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**CROSS-BORDER TRANSFER OF A COMPANY'S
REGISTERED OFFICE IN THE EUROPEAN UNION:
CURRENT LEGAL SITUATION**

Bachelor's thesis

European Union and International Law

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ABSTRACT

This thesis centralises on the concept of cross-border company mobility in the European Union. It aims to determine whether the current legal situation on company seat transfers in the EU restricts companies' right to migrate across borders in violation of the freedom of establishment.

Currently, it is challenging for companies to move within the EU without losing legal personality. Companies may rely on Treaty provisions on freedom of establishment, but specific EU rules on cross-border seat transfers are entirely absent, and issues relating to such operations are only addressed by the European Court of Justice case law. Companies can generally relocate their seat according to national procedures or through alternative options. Alternative options mainly include executing a cross-border merger or forming a SE, which might require excess measures and complex procedures. Only a few Member States have specific procedures for cross-border seat transfers in place, some allow such operations, and some prohibit such transactions altogether. The author hypothesizes that companies' right to relocate their seat within the EU under the freedom of establishment is unnecessarily restricted and, in some cases, rendered impossible primarily by the divergencies in Member states' national laws and fragmented EU procedures. It implies that the absence of common EU rules hinders companies' right to exercise freedom of establishment and unnecessarily complicates their business endeavours. Therefore, the feasibility of a common legal framework for cross-border seat transfers is examined as a solution to these issues.

This thesis follows a qualitative research method, and it is based on the literature review relating to the topic. The research data is gathered from different legal publications, judicial decisions and other relevant legal sources.

Keywords: European Company Law, freedom of establishment, company mobility, cross-border seat transfer, cross-border merger

LIST OF ABBREVIATIONS

| | |
|--------------|--|
| CBM | Cross-border merger |
| CBMD | Cross-border merger directive |
| CBST | Cross-border seat transfer |
| CJEU | European Court of Justice |
| ECLE | European Company Law Experts |
| FCA | Finnish Companies Act |
| MS | Member State |
| SCA | Swedish Companies Act |
| SCE | Societas Cooperativa Europaea (European Cooperative Society) |
| SE | Societas Europaea (European Company) |
| TFEU | The Treaty of the Functioning of the European Union |
| The Proposal | 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 COM/2018/241 final - 2018/0114 (COD) |

INTRODUCTION

Deepest roots of European company law originate from the ratification of one of the constitutional treaties of the European Union in 1958, the Treaty of Rome, later renamed as the Treaty the Functioning of the European Union (TFEU), when the concept of European common market was established.¹ As confirmed by the Court of Justice of the European Union (CJEU), the common market aimed to abolish all barriers to intra-community trade, and it was virtually considered as a first step towards the European Single Market.² The concept of Single Market considers the EU as one common territory without any internal borders or other regulatory obstacles, and it is universally regarded as one of its greatest achievements.³ Since the creation of the Single Market, European market integration has been based on four fundamental freedoms: free movement of goods, capital and workers, and the freedom of establishment. In respect of companies, there is no systematic European company law, and it merely consists of different provisions and legal norms, which constitute a legal framework for companies. Occasionally Member States (MS) need to amend their national company laws to comply with EU secondary legislation, such as directives and regulations, but in the absence of harmonized European legal framework, national rules apply. Hence, business organizations in the EU are principally subject to national laws. The CJEU also stated this in the *Daily Mail*⁴ case, which is one of the central cases determining the future of European company law. The court ruled in *Daily Mail* that “unlike natural persons, companies are creatures of the law, and in the present state of Community law, creatures of national law. They exist only in by virtue of the varying national legislation which determines their incorporation and functioning.”⁵

¹ Other founding treaties are out of this thesis' scope.

² Court decision, 5.5.1982, *Gaston v Inspecteur*, C-15/81, EU:C:1982:135, paragraph 33.

³ The European Single Market (2017). European Commission. Accessible: https://ec.europa.eu/growth/single-market_en, 3 April 2019.

⁴ Court decision, 27.9.1988, *Daily Mail*, C-81/87, EU:C:1988:456.

⁵ *Ibid.*, paragraph 19.

The freedom of establishment constitutes a fundamental basis for cross-border company mobility in Europe. Under this freedom, companies established in one MS are theoretically free to pursue economic activities and locate their business to any other MS without restrictions. This is supported by the EU legal regime mostly through secondary legislation and the CJEU jurisprudence. Companies play a significant role in the European economic setting, and the freedom of establishment is vital in the functioning and development of the Single Market.⁶ Still, even after decades, all barriers to trade have not been abolished since the current legal situation regarding companies remains inadequate as company law is not sufficiently adapted to cross-border mobility in the EU.⁷ This is particularly true with cross-border seat transfers (CBST) since harmonised EU rules governing such transactions are completely absent. It is inherent to the companies' characteristics to restructure and transform their legal form in order to grow, adapt to the changing environment and to pursue new opportunities in new markets.⁸ Hence, companies should be able to transfer their seat cross-border in the EU without any significant legal obstacles. Still, most MSs do not provide for any legislative framework for CBSTs, and some MSs do not allow such transactions directly in their domestic legislation at all.

This thesis aims to determine whether the current legal situation on company seat transfers in the EU restricts companies' right to migrate across borders in violation of the freedom of establishment. To fulfil the aim, it will examine under which conditions companies can relocate their seat within the EU and how such transactions are challenged. It also examines whether the current options for cross-border seat transfers are viable solutions in respect of companies' needs and capabilities and whether these options can be regarded as a substitute for a common legal framework. The author hypothesizes that companies' right to relocate their seat within the EU under the freedom of establishment is unnecessarily restricted and, in some cases, rendered impossible primarily by the divergencies in Member states' national laws and fragmented EU procedures. To propose a solution to the underlying issue and to enable companies better access freedom of establishment in respect of cross-border mobility, the research analyses the feasibility of a common legal framework for cross-border seat transfers.

⁶ 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 COM/2018/241 final - 2018/0114 (COD), p 1.

⁷ *Ibid.*, p 1.

⁸ *Ibid.*, p 1.

The author believes that the topic of this thesis is timely and important in respect of the current policy debate on the company law package published on April 2018, which comprises a Proposal for a Directive including new and harmonised rules on conversions.⁹ This thesis follows a qualitative research method, and it is based on the literature review relating to the topic. The research data is gathered from different legal publications, judicial decisions and other relevant legal sources. European Union primary and secondary legislation relating to European company law will be discussed in the research as primary sources, and the CJEU jurisprudence regarding the topic will be examined as well. The literature used as secondary sources is produced by legal scholars who analyse the issues relating to the topic of this research. Finally, the research will include information from other published research reports, studies and other relevant materials on the topic.

This thesis consists of five parts. Chapter one introduces the general legal framework of cross-border company mobility in Europe, introducing the legal basis and the cornerstone of cross-border company movement, the freedom of establishment. It will also address the issue of conflict of laws and introduce the main European company law directives and regulations. Chapter two outlines the conditions under which companies may relocate their seat within the EU. The impact of the most significant CJEU judgements relating to CBSTs will also be examined. Chapter three identifies the main obstacles hindering companies' efforts to move within the EU by analysing the divergencies in the national legislations and uneven application of EU procedures. Chapter four analyses, through a practical example, one of the alternative ways to relocate company seat. It concerns the re-domiciliation of Nordea Group's parent company by transferring the registered office from Sweden to Finland through a cross-border reversed merger. Finally, chapter five assesses the feasibility of a common legal framework for CBSTs. It will focus on analysing the viability of alternative options, the necessity of common rules and lastly examining the European agenda.

⁹ COM/2018/241 final - 2018/0114 (COD)

1. GENERAL LEGAL FRAMEWORK OF THE COMPANY MOBILITY

The European company law harmonization process begun over 50 years ago, in 1968, as the Council adopted the very first company law directive.¹⁰ Significant process was undoubtedly made, but the developments were not always so well coordinated.¹¹ The measures were mostly considered too trivial¹² and only partial harmonization was achieved. However, in the EU level, it has become evident that company law can no longer be regarded just as a subject of harmonization, but merely an important instrument shaping the future of European economics.¹³ Company law, in general, is the legal regulation of companies, which are formed by activities of associated persons who, for joint activity conduct such activities either commercially or otherwise.¹⁴ Hence, EU legislators are involved with ongoing efforts for establishing a modern and efficient company law and corporate governance framework not only for European undertakings but as well for the stakeholders, to improve the business environment in the EU.¹⁵

Companies are still mostly controlled by and subject to national laws of the MSs, but there are three different fields of law jointly regulating company mobility in Europe.¹⁶ First, there is the European Union law, namely the freedom of establishment granted by articles 49 and 54 TFEU and the company law directives.¹⁷ Due to only partial harmonization, there have to be substantial

¹⁰ Wouters, J. (2000). European Company Law: Quo vadis? – *Common Market Law Review*, No. 37, p 257.

