

## JUDGMENT OF THE COURT (Grand Chamber)

25 October 2017 (\*)

(Reference for a preliminary ruling — Freedom of establishment — Cross-border conversion of a company — Transfer of its registered office without transfer of its real head office — Refusal to remove it from the commercial register — National legislation whereby removal from commercial register is dependent on the winding up of a company after a liquidation procedure — Scope of freedom of establishment — Restriction on freedom of establishment — Protection of the interests of creditors, minority shareholders and employees — Prevention of abusive practices)

In Case C-106/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 22 October 2015, received at the Court on 22 February 2016, in the proceedings brought by

**Polbud — Wykonawstwo sp. z o.o.**, in liquidation,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, T. von Danwitz, J. L. da Cruz Vilaça, A. Rosas, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby M. Berger, K. Jürimäe (Rapporteur) and M. Vilaras, Judges,

Advocate General : J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2017,

after considering the observations submitted on behalf of:

- Polbud — Wykonawstwo sp. z o.o., by A. Gorzka-Augustynowicz, radca prawny,
- the Polish Government, by B. Majczyna, acting as Agent,
- the German Government, by T. Henze and M. Hellmann, acting as Agents,
- the Austrian Government, by C. Pesendorfer and B. Trefil, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and F. de Figueiroa Quelhas, acting as Agents,
- the European Commission, by W. Mölls, L. Malferrari and J. Hottiaux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2017,

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 54 TFEU.

- 2 The request has been made in the context of an action brought by Polbud — Wykonawstwo sp. z o.o. ('Polbud') against the decision to refuse its request that it be removed from the Polish commercial register, made following the transfer of its registered office to Luxembourg.

## **Polish law**

### ***The Companies Code***

- 3 Article 270 of the Kodeks spółek handlowych (the Companies Code), of 15 September 2000, as amended (Dz. U. 2013, No 1030) ('the Companies Code'), provides:

'A company shall be wound up:

...

(2) pursuant to a shareholders' resolution to wind up the company or to transfer the company's registered office abroad, that resolution being confirmed by minutes drawn up by a notary;

...'

- 4 Article 272 of the Companies Code states:

'A company shall be wound up, after being liquidated, by being removed from the register.'

- 5 Article 288 of that code provides:

'§ 1. Upon approval by a shareholders' meeting of the financial statement as at the date preceding the distribution among the shareholders of assets remaining after satisfying or securing the creditors (liquidation statement) and upon completion of liquidation, the liquidators shall lodge the liquidation statement at the company's registered office and file it with the registry court together with an application for removal of the company from the register.

...

§ 3. The books and documents of the wound-up company shall be deposited with the person indicated in the articles of association or shareholders' decision. In the absence of such indication, the depositary shall be appointed by the registry court.

...'

- 6 Articles 551 to 568 of the Companies Code concern the conversion of a company. Article 562(1) of that code provides:

'The conversion of a company or partnership shall require a decision taken, in the case of a partnership, by the partners, and, in the case of a capital company, by a shareholders' meeting or general meeting ...'.

### ***The Law on private international law***

- 7 Article 19(1) of the Ustawa — Prawo prywatne międzynarodowe (Law on Private International Law) of 4 February 2011 (Dz. U. No 80, position 432), states:

'Upon transfer of its head office to another State, a legal person shall be subject to the law of that State. The legal personality acquired in the State where it previously had its head office shall be retained, if the law of each of the States concerned so provides. Transfer of the head office within the European Economic Area shall not lead to the loss of legal personality.'

