European Added Value Assessment

on a Directive on the cross-border transfer of company seats (14th company law Directive)

ANNEX I

Legal effects of the requested legislative instrument

Research paper
by Jeantet Associés Aarpi

Abstract

Case-law of the ECJ allowed for company mobility but did not provide the necessary clarification with regard to the procedures for transferring the company's registered office or head office from one Member State to another with a change on the applicable law. Certain aspects, such as the protection of stakeholders, may be affected, which could confirm the need for minimum standard rules.

A legislative initiative should ensure that the transfer should not affect the rights of stakeholders. It should also be tax neutral and must avoid the misuse of post-box offices and shell companies.

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List of abbreviations and acronyms

ATCC	Act on Transformation of Companies and Cooperatives (Czech Republic)
CCIP	Chambre de Commerce et d'Industrie de Paris (France)
COMI	Centre of main interests (see Definitions)
CRO	Federal ordinance on the commercial registry (Switzerland)
DGCL	Delaware General Corporation Law (USA)
ECJ	Court of Justice of the European Union (ex European Court of Justice)
EEIG	European Economic Interest Grouping
EU	European Union
FE	Fundatio Europaea /European Foundation
LMESM	Ley de Modificaciones Estructurales de las Sociedades Mercantiles (Spain)
LSC	Ley de Sociedades de Capital (Spain)
MS	Member State of the EU
MBCA	Model Business Corporation Act (USA)
SE	Societas Europaea / European Company
SCE	European Cooperative Society
SMEs	Small and medium sized entreprises as defined in EU law (EU recommendation 2003/361[1])
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law

[1] European Commission, (2012), Small and medium-sized enterprises: http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm.

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Definitions

Central administration:	See "Real seat" definition.
Centre of main interests:	The term "centre of main interests" (COMI) is used in the Council Regulation (EC) No 1346/2000[2] (Insolvency Regulation) and the UNCITRAL Model Law on Cross-Border Insolvency (Model Law)[3]. The COMI is not defined in the Insolvency Regulation or the Model Law, although the preamble to the Insolvency Regulation states that it should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties (paragraph 13, Preamble). In both the Insolvency Regulation and the Model Law, there is a rebuttable presumption that a corporate debtor's COMI is the location of the company's registered office (article 3, Insolvency Regulation and article 16(3), Model Law). From the ECJ cases[4] so far, factors to be considered when determining a company's COMI can include (but are not limited to): • the location of the company's internal accounting functions • business relations with clients • the law governing its main contracts • creditors • strategic control functions • IT systems • tax domicile and the domicile of its directors • board meetings • general supervision.
Company:	Any legal entity covered by Article 54 TFEU.
Corporate seat:	The registered office corresponding to the company location in the Member State of incorporation, which is generally the place referred to in the company's memorandum or articles of association and in the public registry where the company is recorded.

[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJEC L 160/1, 30.06.2000.

[3] United Nations Commission on International Trade Law (1997), UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[4] Alexander J. Belohlávek, (2008), Center of main interest (COMI) and jurisdiction of national courts in insolvency matters (insolvency status), International Journal of Law and Management, Vol. 50 Iss: 2, pp.53 – 86.

Cross-border conversion:	Cross-border transfer with adoption of a new form of company submitted to the *lex societatis* of the Host MS.
CBM Directive:	Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.
Cross-border mobility:	See "Cross-border transfer" definition.
Cross-border transfer:	A transfer of seat corresponding to the migration of the company from the Home MS to a Host MS without losing its legal personality but by being converted into a company governed by the law of the Host MS without having to be wound up.
EEIG:	See "European Economic Interest Grouping" definition.
Establishment:	The concept of establishment within the meaning of the Treaty regarding provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in the Host MS and the pursuit of genuine economic activity there[5].
European Company:	The European Company (or Societas Europaea) as regulated by Council Regulation (EC) no. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).
European Cooperative Society:	The European Cooperative Society as regulated by Council Regulation (EC) no. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
European Economic Interest Grouping:	European Economic Interest Grouping as regulated by Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).
European Foundation:	European Foundation (or Fundatio Europaea) as provided for by Proposal for a Council Regulation on the Statue for a European Foundation (FE), published on 8 February 2012 (COM/2012/35) in the framework of the Single Market Act (COM/2011/0206).
EU groupings:	See "SE", "SCE", "FE", "EEIG" definitions.
EU tax merger Directive:	Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the