¹¹ Armour J. & Ringe W-G., (2011). European company law 1999–2010: Renaissance and crisis – *Common Market Law Review*, Vol. 48, Issue 1, p 125.

¹² Enriques, L. (2017). A Harmonized European Company Law: Are We There Already? – *International and Comparative Law Quarterly*, No. 66, p 765.

¹³ Wymeersch, E. (2005). Closing Remarks: European Company Law and Corporate Governance: Quo Vadis? – *The Rabel Journal of Comparative and International Private Law, Company Law and Corporate Governance in Europe – Interim Report and Reflections on the Ongoing Reforms in the European Union and in Selected Member States*, Vol 69, Issue 4, p 789.

¹⁴ Dorresteijn, A. F. *et al.* (2017). European corporate law, Alphenaan den Rijn, the Netherlands: Kluwer Law International B. V., p 9.

¹⁵ Company law - Fact Sheets on the European Union (2018). European Parliament. Accessible: <http://www.europarl.europa.eu/factsheets/en/sheet/35/company-law> , 5 March 2019.

¹⁶ Schön, W. (2006). The Mobility of Companies in Europe and the Organizational Freedom of Company Founders – *European Company and Financial Law Review*, Vol 3, Issue 2, p 123.

¹⁷ *Ibid.*, p 123.

domestic company laws in each MS, which is the second body of regulation.¹⁸ Third, because MSs have their own national rules governing companies, they necessarily possess substantial differences and therefore, there is a need for private international law rules covering the “conflict of laws”.¹⁹ The issue here is that they likely conflict, for example, national company laws may clash with fundamental freedoms granted by EU legislation or the private international law might serve as a protectionist device.²⁰

Broadly speaking, the legal sources of European company law divide in primary and secondary legislation. The legal basis for European company law is established in the European primary law, being articles 49, 50(1) and (2)(g), 54(2) TFEU, and articles 114, 115 and 352 TFEU. Secondary law consists of different legal measures, such as directives, regulations, recommendations and opinions. Moreover, judgements of the European Court of Justice (ECJ) form a non-official but truly influential source of the EU law, which also presents an essential imperative role in company law.²¹

1.1. Legal basis for company law activities

The legal basis for company law activities in the EU is laid down primarily in the article 50(2)(g) TFEU, which requires actions from the European Institutes in reducing restrictions to the freedom of establishment. Article 114 TFEU provides for the European Parliament and the Council the possibility to adopt measures, such as directives, for the approximation of provisions in MSs “which have as their object the establishment and functioning of the internal market”. Whereas the TFEU serves as a primary source of legislation, it also provides the power for enacting secondary legislation to the EU Institutions. Indeed, article 288 TFEU entails a basic rule providing the institutions with the power to adopt regulations, directives, decisions, recommendations and opinions to exercise the Union’s competences. As generally well established, regulations are directly applicable, whilst directives must be implemented as part of national legislation by the MSs.

¹⁸ Schön, W. (2006). *supra nota* 16, p 123.

¹⁹ *Ibid.*, p 124.

²⁰ *Ibid.*, p 124.

²¹ Patterson, D. M., & Södersten, A. (2016). *A companion to European Union law and international law*. Part I, International Law and EU Law, Chapter 5, The Effect of EU Law by Arnall, A., John Wiley & Sons Inc. p 62.

1.2. Freedom of establishment

Companies have the right to move from one MS to another without having to alter its legal personality.²² Article 49 TFEU provides for freedom of establishment by prohibiting all restrictions on the freedom of establishment of nationals of any MS in the territory of another MS. Following the article, setting up agencies, branches, or subsidiaries by nationals of any MS must be allowed in the territory of another MS. In plain language, it means that all restrictions on freedom of primary and secondary establishments must be abolished. The same article also affords the right to pursue activities as self-employed and to set up and manage undertakings, and such right must be equal with the nationals of the Member State where the undertaking was established. Therefore, article 49 seeks to prohibit discrimination in respect of nationals who desire to establish a company in another MS.²³

Article 54 TFEU addresses especially companies and assures that the freedom of establishment may be relied upon not only by natural persons but by companies as well. It states that companies and firms which are formed under the law of any MS having their registered office, central administration or principal place of business within the EU, must be treated in the same manner than those natural persons who are nationals of that MS. Within the meaning of this article, any company formed in accordance with the law of any MS and is recognized thereof must be treated in the same manner as a natural person in exercising his or her right of freedom of establishment and as an establishment of any nationals founding it.²⁴ In the strict sense, the latter is not entirely possible because of the differences between legal and natural persons and because considerable differences still remain in MS national company laws.²⁵

1.3. Conflict of laws

There are two main Private International Law options for MSs to determine the boundary between domestic and foreign law in company law – the real seat theory and the incorporation theory. Countries applying real seat theory determine the applicable law in accordance with the place

²² Dorresteijn, A. F. *et al.* (2017). *supra nota* 14, p 34.

²³ Craig, P., De Búrca, G. (2015). *EU Law: Text, Cases and Materials*. 6th ed. Oxford University Press, p 802.

²⁴ Court decision, 6.11.1984, *Fearon v Irish Land*, C-182/83, EU:C:1984:335, paragraph 8.

²⁵ Craig, P., De Búrca, G. (2015). *supra nota* 23, p 110.

where the head office of the business is located.²⁶ If the company follows incorporation theory, the business is simply established in the jurisdiction of their choice, meaning that the applicable law is the law of the country of incorporation, which generally corresponds the place of the registered office of the undertaking.²⁷ In other words, it is the company's seat that determines which national law in cross-border issues will be applied to an international legal relationship because the seat of a company can be imagined as a connecting factor to the applicable company law.²⁸ This is because the conflict rules regulate the application of company law specifically through the connecting factor – the seat of a company – which substantive company law is applicable.²⁹ A clear majority of MS's opt for incorporation theory.³⁰

The incorporation theory seems to be reasonably straightforward for corporations to exercise their freedom of choice, whilst the use of real seat theory may result in difficulties for jurisdictions to compete in the field of company law because companies following this theory need to be incorporated where they have their real seat.³¹ However, the distinction of whether companies opt for the real seat theory or incorporation theory has lost much of its relevance since the critical judgements of the CJEU.³² Indeed, the CJEU case law has afforded companies the freedom to choose from different MS company laws to govern their business undertakings. As established in *Daily Mail*, companies are creatures of national law, and thus principally the MSs have the right to establish under which conditions domestic companies can be incorporated.³³ Also, the Court ruled in *Centros* that companies can be formed in any MS “whose rules seem to him the least restrictive” without abusing the freedom of establishment³⁴ and *Segers* determined that a company can be lawfully established in a MS even if it did not conduct any trade there.³⁵ Hence, a company is established within the meaning of article 49 TFEU as long as it is formed under the law of any MS and has its register office in that MS and its principal place of business somewhere in the EU.

²⁶ Vaccaro, E. (2005). Transfer of Seat and Freedom of Establishment in European Company Law – *European Business Law Review*, Vol 16, Issue 6. p 1348.

²⁷ *Ibid.*, p 1349.

²⁸ Biermeyer, T. (2015). Chapter 2 - Concepts of 'Seat' and 'Seat Transfer', Stakeholder Protection in Cross-Border Seat Transfers in the EU (WLP, 2015) – *SSRN Electronic Journal*, p 26.

²⁹ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 31.

³⁰ Gerner-Beuerle, C. *et al.* (2016). Study on the law applicable to companies - Final report. European Commission & LSE. *Publications office of the European Union*, p 137.

³¹ Andenas, M., & Wooldridge, F. (2009). *European comparative company law*. Cambridge University Press. p 35.

³² Gerner-Beuerle, C., *et al.* (2016). *supra nota* 30, p 15.

³³ Case C-81/87, *Daily Mail*, paragraph 19.

³⁴ Court decision, 9.3.1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 39.

³⁵ Court decision, 10.7.1986, *Segers v Bestuur*, Case 79/85, EU:C:1986:308, paragraph 19.

1.4. Secondary law applicable to companies

Respecting the nature of directives as legislative measures, they require implementing to the national MS company laws. As established, there is no codified European company law as such, but the harmonization of national law rules through directives has set some minimum standards in certain areas. At present, European Union company law rules can be roughly divided covering issues on five different levels, but a large part of the EU company law is currently codified in a single directive, Directive (EU) 2017/1132³⁶ (Directive 2017) covering issues relating to certain aspects of company law.

On the first level, there is the Directive 2017 and Directive 2009/102/EC³⁷, which cover issues of setting up a company and capital and disclosure requirements. The second level comprises company operations, which involve more than one country covered by the Directive 2017 dealing with business registers, the Council Directive 2014/86/EU³⁸ dealing with taxation issues and the Directive 2004/24/EC³⁹ on takeover bids. On the third level, company restructuring provisions are once again covered with the Directive 2017 covering mergers, divisions and cross-border mergers.⁴⁰ Fourthly, the European company law rules cover guarantees concerning financial situations of companies, and those are covered by directives 2013/34/EU⁴¹ and 2006/43/EC⁴² regulating company accounts and Regulation (EU) No 2015/848⁴³ establishing common rules on the competent court to open insolvency problems and the applicable law. Lastly, the cross-border exercise of shareholders' rights is covered with the latest Directive (EU) 2017/828.⁴⁴

³⁶ OJ L 169, 30.6.2017.

