSs' national laws, and the ECJ rulings, a conclusion can be drawn that, the cross-border conversions rule has urgently required to harmonized at the EU level (finally emerged the Directive 2019/2121). Chapter 3 will start with the evolution of cross-border conversions' definition, to indicate the EU has dealt the definition from unsystematic approach to the professional approach in Directive 2019/2121. Then, the Chapter will focus on the development of EU company law. Also, precisely introduction of matters related to the Proposal for the cross-border conversions, mergers and divisions (hereinafter '2018 proposal')[114] will be presented.

3.1 Definition of the cross-border conversions

The harmonization of the EU company laws is the coordination and unification of the MSs' company law systems. The contents of the EU company laws are commonly involved in the establishment of companies, cross-border mergers, divisions, and conversions, capital systems, and so on. In this thesis, only the laws related to the cross-border mobility of EU companies, especially the cross-border conversions are analyzed in detail to help with a better understanding of the Directive 2019/2121.

Firstly, in order to deeply assessing the evolution of the cross-border conversions, the definition of the conversions has to be figured out. However, according to the development of the EU company law, the EU has dealt with the issue of cross-border *ad hoc* and unsystematically, mainly to leaving things for clarification to the European Court of Justice (hereinafter 'ECJ').[115] Some scholars present that "The ECJ has tried to fill the legal gap through broader interpretation of free movement of establishment, which includes the cross-border conversion. The ECJ' s decision has brought the issue back to the front of public, drawing attention to the lack of rules on cross-border conversions and the need to regulate it at EU level."[116] as mentioned in

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[114] European Commission, Proposal for a Directive of the European Parliament and of the Council amend ing Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2018] 2018/011 4 (COD)

[115] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, 'Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion', EU and Comparative Law Issues Challenges Series, Issue 3 [201 9] p. 948

[116] Ibid.

the above section, in the *Cartesio* case the Court explained about the cross-border conversions, however, the ECJ does not entitle to legislate rules within the EU company laws since it is not a legislative body, it only an interpretational role.

Until recently, with the decision on the *Polbud* case and the adoption of the Directive 2019/2121 the definition can be precisely described. As Szydlo stated in his article "Now clearly that cross-border conversions fall within the scope of freedom of establishment, freedom of establishment principle applies to the transfer of company's registered office, for the purposes of its conversion, the converting company follows the conditions imposed by the legislation of the host MS, into a company incorporated under the law of the host MS, with no change in the location of the headquarter of that company."[117]

And Article 86 b(2) has defined the meaning of the cross-border conversions, " 'cross-border conversion' means a company converts the legal form under which it is registered in a departure MS into a legal form of the destination MS, without being dissolved or wound up or going into liquidation, and transfers at least its registered office to the destination MS, while maintaining its legal personality".[118] Conclusions can be drawn that the cross-border conversions correspond to the free movement of establishment principle, and its definition finally regulated by the Directive 2019/2121.

Before thoroughly make a further analysis about the Directive 2019/2121, it is necessary to get the gist of the EU company law's legislation foundations, to help with the better understanding of the cross-border mobility of EU companies objectives, operations.

3.2 The development of EU company law

In practice, the different legislation between MSs may impede freedoms to transfer a company's registered office or change the company's legal form. According to the case law and the TFEU, the establishment of branches or subsidiaries is entirely guaranteed even there are still exist deficiencies. However, the road of exploring the

[117] M.Szydło, Cross-border conversion of companies under freedom of establishment: Polbud and beyond', 55 Common Market Law Review, [2018] p. 1560

[118] Article 86b (2) of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 No vember 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisio ns, [2019] OJ L 321

possibility of cross-border conversions did not stop yet.

The first stage for the evolution of the EU Company Law starts in 1968 when the so-called First Council Directive (68/151/EEC) was approved. It aims to make it easier and faster for the public to access information about companies, including transactions, obligations and effectiveness of companies,[119] however no transfer of companies' seats rules involved. But in the 1970's several legislative acts had firstly directly or indirectly attempted to regulate the relocation of companies' seats problem.

For example, 1985 is a milestone in the history of EU Company Law, because the first European company type is created: the European Economic Interest Grouping (hereinafter 'EEIG')[120], and the Regulation 2137/85 which settled the EEIG stated rules concerned by this thesis, within Regulation 2137/85, the realization for the transfer of the EEIG's official address needs special notices and a transfer proposal, for instance, a notice of the completion of a company's liquidation.[121]

Although the cross-border mobility issue arose from very early times, however, it is the decision of the *Daily Mail* case in 1988 that brings people's attention widely to the free movement of establishment, renews the interests in the cross-border mobility of companies. Then the new Council Regulation (EC) No 2157/2001 of 8th October 2001 on the Statute for a European company had ruled on cross-border conversion but only targeting at the public LLC to Societas Europaea (hereinafter 'SE').[122] It only deals with the creation and the basic structure of the European company. And the regulation also requires an SE to has its registered office in the same MS as its head office (headquarter).

In order to tackle the problems related to cross-border mobility, the Council made a proposal for the 14th Company Law Directive firstly in 1997.[123] The resolution of the European parliament referred to above also contains an outline of a possible organization of the transfer and other related issues. Some fundamental principle must

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[119] European Parliament, 'Fact Sheets on the European Union-Company Law', [2021] p.2 <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.11.pdf> accessed 13th March 2021

[120] Carlos Gorriz, 'Evolution of EU Company Law', Edinburgh Law School [2010] p.2

[121] Ibid.

[122] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 [2019] p. 950

[123] European Commission, Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law, [1997] XV/D2/6002/97- EN REV. 2

be guaranteed: firstly, the legal status of the company shall not be affected by the transfer; secondly, contracts between companies shall be not affected either; thirdly, the transfer shall not imply the transfer of the main business activities of the company; finally, the protection of minority shareholders should also be involved.[124]

Then came 2003, the Commission published a plan called *Modernising company law and enhancing corporate governance in the European Union*. The new EU Company Law was based on three pillars. The Commission recognized that the harmonization of national legislation is not an end in itself, but a mean to achieve the goals regulated in the Treaties, for instance, the free movement of establishment.[125] The second and third pillars are linked to the cross-border mobility of the EU companies. The second pillar includes shareholders and creditors' protections, it is considered necessary to strengthen these protections, because the protections were very much attractive to investors, and could increase competitiveness of companies.[126] It was a crucial mechanism to assist the EU companies to move freely within the European area, and also to promote intra-European international operations.

In 2012, the Commission deiced again on the topic of EU Company Law, because there was still lack the proper harmonize EU company law, and the Commission approved an action plan, after the communication with the Council, EP, the European and Social Committee and the Committee of the Region, which called: *European Company Law and Corporate Governance-A modern legal framework for more engaged shareholders and sustainable companies*. The 2012 Action Plan concerned the improvement of the regulatory framework of cross-border operations. The Commission had considered several issues, for instance, with regard to the cross-border transfer of seat, it was considered necessary to obtain reliable data before the transfer decision was taken, because numerous studies in 2008 had questioned the benefits of such mobility.[127]

Backing to 2005, the Sixth Council Directive (82/891/EEC) on the division of public LLCs which concerned requirements for the submission of independent expert reports on cross-border transfer of mergers or divisions, as well as obligations on reporting and documentation requirements had been adopted, and it has been codified by

124 Ibid, p. 11
125 Carlos Gorriz, 'Evolution of EU Company Law', Edinburgh Law School [2010] p.7
126 Ibid.
127 Ibid, p. 12

Directive (EU) 2017/1132.[128] On 14 June 2017, the Directive 2017/1132 relating to certain aspects of company law selectively dealt with some issues regarding cross-border mergers, but no cross-border conversions and divisions rules involved. Evidently, the EU lacked a systematic approach in regulating cross border mobility, especially the cross-border conversions, since through almost 50 years, after the publishment of several plans and legislative acts, within several directives the cross-border mergers have been regulated at the EU level, but some procedures and stakeholders' protections issues still exist, the problems related to the cross-border conversions are still mainly relied on the CJEU to deal with.

Nonetheless, the Directive 2017/1132 is also not a successful legislation, since it only focused on several aspects of the cross-border merger but ignored tough problems related to the transfer of seats of companies, the protection of stakeholders, and also some procedures issues. Vanessa in her study stated that "there are still some obstacles have to be removed within the cross-border mergers. Differences in the way MSs provide protections for minority shareholders and creditors of the merged company posed practical problems for the merged company."[129] After the ECJ decision on the *Polbud* case, the Commission presented a proposal to amend the Directive 2017/1132 in 2018, and it became a topic that highly discussed within the EU Company Law. After several negotiations and disputations, finally, the Directive 2019/2121 adopted on 27th November 2019.

After a hasty glimpse of the EU company history, conclusions can be drawn that, even though the EU has never stopped its steps to seek proper legislative acts to integrate the EU company law, the rules on cross-border mobility, particularly the transfer of seat, are still unsystematic and mainly rely on the case laws until the Directive 2019/2121 came into force.