[5] ECJ, 25th July 1991, Factortame and Others, C-221/89 [1991] ECR I-3905, paragraph 20; ECJ, ECJ 4 October 1991, Commission v United Kingdom, C-246/89 [1991] ECR I-4585, paragraph 21 VALE, cons. 34 ; ECJ, 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, Rec. P. I-7995, point 54.

	transfer of the registered office of an SE or SCE between Member States.
FE:	See "European Foundation" definition.
Head office:	See "Real seat" definition.
Home MS:	The MS according to whose laws the company was formed before the completion of the cross-border transfer.
Host MS:	The MS to which the seat is transferred.
Forum shopping:	The possibility of selecting the legal system whose case law is most beneficial.
Inbound transfer:	Situation of the Host MS when a company is moving its seat from another MS to its jurisdiction.
Incorporation theory:	This theory determines the applicable company law by reference to the MS in which the company is incorporated (and registered with the national business registry operated by the MS according to the 1st Company Law Directive[6]), the connecting factor being the MS of incorporation. *Ex: UK.*
Law shopping:	The possibility of selecting the law applicable in a given situation.
Lex societatis:	The law applicable to the company corresponding to the law of its MS of incorporation.
Limited liability company:	A company with share capital and having legal personality, possessing separate assets that alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees, as provided for by Directive 2009/101/EC on the protection of the interests of associates and third parties.
Member State:	Any Member State of the European Union.
Migration:	See "Cross-border transfer" definition.
Mobility:	*See* "Transfer" definition.
Outbound transfer:	Situation of the Home MS when a company is moving its seat outside its jurisdiction.
Principle of subsidiarity:	The principle of subsidiarity aims at determining the level of intervention that is most relevant in the areas of competences

[6] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by MS of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, now codified by Directive 2009/1011/EC (also known as the First Company Law Directive).

	shared between the EU and the MS and can be found in Article 5 TEU[7]
Real seat:	The real seat of a company, its administrative seat or its head office which refers to the place where the company conducts the administration of its interests on a regular basis (mainly the place of location of the management where the decisions are taken).
Real seat theory:	This theory determines the applicable company law by reference to the MS in which the company has its actual real seat (head office), the connecting factor being the MS where the real seat is located.
Registered office:	See "Corporate seat" definition.
SE:	See "European Company" definition.
SE Directive:	Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.
Seat:	The corporate seat and/or the administrative seat of a company.
SCE:	See "European Cooperative Society" definition.
Stakeholders:	Any party that can be affected by the transfer. Stakeholders can be divided into: • internal stakeholders: those who engage in economic transactions with the company (for example, stockholders, customers, suppliers, creditors, and employees) • external stakeholders: those who - although they do not engage in direct economic exchange with the company - are affected by or can affect the transfer (for example: MS, national administrations, government agencies, labor unions, supervisory authorities).
Tax neutrality:	In accordance with the EU tax merger Directive 2009/133/EC, Member States do not tax capital gains and tax-free reserves

[7] Article 5 (3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the MS, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol".

	on assets transferred further to a merger or contribution of assets for shares which are realized at the time of the transfer but allow a deferral of taxation until such gains are recognized (at the time of a further disposal of such assets in the Host Member State).
Transfer:	See "Cross-border transfer" definition.

Executive summary

Background

Cross-border mobility is secured by the four freedoms of the Treaties, namely: the freedoms of establishment, of services, of goods, and of capital. Within company law, the freedom of establishment is particularly important but remains incomplete.

As established by case law, the freedom of establishment allows, as a matter of principle, a company to transfer its registered office from its Home MS to a Host MS with the retention of legal personality. Nevertheless, the ECJ notes[8] that:

> "*It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and, if so, how - the registered office or real seat of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions*."

Through two reports (Lehne report and Regner report) including recommendations to the Commission, voted in March 2009 and January 2012[9], the European Parliament encouraged the Commission to present a proposal for a Directive on the cross-border transfer of company seats. As of this day, though, the Commission has not yet proposed any legislative action, justifying this by the fact that the Impact Assessment (IA) carried out in 2007[10] showed that the no-action option was appropriate.