³⁷ OJ L 258, 1.10.2009.

³⁸ OJ L 219, 25.7.2014.

³⁹ OJ L 142, 30.4.2004.

⁴⁰ Directive (EU) 2017/1132 replaced the Tenth Company Law Directive 2005/56/EC on cross-border mergers.

⁴¹ OJ L 182, 29.6.2013.

⁴² OJ L 157, 9.6.2006.

⁴³ OJ L 141, 5.6.2015.

⁴⁴ OJ L 132, 20.5.2017.

2. COMPANY SEAT TRANSFERS WITHIN THE EU

Companies may exercise the freedom of establishment in two different ways: the freedom of primary establishment or the secondary establishment.⁴⁵ The primary establishment enables companies to choose the place of their seat or to relocate the company to another MS, whilst the secondary establishment affords the right to set up agencies, branches and subsidiaries in the host MS.⁴⁶ In principle, companies which are incorporated under the national legislation of one MS, may transfer the business to another MS and subject themselves to the law of that MS without first having to liquidate the company.⁴⁷ All companies operating in the EU must still be registered in the commercial register of one MS under the Directive 2009/101/EC.⁴⁸ Besides the possibility to set up a company ‘out of the blue’ in another MS, companies mostly exploit the right of establishment in two main ways – a company can relocate its seat, or it can reincorporate in another jurisdiction.⁴⁹ This has been widely demonstrated in the CJEU case law. These kinds of restructurings and transformations are inherent to companies’ nature in making the business grow and explore new markets.⁵⁰

2.1. The concept of cross-border seat transfer

Reasons for cross-border seat transfers might be diverse, but generally, companies might want to seek to subject themselves under a more beneficial jurisdiction or change the law applicable because the company’s activities have changed to a different country.⁵¹ It is nowadays generally accepted that companies incorporated and registered under the law of one MS, may choose to

⁴⁵ Stoica, C. (2016). Recent Developments Regarding Corporate Mobility within EU's Internal Market. Accessible at SSRN: <https://ssrn.com/abstract=2783809> p 3.

⁴⁶ *Ibid.*, p 3.

⁴⁷ Gerner-Beuerle, C. *et al.* (2017). Cross-border reincorporations in the European Union: the case for comprehensive harmonisation – *Journal of Corporate Law Studies*. p 1.

⁴⁸ OJ L 258, 1.10.2009, art. 3.

⁴⁹ Gerner-Beuerle, C., *et al.* (2016), *supra nota* 30, p 32.

⁵⁰ COM/2018/241 final - 2018/0114 (COD).

⁵¹ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 41.

transfer their real seat or the effective place of management to another MS.⁵² Indeed, there are two main options for companies to relocate their seat and there are two kinds of seats: the registered office and the central administration.⁵³ The seat of a company generally means the place where the members of the company's administration (the directors or the board) and employees are located.⁵⁴ The simplest way would be to transfer the central administration or the registered office directly.⁵⁵ Transfers of central administration are excluded from the scope of this thesis, but when a company relocates its registered office, it needs to amend its statutes in accordance with the new place.⁵⁶ The other option would be to reincorporate the company in another MS, which, in principle, means that a company incorporated in accordance with the law of one MS, seeks to subject themselves under company law of another MS without having to liquidate the business first.⁵⁷ Reincorporation could be done through merger, conversion or a "pure" seat transfer.⁵⁸

Company seat transfer through a cross-border merger (CBM) can principally be realized by acquisition or by formatting a completely new company. In any case, the consequences are similar than in domestic merger.⁵⁹ Generally speaking, a merger is realized when the assets and liabilities of one or more companies are transferred to another legal entity.⁶⁰ A company may, for example, merge with a company in the host MS, which is established for the purpose of merging. The downside of mergers between companies is that they are complicated, and they might turn out time-consuming and complex.⁶¹ Still, mergers are also an essential part of companies' activities.⁶²

Compared to CBMs, seat transfers and conversions are a different thing, and they are sometimes treated as synonyms. When a company transfers its seat, depending on the Private International Law, the applicable law may or may not be changed.⁶³ Conversion is similar and then again different, but they still both belong under the "reincorporation group", where merger also belongs.

⁵² Mörsdorf, O. (2012). The legal mobility of companies within the European Union through cross-border conversion – *Common Market Law Review*, Vol. 49, Issue 2, p 629.

⁵³ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 26.

⁵⁴ Szydło, M., (2008). Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the *Cartesio* Case – *European Private Law Review*, Vol 16, Issue 6, p 974.

⁵⁵ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 43.

⁵⁶ *Ibid.*, p 43.

⁵⁷ Gerner-Beuerle, C., *et al.* (2016), *supra nota* 30, p 215.

⁵⁸ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 43.

⁵⁹ Dorresteijn, A. *et al.* (2017). *supra nota* 14, p 78.

⁶⁰ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 43.

⁶¹ Van Gerven, D. (2010). *Cross-border mergers in Europe*. Cambridge University Press. Vol 1. p 4.

⁶² Siems, M. M. (2007). SEVIC: Beyond Cross-Border Mergers – *European Business Organization Law Review*, Vol. 8, Issue 2, p 308.

⁶³ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 43.

When a company undergoes conversion, the legal entity is converted into a different form by changing the applicable law, and it can happen through a seat transfer.⁶⁴ In simple terms, the purpose of cross-border conversions is therefore to change the applicable law. To conclude, whereas cross-border conversion of a company is done within the aim of changing the applicable law, a cross-border seat transfer could be carried out with or without the change of applicable law.

2.2. The Court of Justice jurisprudence

Through case law, the CJEU has proved to be supportive of cross-border corporate mobility in Europe. The first landmark case, *Centros*,⁶⁵ can be considered as a starting point in promoting company mobility in general and since then the CJEU has made great progress in facilitating the choice afforded by the freedom of establishment. In *Centros* the Court said:

“... the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive... cannot itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member State is inherent in the exercise, in single market, of the freedom of establishment guaranteed by the Treaty”.⁶⁶

In respect of CBSTs, it all started in 1988 within the decision in the *Daily Mail*⁶⁷ case, where the CJEU ruled that a transfer of central management did not belong under the fundamental freedoms granted by articles 49 and 54 TFEU, thereby excluding cross-border seat transfers from the application of freedom of establishment.⁶⁸ However, this judgement was more or less reconsidered in subsequent cases. In this case, a company was seeking to move its seat out of the country – outbound migration – and it was hindered by the home MS.

The following three cases consider inbound migration, where a company is hindered when seeking to transfer their seat into a country. As stated already, a company may relocate its real seat by setting a subsidiary or a branch in another MS. The Court stated in cases *Centros*⁶⁹ and *Inspire*

⁶⁴ Biermeyer, T. (2015). Chapter 2. *supra nota* 28, p 44.

⁶⁵ Case C-212/97, *Centros*.

⁶⁶ *Ibid.*, paragraph 27.

⁶⁷ Case C-81/87, *Daily Mail*.

⁶⁸ *Ibid.*, paragraph 25.

⁶⁹ Case C-212/97, *Centros*.

*Art*⁷⁰ that a refusal to register a branch of a company or to impose certain conditions provided for in domestic law on a company, which has been duly established in accordance with laws of another MS, is contrary to articles 49 and 54 TFEU resulting in limiting their freedom of establishment.⁷¹ The CJEU ruling on *Überseering* established in turn that where a company is duly established by the laws of one MS, it is entitled to rely on the freedom of establishment and thus its legal capacity must be recognized in another MS.⁷² In *Inspire Art* the Court ruled that rules imposing certain conditions provided for in domestic law regarding company formation (in this case it was about minimum capital requirements and directors' liability) to a company formed under the law of another MS, impose a restriction in violation of freedom of establishment.⁷³ Thus, it was made evident in *Centros*⁷⁴, *Überseering*⁷⁵ and *Inspire Art*⁷⁶ that a host MS is not allowed to apply their domestic company law rules to companies who wish to relocate their seat in that MS. However, it can be allowed if the host MS can justify the use of domestic laws under the *Gebhard* test, which allows the authorities of the host MS to use appropriate measures for preventing or penalising fraud.⁷⁷ According to the test, the measures must be applied in a non-discriminatory manner, they must be justified by necessary requirements in the public interest, they must be appropriate for securing the aim pursued, and lastly, the measures cannot go beyond what is necessary to achieve the purpose.⁷⁸ In other words, any restrictions imposed on inbound reincorporations need to be justified by overriding grounds not only in the public interest but those reasons must also be proportionate to the objectives the MS is aiming to achieve.