3.3 Process of the Directive 2019/ 2121 adoption

The Directive 2019/2121 proves the possibility of cross-border conversions and divisions and improves the already existing regime of cross-border mergers by making it easier for companies to merge, divide or move within the EU internal

[128] European Parliament, 'Fact Sheets on the European Union-Company Law', [2021] p. 3 <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.11.pdf> accessed 13th March 2021

[129] Vanessa Knapp, 'Cross border mobility: what do we need in practice?', ERA Forum volume 19,[2018] p.63–76

market, meanwhile, it also formulate rules to preventing fraud and abusive actions in these operations.[130]

The process for adopting the Directive 2019/2121 is an onerous one, on 25th April 2018 the Commission announced a company law package which comprises two proposals, one is regards to the use of digital tools and processes in company law which aims to revise EU rules in the field of company law to adapt them to the digital age.[131] Another proposal, the 2018 proposal which improves the provisions about the cross-border mergers, and for the first time, aims to create a legal framework for the cross-border conversion and divisions. In order to have a better understanding of the Directive 2019/2121, the focuses should primarily on the second proposal regards the cross-border mobility, the process of how the Directive 2019/2121 was adopted and the contents of the proposal would be precisely analyzed in this section.

3.3.1 The Structure and Main objectives of the 2018 Proposal

The Proposal titled "Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and division"[132], from this title it is clear that the 2018 Proposal deals with the problems regards the cross-border mobility. The 2018 Proposal is a surprisingly large document which altogether has 89 pages, almost 30 pages explanatory memorandum provided by the Commission to analyze the reasons and objectives of the Proposal, then the followed 50 pages of proposed amendments for the current text —Directive 2017/1123.

The 2018 Proposal has a very explicit structure, it is divided into two parts, the first part is the explanatory memorandum which encompasses five main contents. Firstly, in the Context of the Proposal, the objectives of the 2018 Proposal have been precisely addressed. Generally speaking, EU companies and the Single Market are building on each other, well development of EU companies could stimulate the EU's economy and integration. Specifically, the objective of this proposal is two-fold: Providing specific and comprehensive procedures for cross-border conversion,

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[130] Peter Suykens, Angela Nowosad, Marija Dutcik, Commentary on the Directive on cross-border mergers, divisions and conversions, [2020] <https://www.eylaw.be/2020/09/03/commentary-on-the-directive-on-cross-border-mergers-divisions-and-conversions/>accessed 10th March 2021

[131] European Parliament, 'Use of digital tools and processes in company law', 2018/0113(COD) [2019] <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1586783&t=f&l=en> accessed 15th March

[132] Ibid.

divisions and mergers to facilitate cross-border mobility within the EU, while providing adequate protections for companies' stakeholders.[133] With those objectives, the Commission putted forward this 2018 Proposal.

Contexts of the Proposal—Cross-border conversions

In this Proposal, the reasons for the necessity of regulating cross-border conversions at the EU level have been precisely presented. Similarly as Charter 1, 2 stated, even though, the *Polbud* case confirmed the companies' rights to carry out cross-border conversions but the ECJ as a judiciary organ could not settle rules and procedures for companies to conduct the cross-border conversion. Without a harmonized rule for the cross-border conversions, companies have to follow different MSs' regulations and procedures which might often incompatible with each other, since MSs have followed different legal doctrines, some of them have indeed prohibited the cross-border conversions.

In this Cross-border conversion part, the conversion procedure is fairly detailed introduced. It is envisaged as a structured and multi-tiered procedure to ensure the legitimacy of the review of transboundary conversions first by the competent authority of the home MS and then by the authority of host MS.[134] The procedure will be introduced precisely in the next Directive 2019/2121 Chapter, since the Directive has been adopted, the final version of the procedure confirmed.

Legal Basis, Subsidiarity and Proportionality is the second main content of the Explanatory memorandum. The legal basis of this 2018 Proposal is Article 50 of the TFEU which is precisely presented in Chapter 2 of this thesis. And the proposed rules in the Proposal must comply with the principle of subsidiarity, the actions should not exceed the what is necessary to achieve the objectives, and the positive impacts of the proposed measures should outweigh the negative impacts.[135]

The third part of the explanatory memorandum related to *Results of ex-post Evaluations, Stakeholder consultations and Impact assessments*. In this thesis, this part would be analyzed in detail in section 2.3.2. Next is the *Budgetary implications*

[133] Ibid.
[134] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 [2019] p. 945
[135] Ibid, p. 950

section. And lastly, *Other elements* are replenished, for instance, the implementation plans and monitoring, evaluation and reporting arrangements, the detailed explanation of the specific provisions of the proposal, those contains may be involved in the next Chapter to help with the explanation of the Directive 2019/2121. Similarly, the second large part of the 2018 Proposal, the text of amendments for the Directive 2017/1123 will not present in detail within this thesis, since the Directive 2019/2121 has already been adopted.

3.3.2 The backgrounds and disputations for the adoption of the Directive 2019/2121

3.3.2.1 Things before the release of the 2018 Proposal

As mentioned in section 3.2, the 2012 Action Plan has already concerned the harmonization of the regulatory framework of cross-border operations. Also in 2012, the European Add Value Assessment (hereinafter 'EAVA') presented an assessment for the 14th company law Directive which addressed that companies wishing to move their registered office should be able to adopt a much more cost-effective process than the expensive and tortuous route of to first become an SE or undertake a cross-border merger.[136] Without a harmonized Directive to regulate the transfer of companies registered office, the current instruments for transfers have important disadvantages since the cross-border operations are organized by different MSs. The Commission would willing to create a harmonized Directive for the cross-border operations of the EU companies. Before present a proposal for the cross-border mobility topic, recourse to studies, consultations evaluations, the Commission staffs worked out an impact assessment regards the 2018 Proposal.[137] Those basic materials for the publishing of the 2018 Proposal will be introduced in this section.

Public consultations

Furthermore, as addressed in the 2018 Proposal, the Commission has actively engaged with companies stakeholders throughout the impact assessment process and

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[136] European Parliament, 'Directive on the cross-border transfer of a company's registered office 14th Company Law Directive--An assessment accompanying the European Parliament's ', Rapporteurs Lehne and Regner, MEP [2012] p. 37

[137] European Commission, Commission Staff Working Document- Impact assessment, SWD(2018) 141 final [2018] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0141&from=EN> accessed 15th March

carried out comprehensive consultations.[138] To put forward the 2018 Proposal, the consultations of stakeholders should be demonstrated. In early 2012, the Commission conducted a public consultation to assess the key interests of stakeholders in European company law and determine the future priorities of EU company law.[139] This 2012 consultation covers the question regard cross-border mobility for companies–"What can be done to facilitate the cross-border transfer of a company's seat? What if a company splits into different entities cross-borders? Should the rules on cross border mergers be reviewed."[140] Finally, the consultation received 496 replies which originated in 26 EU MSs and in a number of countries from outside the EU. And 118 of the 496 replies, were provided by organizations and stakeholders registered in the Interest Representative Register.[141] And there was a strong support which about 68% participants opt a harmonize Directive to facilitating the cross-border transfer of registered office.[142] All in all, the majority of participants are concerned about the problems for the transfer of companies' registered office and desired an EU level legislation. Also, the participants wished to enhance the stakeholders' protections within the cross-border situations.

A further public consultation that focuses on cross-border mergers and cross-border conversions has launched in 2015. To create new procedures for the cross-border divisions similar to the cross-border conversions was quite welcome by the consultation participants. And the protection of minority shareholders and the protection of employees' rights, briefly the stakeholders, are the main issues that the participants focused on. About 72 percent of respondents said that unifying legal requirements on cross-border division would help businesses and facilitate cross-border activities, and reduce costs directly related to cross-border division. Concerning cross-border mergers, 88 percent of the respondents were in favour of the harmonization of creditors protections.[143] Furthermore, in regards to minority shareholders protections, a majority of 66 percent of respondents were in favour of

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[138] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2018] 2018/0114 (COD) p. 12

[139] Ibid, p. 14

[140] European Commission, European Company Law: what way forward?, [2012] <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_149>

[141] European Commission, Feedback Statement-Summary of Responses to the Public Consultation on the Future of European Company Law, [2012] <https://sem.gov.mt//wp-content/uploads/2018/03/feedback-statement-1.pdf> accessed 13th March 2021 p. 2

[142] Ibid, p. 11

[143] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2018] 2018/0114 (COD) p.15

harmonization with 71 percent of which support the harmonization on a maximum basis.[144]

In addition, a public consultation related to the topic "EU Company law upgraded: Rules on digital solutions and efficient cross-border operation" launched in 2017, the period of the consultation is from 10th May 2017 to the 6th August 2017. The results of previous consultations have shown support among stakeholders for addressing the issue of cross-border operations of companies,[145] for example, the aforementioned 2014 public consultation on cross-border mergers and divisions and the 2012 consultation on the future of EU company law. The third part of the consultation concentrate on the problems related to the cross-border operations of companies (mergers, divisions, conversions).