As there are still hurdles to the freedom of establishment and to the mobility of companies within the EU, policy makers have to make informed choices between a no-action approach versus an active legislation approach.

This assessment note questions the appropriateness of an EU directive on cross-border transfers of company seats which would aim at creating a harmonized framework for companies to allow them to transfer their company seat within the EU.

Aim

This Assessment Note deals with the transfer of seat corresponding to the migration of the company from the Home MS to a Host MS without losing its legal personality but by being converted into a company governed by the law of the Host MS without having to be wound up.

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[8] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, par. 108.

[9] Regner E., (2012), Report with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)). It follows the line set by Parliament's Resolutions of 25 October 2007 (OJ C 263 E, 16.10.2008, p. 671) and 10 March 2009 (Lehne Report, OJ C 87 E, 1.4.2010, p. 5). The latter already contained recommendations to the Commission on the cross-border transfer of the registered office of a company.

[10] SEC, (2007), Impact assessment on the Directive on the cross-border transfer of registered office, 1707.

This note does not deal with cross-border transfers of seat which do not change the applicable company law. Neither does it cover the delocalization of companies (transfer of all its operating assets).

In order for policy makers to make an informed choice between a no-action approach and an active legislation approach on cross-border transfers of company seats, we have provided, in Part I, a synthetic view on existing EU legislation and EU case law with an analysis of advantages and drawbacks. This first analysis has been used to identify convergences and divergences between EU legislation and case law. More precisely, this analysis has been used to establish the differences between:

- Transfers of company seats performed according to EU current legislation (EU Treaty, EU structures such as SE, SCE and CBM Directive), which take into account, beyond the harmonization of transfer rules, stakeholders protection (shareholders, employees, etc.), and

- ECJ case law, in particular the *Cartesio*[11] and *VALE Epitesi*[12] cases which submit the transfer of the corporate seat to the "conversion" of the company to the national laws of the Home MS and Host MS, subject to the application of the freedom of establishment principle. As a consequence, MS national laws remain the only rules applicable to a cross-border transfer of a company seat without any harmonization, provided that national laws comply with the freedom of establishment principle, and in particular with the principles of equivalence and effectiveness which participate in the freedom of establishment.

Once these differences were established, we undertook statistical work to identify (i) the real use of the European tools and (ii) the economical impact of the absence of harmonized regulation governing cross-border transfers of company seats.

For the first purpose, when it was not possible to provide statistics on companies' mobility since such information is not available, we referred to existing information and data resulting from various public consultations[13]. We also conducted our own research with our correspondents in the EU and interviewed a large spectrum of companies, from SMEs to listed companies, to understand, firstly, if they have an actual need for a legislative instrument on transfers of seats and, secondly, to what extent companies use other means, such as the CBM Directive, the SE statute and the SCE statute and if so, to what extent they have solved the cross-border mobility problem. Based on these sources,

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[11] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06.

[12] ECJ 12 July 2012, VALE Epitési kft, C-378/10.

[13] Ernst & Young, (2009), Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482, http://ec.europa.eu/internal_market/company/se/index_en.htm; M. Becht, C. Mayer and H.F. Wagner, (2006), Where do firms incorporate, ECGI Law Working Paper N° 70/2006, September 2006; ETUI, Overview of current state of SE founding in Europe, http://www.worker-participation.eu/European-Company/SE-COMPANIES; European Commission, (2011), Consultation on the future of European Company Law, http://ec.europa.eu/internal_market/company/modern/index_en.htm; Report of the Reflection Group on the Future of EU Company Law (2011), http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf.

we have built a synthetic view on national legislation and some information regarding practices and alternative means of reaching cross-border mobility of companies that are currently being used.

As far as analysis of EU national laws and practices are concerned, we have focused on Austria, Czech Republic, Cyprus, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain and the UK. Our selection was made according to the main issues involved in cross-border transfers:

- MS with a high level of employee representation systems: Germany, Austria
- MS with strategic insolvency migration: France (so-called "safeguard" proceedings), UK, Germany
- MS with a high level of tax implications: Luxembourg, Ireland, Cyprus, the Netherlands, Czech Republic
- MS allowing cross-border transfers of seat (without the SE status): France, Luxembourg, Spain
- MS not allowing cross-border transfer (without the SE status): UK, or allowing it with restrictions: the Netherlands (incorporation principle)
- MS where mainly SEs transferred their seat: UK, Cyprus, Austria, Luxembourg.
- Italy was added to the selected MS to enlarge the panel.