In respect of mergers, it was established in *SEVIC*⁷⁹ in 2005 that the freedom of establishment in accordance with the articles 49 and 54 TFEU applies to cross-border mergers as well.⁸⁰ The Court stated that different treatment of domestic and cross-border mergers was considered discriminatory and such conduct constitutes a restriction on freedom of establishment.⁸¹ In this ruling, the Court gave its perspective relating to outbound cross-border seat transfers for the first time.

⁷⁰ Court decision, 30.9. 2003, *Inspire Art*, Case C-167/01, EU:C:2003:512.

⁷¹ Erk, N. K., (2010). Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine – *European Business Law Review*, Vol. 21, Issue 3, p 421 and 423.

⁷² Court decision, 5.11.2002. *Überseering*, Case C-208/00, EU:C:2002:632, paragraph 94.

⁷³ Case C-167/01, *Inspire Art*, paragraph 143.

⁷⁴ Case C-212/97, *Centros*.

⁷⁵ Case C-208/00, *Überseering*.

⁷⁶ Case C-167/01, *Inspire Art*.

⁷⁷ Court decision, 30.11.1995, *Gebhard*, Case C-55/94, EU:C:1995:411.

⁷⁸ Craig, P., de Búrca, G. (2015). *Supra nota* 23, p 805.

⁷⁹ Court decision, 13.12. 2005, *SEVIC*, Case C-411/03, EU:C:2005:762.

⁸⁰ *Ibid.*, paragraph 63.

⁸¹ *Ibid.*, paragraph 63.

In 2008, the Court addressed the question about outbound seat transfers in detail in *Cartesio*⁸², where a company wanted to remain under the home MS law, and it was hindered by the home state authorities. In *Cartesio* the Court reaffirmed its ruling in *Daily Mail* and ruled that an outbound transfer did not fall under the scope of articles 49 and 54 of TFEU since it was a question of freedom of establishment and not a freedom of departure.⁸³ The Court also granted the right of companies to convert into a company form governed by the law of another MS.⁸⁴

In accordance with the CJEU ruling in 2012 in *VALE*⁸⁵ cross-border mergers fall under the scope of freedom of establishment. The CJEU ruled that companies which are established in one MS may transfer their seat by cross-border conversion, meaning that the host MS has to accept cross-border conversions if it allows them domestically.⁸⁶ No exceptions to this rule are allowed unless they are provided under the derogations of the Treaty or by overriding public interests.⁸⁷ The ruling in *VALE* is of great importance in the EU legal regime relating to cross-border seat transfers because the Court established a legal structure under which cross-border conversions must be possible within the EU, and thus the MSs must provide foreign companies with a procedure for such activities if it is provided to domestic companies.⁸⁸

The most recent case relating to cross-border seat transfers is the *Polbud*⁸⁹ case contributing to the development of the concept of cross-border conversions. This case considered a situation where a company moved its registered office and wished to change the applicable law and legal form. The CJEU first pointed out that a company duly formed under the law of one MS and having its registered office, the central administration or the principal place of business within the EU may, in principle, rely on freedom of establishment.⁹⁰ According to the case it is inherent to the freedom of establishment that companies, having the right to set up and manage companies in the host MS under its domestic conditions, also have the right to conduct a cross-border conversion through a

⁸² Court decision, 16.12.2008, *Cartesio*, Case C-210/06, EU:C:2008:723.

⁸³ *Ibid.*, paragraph 124.

⁸⁴ *Ibid.*, paragraphs 111-113.

⁸⁵ Court decision, 12.7.2012, *VALE*, Case C-378/10, EU:C:2012:440.

⁸⁶ *Ibid.*, paragraph 62.

⁸⁷ Panizza, R. (2017). Cross-border transfer of company seats. European Parliament. Accessible: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI\(2017\)583143](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2017)583143), 3 April 2019. p 2.

⁸⁸ Biermeyer, T. (2015). Chapter 3 - The Impact of European Law on Cross-Border Seat Transfers. Stakeholder Protection in Cross-Border Seat Transfers in the EU (*WLP*, 2015). *SSRN Electronic Journal*, p 60.

⁸⁹ Court decision, 25.10. 2017, *Polbud*, Case C-106/16, EU:C:2017:804.

⁹⁰ *Ibid.*, paragraph 32.

seat transfer of the registered office as long as the company complies with the law of the host state.⁹¹

2.3. Alternative options

Problems emerging from the lack of specific legal framework on cross-border seat transfers has been at issue for over a decade. The absence of such rules does not, however, obstruct company seat transfers completely since companies may rely on alternative options to migrate within the EU. These alternative means can also be characterized as indirect mechanisms.⁹² They are available on cross-border mergers⁹³, on the European Company (SE)⁹⁴, and on the European Cooperative Society (SCE).⁹⁵ The SE and SCE Regulations can be regarded as special rules for the cross-border transfer of companies belonging under their scope.⁹⁶

2.3.1. Cross-border merger Directive

As established already, CBMs are governed by the recently adopted Directive (EU) 2017/1132⁹⁷, which harmonized legislation concerning CBMs across the EU. Formerly a separate Cross-border Merger Directive (CBMD) 2005/56⁹⁸ was facilitating cross-border company mobility in the EU. The newly revised directive includes new fast-track rules for “simple” mergers and more protective measures for shareholders and creditors, whilst the principal procedure for CBMs remained as it was in the 2005 Directive.⁹⁹ Because these rules were only newly revised and there have not been any fundamental changes for the purposes of this research, the rules on CBMs will be observed under the Directive from 2005.

⁹¹ Case C-106/16, *Polbud*, paragraphs 33, 38, 41, 43, 44.

⁹² Panizza, R. (2017). *supra nota* 87, p 2.

⁹³ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p 1–9.

⁹⁴ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001.

⁹⁵ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003.

⁹⁶ Schmidt, J. (2016). Cross-Border Mergers and Divisions, Transfers of Seat: Is there a Need to Legislate? *Policy Department for Citizens' Rights and Constitutional Affairs*. Accessible:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2016\)556960](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)556960), p 12

⁹⁷ OJ L 169, 30.6.2017.

⁹⁸ OJ L 310, 25.11.2005.

⁹⁹ European Commission press release database: New Company Law Rules (2018). Accessible: http://europa.eu/rapid/press-release_MEMO-18-3509_en.htm, 14 April 2019.

It was already established in the *SEVIC*¹⁰⁰ judgement that refusal to register a cross-border merger constitutes a violation on the freedom of establishment, and this ruling was later superseded by the CBMD.¹⁰¹ The CBMD unified the procedure for CBMs and it has been implemented in all EU and EEA MSs.¹⁰² The scope of the Directive is limited to public limited liability companies which are formed in accordance with the law of one MS, have their registered office in the EU, and at least two of the merging companies must be governed by the different MS laws.¹⁰³ The CBMD allows companies to transfer their seat cross-border through a merger without having to go through liquidation and is possible through a down-stream merger, in other words, a reversed merger. This means that a company, usually a parent company, can set up a subsidiary company in the target MS and then merge with this newly formed foreign company.¹⁰⁴ As a downside, such an operation could be time-consuming and expensive process particularly in cases where the objective is merely the cross-border seat transfer rather than a merger where a real integration between the companies happen.¹⁰⁵

2.3.2. SE Regulation

A Statute for European Company (*Societas Europaea*), the SE Regulation,¹⁰⁶ was adopted in 2001. The purpose was to create a European Company with its very own legal framework to avoid confusion from dealing with all the different MS legal systems.¹⁰⁷ Creation of a SE is promoted as an easier way to companies run their business under a single set of rules enabling them to migrate more easily across the EU.¹⁰⁸

A SE can be formed by way of merger, conversion or by the establishment of a European holding company or a European subsidiary.¹⁰⁹ Article 8 of the SE Regulation¹¹⁰ provides for a possibility to transfer a registered office of a SE without liquidation. In simple terms, in case of an already existing company the SE Regulation requires it to convert into a SE and then execute a cross-

¹⁰⁰ Case C-411/03, *SEVIC*.

¹⁰¹ Siems, M. M. (2007). *supra nota* 62, p 316.

¹⁰² Schmidt, J. (2016). *supra nota* 96, p 16.

¹⁰³ OJ L 310, 25.11.2005, art. 1.

¹⁰⁴ Gerner-Beuerle, C., *et al.* (2017). *supra nota* 47. p 7.

¹⁰⁵ *Ibid.*, p 7.

¹⁰⁶ OJ L 294, 10.11.2001.

¹⁰⁷ Biermeyer, T. (2015). Chapter 3, *supra nota* 88, p 84.

¹⁰⁸ Setting up a European Company (SE). (2019). Available: https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm, 4 May 2019.

¹⁰⁹ Ernst&Young (2018). Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies - Final Report, p 33.