From the cross-border conversions perspective, the majority of public authorities agreed that the lack of rules of procedures for cross-border conversions does constitute obstacles to the internal market. The business groups as similar percentage as public authorities strongly supported the introduction of a conversion procedure, 44 percent of business groups said construct integrated cross-border conversion procedure was a top priority for the EU, 22 percent said it was a top priority and 22 percent said it was not.[146] Trade unions and notaries Academics were also broadly in favour of the introduction of a conversion procedure. Most public authorities and business organizations are in favour of addressing the possibility of changing the applicable law by transboundary conversion to another MS without loss of company's legal personality.[147] And also the similar results regards the cross-border divisions.

Conclusions can be drawn that, based on those public consultations, introduce a cross-border conversions procedure and harmonize the cross-border mobility within an EU level are pressing demands of not only the public authorities but also trade unions, stakeholders, and so on. And they also concentrate on the protection of minority shareholders and the protection of employee rights within cross-border mobility. Constructing an integrity legal framework for cross-border mobility,

144 Ibid.
145 European Commission, EU Company law upgraded: Rules on digital solutions and efficient cross-borde r operations, Newsroom [2017] <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=58190#_ftn3>
146 European Commission, 'Feedback Statement to the 2017 Public Consultation on "EU Company Law U pgraded: Digital solutions and Providing efficient rules for cross-border operations of companies"' [2018] p. 4 <https://ec.europa.eu/info/sites/info/files/summary_of_feedback_to_the_2017_public_consultation_on.pdf> accessed 15th March 2021
147 Ibid, p. 4-6

especially cross-border conversions is the social desire.

Studies&Report

The studies for the Committee on Legal Affairs (hereinafter 'JURI') and the EP are in line with the impact assessment of the 2018 Proposal. In the June 2016 study for the JURI, it presented that the need to enable companies to effectively exercise their 'freedom to convert' requires the adoption of an EU legal framework for cross-border conversions.[148] Currently, options for a company to transfer its seat compare to the cross-border conversions have great shortcomings, for example, one option is to winding-up in the home MS, then establish a new company in the host MS, transfer of all the assets and liabilities individually, however, it is not only cumbersome and costly, but the legal personality of the company could survived.[149] Before the adoption of Directive 2019/2121, context of stakeholders protections, the rules for protecting minority shareholders, creditors and employees vary widely and are often vague. The shareholders and MSs public authorities are desire a legislative framework, wish EU creates a level playing field and establishes clear and harmonized standards for the protection of minority shareholders, creditors and employees.[150] Also in the study, the scope of the directive for the cross-border operations (this thesis focuses on conversions), the procedures of conversions and the rules for the protection of stakeholders have been suggested and evaluated which are similar to the current Directive 2019/2121, thus no deeper dissects involve here.

In 2014, the Commission commissioned a report on the conflict of law rules applicable to companies. The Final Report was published in April 2017.[151] The main finding in the report was that there are significant practical obstacles for the cross-border operations in the EU area. The Report suggested that a directive of substantive company law should be adopted to provide for harmonized rules and procedures to allow a company created under the law of a MS to convert into a company governed by the law of another MS, without liquidation or the create a new legal personality. It said that a directive should harmonize cross-border conversions procedures and provide a minimum harmonization of rules for the protection of

148 European Parliament,Jessica Schmidt, 'Cross-border mergers and divisions, transfers of seat: Is there a need to legislate? Study for the JURI Committee' , [2016] p. 32 <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf>accessed 12th March 2021

149 Ibid.

150 Ibid, p. 34

151 European Commission, 'Final Report - Study on the Law Applicable to Companies', DS-02-16-330-EN-N [2017]<https://op.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1>accessed 13th March 2021

creditors with the aim of avoiding opportunistic reconsolidation at the expense of creditors and other stakeholders.[152] Based on the former researches, studies, consultations and adopted rules, the Impact assessment and 2018 Proposal has been put forward.

The Impact Assessment

As the 2018 Proposal addressed, the impact assessment covering digitalization, cross-border operations and conflict of law rules in company law.[153] This thesis mainly concentrates on the assessment of cross-border operations. Recent research estimates that 350-900 cross-border conversion operated in 2016.[154] And the findings of the study are used in preparation of the " Company Law Package" initiative which also is utilized in the impact assessment.

Similarly, with the aforementioned materials, the impact assessment emphasized the problem of the procedures for a company to conduct the cross-border conversions, since currently there are no harmonized procedure rules for cross-border conversions to refer, companies could only rely on the MS laws which may often incompatible with each other. Even if the program matches, the average costs of the cross-border conversion itself is estimated to be between $20,000 and $40,000 under the current MSs law, depending on the sizes of the MSs and the companies involved .[155] Also, the impact assessment focuses on the problems for the protection of stakeholders. For example, as regards the protection of employees, some MSs have specific rules on it, but some do not have rules at all, employees are not fully informed about cross-border transfers in common, which seem to be particularly problematic because cross-border transfer of seat are perceived to be risky to employees' rights.[156]

To introduce new procedural rules of the cross-border conversions and divisions, the

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152 Vanessa Knapp, 'Cross border mobility: what do we need in practice?', ERA Forum volume 19,[2018] p.70

153 European Commission, Proposal for a Directive of the European Parliament and of the Council amend ing Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2018] 2018/011 4 (COD) p.18

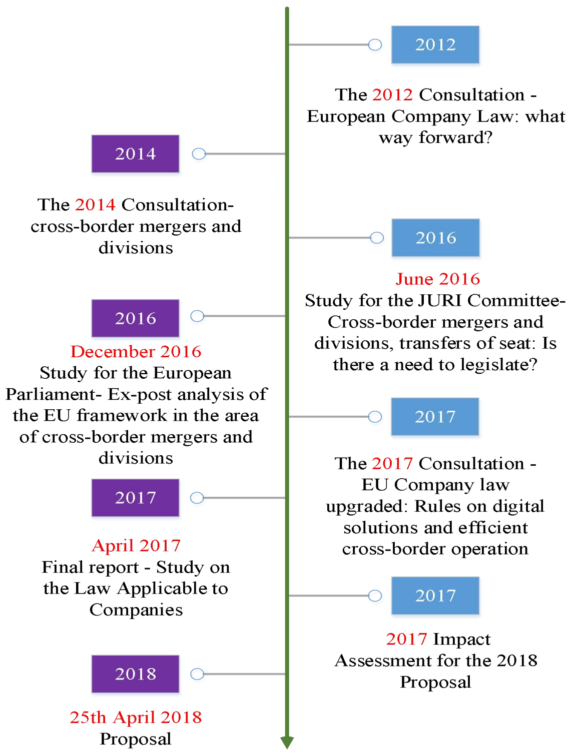
154 Justice and Consumers, 'EY study on cross-border operations of companies', [2018] p. 19 <https://ec.europa.eu/info/publications/ey-study-assessment-and-quantification-drivers-problems-and-impacts-related-cross-border-transfers-registered-offices-and-cross-border-divisions-companies_en#:~:text=This%20study%20assesses%20and%20quantifies,solutions%20and%20assesses%20their%20impacts.>accessed 10th March 2021

155 European Commission, 'Commission staff working document - Impact assessment', SWD/2018/052 final/2 [2018] p. 30

156 Ibid.

Impact assessment examined the option 0 (baseline scenario) of having no procedure rules for cross-border conversions and divisions against the option 1 which would introduce harmonized EU cross-border conversion and division procedures.[157] The lack of procedural rules makes cross-border conversions and divisions extremely difficult. Similarly, the impact assessment also examined several options for the protection of stakeholders, and the result is that the option to amend current Directive 2017/1123 rules while at the same time add more specific rules for the stakeholders' protection would accelerate the transfer of seats of companies.

Timeline



[158]

3.2.2.2 After the release of the 2018 Proposal

From the earliest Regulation 2137/85 in 1985 to the newest Directive 2019/2121, the Commission has not ceased its steps to harmonize rules regards cross-border mobility. On 25th April 2018, the Commission presented a package of proposals related to the reformation of the current company law, the 2018 Proposal concerned the amendment of the Directive 2017/1123 with regards to the cross-border mergers, conversions and divisions. The specific contains the 2018 Proposal have already been presented. From the publication of the 2018 Proposal to the adoption of the Directive 2019/2121,

[157] European Commission, Proposal for a Directive of the European Parliament and of the Council amend ing Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2018] 2018/011 4 (COD)
p.19

[158] Made by the thesis author

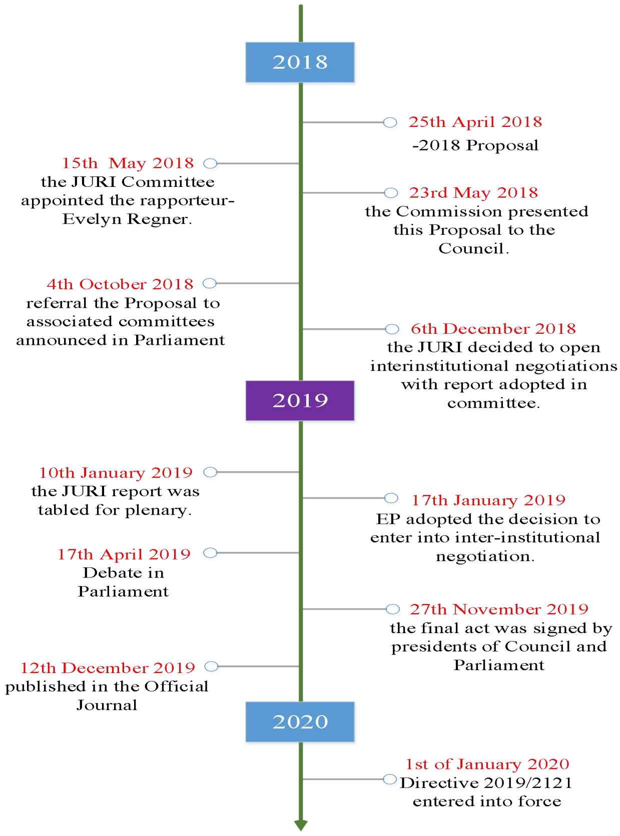
reports, suggestions, comments came in like floods. In this section, briefly, an introduction of the Directive adoption procedures and comments, assessments, suggestions related to the 2018 Proposal, is involved.