For the second purpose, the economical impact of the absence of a harmonized regulation versus an active legislative approach governing cross-border transfers of company seats, we performed interviews with selected economists.

Then, after having acknowledged that even if EU legislation and EU case law should achieve a sufficient level of guarantee of the freedom of establishment and of the mobility of companies within the EU, we have identified remaining hurdles bearing on these freedoms due to the absence of harmonization of national laws and the lack of harmonized legislation dealing with transfer procedures.

We then gave our first conclusions on the advantages and disadvantages of a no action approach versus an active legislative approach through an analysis dealing with the legal effects, and when possible quantification (and/or monetization) of the consequences with the views of an economist and a tax specialist, including consequences with regard to EU insolvency regulation and case law.

We identified what benefits the requested legislative measure can bring to the transfer process for legal certainty, clarity, transparency and simplicity and how these can be enhanced.

We also focused on to what extent the requested legislative measure does significantly facilitate cross-border mobility of company seats, in relation to the existing measures claimed to be sufficient by the Commission. We have examined key questions such as, namely, whether it should concern all types of companies or only joint stock companies, or whether it should provide a requirement to have the registered office and the head office located in the same MS.

In Part II, we have investigated whether lessons can be drawn from non EU existing systems.

To answer this question, we focused on the United States system and examined whether any legal conclusions can be drawn from the comparison of a potential Directive on cross-border transfers of company seats with the American system (mentioned in the Commission's impact assessment dated 2007).

We also examined the transfer of companies' seats in Switzerland, a system we deemed of interest as in the last few years there have been a number of relatively large (mainly public) companies that have moved their corporate seats from a foreign jurisdiction to Switzerland[14].

In Part III, we have provided an overview of what effects (intended effects or unintentional effects) can be expected by shareholders, creditors and employees, as well as possible social and economic effects (both positive and negative) with a distinction drawn between short and long term impacts. For this purpose we have identified the areas of law that could be affected by a cross-border transfer, the economic effects, how the distinction between short and long term impacts is understood, and how social and economic effects can be measured.

We then carried out an analysis of the importance of guaranteeing the effective protection of the interests of the main stakeholders in respect of the transfer (shareholders, employees, creditors, tax authorities and potentially governments). We have therefore paid special attention to insolvency rules.

We re-assessed the different options (particularly as regards shareholders' rights, minority shareholders' protection, creditor protection and employee participation rights and tax consequences). For example, we asked how to reach the VALE case law criteria on minimum economic activity[15].

We also tried to answer the following questions:

- To what extent can EU legislation better provide legal protection for stakeholders than national legislation?
- How can the issue of legal protection of stakeholders involved (particularly as regards minority shareholders' protection, creditor protection and employee participation rights) be addressed in the Directive? Lessons have been drawn from the SE status and the CBM Directive as these instruments provide for the legal protection of stakeholders in company cross-border transfers and therefore an analysis has been made re-assessing the protection under such instruments;
- The specific question of transfer of seat issues from the perspective of tax authorities and governments (hence citizens of the EU), which has been approached based *inter alia* on the interviews that we performed.

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[14] For example, Tyco International, Transocean Ltd., Noble Corporation, Weatherford International, Garmin Ltd., Foster Wheeler Ltd., Shire plc or Ineos.

[15] ECJ 12 July 2012, VALE Epitési kft, C-378/10, § 34 and 35.

Finally, to allow policy makers to make informed choices among different alternatives, we drew conclusions based upon these different analyses and considered the appropriateness of an EU directive on cross-border transfers of company seats which would aim at creating a harmonized framework for companies to allow them to transfer their company seat, without neglecting at the same time the interests of the concerned stakeholders (considered as broadly as possible), since the aim of such contemplated legislation would be to ensure the objective of increased satisfaction of EU companies and citizens in relation to the completion of the internal market and sustainable competitiveness.