¹¹⁰ OJ L 294, 10.11.2001.

border seat transfer. It thus enables companies to reorganize across the EU and EEA without major legal obstacles, like losing business continuity. The SE Regulation also allows seat transfer by means of a reversed merger as long as both the subsidiary company and the merging company are both public limited liability companies and the cross-border merger procedure is conducted under the SE Regulation.¹¹¹

2.3.3. SCE Regulation

Regulation of the Statute for a European Cooperative Society¹¹² was adopted in 2003, and it parallels the SE Regulation.¹¹³ It provides a legal instrument for companies that wish to group together in order to, for example, access markets or achieve economies of scale.¹¹⁴ The regulation allows a cross-border company seat transfer in accordance with article 7 of the SCE Regulation.¹¹⁵ Similarly to the SE regulation, the SCE Regulation enables companies to preserve their legal identity since they are not required to go through liquidation first. The downside of this instrument is that it is only available to cooperatives and not applicable to normal capital companies.

Issues relating to these options will be further elaborated in chapter 5.

¹¹¹ Ernst&Young (2018). *supra nota* 109, p 33.

¹¹² OJ L 207, 18.8.2003.

¹¹³ The European Cooperative Society (SCE) (2017). European Commission. Accessible: https://ec.europa.eu/growth/sectors/social-economy/cooperatives/european-cooperative-society_en, 16 April 2019.

¹¹⁴ *Ibid.*

¹¹⁵ OJ L 207, 18.8.2003.

3. FRAGMENTED POLICIES

As already established, only partial harmonization has been achieved in the EU company law. For the purpose of this research and following the prevailing, anti-literal and extensive interpretation, harmonization refers to making the company law across Europe uniform.¹¹⁶ Some views indicate that a completely uniform European company law could, in fact, be entirely out of reach.¹¹⁷ It is true that there are still some significant practical obstacles to company mobility in Europe and this has also been demonstrated in several studies in recent years.¹¹⁸ The underlying issues regarding seat transfers arise when MSs apply diverging rules or procedures to such operations. The harmonising efforts in European company law have only done little to remove diversity in the MSs legal systems.¹¹⁹

3.1. Absence of common procedures

The CJEU jurisprudence has provided a comprehensive set of guidelines on the issues relating to CBSTs and companies may rely on the alternative options to transfer the seat cross-border. However, a specific legal framework harmonizing the rules and providing common EU procedures and legal instruments for CBSTs is still absent. To demonstrate the issue, only five MSs out of 28 provide explicit procedures in their national company law for cross-border transfer of a company's registered office.¹²⁰ Contrastingly, six MSs do not allow such transfers at all.¹²¹ Majority of the MSs thus allow CBSTs, but some only permit inbound transfers and not outbound transfers at

¹¹⁶ Enriques, L. (2017). *supra nota* 12, p 767.

¹¹⁷ *Ibid.*, p 8.

¹¹⁸ See for example: Schmidt, J. (2016). Cross-Border Mergers and Divisions, Transfers of Seat: Is there a Need to Legislate? *Policy Department for Citizens' Rights and Constitutional Affairs.*; Gerner-Beuerle, C. *et al.* (2016). Study on the law applicable to companies - Final report. *European Commission & LSE.*; Ernst&Young. (2018). Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies - Final Report.

¹¹⁹ Deakin, S. (2000). Regulatory competition versus harmonization in European company law – *ESRC Centre for Business Research, University of Cambridge Working Paper*, No. 163, p 1.

¹²⁰ Cyprus, Czech Republic, Denmark, Malta and Spain. See: Ernst&Young. (2018). p 40.

¹²¹ Croatia, Finland, Ireland, Lithuania, Romania and the UK. See: Ernst&Young. (2018). p 41.

all.¹²² As some MS allow the transfer of a registered office directly based on the national legislation and some MS need to execute such transfers under the alternative methods, the possibility to transfer a seat cross-border does not exist equally across Europe. Because alternative options deal only indirectly with seat transfers, the viability of these methods will be discussed more in the last chapter.

The lack of coherence has also been raised as an issue in the application of CJEU jurisprudence. MSs apply case law unevenly since it has not been codified into national and EU legislation.¹²³ In cases *Cartesio*¹²⁴, *VALE*¹²⁵ and *Polbud*¹²⁶ the CJEU confirmed that CBSTs belong under the scope of freedom of establishment and obliged MSs to allow cross-border transfers of registered office. In *VALE*, the Court specifically ruled that companies incorporated in one MS have the right to convert into other forms of companies in other MSs if such conversions are allowed for domestic companies.¹²⁷ In *Cartesio*, the Court ruled that the MS of the origin cannot prohibit cross-border reincorporations.¹²⁸ In this regard, some MS do not comply with the Court judgements in their national legislation. For example, recent findings show that many MSs have failed to comply in their national legislation with the interpretation in *Cartesio* and still prohibit outbound reincorporations.¹²⁹ Overall the lack of codification at EU level leads to ambiguity and uneven application of CJEU jurisprudence.¹³⁰

3.2. Divergences in national legislation

National rules of different MSs are extremely diverse, and requirements regarding restructurings differ to a great extent across the EU.¹³¹ As established above, several MSs do not provide for any legislative framework for cross-border seat transfers in the first place, or, they fail to make such transactions effectively possible. Some MSs even outright restrict or prohibit cross-border reincorporations.¹³² This issue seems to originate from the practice of several MS not allowing

¹²² Ernst&Young. (2018). *supra nota* 109, p 41.

¹²³ *Ibid.*, p 37.

¹²⁴ Case C-210/06, *Cartesio*.

¹²⁵ Case C-378/10, *VALE*.

¹²⁶ Case C-106/16, *Polbud*.

¹²⁷ Case C-378/10, *VALE*, paragraph 62.

¹²⁸ Case C-210/06, *Cartesio*.

¹²⁹ Gerner-Beuerle, C., et al. (2017), *supra nota* 47. p 30.

¹³⁰ Ernst&Young. (2018). *supra nota* 109, p 37.

¹³¹ *Ibid.*, p 39.

¹³² Gerner-Beuerle, C., et al. (2017), *supra nota* 47. p 2.

companies established in their territory to transfer their seat to another MS because most national laws often do not recognize companies as continuing to exist after transferring their seat in another country.¹³³ In such a case, national laws require winding-up of the company in the home MS state and establishment of an entirely new legal entity in the host MS.¹³⁴ Because of this kind of conduct, the companies lose their legal and business continuity.¹³⁵ Therefore, the core issue originates from the MS laws, because some simply lack consistent rules enabling companies to migrate effectively.

The issue is closely connected to the conflict of law rules as well. A CBST could turn out to be a very complex process since national approaches in determining the applicable law differ notably among the MSs. Whether a MS opts into the incorporation theory or the real seat theory, these conflict of laws rules are still in several MSs uncertain and underdeveloped.¹³⁶ The differences between national approaches to determine the applicable law influence the rules and procedures governing cross-border operations and results in legal difficulties, significant administrative costs and social and tax burdens.¹³⁷

To sum up, the lack of uniformity among the laws of MSs and the resulting problems leads to the conclusion that CJEU jurisprudence is not sufficiently precise in facilitating the freedom of establishment in practice.¹³⁸ This seems to be the case relating to the conflict of law rules as well because the case law has not been able to overcome all the differences between the conflict of laws rules after all.¹³⁹ It was also found by a survey answered by lawyers across EU in September 2017, that majority of the respondents did not consider the European case law as a substitute for a possible harmonisation of conflict of law rules.¹⁴⁰

¹³³ Petronella, V. (2010). The Cross-Border Transfer of the Seat after *Cartesio* and the Non-Portable Nationality of the Company – *The European Business Law Review*, Vol 21, Issue 2, p 245.

¹³⁴ Szydło, M., (2008). *supra nota* 54, p 994.

¹³⁵ Panizza, R. (2017). *supra nota* 87, p 2.

¹³⁶ Schmidt, J. (2016). *supra nota* 96, p. 274.

¹³⁷ Panizza, R. (2017). *supra nota* 87, p 2.

¹³⁸ Gerner-Beuerle, C., *et al.* (2016). *supra nota* 30, p 274.

¹³⁹ *Ibid.*, p 63.

¹⁴⁰ *Ibid.*, p 90.

4. SEAT TRANSFER BY MEANS OF A CROSS-BORDER REVERSED MERGER - NORDEA CASE

This chapter will elaborate on how cross-border seat transfer through an alternative option functions by examining a practical example. It aims to demonstrate that it is possible to exploit cross-border merger as an alternative option to transfer company seat, but it concurrently only serves as a cumbersome alternative. The case concerns re-domiciliation of the parent company of the Nordea Group from Sweden to Finland by means of a cross-border reversed merger.