After the Commission's presentation of the 2018 Proposal on 25th April 2018, On 15th May 2018, the JURI Committee appointed the rapporteur Evelyn Regner. subsequently on 23rd May 2018, the Commission presented this Proposal to the Council. Then on 4th October 2018, referral the Proposal to the associated committees announced in Parliament after the presentation of the rapporteur's draft report. And on 6th December 2018, the JURI decided to open interinstitutional negotiations with report adopted in committee. On 10th January 2019, the JURI report was tabled for plenary. It provides for a total of 112 amendments for the Proposal, concerns perspective of adequate protection for workers, creditors and minority shareholders, especially rules protecting employee representation after the conversion. Furthermore, it involves the provision of rules regulating cross-border conversions and divisions to promote the liquidity of transnational corporations.[159] At the plenary sitting of 17th January, 2019 EP adopted the decision to enter into inter-institutional negotiation. And the EP adopted the legislative resolution on the Proposal with the roll-call final vote which has 511 "For" votes, 54 "against" votes, and 16 abstentions. Lastly, the final act was signed by presidents of Council and Parliament on 27th November 2019. It was published in the Official Journal on 12th December 2019 entered into force on the twentieth day following that of its publication.[160]

159 European Parliament, 'Legislative observatory- Cross-border conversions, mergers and divisions', SWD 2018/0114(COD) [2018] <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0114(COD)&l=en> accessed 15th March 2021

160 Silvia Kotanidis, Members' Research Service, 'Legislative train schedule-Deeper and Fairer Internal Market with A Strengthened Industrial Base/Services including Transport', [2021] <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-cross-border-mobility-for-companies> accessed 15th March

Procedures of the Directive 2019/2121 adoption



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Dubravka Aksamovic has a positive perspective for the publication of the 2018 Proposal, she stated in her article that "The proposal introduces new rules which, when adopted, will provide a range of cross-border legal services to companies in which wish to move their seats from one MS to another one in search of better business opportunities or a more favourable business environment."[162] With new rules and legal frameworks for cross-border conversions, companies, especially SMEs could more freely and cost less to transfer their seat in the EU area. However, the European Company Law Experts (hereinafter 'ECLE') have a critical view for the integration of the cross-border conversions' rules with the EU level. The ECLE states that acceptance of the view that a certain degree of convergence of the company laws of the MSs would contribute to the functioning of the internal market does not lead to the conclusion that such convergence is best achieved through harmonized EU legislation, for the perspective of internal market, one may alternatively aim at giving companies the freedom to choose the MS company law system which best suits their

[161] Made by the thesis author

[162] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 [201 9] p. 950

needs.[163] The ECLE deems that harmonized EU rules may not the best choices for the operation of free movement of establishment and the stimulation of the cross-border mobility, because if there were no harmonized procedures for a company to transfer its seat, the company could gain more freedom to choose the MS rules which fit the company's desire. The Chamber of Commerce and Industry (CCI) Paris Ile de France welcomes the Commission's desire to create a harmonized framework for cross-border conversions, mergers and divisions. However, it also leaves critical comments on the 2018 Proposal, for example, it thinks that the Commission's approach leads inevitably to proposing procedures that are so complex that the result might be opposite to that sought: The text would not be applied because it was too cumbersome and restrictive to ensure the legal certainty desired by companies.[164] It also recommended that the time for publication of the draft articles (article 86h) should be extended from one month to two months prior to the general meeting.[165]

Furthermore, there are more positive comments on the 2018 Proposal than the negative ones. Anna-Maja Henriksson, the Finnish minister of justice, presented on 18th November 2019 in the Council Press that "New legislation enables EU companies to take full advantage of the single market and remain globally competitive. In the meanwhile, the directive provides for appropriate safeguards to prevent abuse of power and protect the legitimate interests of minority shareholders, creditors, and employees."[166] Vanessa, a scholar states that " With the 2018 Proposal the companies could follow the legible procedures which have set out the circumstances in which interests will be treated as not being prejudiced and have regulated the protection of shareholders, creditors, and employees, will contribute enormously to conduct cross-border operations efficiently and smoothly."[167] The Commerce and Industry Chamber of Thessaloniki also has a positive assessment of the 2018 Proposal, for similar reasons as Vanessa raised above.[168]

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[163] European Company Law Experts, 'Response to the European Commission's Consultation on The future of European Company Law, [2012] <https://europeancompanylawexperts.wordpress.com/the-future-of-european-company-law-response-to-the-european-commissions-consultation-may-2012/> accessed 13th March 2021

[164] Didier Kling, 'Cross-border mobility in EU: Paris-Ile-de-France Chamber of Commerce and Industry comments on the proposal for a Directive', [2018] <https://www.euractiv.com/section/economy-jobs/opinion/cross-border-mobility-in-eu-paris-ile-de-france-chamber-of-commerce-and-industry-comments-on-the-proposal-for-a-directive/> accessed 19th March

[165] Ibid.

[166] European Council, 'EU makes it easier for companies to restructure within the single market', [2019] <https://www.consilium.europa.eu/en/press/press-releases/2019/11/18/eu-makes-it-easier-for-companies-to-restructure-within-the-single-market/>accessed 16th March

[167] Vanessa Knapp, 'Cross border mobility: what do we need in practice?', ERA Forum volume 19,[2018] p.72

[168] Thessaloniki, 'comments on the Proposal for a Directive amending Directive 2017/1132 as regards cross border conversions, mergers and divisions', [2018]

Most positive assessments are made from the perspectives of constructing an integrity EU single market and protecting the rights of stakeholders (the minority creditors, employees, etc). Generally, scholars, public authorities are support this 2018 Proposal, think that the Proposal could help with the fostering of the cross-border mobility of EU companies. The process of the 2018 Proposal's birth was complicated and lengthy, which also proves its importance, so it is necessary to understand the adopted Directive 2019/2121 correctly and thoroughly on the basis of the directive content itself and related history, researches, assessment, consultations, studies, comments and so on.

4. Reviewing the newly adopted Directive 2019/2121

To understand and explore the background of the Directive 2019/2121's adoption, further analysis of the Directive itself is indispensable because it has acknowledged new legal frameworks regards cross-border conversions and division, also there are amendments for cross-border mergers in the new Directive. However, in this section, only contents concern cross-border conversions will be introduced, as this thesis mainly focuses on the interesting cross-border conversions topic which is crucial for the thesis' research objective and the development of EU company law.

Due to the nature of the directive, Directive 2019/2121 could not straightly applies to the MSs, it has relied on the MSs to transfer those provisions into their national laws. And the MSs should do this by 31st January. According to the recitals of the Directive 2019/2121, this directive sets minimum standards for MSs, the MSs entitled to set higher standards than the standards in the directive, for instance, as the recital 17 stated "Based on obeying the free movement of establishment and coherent to rules of this directive, MSs could maintain or introduce additional rules for the protection of members."[169] Compare to the precursor of the Directive 2019/2121 (the Directive 2017/1123), the Directive 2019/2121 has inserted numerous new provisions and new chapters, amended and revised related regulations, the scope of EU company law is expanding, and a unified and coordinated EU corporate law is taking shape.[170] This section only introduces the newly added cross-border conversions part of the

[169] Recital 17 of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Novem ber 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321

[170] Johanna Storz, 'EU Company Law Package: cross-border mobility for companies', [2020] <https://www.pinsentmasons.com/out-law/analysis/eu-company-law-package-cross-border-mobility>accessed 10th March 2021

Directive 2019/2121, since it has close contact with the research question.

4.1 Objectives of the Directive 2019/2121

Directive 2019/2121 was amended from the Directive 2017/1132 which mainly focus on cross-border mergers and entered into force on 20th July 2017, the Directive 2017/1132 is aimed at facilitating cross-border mergers across the EU, and construct specific harmonized safeguards for the stakeholders and its ultimate goal is to establish an internal market without barriers. However, as mentioned in the above section, the majority of MSs and companies deemed that only harmonize the cross-border mergers with EU level is not sufficient to foster the development of the economy and EU companies competitiveness in the global area.