## **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 8 Polbud is a limited company established in Łąck (Poland). By a resolution of 30 September 2011, an extraordinary general meeting of shareholders of that company decided, under Article 270, point 2, of the Companies Code, to transfer the registered office of that company to Luxembourg. According to the request for a preliminary ruling, that resolution made no reference to a transfer of either the place where Polbud's business is managed or the place where that company's business is actually carried out.
- 9 On the basis of that resolution, on 19 October 2011 Polbud lodged a request that the opening of a liquidation procedure be recorded by the court responsible for keeping the commercial register ('the registry court'). On 26 October 2011 the opening of the liquidation procedure was recorded in that register and the liquidator was appointed.
- 10 On 28 May 2013 the meeting of shareholders of Consoil Geotechnik Sàrl, whose registered office is in Luxembourg, adopted a resolution which, inter alia, implemented the resolution of 30 September 2011 and transferred the registered office of Polbud to Luxembourg, with a view to the application of Luxembourg law to it, without loss of its legal personality. According to the resolution of 28 May 2013, the transfer was to take effect on that date. On 28 May 2013, therefore, Polbud's registered office was transferred to Luxembourg and that company was no longer named 'Polbud' but became 'Consoil Geotechnik'.
- 11 On 24 June 2013, Polbud lodged an application at the registry court for its removal from the Polish commercial register. The reason stated for that application was the transfer of the company's registered office to Luxembourg. For the purposes of the removal procedure, by decision of 21 August 2013, Polbud was asked to produce (i) the resolution of the general meeting of shareholders containing the indication of the name of the depositary of the books and documents of the undertaking being wound up, (ii) the financial accounts relating to the periods from 1 January to 29 September 2011, 30 September to 31 December 2011, 1 January to 31 December 2012, and 1 January to 28 May 2013, signed by the liquidator and by the person responsible for keeping the accounts, and (iii) the resolution of the general meeting of shareholders approving the report on the process of liquidation.
- 12 Polbud stated that it did not see any need to produce those documents since it was not being wound up, its assets had not been distributed to the shareholders and the application for removal from the register had been lodged because of the transfer of the company's registered office to Luxembourg, where it was continuing its existence as a company incorporated under Luxembourg law. In those circumstances, by decision of 19 September 2013 the registry court refused the application for removal on the ground that the abovementioned documents had not been submitted.
- 13 Polbud brought an action against that decision before the Sąd Rejonowy w Bydgoszczy (District Court of Bydgoszcz, Poland), which dismissed the action. The company brought an appeal against that dismissal before the Sąd Okręgowy w Bydgoszczy (Regional Court of Bydgoszcz, Poland), which dismissed the appeal by order of 4 June 2014. Polbud then brought an appeal on a point of law before the referring court.
- 14 Before that court, Polbud claims that, when its registered office was transferred to Luxembourg, it had lost its status as a company incorporated under Polish law and had become a company incorporated under Luxembourg law. Consequently, according to Polbud, the liquidation procedure should have been closed and its name should have been removed from the commercial register in Poland. In addition, Polbud states that compliance with the requirements of the liquidation procedure laid down under Polish law was neither necessary nor possible, since it had not lost its legal personality.
- 15 The referring court, for its part, states, first, that a liquidation procedure is focused on the end of a company's legal existence and implies certain obligations in that regard. In this case, however, the company is continuing its legal existence as a legal person under the law of a Member State other than the Republic of Poland. The referring court asks whether, therefore, the imposition on that company of obligations comparable to those required to bring its legal existence, as a company, to an end do not improperly restrict its freedom of establishment. Further, that court seeks to ascertain whether the fact of the company's reconstitution, based solely on the decision of shareholders to maintain the legal personality it had acquired in the Member State of origin, and of its being registered in the commercial register of the host Member State pursuant to that decision, can be relied upon against the Member State of origin, in spite of the ongoing liquidation procedure in the latter State.

- 16 Second, the referring court states that, while, as a general rule, a Member State may not refuse to recognise legal personality acquired in another Member State and may not undertake an assessment of the correctness of the measures adopted by the authorities of that Member State, removal from the former commercial register is a matter for the law of the Member State of origin, which must ensure that the interests of creditors, minority shareholders and employees are protected in the liquidation procedure. That court considers, consequently, that the registry court ought not to abandon that procedure.
- 17 Third, the referring court states that, according to the Court's case-law, it is, as a general rule, permissible to check whether an undertaking intends to establish a lasting economic connection with the host Member State and, for that purpose, to transfer its registered office, understood as meaning its place of actual management and the place where it carries on its business. It is unclear, however, whether it is the host Member State or the Member State of origin that should undertake that check.
- 18 In those circumstances, the Sąd Najwyższy (Supreme Court, Poland), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

If the answer to that question is in the negative:

- (2) Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out — including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted — which precedes the winding-up of the company, that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?
- (3) Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which — for the purpose of its conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?