4.1. Facts of the re-domiciliation

On October 1st, 2018 Nordea Bank Abp became the largest financial services group in the Nordic and Baltic region. The re-domiciliation – transfer of registered office – of the Nordea Group parent company from Sweden to Finland was initiated by the board of directors on 6 September 2017, with the purpose of having the parent company in a country belonging to the EU’s banking union.¹⁴¹ The process was carried out by means of a cross-border reversed merger by way of absorption. In accordance with the merger plan, which was accepted by the Nordea’s shareholders on March 2018 in the Annual General Meeting, Nordea Bank Abp (Nordea Finland) replaced Nordea Bank AB (Nordea Sweden) as the parent company.¹⁴²

From a technical perspective, before the execution of the merger, Nordea Sweden (merging company) as a parent company owned all shares of the Nordea Holding Abp (acquiring company), which was specifically established for the purpose of the merger.¹⁴³ After the execution of the merger the, acquiring company was licenced to conduct banking businesses and investment services in Finland and it holds such licence in other jurisdictions in which the Nordea Sweden

¹⁴¹ Nordea Merger Prospectus (2017). Available: <https://www.nordea.com/Images/35-247881/Nordea%20Merger%20Prospectus.pdf>, p 1.

¹⁴² Nordea Merger Plan (2017). Available: <https://www.nordea.com/Images/35-230085/Merger%20plan.pdf>

¹⁴³ *Ibid.*, p 6.

formerly conducted such operations through its branches.¹⁴⁴ Thereafter also the name was changed to Nordea Bank Abp and the Finnish subsidiary company was closed down.

4.2. Analysis

The objective of the merger initially was to relocate the registered office to an EU MS that is participating in the EU's banking Union. This was found by the board of directors of Nordea Sweden whose analysis revealed that having the registered office in such MS could be expected to benefit its customers, shareholders and employees.¹⁴⁵ Finland and Sweden are both members of the EU, but Finland belongs to the EU banking union whilst Sweden does not. Having its registered office in Finland, Nordea Group is now subject to a similar regulatory framework as its European peers, meaning that there is now a better consistency in the application of laws and regulations.¹⁴⁶

Companies can choose to merge under the EU laws, but they might as well merge in accordance with the national laws of a relevant MS. Companies are creatures of national laws after all.¹⁴⁷ In the latter situation, companies taking part in the cross-border merger comply with the provisions and formalities of the national law to which they are subject. The transfer of Nordea's registered office was executed under the relevant laws of both MSs, although both countries have implemented the CBMD¹⁴⁸ in their national legislation. The Finnish government proposal on 2007¹⁴⁹ proposed to implement the CBMD on limited liability companies in Finnish national legislation. Consequently, it was implemented in the Finnish Companies Act (FCA) in 2007¹⁵⁰ and also the Finnish Commercial Banking Act was amended in the transposition of the CBMD.¹⁵¹ Before the transposition, cross-border mergers were not included in Finnish national company law at all, and it was not possible to execute a cross-border merger.¹⁵² The CBMD has also been implemented in Sweden whereby the Swedish Companies Act (SCA) of 2005¹⁵³ was amended. The amended Companies Act came into force in 2008 including a new section (section 23) on

¹⁴⁴ Nordea Merger Plan (2017). *supra nota* 142, p 10.

¹⁴⁵ *Ibid.*, p 9.

¹⁴⁶ *Ibid.*, p 9.

¹⁴⁷ C-81/87, *Daily Mail*.

¹⁴⁸ Directive 2005/56/EC, currently Repealed by Directive (EU) 2017/1132.

¹⁴⁹ Hallituksen esitys Eduskunnalle rajat ylittäviä pääomayhtiöiden sulautumisia ja jakautumisia koskevaksi yhteisölaainsäädännöksi, HE 103/2007.

¹⁵⁰ See Laki osakeyhtiölain muuttamisesta. 28.12.2007/1415 and Osakeyhtiölaki 21.7.2006/624.

¹⁵¹ Biermeyer, T., Bech-Bruun, Lexidale. (2013). Study on the application of the Cross-border Mergers Directive. Publications office of the European Union, p FI-4.

¹⁵² *Ibid.*, p FI-4.

¹⁵³ Aktiebolagslag (2005:551)

cross-border mergers.¹⁵⁴ Therefore, the merger was executed pursuant to national legislations which are based on the CBMD.

Within the meaning of the definition of a merger as established before, the assets and liabilities were transferred from Nordea Sweden to Nordea Finland through a cross-border reversed merger by absorption pursuant to FCA¹⁵⁵ chapter 16, sections 19-28, chapter 2 of the Finnish Commercial Banking Act¹⁵⁶, chapter 23, section 36 of the Swedish Companies Act¹⁵⁷, and chapter 10, sections 18-25 b of the Swedish Banking and Financing Act.¹⁵⁸ Under the FCA, a merger by absorption is an operation where one or several merging companies merge into the acquiring company.¹⁵⁹ Reversed merger refers to a situation where the parent company is absorbed into a subsidiary company, as defined already in chapter 2. The merger was considered complete as the Finnish Patent and Registration Office registered the merger in the Finnish trade register on 1st October 2018, pursuant to Chapter 16, section 25 of the FCA, which provides rules for the registration of the cross-border merger in Finland. After the registration, the legal consequences entered into force pursuant to Chapter 16, section 27 first paragraph of the FCA and Chapter 23, section 49, first paragraph of the SCA.¹⁶⁰ At least in Finland, article 14 of the CBMD providing rules for the consequences for a cross-border merger (FCA Chapter 16, Section 27) has been transposed wholly to the Finnish national legislation.¹⁶¹ Thereafter Nordea Sweden was dissolved and deregistered by the Swedish Company Register.¹⁶² As a result, the Nordea Groups' registered office is now located in Helsinki, Finland.

Initially, this example shows that it is indeed possible to transfer a company seat through an alternative option, by means of a cross-border merger. However, the next chapter will elaborate in more detail why these kinds of procedures may not always serve as a viable solution. To sum up just briefly, these transactions are often time-consuming and complex, mainly because a lot of requirements must be complied with, such as conducting a merger plan and its acceptance by the board of directors. The example also shows that a lot of steps must be complied with and the national laws of both MS respected. As established before, when a cross-border seat transfer takes

¹⁵⁴ Van Gerven, D. (2010). *supra nota* 61, p 181.

¹⁵⁵ Osakeyhtiölaki 21.7.2006/624.

¹⁵⁶ Laki liikepankeista ja muista osakeyhtiömuotoisista luottolaitoksista. 28.12.2001/1501.

¹⁵⁷ Aktiebolagslag (2005:551)

¹⁵⁸ Lag om bank- och finansieringsrörelse (2004:297)

¹⁵⁹ Osakeyhtiölaki 21.7.2006/624. Ch. 16, Sec. 2, first paragraph.

¹⁶⁰ Nordea Merger Plan (2017). *supra nota* 141, p 8.

¹⁶¹ Biermeyer, T., Bech-Bruun, Lexidale. (2013). *supra nota* 151, p FI-17.

¹⁶² *Ibid.*, p FI-17.

place the applicable law may or may not be changed. Here, the applicable law was changed since the initial objective was to subject the company under Finnish law in order to be part of the EU banking union. This case also strengthens the assumption that company migration does not reach companies evenly across all MSs because foreign incorporations occur more often between neighbouring countries, which share linguistic, social and economic similarities.¹⁶³ The Nordic countries¹⁶⁴ have traditionally cooperated in different legislative areas and these countries often many similarities in their company laws.¹⁶⁵ Therefore, Finland and Sweden might have entered into this agreement because they share these similarities enabling them to proceed without major legal difficulties. Also, as an interesting note, it was shown in a project on cross-border mobility, that Finnish companies merged as acquiring companies most with Swedish companies.¹⁶⁶ The data collected between 2013-2017 also indicated that Finland is seen as a “net receiving country”, whereas Sweden is considered as a “net sending country” because in more occasions Sweden was as merging as a merging company and not as an acquiring company.¹⁶⁷ In this case, the pattern was the same. To conclude, as it was established in subchapter 3.1. Finnish national legislation does not allow CBSTs at all thus preventing the transfer of Nordea’s registered office directly. Therefore, it seems that there was no other choice but to apply one of the alternative options to achieve the same result, but with more time and efforts.

¹⁶³ Gerner-Beuerle, C., *et al.* (2016). *supra nota* 30, p 62.

¹⁶⁴ Generally, Denmark, Finland, Island, Norway and Sweden.

¹⁶⁵ Westman, F. (2014). Nordic Company Law Regulation and Why Harmonisation Through Competition Is Necessary – *European Business Organization Law Review*, Vol 15, Issue 3, p 357.

¹⁶⁶ Biermeyer, T. & Meyer, M, (2018). Cross-border Corporate Mobility in the EU: Empirical Findings 2018. p. 26.

¹⁶⁷ *Ibid.*, p 26.