Then the Directive 2019/2121 has been worked out, with the objectives of treaties to construct an single market without internal barriers for companies, and enhance social protection which settled in Article 3 of TEU and Article 9 of TFEU.[171] Specifically, the Directive 2019/2121 is aimed at facilitating cross-border operations (cross-border conversions, divisions, and mergers) and harmonizing rules on the cross-border operations to strengthen legal certainty for the better exercise of free movement of establishment, and meanwhile providing adequate protection for stakeholders, such as creditors, employees, and minority shareholders.[172] All contents of the directive revolve around those objectives, the next sections would dig into Chapter I of the cross-border conversions, examine how do the procedures and protection rules achieve the Directive 2019/2121's objectives.

4.2 Scope and related definition of the cross-border conversion Chapter

This cross-border conversions chapter would only apply to the LLC applicable to MS's law and with its registered office, central administration, or principal place of business in the EU area,[173] it does not cover other forms of companies, for example, the partnerships are excluded from the cross-border conversion scope. This means that,

[171] Recital 4 of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Novemb er 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321
[172] Ibid, recital 5, 6
[173] Ibid, Art. 86a(1)

if the partnerships plan to conduct cross-border operations, they could solely rely on the EU case laws and fundamental principle of free movement of establishment in Article 49 and 54 TFEU. Despite that, it remains to observe space for MSs to expand the scope of the Directive 2019/2121 in national laws to include partnerships[174] as long as they are aligned with the directive objectives and Treaties principles.

In addition, this chapter shall not apply to companies that are subject to insolvency or liquidation proceedings that start to split assets to their shareholders, crisis prevention measures, as well as companies which object is the collective investment of capital provided by the public.[175]

Then the chapter has also confirmed the definition of cross border conversion (inserted in Chapter 2) which disputed a lot in the EU corporate law history since different MSs adopt different company legal doctrines. And Article 86b(3) (4) (5) have explained the meanings of departure MSs, destination MSs and the converted company. The departure MS is the MS in which the company originally established before the conversion, and the destination MS is where the converted company registered via a cross-border conversion, the converted company is the company located in the destination MS as a result of cross-border conversion.[176]

4.3 Procedures for the cross-border conversions

The Directive 2019/2121 sets out the same general legal procedures for each cross-border operation, although the specific requirements for some operations may be slightly different, for example, the cross-border conversions procedures demand almost the same documents with the cross-border mergers. With the objective of this thesis, in this section, only cross-border conversions procedure will be introduced. Specifically, procedures all involved in those documents—a daft term published by the operating companies, a report for members and employees, moreover, an independent expert report which admitted by the general meeting, a pre-operation certificate given by the competent authority, etc.

[174] Johanna Storz, 'EU Company Law Package: cross-border mobility for companies', [2020] <https://www.pinsentmasons.com/out-law/analysis/eu-company-law-package-cross-border-mobility>accessed 13th March 2021

[175] Art 86a(2), (3) of 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, [2019] OJ L 321

[176] Ibid, Article 86b(3), (4), (5)

Firstly, to operate a cross-border conversion, the converting company has to ask its administrative or management body to draw up the **Draft terms** of a cross-border conversion which includes all relevant information about the proposed conversion from which employees, creditors, and other stakeholders could determine how the cross-border conversion will affect their status and rights.[177] The draft terms also contain general information about the company itself, for example, its name, legal form, proposed destination MS, the proposed timetable for the conversion, etc.[178] Besides, there are requirements for the management or the administrative body of the converting company to formulate a report for its members and employees to explaining and justifying the legal and economic aspects of the cross-border conversions,[179] the report shall separate into **Two reports or sections**, one should provide to the members of the converting company, another one to the employees. **The report or section for members** shall contain contents of implications, cash compensation, and methods to determine it, rights and remedies, if all members have waived the requirements the report would be unnecessary.[180] **The report or section for** employees shall contain contents of implications for employment relationships, safeguards measures of the cross-border conversion, any substantial changes in the conditions of employment, and location of the company or subsidiarity.[181]

Afterwards, the draft terms and the reports for members and employees shall be together made available electronically to the members of each involved company and parties concerned or representatives of the employees at least six weeks before the date of the general meeting in which a resolution is to be adopted concerning the conversion.[182] The Directive requires to present reports and draft terms to members and employees no less than six weeks would give the shareholder and employees adequate time to analyze and evaluate the documents, during the six weeks, company members (shareholders) and employees could comment on those documents and propose amendments to the original draft terms and reports, those contents shall be appended to the documents.[183] It is worth noting that there are no official language

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[177] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 [201 9], p. 950
[178] Art 86(d) of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Novemb er 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321
[179] Ibid, Art 86e(1)
[180] Ibid, Art 86e(2)
[181] Ibid, Art 86e(5)
[182] Ibid, Art 86e(6)
[183] Ibid, Art 86e(6), (7)

requirements for the documents, for example, the draft terms must write in English or French, etc. Thus, because of the diversity of languages in European MSs, the converting companies may apply different official languages which may hamper proceedings of the cross-border conversions.

For the purpose to avoid the abuse of the accuracy of the information provided in the draft terms and reports,[184] the next step is to examine the draft terms of the cross-border conversion with **Independent expert report** provided by an independent expert, the expert will also draw up a report for members.[185] The report should include the indication of methods to determine the cash compensation and expert's opinion on whether the cash compensation is adequate.[186] And the expert shall obtain all information need to conduct the report duties, if all members of the converting company unanimously agree that there is no need for an independent expert report, then the report will not be required.[187] If necessary, the independent expert report shall be submitted to members at least one month before the general meeting.[188]

Furthermore, it is the step to **Disclose and Public** relevant documents to the registry of departure MS at least one month prior to the general meeting. The documents are the draft terms of the cross-border conversion and a notice apprising members, creditors and representatives of employees or, if not applicable, the employees themselves that they could make comments on the draft terms and submit them no later than five working days before the date of the general meeting.[189] Besides, in order to protect creditors, the MS shall require the management or administrative organ of the converting company provides a **Declaration** that accurately reflects the current financial situation of the company at a date not earlier than one month prior to the disclosure of the declaration.[190] Also, the departure MS may require the independent expert report to be disclosed publicly and available in the registry which

[184] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 (2019), p. 952

[185] Art 86f (1) of 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, [2019] OJ L 321

[186] Ibid, Art 86f (2)

[187] Ibid, Art 86f (3)

[188] Ibid, Art 86g (1)

[189] Ibid.

[190] Ibid, Art 86j (2)

also has to be on the date at least one month before the general meeting.[191] Other information as the location, name, legal form of the converting company, and proposed converted company, details of website for the draft terms, and notices of arrangements for the creditors, members, and employees shall also be submitted to the departure MS as same time requirement with the independent expert report.[192] Additionally, as regulated in the Directive 2019/2121, those documents may have to be published with reasonable prices for the disclosure in national gazette or a central electronic platform as the requirement of MS.[193] All the information shall be freely exchanged through the new pan-European Business Register Interconnection System (hereinafter 'BRIS') between the MSs registries.[194]

Then, with all documents prepared the **General meeting** shall be hold, during this meeting, resolution on cross-border conversion will be considered and may be adopted. The majority of votes required for a resolution to permit a cross-border conversion shall be at least two-thirds of the shares or subscribed capital represented at the general meeting of shareholders, but not more than ninety percent of the votes. In no case shall the threshold for voting be higher than that provided by the law of the MS for the approving of cross-border mergers.[195] After the approvement of the transaction, meanwhile, a competent authority (the court, notary, or other authority) shall be designated by the departure MS to issue a **Pre-conversion certificate** within three months of the date when the documents and information concerned the approval of general meeting of the converting company had received.[196] The pre-conversion certificate should state the converting company has complied with the provisions and procedures of the national laws concerning the incorporation and registration of the company and, if applicable, the existence of subsidiaries and their respective geographical location have been provided, arrangements for the participation of employees have been determined.[197] If the competent authority of departure MS determines that the conversion does not comply with national legal requirements, it will not issue a pre-conversion certificate and will inform the company of that

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[191] Ibid, Art 86j (1)
[192] Ibid, Art 86j (3)
[193] Ibid, Art 86j (5) (6)
[194] Johanna Storz, 'EU Company Law Package: cross-border mobility for companies', [2020] <https://www.pinsentmasons.com/out-law/analysis/eu-company-law-package-cross-border-mobility>accessed 13th March 2021
[195] Art 86h (3) of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Nove mber 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321
[196] Ibid, Art 86m (7)
[197] Ibid, Art 86m (2) (3)

decision.[198] Thus only after the issuance of the pre-conversion certificate in the destination MS, the certificate can be published. Finally, if the competent authority during the above scrutiny suspects that the cross-border conversion is illegal because of fraudulent purposes to circumvent EU or national law, it shall make a deep assessment case by case via analyzing relevant facts to determine whether the transaction forms a circumvention.[199] If no doubts about the cross-border conversion documents exist, the competent authority of departure MS will issue the pre-conversion certificate and deliver it to the competent authority of the destination MS, then the destination MS's authority will gain the entire competence of the remaining proceedings, as mentioned above, the authority of departure MS could transmit the pre-conversion certificate to the destination MS through BRIS without fees.[200]