### **The request to have the oral procedure reopened**

- 19 By document lodged at the Registry of the Court on 28 June 2017, Polbud asked the Court to order the reopening of the oral part of the procedure, under Article 83 of the Court's Rules of Procedure.
- 20 In support of its request, Polbud claims, in essence, first, that, contrary to what is stated in the request for a preliminary ruling, its intention was to transfer to Luxembourg both its registered office and its real head office, as confirmed by the resolution of 28 May 2013. Second, Polbud states that the Opinion presented by the Advocate General, although the reservations expressed by Polbud at the hearing are noted therein, is nonetheless based on an erroneous finding of fact contained in that request. Consequently, Polbud considers that it is necessary to reopen the oral stage of the procedure so that it can clarify the facts of the main proceedings.
- 21 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to have a decisive bearing on the decision of the Court, or where

the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

- 22 That is not the situation here. Polbud set out, at the hearing, its assessment of the facts at issue. In particular, Polbud had the opportunity to state its view of the presentation of the facts of the main proceedings as set out in the request for a preliminary ruling, and to explain that its intention was to transfer to Luxembourg both its registered office and its real head office. Accordingly, the Court considers, after hearing the Advocate General, that it has before it all the information necessary to give judgment.
- 23 Furthermore, as regards the criticisms made of the Advocate General's Opinion, it must be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgment of 4 September 2014, *Vnuk*, C-162/13, EU:C:2014:2146, paragraph 30 and the case-law cited)..
- 24 Second, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In this regard, the Court is not bound either by the Opinion delivered by the Advocate General or by the reasoning which led to that Opinion. As a consequence, the fact that a party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 4 September 2014, *Vnuk*, C-162/13, EU:C:2014:2146, paragraph 31 and the case-law cited).
- 25 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

## **Consideration of the questions referred**

### ***Preliminary observations***

- 26 At the outset, it must be observed that the questions referred for a preliminary ruling are based on the premiss, which Polbud disputes, that Polbud did not intend to transfer its real head office to Luxembourg.
- 27 In that regard, it should be observed that, according to settled case-law of the Court of Justice, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (see, inter alia, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 15).
- 28 Consequently, the questions referred must be answered on the basis of that premiss, the accuracy of which it is, however, for the referring court to check.

### ***The third question***

- 29 By its third question, which it is appropriate to examine first, the referring court seeks, in essence, to ascertain whether Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, with a view to that company being converted to a company under the law of that other Member State, when there is no change of location of the real head office of that company.

- 30 The Polish and Austrian governments submit that Articles 49 and 54 TFEU are not applicable to a company transfer such as that at issue in the main proceedings. According to the Austrian government, freedom of establishment cannot be relied on when the reason for the transfer of the registered office is not the pursuit of an actual business by means of a permanent establishment in the host Member State. The Polish Government relies, inter alia, on the judgments of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456), and of 16 December 2008, *Cartesio*(C-210/06, EU:C:2008:723), in support of its conclusion that a transfer of a company such as that at issue in the main proceedings does not fall within the scope of Articles 49 and 54 TFEU.
- 31 That argument cannot be accepted.
- 32 It must be observed that Article 49 TFEU, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union. Accordingly, a company such as Polbud, which was formed in accordance with the legislation of a Member State, in this case, with Polish legislation, may, in principle, rely on that freedom.
- 33 Under the second paragraph of Article 49 TFEU, read in conjunction with Article 54 TFEU, the freedom of establishment for companies or firms covered by the latter article includes, inter alia, the right to set up and manage such companies or firms under the conditions laid down, by the legislation of the Member State where such establishment is effected, for its own companies or firms. Freedom of establishment therefore encompasses the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law another Member State (see, to that effect, judgment of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraph 17), provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter State to determine the connection of a company or firm to its national legal order is satisfied.
- 34 In that regard, it must be recalled that, in the absence of harmonisation of EU law, the definition of the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 TFEU, within the powers of each Member State, that article having placed on the same footing the registered office, the central administration and the principal place of business of a company or firm as such connecting factors (see, to that effect, judgment of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraphs 19 to 21).
- 35 It follows, in this case, that freedom of establishment confers on Polbud, a company incorporated under Polish law, the right to convert itself into a company incorporated under Luxembourg law, provided that the conditions laid down by Luxembourg legislation are satisfied and, in particular, that the test adopted by Luxembourg to determine the connection of a company or firm to its national legal order is satisfied.
- 36 That conclusion is not called into question by the arguments made by the Polish and Austrian governments.
- 37 First, the argument of the Austrian government that no business is actually being conducted by Polbud in the host Member State cannot be accepted.
- 38 The Court has held that freedom of establishment extends to a situation in which a company formed in accordance with the legislation of one Member State, where it has its registered office, wants to set up a branch in another Member State, even where that company was formed, in the first Member State, solely for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to that effect, judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 17). Equally, a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the test applied by the second Member State in order to determine the connection of a company to its national legal order, falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State.