5. FEASIBILITY OF A COMMON LEGAL FRAMEWORK

Issues relating to CBSTs have remained controversial and are discussed widely by academics and researchers. Creating a uniform legal framework for the 28 different legal systems in the EU requires from the EU legislators the ability to identify a single rule that is competent across the whole EU. This can in many cases be impossible or at least difficult, because of the differences particularly in the economic environments of the MSs.¹⁶⁸ However, several studies and academics have found that specific rules on CBSTs are highly needed. It was already established in 2012 by the European Company Law Experts (ECLE) that a highest legislative priority should be given to certain cross-border issues which can only be solved at EU level and seat transfers were identified as one of them.¹⁶⁹

5.1. Viability of alternative methods

The CBMD¹⁷⁰ established a harmonized procedure in the EU level for cross-border mergers for limited liability companies and it resulted in a substantial increase of CBM activity in the EU and EEA.¹⁷¹ It is therefore clear that it provides a clear and structured framework for CBMs and thus improves legal security for companies engaging in such complex operations.¹⁷² However, it only deals indirectly with seat transfers and cannot really be regarded as a substitute for specific legislation.¹⁷³ It was already discovered in 2012 by the ECLE, that many years' experience with CBMs had revealed difficulties deriving from the CBMD,¹⁷⁴ causing problems in the practical application thereby hindering the effective use of such operations.¹⁷⁵ Also, issues that were not

¹⁶⁸ Böckli, P., *et al.* (2012). The Future of European Company Law – *Columbia Law and Economics Research Paper*, No. 420, p 3.

¹⁶⁹ *Ibid.*, p 6.

¹⁷⁰ OJ L 310, 25.11.2005.

¹⁷¹ Commission Proposal COM/2018/241 final - 2018/0114 (COD), p 5.

¹⁷² Schmidt, J. (2016). *supra nota* 96, p 16.

¹⁷³ Ernst&Young. (2018). *supra nota* 109, p 37.

¹⁷⁴ OJ L 310, 25.11.2005.

¹⁷⁵ Böckli, P., *et al.* (2012). *supra nota* 168, p. 8.

addressed even in the revised 2017/1132 Directive¹⁷⁶ have been identified. Namely, the scope is still limited to limited liability companies, whereas it rather should include all legal entities within the meaning of Article 54 TFEU.¹⁷⁷ The lack of protection of stakeholders has also gone through a lot of discussion, but these issues are at least to a certain degree identified with the new proposal.

The CBMD allows CBSTs through merger by acquisition, the formation of a new company or by means of a group merger. Although the liabilities and assets can be transferred through a single operation, it still requires the formation or acquisition of a company in the host MS, which in turn requires efforts and poses costs.¹⁷⁸ Overall compared to a direct company seat transfer, the current EU measures on CBMs makes the transfer process time-consuming and costly.¹⁷⁹ For bigger companies this might not be a problem, but at least smaller companies could face difficulties in investing for CBM since they tend to be more sensitive to significant expenses. Moreover, since bigger companies generally have better resources, they are able to hire external assistance such as lawyers and experts.

Also, the other alternative options, the SE¹⁸⁰ and SCE Regulation¹⁸¹, do not practically serve as equivalent options.¹⁸² Carrying out a CBST under the SE or SCE Regulation is similarly a complex procedure consuming time and assets.¹⁸³ It does preserve the legal identity enabling the continuity of a business, but it is often the case that the parties do not, in fact, want a SE or an SCE, but use it only as an alternative method to transfer the seat.¹⁸⁴ Article 7 of the SE Regulation requires that the minimum subscribed capital must be at least 120,000€ and there must be a cross-border element involved to set up this kind of an arrangement.¹⁸⁵ Therefore, this opportunity seems to be only limited to bigger companies, since it may be impossible for smaller businesses to invest such funds. It was also discovered in a study on the operation and the impact of the Statute for a European Company that SEs have not proved to be a popular legal instrument.¹⁸⁶ The situation with SCEs seems to be even more unsuccessful since it was established in a study on the

¹⁷⁶ OJ L 169, 30.6.2017.

¹⁷⁷ Schmidt, J. (2016). *supra nota* 96, p 17.

¹⁷⁸ *Ibid.*, p 32.

¹⁷⁹ Panizza, R. (2017). *supra nota* 87, p 2.

¹⁸⁰ OJ L 294, 10.11.2001.

¹⁸¹ OJ L 207, 18.8.2003.

¹⁸² Schmidt, J. (2016). *supra nota* 96, p. 32.

¹⁸³ *Ibid.*, p 33.

¹⁸⁴ *Ibid.*, p 33.

¹⁸⁵ OJ L 294, 10.11.2001.

¹⁸⁶ Ernst&Young. (2018). *supra nota* 109, p 34.

implementation of the SCE Regulation that by 2010 there were only 17 established SCEs.¹⁸⁷ It also turned out too complex legal instrument.¹⁸⁸ Hence, these findings imply that both of these regulations have only had limited success.

5.2. Necessity

The research has so far outlined the relevant CJEU jurisprudence relating to CBSTs confirming that companies in the EU have the right to exercise their freedom of establishment through CBST within the meaning of articles 45 and 54 TFEU. However, the absence of specific rules governing such operations and the fragmented policies across the EU prevents companies from relying on that right entirely. Efforts in addressing the legal issues arising from cross-border operations of transferring a company seat within the EU has been on the legislators' table for over a decade.¹⁸⁹ A proposal for Fourteenth Company Law Directive¹⁹⁰ concerning CBSTs was on the agenda for long, but the initiative was eventually discontinued after the Commission Impact Assessment in 2007.¹⁹¹ Nevertheless, thereafter the establishment of specific rules on CBSTs have been supported by many practitioners and academics and the European Parliament.¹⁹² The Parliament has in fact asked for a Directive for such operations repeatedly through several documents¹⁹³, invoking that the current situation without common EU rules on CBSTs impairs company mobility and thus freedom of establishment.

A study on the law applicable to companies revealed that outbound reincorporations by transferring the registered office of a company, such as the *Polbud*¹⁹⁴ case, are only rarely used in practice unless there is a possibility for clear rules from both sides (the host MS and MS of origin) and an agreement of prerequisites. Hence, to enable companies to exploit their freedom of

¹⁸⁷ Cooperatives Europe, EURICSE, EKAI Center (2010). Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE), Publications office of the European Union, p 28.

¹⁸⁸ Cooperatives Europe, EURICSE, EKAI Center (2010). *supra nota* 187, p.28.

¹⁸⁹ Panizza, R. (2017). *supra nota* 87, p 3.

¹⁹⁰ Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the De Facto Head Office of a Company from One Member State to Another, 20.4.1997.

¹⁹¹ Commission Staff Working Document - Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007)1707/1.

¹⁹² Schmidt, J. (2016). *supra nota* 96, p 15.

¹⁹³ For example: Resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat (OJ C 263 E, 16.10.2008, p. 671); resolution of 10 March 2009 on Cross-border transfers of companies' registered offices (Texts adopted, P6_TA(2009)0086); resolution of 13 June 2017 on cross-border mergers and divisions (Texts adopted, P8_TA(2017)0248).

¹⁹⁴ Case C-106/16, *Polbud*.

establishment fully, clear rules should be provided to avoid such constraints. Evidently, even after the CJEU jurisprudence legal uncertainty persists. Backing up the argument already made above in chapter 3 that the CJEU jurisprudence is not sufficiently precise in facilitating the company movement, the ECLE also stated strictly that the CJEU judgements are without question not able to solve all the practical problems connected to the issues of cross-border mobility.¹⁹⁵

CBSTs allow companies in the EU to exercise their built-in characteristics by reorganizing or reincorporating when seeking to grow, adapt to new markets or benefit economically.¹⁹⁶ According to the Commission estimation costs originating from using alternative methods to transfer the company seat could be between €80,000 - €100 000.¹⁹⁷ Hence, at least smaller companies often cannot afford to move. A special legal instrument for CBSTs could significantly save costs and therefore form a fairer basis for all companies in the EU to migrate.¹⁹⁸ In addition to the economic arguments, efficiency and clarity would be significantly improved.¹⁹⁹

One of the reasons why legislative efforts on cross-border mobility are necessary are the risks posed to the stakeholders.²⁰⁰ Not only do these kinds of cross-border operations involve risks for stakeholders – minority shareholders, creditors and employees – but these transfers may also all together challenge the fulfilment of these stakeholders’ rights acquired in their home MS.²⁰¹ Whilst these risks could be mitigated to a certain degree by the shareholders themselves, still, further actions from the MSs and EU legislators are necessary.²⁰² Protecting the stakeholders is an issue of great importance and should be addressed by EU level legislation, but since the examination of the issue further would require extensive elaboration, it is out of this research’s scope.

The obstacles in carrying out cross-border transfers of the seat, as identified in chapter 3, pose different consequences on companies. For example, a recent study on the cross-border operations

¹⁹⁵ Davies, P. *et al.* (2018). The Commission’s 2018 Proposal on Cross-Border Mobility - An Assessment – *European Company and Financial Law Review Forthcoming, Oxford Legal Studies Research Paper No. 25/2018.* p 2.

¹⁹⁶ Schmidt, J. (2016). *supra nota* 96, p32.

¹⁹⁷ Jourová, V. (2019). Company Law for thriving businesses and fair conditions. European Commission. Accessible: https://ec.europa.eu/info/sites/info/files/company_law_factsheet_2019.pdf, p 3.