The competent authority of destination MS will examine whether the cross-border conversion met the requirements of establishment in the destination MS.[201] If the cross-border conversion conditions are fulfilled, after the **scrutiny of the legality of the transaction**, the converted company will be **registered with the register of the destination MS** as well as removed from the departure MS system when the notification of the registration from destination MS has been received.[202] The law of destination MS shall determine when the **cross-border conversion comes into force**, however, the date should later than the issuance of the pre-conversion certificate.[203]

4.4 Stakeholders' protections of the Directive 2019/2121

Members who voted against the draft terms of the cross-border conversion in the general meeting will have cash compensation when they dispose of their shares, and the departure MS will render a period of one month for members of converting the company to dispose of their shares, and two months for the payment of cash compensation after the cross-border conversion.[204] If some member has not satisfied with the cash compensation, they will entitle to claim additional cash compensation before the competent authority, and MS may make a decision to claim the additional

198 Ibid, Art 86m (6)(b)
199 Ibid, Art 86m (9)
200 Ibid, Art 86n
201 Ibid, Art 86o
202 Ibid, Art 86p
203 Ibid, Art 86q
204 Ibid, Art 86i

cash compensation applies to all members who desire to dispose of their shares.[205]

Additionally, the **Creditors** are entitled to require the competent judicial authority to offer adequate safeguards if they are not satisfied with the safeguards provided in the cross-border conversion draft terms within three months of the disclosure and publication of that draft terms.[206] The implementation of any such safeguards is conditional on the cross-border conversion becoming effective.[207] Also, the creditors who are not satisfied with the safeguards could institute proceedings against the company in the departure MS within two years of the date the cross-border conversion has taken effect.[208] Finally, there are existing provisions to protect the **Employees**' rights in the Directive 2019/2121. The rights which should be ensured by MSs for the employees are the rights to information and consultation, the employees' rights should be respected at least before the draft terms or report for employees are decide upon.[209] Moreover, in the destination MS, the converted company should conduct rules for employee participation and guarantee the participation as the same level of participation as before the cross-border conversions.[210]

With the introduction of the Chapter 3, cross-border conversion of the Directive 2019/2121, the conclusion can be drawn that the Directive has unquestionably brought legal, ordered, uniform, concisely proceedings for the cross-border conversions, and it is also the first time that the cross-border conversion is regulated within the EU legislation in the long history of EU corporate law. LLCs established in MSs now, have clear, explicit guidance to operate the cross-border conversions. Undoubtedly, with the precise legislation, the exercise of free movement of establishment will be facilitated, since companies would not solely rely on the ECJ rulings and treaties provisions to conduct the cross-border conversion. However, there still exist issues that Directive 2019/2121 might not deal with. A critical analysis about whether the currently Directive 2019/2121 rules could impeccably achieve its enhancement of cross-border conversion, elimination of barriers of the internal markets, and protection of the stakeholders' objectives, shall be presented in the next sections.

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205 Ibid.
206 Ibid, Art 86j(1)
207 Ibid.
208 Ibid, Art 86j (4)
209 Ibid, Art 86k
210 Ibid, Art 86l

5. Conclusion

In the introduction chapter, the research question has arisen. With regards to the aims of the thesis, this chapter shall focus on the answers to the research question. The research question is “Are the cross-borders conversion rules in Directive 2019/2121 suitable for achieving that Directive's objectives?”. Generally, in accordance with the contents of this thesis, the answer is not certain that Directive 2019/2121 is an impeccable one to achieve its objectives because several drawbacks conceal in the directive. However, this thesis insists, it has to acknowledge that this Directive 2019/2121 is the best option to facilitating cross-border conversions and protecting stakeholders of the converting companies for the EU company law currently if the negative comments and drawbacks have been ignored. This chapter has positive attitudes towards the suitability of the cross-border conversions rules of Directive 2019/2121 to achieving its objective but with a critical examination on it.

5.1 Positive effects of the current legislation

A large number of companies, especially the SMEs have established in recent years, for economic or operational reasons, some companies would desire to operate the cross-border conversions. However, companies could not easily manipulate cross-border conversions between MSs, since different MSs following different corporate legal doctrines, in Chapter 3, the definitions of real seat doctrine and the incorporate doctrine has been precisely introduced.

Tracing back to Chapter 2, as presented in Scheme 1, some MSs even did not allow the cross-border transfer of seat, and of course have no legislation on the procedures to conduct the transfer, since some MSs might doubt the destination MSs could not protect the company’s stakeholders as the same level as the original MS provided, for instance, Sweden, Finland, and Norway. Companies in which aspire to conduct the inbound and outbound conversion within those MSs would be impeded, notwithstanding that, from the 1980s until now, the ECJ has not stopped seeking methods for companies to exercise their right of free movement of establishment. The landmark case, *Polbud*, confirmed the cross-border conversions are the fundamental rights of companies regards to the free movement of establishment. However, the ECJ is solely a judicial organ to interpret EU laws, it could not set out cross-border conversions procedures for companies and MSs to implement and reference, thus without harmonizing EU legislation, the aims of facilitating cross-border conversions, enhancing the protection of stakeholders of converting companies, and eliminating internal border of the EU single market are in dire straits.

Before the adoption of Directive 2019/2121, as demonstrated in the development of the EU company law chapter, the EU legislators have been actively enacted rules related to cross-border transfers. As early as 1997, the Commission had put forward the issues of cross-border transfer of seat in the proposal of the 14th Company Law Directive, and the protection of stakeholders within the cross-border operations are the timeless topics for the legislators. The Directive 2019/2121 is a revision of the Directive 2017/1132 which mainly concerned the facilitation of mergers and cross-border of mergers of LLCs, the division of public LLCs to ensure that the shareholders of the company involved remain fully informed.[211] Pursuant to the *Polbud* formula, the cross-border transfer of registered office is a component of the cross-border operations, and part of the free movement of establishment. However, the Directive 2017/1132 with which consolidated six corporate directives but not involved any provisions to operate the cross-border conversions. The transfer of registered offices is the primary option for the companies in which have no strong economic foundations, lacking harmonized legislation of cross-border conversion could not help those companies to save costs on the transfer.

The incompletely and unclear Directive 2017/1132 would lead to legal fragmentation and legal uncertainty of the cross-border mobility as well as inadequate protection of shareholders, creditors, employees. After a series of investigation, consultations, assessments, and studies which confirmed insert cross-border conversions provisions to the Directive 2017/1132 would stimulate cross-border mobility of companies, increase legal certainty, and with the majority of MSs, companies, trade unions, and scholars' approvals of amending the Directive 2017/1132 (see details in Chapter 3), the Directive 2019/2121 has entered into force on 1st January 2020. As the statement on 18th November 2019 of the Věra Jourová, the Commissioner for Justice, Consumers and Gender Equality, the newly adopted Directive will benefit the EU that "By providing clear procedures for cross-border operations and providing more opportunities for EU businesses, which will cut costs and save time for companies to

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211 Van Bel & Belles, 'European Union Consolidates Six Corporate Directives Into New EU Directive 2017/1132', [2017]<https://www.vbb.com/insights/corporate-commercial/corporate-commercial/european-union-consolidates-six-corporate-directives-into-new-eu-directive-20171132> accessed 5th April 2021

transfer within the EU as well as to provide strong safeguards to members, creditors, employees and prevent abuses."[212]

With the adoption of the Directive 2019/2121, the uniform, organized, harmonized EU company Law now emerging. Firstly, as introduced in Chapter 4, the Directive 2019/2121 has endowed the departure MSs' competent authority the right to issue a pre-conversion certificate, with this right the authority could detect whether that the relevant conditions have been met and proper formalities have been completed to operate a cross-border conversion. This pre-conversion certificate procedure shall enlarge the departure MS competent authority's right to control the cross-border conversion that will provide the converting company more certainty to prepare documents, for example, the draft terms, independent expert reports with the official language of the departure MS, with the legal certainty, the document preparation will be more efficient and less costly for converting companies. However, this enlargement rights of departure MS competent authority in the perspective of this thesis would somehow prolong the duration of cross-border conversion procedure, this may hamper the free movement of establishment (see details in the next section).

Secondly, all documents could be transferred with the BRIS and received by MSs registry, all procedures have strict time limits for the relevant personnel to comply with, these rules will alleviate burdensome of the procedures for the converting companies. For instance, the reports for members and employees should be published available to the members and employees electronically prior to at least six weeks of the general meeting, and the draft terms of the cross-border conversion should be disclosed and published at least one month before the general meeting.[213] With a clear timeline, converting companies can prepare necessary documents for the transaction more efficiently, and all MSs, even those MSs that have no regulations in this cross-border operation project at all, should bring their national legislation in line with those provisions. Precise timepoints and detailed documentation requirements would save converting costs, and promote converting efficiency for companies since the Directive 2019/2121 has laid down time limits for MSs authority, converting

[212] Věra Jourová, Twitter, [2019] <https://twitter.com/verajourova/status/1196419515791413251> accessed 26th April 2021

[213] Art 86g of 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, [2019] OJ L 321

companies to respect.