- 39 It must be recalled that the question of the applicability of Articles 49 and 54 TFEU is different from the question of whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation, given that, in accordance with settled case-law, it is open to a Member State to adopt such measures (judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraphs 18 and 24, and of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraph 98)
- 40 However, it must be observed that, as the Court has previously held, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse (see, to that effect, judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 27, and of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraph 96).
- 41 It follows that, in the main proceedings, the fact that it was decided to transfer to Luxembourg the registered office alone of Polbud, that transfer not affecting the real head office of that company, cannot, in itself, mean that such a transfer does not fall within the scope of Articles 49 and 54 TFEU.
- 42 Second, as regards the judgments of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456), and of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), it does not follow, contrary to the submissions of the Polish Government, that the transfer of the registered office of a company should necessarily be accompanied by the transfer of its real head office in order to fall within the scope of freedom of establishment.
- 43 On the contrary, it follows from those judgments, and from the judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440), that, as EU law currently stands, each Member State has the power to define the connecting factor required of a company if that company is to be regarded as incorporated in accordance with its national legislation. In the event that a company governed by the law of one Member State converts itself into a company under the law of another Member State while satisfying the conditions imposed by the legislation of the latter if it is to exist within its legal order, that power, far from implying that the legislation of the Member State of origin on the incorporation or winding-up of companies enjoys any immunity from the rules relating to freedom of establishment, cannot provide justification for that Member State preventing or deterring the company concerned from undertaking a cross-border conversion by means of, in particular, the imposition, with respect to such a cross-border conversion, of conditions that are more restrictive than those that apply to the conversion of a company within that Member State itself (see, to that effect, judgments of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraphs 19 to 21; of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 109 to 112; and of 12 July 2012, *VALE*, C-378/10, EU:C:2012:440, paragraph 32).
- 44 In the light of the foregoing, the answer to the third question is that Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.

### *The first and second questions*

- 45 By its first and second questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, with a view to its conversion into a company under the law of the latter Member State, in accordance with the conditions imposed by the legislation of the latter Member State, is subject to the liquidation of the former company.