Key findings

- The SE Regulation and the CBM Directive provide appropriate instruments for cross-border transfers. Yet, since ECJ case law confirmed the right for a company to perform a cross-border transfer, this should also be achievable outside of this existing harmonized framework. In order to protect stakeholders and create a "level playing field" between European companies, a European legilsation on the cross-border transfer is needed, on the basis of the principles of subsidiarity.
- On the matter of a mandatory coupling of registered office and real seat, the analysis has shown that the risk to stakeholders is higher in this situation than in the case of a transfer of registered office only (notably modifications of tax law, insolvency law). Besides, the freedom of establishment allows the transfer of registered office if it "*involves the actual pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period*"[16]. Consequently, we consider that, upon the above-mentioned conditions, to perform a cross-border transfer should be possible under a European legislative instrument.
- The minimum condition to perform cross-border transfers should be that one of the following conditions is fulfilled: (i) the pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period; (ii) to already have an establishment in the Host MS before the transfer; (iii) transferring the real seat and the registered office at the same time.
- Minimum harmonization of stakeholders protection must be provided in the proposed Directive.
- Conclusions regarding cross-border transfers in the U.S. and Switzerland should be treated carefully in the EU context. The situation in both jurisdictions is very different. Those jurisdictions are interesting regarding the application of the principles of tax neutrality.
- The cross-border transfer must be tax neutral.

[16] ECJ 12 July 2012, *VALE Epitési kft*, C-378/10.

Recommendations

1. Choice of instrument:
   - Directive which should not impose maximum harmonization

2. Scope of the Directive:
   - Operations of cross-border transfers of the registered office from one MS to another MS of incorporated companies formed in accordance with the legislation of a MS and having their registered office, their real seat or their main establishment inside the EU

3. Conditions of transfer:
   - One of the following conditions must be fulfilled
     - the pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period;
     - to have an establishment in the Host MS;
     - transferring both the real seat and the registered office at the same time

4. Conditions of transfer:
   - Only applicable to a company stated in the Annex of the proposed Directive (as defined by Article 1 of Directive 2009/101/CE)

5. Transfer procedure:
   - Refer to the SE procedure

6. Approval of the transfer by the general meeting of shareholders:
   - Decision by the general meeting of shareholders made by a majority which may not be less than two-thirds of the votes cast
   - Where a company has two or more classes of shares, each decision by the general meeting of shareholders shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby

7. Registration in the Host MS and de-registration in the Home MS:
   - Effect of the transfer on the date on which the company is registered in the registry of the Host MS
   - Notification by the registry of the Host MS to the registry of the Home MS
   - Deletion of the registration in the Home MS completed immediately on receipt of that notification, but not before
   - In order to prevent the consequences of a double registration of the company both in the Home MS and the Host MS in case of delay in the notification and/or deregistration, if the deregistration of the company from the registry of the Home MS has not been completed within fifteen (15) days from the notification, third parties may not continue to rely on the registration of the company in the Home MS from that date

8. Protection of shareholders and stakeholders:
   - Ability for the MS to adopt measures intended to guarantee an effective protection for the minority shareholders opposed to the transfer; this protection shall not amount to a veto right
   - A company may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it or are about to be brought against it

9. Protection of creditors:
   - Ability for the MS to adopt measures intended to protect creditors and holders of other rights existing prior to the transfer

10. Protection of public interests:
    - Ability for the MS to provide opposition right of competent authorities based on grounds of public interest
    - Provision of guidance as to (i) what such grounds could be and (ii) what MS's competent authorities could be

11. Tax neutrality

12. Employees' information and consultation

13. Employees' participation
    - No loss of participation rights (or equivalent) in force in the Home MS unless a similar system is put in place offering at least the same rights and protection
    - Employee participation is defined in accordance with Article 2(k) of Directive 2001/86/CE (SE)
    - Option 1: participation rights are determined by legislation of the Home MS (principle and exceptions)
    - Option 2: participation rights are determined by legislation of the Host MS (principle and exceptions)

14. Consequences of a seat transfer on the employment contract
    - Legislation relating to the employment contract of the MS within which the employee normally carries out his/her duties remains in force

Part I - No action approach versus active legislative approach

A synthetic view on existing EU legislation (1) and EU case law (2) on the cross-border transfer of a company's seat will be followed by an overview of the various national approaches (3) and the tax standpoint (4) before presenting the first conclusions on the advantages or disadvantages of a no action approach version an active legislative approach (5).