Finally, the harmonized EU directive has also strengthened the stakeholders' protections. Before the adoption of the newly Directive 2019/2121, the Directive 2017/1132 legal framework lacks, *inter alia*, efficient and harmonized rules for the protection of creditors and minority shareholders. With the new directive, creditors have been guaranteed additional safeguards if they did not satisfied with the safeguards listed in the draft terms. Besides, the employees' protections have also be enhanced by the imposition of a heavier duty of information on potential impacts of cross-border conversions.[214] The Directive 2019/2121 has conferred on the negotiating body which employees could organize themselves into it, the right to decide whether open the negotiations or not, and the directive should ensure the transparency of the employee participation.[215] As for the members who opposed the cross-border conversion of the company, Directive 2019/2121 has provided the exit right and cash compensation for the shareholders at least who voted against the transaction.

To sum up, it has been tested by the EU corporate law history, an integrated EU law in the aspects of cross-border operations is imminently needed, and the Directive 2019/2121 is an efficiency, well-structured and well-rounded mechanism to guide the MSs to be more coherent to the fundamental principle of the EU, especially the free movement of establishment.

Based on differences of MSs' national conditions, geography, and laws, the definition of 'seat' in divergent company laws could not mean the same, that often obstacle to the cross-border transfer of seat, however, with the clarification of the cross-border conversions meaning in the Directive 2019/2121, the operation of cross-border conversion gained more legal certainty, and all MSs, including those MSs which refuse the transaction, have to bring the directive in line with their national laws that would facilitate the cross-border conversion.

Comparing to the prior Directive 2017/1132 which provided safeguards for the

[214] Peter Suyken, 'Commentary on the Directive on cross-border mergers, divisions and conversions', [202 0]<https://www.eylaw.be/2020/09/03/commentary-on-the-directive-on-cross-border-mergers-divisions-and-conver sions/> accessed 21st April 2021

[215] Art 86l (4) of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Nove mber 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321

stakeholders, the newly Directive 2019/2121 provisions are more complete for the protections of stakeholders. Rules for stakeholder protections are more standardized and procedural, new provisions of employees participation rights have been introduced into the Directive 2019/2121, and creditors, members shall achieve additional safeguards if they did not satisfied safeguards in draft terms, or opposed the conversion.

All in all, ascending to the research question, as the above analysis, it can be drawn that the Directive 2019/2121 is a milestone on the integration of EU company law, with which the barriers for operating the cross-border conversion, to a certain degree could be eliminated, and the protection of stakeholders has been enhanced and improved. Despite those positive effects of the directive, this Directive 2019/2121 is not a flawless one, some issues remain exists in the domain of cross-border conversions which desire to be further analyzed.

5.2 Drawbacks of the current legislation

Although the advantages of Directive 2019/2121 outweigh the drawbacks, in light of the promotion of cross-border conversion, it is crucial to critically examine the directive and point out drawbacks within it.

Firstly, it raises a question regarding ***the scope of Directive 2019/2121***, as regulated in Directive 2019/2121, all procedures and safeguards for stakeholders are solely applying to the LLCs. In 2018 (the newest statistic found by the thesis author), there were nearly 25.3 million active business and economic enterprises in the EU, with more than 131 million employees,[216] and 9 out of every 10 enterprises is an SME, and the enterprises have composed of self-employed, family firms, partnerships, and associations or any other entities that are regularly engaged in a particular economic activity may be considered as enterprises.[217] Thus, excluding the LLCs, there are still numerous enterprises that have made significant economic contributions to the EU, generally, some of them aspire to convert freely within the EU area for a better business environment or more competitive status either. However, the Directive 2019/2121 has not included companies except the LLCs, those enterprises, for

[216] Eurostat, 'Business demography statistics', [2020] <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Business_demography_statistics> accessed 27th April 2021

[217] European Commission, 'User guide to the SME Definition', Ref. Ares(2016)956541 [2016] p. 11 <https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf> accessed 27th April 2021

instance, the partnership, which desires to conduct the cross-border could base on the free movement of establishment principle of the Article 49 and 54 TFEU, national laws, and case law rulings to operate the conversion, since as *Cartesio* ruling stated the cross-border conversion of companies is covered by the free movement of establishment, and Cartesio, a limited partnership was confirmed by ECJ, had the right to transfer its head office from Hungary to Italy.

As introduced in Scheme 2, some MSs do not allow cross-border conversions, thus no legislation for the transaction. Even though they have to bring their national laws in line with the Directive 2019/2121 in 2023, they could still leave enterprises excluding the LLCs in the legislative void. Without precise procedures and safeguard mechanisms for stakeholders, the cross-border conversion will be impeded. It could argue that some MSs, for instance, Belgium, are willing to expand the scope into other companies forms since the Directive 2019/2121 is a minimal appropriation. However, for a variety of reasons, such as distrust of other MSs' protection mechanisms for stakeholders, some MSs would reluctant to extend the scope from LLCs to other companies. Under this circumstance, cross-border conversion of companies could be impeded, the objectives of the Directive 2019/2121 could not completely be achieved, because of the lacking of harmonized legislation for other forms of companies except the LLCs.

Secondly, the Directive 2019/2121 has detailed set up the document requirements, for instance, the converting company has to issue draft terms, reports for members and employees, independent expert report, etc. The Directive 2019/2121 mainly focuses on stipulate the contents and structure, however, it ignored a small point, that ***no standardized forms requirement of official language*** for all documents in the directive. MSs would have the competence to prescribe language standards for those documents, if each MSs also does not stipulate the language standard, it leaves spaces for the converting companies. EU is made up of 27s MS, thus the languages are diverse, English is not the primary choice for some companies, for example, German companies, French companies, or Italian companies. When those companies desire to convert to other MSs, they would prefer to utilize their local languages to issue the documents, that would be troubling for the destination MSs if they have different official languages with the departure MSs, the converting companies may have to find an authority to translate documents, that would be additional costs for companies, and the actual process of the converting becomes tardiness because of the problems of communication between MSs. This can lead to deviation from the Directive 2019/2121 objectives since no language requirement of the documents.

Another controversial point of Directive 2019/2121 is related to the ***pre-conversion certificate***. The scholar Segismundo Alvarez insists that "compare to the former cross-border mergers, the most important change in the procedure is that competent authority of the departure MSs have greater control over operations. This could lead to the suspension of the transaction and certainly to an extension of the process."[218] As introduced in Chapter 4, competent authority of the departure MS has the right to control the proper completion of all procedures and formalities in the departure MS,[219] however, in the newly adopted Directive 2019/2121 such control has enlarged to "the satisfaction of payments, or securing payments or non-pecuniary obligations due to a public body or the compliance with special departmental requirements, including securing payments or obligations arising from ongoing proceedings."[220] Because of this enlargement, the issuance period has expended from one month to three months. With this rule, the competent authority has to consult relate agencies to inquiry whether the company fulfilled the requirements, which may require the competent authority to invest significantly manpower, resources, and time into the investigations. The enlargement of control for the departure MS competent authority is the exact opposite of the objectives of the Directive 2019/2121 which aims to facilitate the cross-border operations since the period expanded and competent authority of the departure MS needs to devote more energies.

And with Art 86m (8), the departure MSs have also to ensure the competent authority has the right to doubt whether the converting company is set up for fraudulent or abusive purposes or aimed at circumvention of Union or national law, or for criminal purposes.[221] Commonly, if all goes well, the scrutiny time would last for three months at most, however, it can be prolonged to a maximum of three months when the competent authority has to make additional investigations to assess whether the converting company set up for the abusive or fraudulent purpose. A converting

[218] Segismundo Alvarez, 'The cross border operations Directive: wider scope but more restrictions', European Law Blog [2020] <https://europeanlawblog.eu/2019/07/10/the-cross-border-operations-directive-wider-scope-but-more-restrictions/> accessed 15th April 2021
[219] Art 86m (1) of 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, [2019] OJ L 321
[220] Ibid.
[221] Ibid, Art 86m (8)

company maybe be offered the pre-conversion certificate with a maximum of six months, which seems like a long-winded proceeding and contrary to the purpose of modernizing and simplify the cross-border conversion procedures to foster the transactions and harmonization of the internal market.

Additionally, ***the independent expert reports***, to some extent, impede the Directive 2019/2121 to achieve its objectives. An independent expert report should examine the draft terms of cross-border conversion related to cash compensation, and this expert report would not be required if all members agreed.[222] The expert, as the directive described, is a natural or legal person whom independent from the company and holds an impartial and objective opinion towards the draft terms.[223] According to scholars the independent expert report has great practical value and they reduce the risks associated with fraudulent cross-border conversions, so they are justified, but also raise some questions,[224] which may hamper the cross-border conversion. The expert who could issue authoritative reports must be at the top of the industry of his/her professional field, however, the expert is not a member or relevant person of the converting company, and the Directive 2019/2121 has not indicated specific criterion, the burden of finding the right experts falls on MSs or companies.