### *Whether there is a restriction on freedom of establishment*

- 46 Article 49 TFEU requires the abolition of restrictions on freedom of establishment. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 36 and the case-law cited).
- 47 In this case, it is apparent from the request for a preliminary ruling that the transfer of the registered office of a company incorporated under Polish law to a Member State other than the Republic of Poland does not entail, in accordance with Article 19(1) of the Law on private international law, the loss of legal personality. As stated by the Advocate General in point 46 of her Opinion, Polish law accordingly recognises, in this case, that Polbud's legal personality may, in principle, be continued by Consoil Geotechnik.
- 48 Nonetheless, under Article 270, point 2, of the Companies Code and Article 272 of that code, a resolution of the shareholders on the transfer of the registered office to a Member State other than the Republic of Poland, adopted pursuant to Article 562(1) of that code, entails the winding-up of the company on the conclusion of a liquidation procedure. In addition, the effect of Article 288(1) of that code is that, if it is not liquidated, a company that wishes to transfer its registered office to another Member State other than the Republic of Poland cannot be removed from the commercial register.
- 49 Accordingly, although it may in principle transfer its registered office to a Member State other than the Republic of Poland without the loss of its legal personality, a company incorporated under Polish law, such as Polbud, that wishes to make such a transfer, can obtain the removal of its name from the Polish commercial register only if it has been liquidated.
- 50 It must, in that regard, be made clear that, according to the request for a preliminary ruling, the process of liquidation extends to the completion of current business, recovery of debts owed to the company, performance of its obligations and sale of its assets, satisfaction or securing of its creditors, submission of a financial statement on the conduct of that process and indication of where the books and documents of the company in liquidation are to be deposited.
- 51 In those circumstances, the Court must hold that the national legislation at issue in the main proceedings, by requiring the liquidation of the company, is liable to impede, if not prevent, the cross-border conversion of a company. It therefore constitutes a restriction on freedom of establishment (see, to that effect, judgment of 16 December 2008 *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 112 and 113).

*Whether the restriction on freedom of establishment is justified*

- 52 According to the Court's settled case-law, such a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary that it should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 42 and the case-law cited).
- 53 First, the referring court considers that the restriction on freedom of establishment is justified, in this case, by the objective of protecting the interests of creditors, minority shareholders and employees of the company transferred.
- 54 In that regard, it must be recalled that the Court has recognised that overriding reasons in the public interest include the protection of the interests of creditors and minority shareholders (see, to that effect, judgment of 13 December 2005, *SEVIC Systems*, C-411/03, EU:C:2005:762, paragraph 28 and the case-law cited). The same is true of the protection of workers (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 73 and the case-law cited).
- 55 Accordingly, Articles 49 and 54 TFEU do not, in principle, preclude measures of a Member State intended to ensure that the interests of creditors, minority shareholders and employees of a company, that has been incorporated under the law of that Member State and is to continue to carry on business in the national territory, are not improperly affected by the transfer of the registered office of that company and its conversion into a company under the law of another Member State.



- 56 However, in accordance with the settled case-law cited in paragraph 52 of the present judgment, it must also be determined whether the restriction at issue in the main proceedings is appropriate for securing the attainment of the objective of protecting the interests of creditors, minority shareholders and employees and does not go beyond what is necessary to achieve that objective.
- 57 In this case, the Polish legislation requires the mandatory liquidation of a company that wishes to transfer its registered office to a Member State other than the Republic of Poland.
- 58 It must be observed that that legislation prescribes, in general, mandatory liquidation, there being no consideration of the actual risk of detriment to the interests of creditors, minority shareholders and employees and no possibility of choosing less restrictive measures capable of protecting those interests. As regards, in particular, the interests of creditors, as stated by the European Commission, the provision of bank guarantees or other equivalent guarantees could offer adequate protection of those interests.
- 59 It follows that the mandatory liquidation required by the national legislation at issue in the main proceedings goes beyond what is necessary to achieve the objective of protecting the interests referred to in paragraph 56 of the present judgment.
- 60 Second, the Polish Government relies on the objective of preventing abusive practices in order to justify the national legislation at issue in the main proceedings.
- 61 In that regard, it is open to the Member States to adopt any appropriate measure for preventing or penalising fraud (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 38).
- 62 However, in accordance with the case-law cited in paragraph 40 of the present judgment, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse.
- 63 Moreover, the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty (see, by analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 84).
- 64 Since a general obligation to implement a liquidation procedure amounts to establishing a general presumption of the existence of abuse, the Court must hold that legislation, such as that at issue in the main proceedings, which imposes such an obligation, is disproportionate.
- 65 In the light of the foregoing, the answer to the first and second questions is that Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.

### Costs

- 66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other**

**Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.**

- 2. Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.**

[Signatures]

---

\* Language of the case: Polish.