¹⁹⁸ Jourová, V. (2019). *supra nota* 197, p 3.

¹⁹⁹ Schmidt, J. (2016). *supra nota* 96, p 32.

²⁰⁰ Biermeyer, T. & Meyer, M. (2018). Chaos days and tragedy in EU legislation making on cross-border corporate mobility? - *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue, p 3.

²⁰¹ Biermeyer, T. (2015). Chapter 11: Conclusion. Stakeholder Protection in Cross-Border Seat Transfers in the EU (WLP, 2015). *SSRN Electronic Journal*, p 362.

²⁰² *Ibid.*, 363.

by Ernst&Young discovered that there are three possible consequences for the present lack of uniform EU measures: (1) Company abandons the seat transfer all together remaining in the home MS, (2) company transfers its seat directly by means of national procedures (only those countries that have such procedures in place) or apply CJEU jurisprudence, or, (3) company transfers the registered office through alternative options.²⁰³ A similar approach was also found in small Estonian research, which discovered that in several cases company having a real intention to transfer its registered office across borders had to abandon those plans or use alternative methods because such operations are not regulated across the EU.²⁰⁴ This means that the lack of uniform rules currently compels companies in the EU undertake CBSTs very unevenly, because of different starting points in their legal systems. Therefore, it must be concluded that there is an actual need for a common legal framework, along with the views of several studies, academics and even the EU legislators. Also, the ECLE consider it necessary to establish a Directive on cross-border mobility.²⁰⁵

5.3. European agenda on cross-border seat transfers

As stated above the European Parliament has repeatedly called for a directive on CBSTs as the diversity of substantive company laws seem to be persistent. In its study on the Law Applicable to Companies in 2016, also the Commission suggests the adoption of a directive on seat transfers, which would provide harmonized rules and procedures for such operations.²⁰⁶ The study suggested that the directive should provide for harmonized rules and procedures allowing legally established companies in one MS to convert into a company governed in another MS without having to wind up the company or create a new legal personality.²⁰⁷ The expertise and evidence-based information gathered by the European Parliament has revealed that a harmonised framework for cross-border company mobility could bring both legal and economic benefits.²⁰⁸

It is clear that companies operating in the European Union form a cornerstone to the Internal Market and play a decisive role in promoting economic growth, creating jobs and attracting

²⁰³ Ernst&Young. (2018). *supra nota* 109. p 51.

²⁰⁴ Pavelts, A. *et al.* (2017). Regulation of Cross-border Movement of Companies, Summary by research questions. CentAR: Estonian Centre for Applied Research, p 5.

²⁰⁵ Davies, P. *et al.* (2018). *supra nota* 195, p 14.

²⁰⁶ Gerner-Beuerle, C. *et al.* (2016). *supra nota* 30, p 351.

²⁰⁷ *Ibid.*, p 351.

²⁰⁸ Panizza, R. (2017). *supra nota* 87, p 1.

investments in the EU.²⁰⁹ Therefore, companies must be provided with such legal and administrative environment, which does not only lead to growth but is also adjusted to the new economic and social challenges of a globalized digital world.²¹⁰ With these words, a year ago on April 25 2018, the Commission published a Proposal for a Directive amending the Directive (EU) 1132/2017 as regards cross-border conversions, mergers and divisions (The Proposal),²¹¹ aiming to enable companies to convert – transfer the seat by changing the legal form – cross-border from one MS to a similar form in another MS. This Proposal is part of the Company Law Package of April 2018, which is currently under negotiations by the European Parliament and the Council. It also includes a proposal for a Directive amending (EU) 1132/2017 Directive in respect of the use of digital tools and processes in company law.²¹²

5.3.1. The Commission Proposal for a Directive on cross-border mobility

The underlying objective of The Proposal²¹³ is to enable companies to make use of the freedom of establishment efficiently, as it is now restricted. As regards CBM rules, it provides improved rules compared to its predecessors, Directive 2005/56²¹⁴ and Directive 1132/2017.²¹⁵ It also addresses cross-border divisions. But what is new, The Proposal introduces an entirely new set of rules for cross border conversions, proposing to allow companies to convert the legal form they have in one MS into the same kind in another MS. This would allow companies to transfer their seat directly by changing the country of incorporation without losing the legal personality and continuity of the business. Without going into further detail of the procedure, these rules would without a doubt be a step forward to solving the present issue. The proposal would especially form an attractive possibility to smaller companies who currently suffer more from the lack of specific rules, as explained above. Through such a legal instrument, smaller companies could be able to transfer their registered office directly, whilst before they could face a lack of resources to do it through alternative methods. To respond to the needs of shareholders, the proposal seeks to provide better safeguards to protect their interests.

²⁰⁹ COM/2018/241 final - 2018/0114 (COD). p 1.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law COM/2018/239 final - 2018/0113 (COD).

²¹³ COM/2018/241 final - 2018/0114 (COD).

²¹⁴ OJ L 310, 25.11.2005.

²¹⁵ OJ L 169, 30.6.2017.

The proposal is currently under review of the MSs and amendment rounds. As it was published only a year ago, the end result remains to be seen. As a preliminary remark, the ECLE regards the general approach of the ambitious proposal excellent and strongly endorses the proposal in principle.²¹⁶

²¹⁶ Davies, P. *et al.* (2018). *supra nota* 195, p 14.

CONCLUSION

This thesis aimed to determine whether the current legal situation on company seat transfers in the EU restricts companies' right to migrate across borders in violation of the freedom of establishment. Concurrently, company mobility is guaranteed by the Treaty provisions on freedom of establishment which allows companies to opt for another legal system than they originally were established. The EU legal regime has also made it easier for companies to relocate their seat by establishing secondary legislation and the CJEU has afforded companies a comprehensive set of guidelines through its several revolutionary rulings – especially in *Cartesio*, *VALE* and *Polbud*. Even after numerous efforts harmonising EU level legislation has still not been achieved.

This thesis centralised on the hypothesis that companies' right to relocate their seat within the EU under the freedom of establishment is unnecessarily restricted and, in some cases, rendered impossible primarily by the divergencies in Member states' national laws and fragmented EU procedures. In number of MSs it is still difficult, if not practically impossible, for companies to transfer their seat cross-border to another MS. Clear majority of the MSs do not provide for any legislative framework for cross-border seat transfers, some MSs allow only inbound or outbound seat transfers, or vice a versa, and some do not allow such transactions directly in their domestic legislation at all. When the company's objective is to relocate its seat across borders and the MS does not provide procedures for such transfer, this objective can be achieved through alternative options, but the company often has to go through costly and complex procedures. These options mainly include effecting a cross-border merger or forming a SE since the use of SCEs has only been scant. Thereby companies' business continuity can be preserved, but they may be forced to use these options since often companies do not wish to merge or form a SE but do it solely for the purpose of relocation. The lack of clear rules may also compel companies to abandon their plans, although they had a real intention to redomicile. This is an issue especially for smaller businesses, placing them in an unequal setting. Smaller companies more likely lack resources to perform a seat transfer abroad through alternative methods. The *Nordea* case also demonstrated that the use

of cross-border merger serves as an alternative option, but the procedure requires considerable efforts.

Based on this research, the author's hypothesis seems to be fulfilled. However, it is impossible to answer such a complicated and controversial issue exhaustively. The author agrees that the majority of the MSs unduly complicate or even restrict cross-border seat transfers by not having procedures at place for such transactions or fail to make them efficient. Hence, the possibility to transfer company seat cross-border does not reach companies evenly across the Europe since MS apply these procedures rather unevenly. The author also agrees that in this regard national laws are not in compliance with the jurisprudence of the CJEU, and the case law has not been able to overcome all issues. The CJEU jurisprudence or the alternative options under the EU law cannot be considered as a substitute for harmonised rules. The absence of a specific set of rules on cross-border seat transfers thus complicates companies' business endeavours and limits the access to freedom of establishment. Without a clear and efficient EU legal framework the right to relocate a company seat under the freedom of establishment is mostly notional. Legal uncertainty and excess constraints could be avoided by enacting clear and coherent EU rules, which would also respect the companies' objectives and structure. Establishing such a rule is, however, problematic. Creating a single rule, which would fit the 28 different MS and their different legal systems thereby establishing a uniform legal instrument, is without a doubt a complicated task. Legislative efforts in establishing such a framework have been at issue for over a decade now, and a proposal on seat transfers, the Fourteenth Company Law Directive was already discontinued once. In this respect, there are potential further research possibilities, for instance, examining the success of a common legal framework, if it were ever to be enacted.

As a final concluding remark, the author states that the current solutions for cross-border seat transfers are not optimal in respect of companies' needs and capabilities, and thus, there is an actual need for a special EU framework on cross-border seat transfers. Hence, the author of this thesis supports, based on this research and along with the opinions and studies conducted by professionals in this area, creation of a common legal framework for seat transfers. Thus, the upcoming action by the European Commission in respect of The Proposal on cross-border mobility is avidly awaited.

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