With the perspective of this thesis, the expert is very unfamiliar with the converting company's structure and members, however, the expert has the burden of evaluating the cash compensation, thus it may not be able to fully evaluate methods, difficulties of cash compensation from the perspective of the company and its members which could undermine the rights and interests of members. And the expert report should available to members at least one month before the general meeting, since no unified standard of the expert exists, the converting company may have to initiate the transaction preparation earlier than expected which makes the burdens of the converting company even heavier. In short, an unsound rule of the independent expert report would hinder Directive 2019/2121 to achieve its objectives.

Reviewing the contents of Directive 2019/2121 in Chapter 4, it is worth noting that no provisions related to the opposition of the cross-border conversion in virtue of the

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[222] Ibid, Art 86f
[223] Ibid, Art 86s
[224] Dubravka Akšamović, Lidija Šimunović, Iva Kuna, "Cross Border Movement of Companies: The New EU Rules on Cross Border Conversion", EU and Comparative Law Issues Challenges Series, Issue 3 [2019] p. 952

exceptions, for example, public interests reasons, in ***Article 52(1) of the TFEU,*** exists in the directive. However, as the TFEU confirmed, the prohibition of cross-border conversion which seemed to violate the free movement of establishment principle could be exempt for the reasons of public interests. The *Vale* case also stated that the restrictions on the transfer of seat could be justified via the reasons of public interests of Article 52 TFEU which complies with the proportionality principle. The lack of provisions on the public interests in the Directive 2019/2121 makes the directive incomplete, and also makes it difficult to judge whether the conversion is feasible, those are not conducive to the facilitation of the cross-border conversions.

Finally, the cross-border conversion could be affected by the concept of the seat, MSs usually follow different legal doctrines and have a diverse ***definition of the 'seat'***, this will lead to differences regarding the connecting factors within the cross-border conversions. Despite that, Article 54 of TFEU and Directive 2019/2121 has regulated the connecting factors as registered offices, central administration, or principal place of business. In reality, the situation is often more complicated, especially in the MSs which apply the real seat doctrine. Within the modern technological society, it is an onerous task to identify the real seat's location.[225] Understanding what type of seat is transferred by the converting company to destination MS is crucial to defining the consequences of such transfer.[226]

Cartesio case dealt with the transfer of the real seat which indicated by the ECJ, however, the English version of the reference for a preliminary ruling concerned the transfer of the registered office, thus after a long process, the ECJ could finally indicate the 'seat' in *Cartesio* represented the real seat/headquarter. Thus, the word 'seat' in one MS law could be a vague one which is difficult to identify whether the 'seat' refers to the registered office or real seat. For the purpose to conduct the cross-border conversion more efficiently, some MSs have converted the real seat doctrine to the incorporation doctrine, for instance, Belgium transfers its legal doctrine within the BCAC, which would make the Belgian national law compliance with the Directive 2019/2121 easier. However, no mandatory requirements are settled in the Directive 2019/2121 for the MSs to convert their legal doctrines or explicitly explain 'seat' meaning in their national law to coherent to the Article 52 TFEU and

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[225] J Armour, H Fleischer, V Knapp, M Winner, 'Brexit and Corporate Citizenship' (2017) 18 European Business Organization Law Review 225, 236

[226] Iryna Basova, 'Cross-Border Conversions in the European Union After the Polbud Case', p. 13 [2018] <https://journals.lub.lu.se/njel/article/view/18682/16938> accessed 31st March

the Directive 2019/2121. The 'seat' obsession will always be there if MSs have not consciously changed their relevant laws which would hinder the process of cross-border conversion, since the competent authority of the destination MS may spend a certain amount of time to deal with the 'seat meaning' problem to decide the connecting factor.

The conclusion can be drawn that, the Directive 2019/2121 could, in general, achieve its objectives of facilitating cross-border conversion and enhancing the protection of stakeholders, since it simplified and harmonized the cross-border operations procedures and added some new safeguards for stakeholders. In light of the Directive 2019/2121's scope and other contents, combining with its objectives, there are still rooms for Directive 2019/2121 to conduct improvement.

5.3 Recommendations

Hinged on the above researches and analysis, it is suggested to implement the recommendations below to consolidate the current cross-border conversion legislation and facilitate the transaction to help the EU achieve its ultimate goal of constructing an internal market without barriers.

Combine with the analysis of Directive 2019/2121's drawbacks, it is suggested to ***revise the scope*** of Directive 2019/2121. Currently, the directive only applies to the LLCs, however, according to the Article 54 TFEU, the partnerships, limited partnerships, and other forms of enterprises are also covered by the free movement of establishment, and the *Cartesio* case has also confirmed the partnership has fallen into the Article 54 TFEU scope because that case dealt with the limited partnership's converting. Expanding the directive' s scope to other companies or firms would foster cross-border operations and legal harmonization to some extent.

In addition, it is advised to stipulate provisions related to the ***official language***, preferable English, for standardizing cross-border conversion documents, for example, the draft terms, reports for members and employees, independent expert report. This will increase the effectiveness of cross-border transfer of seats.

Provisions related to the opposition of the cross-border conversions for protection of public interests which also stipulated in Article 52 (1) TFEU is recommended to insert in the Directive 2019/2121. With the ***public interest provision***, the Directive 2019/2121 would be more complete, and legitimate rights and interests of one MS can be protected.

It is advised for MSs to add provisions about the ***'seat' meanings*** in their national laws and correspond the 'seats' to the registered office, central administration, or principal place of business in the Directive 2019/2121 for the purposes to reduce the barriers caused by legal doctrines, and enhance communications between MSs, or the MSs convert their legal doctrines to which more compatible with the Directive 2019/2121 objectives. For instance, Belgium, according to BCAC, changed the real seat doctrine into the incorporate doctrine, which has anticipated the future development of cross-border operations. Also, all MSs shall bring their national laws in line with the Directive 2019/2121 as soon as possible not wait until the 2023 deadline. The domestic LLCs and other companies (if the MS expand the directive to other companies) in which desire to conduct an outbound transfer of seat would gain more legal certainty and assurance.

It is suggested that the ***stakeholders*** should familiarize themselves with the Directive 2019/2121 in advance, to be better protected if disputes arise. The ***enterprises*** have to either make an early plan before the MSs legislation brings in line with Directive 2019/2121 if they desire to operate the cross-border conversions. Enterprises could examine the contents of the directive, current legislation about the departure MS and the destination MSs, and case law rulings related to cross-border operations to obtain the most dominant position in the operations of cross-border conversions.

5.4 Conclusion

It could summarize that the cross-border conversions will benefit from the harmonized Directive 2019/2121. Firstly, with the precise procedures, for example, the pre-conversion certificate which requires several documents addressed explicitly in Directive 2019/2121 that will provide the converting company more certainty to prepare documents. Secondly, all the documents could transfer without fees electronically through all MSs, all procedures have strict time limits for the relevant personnel to comply with, these rules will alleviate the burdensome of the procedures for the converting companies. Finally, the Directive 2019/2121 has enhanced the protections of stakeholders, employees are entitled to the rights of information and consultation, creditors could be proved with additional safeguards if they did not satisfied with the original safeguards. Similarly, the shareholders of the converting company that exit the company could gain cash compensations.

However, drawbacks of the Directive 2019/2121 still exist. First of all, the thesis alleged that the scope of the Directive 2019/2121 is a narrow one, with that scope the procedures and safeguards are solely apply to the LLCs, however, other forms of companies could not be benefited from this directive if their established MSs have not expanded the scope of the directive within the national law. Second, the Directive 2019/2121 has not regulated official language about the conversion documents, different MSs may utilize diverse languages which could hamper the converting proceedings, increasing difficulties to the MSs authorities and converting companies. Then, the thesis holds the opinion that, the scrutiny time for MSs authority to examine whether the converting company has a fraudulent purpose would last for three months at most, also the pre-conversion certificate examination could last for three months. In total, the converting company may achieve the certificate after six months. The prolong defeats the purpose of the reduction. Lastly, as inserted in Article 52(1) of TFEU, exceptions of public interests should be considered, however, no relevant articles are involved in Directive 2019/2121.

And in the above section, recommendations are provided. For example, expanding the scope of the Directive 2019/2121, stipulating English as the official language of the documents related to the converting, adding articles about the exceptions for the restrictions of the conversions within the spirits of Article 52(1) of TFEU, noticing the MSs regulate the ‘seat’ meanings correspond to those stipulated in TFEU. Moreover, the MSs and companies should familiarize themselves with the Directive 2019/2121 as soon as possible.

Before the adoption of Directive 2019/2121, the conversions procedures would cost companies a huge amount of money, and for the purpose to transfer successfully, the majority of companies might choose the cumbersome mergers methods. The legal uncertainty of the cross-border conversions domain would straightly affect the cross-border mobility of companies, which could impede the process of creating an internal market without barriers. With a harmonized directive, barriers of the internal market are being reduced, the converting companies and MSs have precise instructions to operate the transfer of companies' seats. The future of the internal market is very bright, even if there are still some problems.

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