1. The EU instruments

The main EU instruments dealing with companies' mobility are the EU Treaties, the ECJ case law, and the regulations on EU groupings, such as the SE Regulation, the SCE Regulation and the CBM Directive.

1.1. EU Treaties: Principle of freedom of establishment

Freedom of establishment is enshrined in the EU Treaties.

The freedom of establishment is one of the 'four freedoms' of the internal market, which has the goal to increase the competitiveness and welfare of all MS in the EU by abolishing barriers between these MS and to simplify rules. Together with the free movement of goods, workers, services and capital it was already included in the Treaty of Rome from 1957. The freedom of establishment seeks to enable companies to easily carry out economic activities in all EU MS.

Freedom of establishment within the EU, as derived from Articles 49 (with reference to nationals) and 54 (with reference to companies or firms) of the Treaty on the Functioning of the European Union (TFEU)[17], is offered to all forms of companies governed by civil or business law, including cooperative societies and other legal entities incorporated under public or private law.

> *Article 54 (ex Article 48 TEU)*
> *"Companies or firms formed in accordance with the law of a MS and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of MS.*
> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".*
>
> *Article 49 (ex Article 43 TEU)*
> *"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a MS in the territory of another MS shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any MS established in the territory of any MS.*

[17] Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, 30.3.2010 Official Journal of the European Union C 83/67.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital".

The ability to transfer a company's registered office from one MS to another is the logical corollary of the freedom of establishment guaranteed by articles 49 and 54 of the Treaty. But the principle of freedom of establishment provided by the Treaty does not permit in practice a company to move out of the Home MS into another MS while preserving its legal capacity.

ECJ case law and some national laws have complemented those principles.

1.2. ECJ case law

- **Summary of the ECJ position**

To summarize the position of the ECJ regarding corporate cross-border transfers:

- Companies are creatures of national law and MS can determine their incorporation and functioning. Moreover, MS have the sovereignty to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status (*Daily Mail*,[18] *Cartesio*,[19] *Vale*[20]).

- Companies established in a Home MS have the right to transfer their seat (centre of administration or the principal (or only) place of business of the company) without cross-border conversion to a Host MS if they remain in compliance with the connecting factor of the Home MS. The Host MS must recognize these foreign companies (*Centros*,[21] *Überseering*,[22] *Inspire Art*[23]).

- Yet, companies established in a Home MS have the right to transfer their seat by cross-border conversion to a Host MS without losing their legal personality based on the freedom of establishment (*Cartesio*[24] and particularly *Vale*[25]).

- Neither the Home MS, nor the Host MS may discriminate between domestic and cross-border rules on cross-border transfers or company conversions. If a MS

[18] ECJ 27 September 1988, Daily Mail and General Trust Plc, C-81/87,para. 19.
[19] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06. para. 104.
[20] ECJ 12 July 2012, VALE Epitési kft, C-378/10, para. 27.
[21] ECJ 9 March 1999, Centros Ltd vs. Erhvervs-og Selskabsstyrelsen, C-212/97.
[22] ECJ 5 November 2002, Überseering, C-208/00, [2002] ECR I-9919.
[23] ECJ 30 September 2003, Inspire Art, C-167/01.
[24] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06., para. 111-112.
[25] ECJ 12 July 2012, VALE Epitési kft, C-378/10, para. 49.

provides such rules for domestic operations, the freedom of establishment obliges such MS to provide the rules also for cross-border operations (*Sevic*,[26] *Vale*[27]).

- Within the limits of the previous paragraphs, neither the Home MS, nor the Host MS may block a cross-border transfer or refuse a cross-border conversion unless national regulation can be justified under the Treaty derogations or serves overriding requirements in the public interest (*Centros*, *Überseering*, *Inspire Art*, *National Grid Indus*,[28] *Cartesio*, *Vale*).

- Since secondary law of the European Union does not provide specific rules governing cross-border conversions, the provisions which enable such an operation to be carried out have to be found in national laws, namely the law of the Home MS and the law of the Host MS in accordance with which the company resulting from that conversion will be governed.

- A company seeking to transfer its registered office to a Host MS must comply with the national law of the Host MS including requirements as to change of company form, registration in the national company registry, place of registered office and real seat, etc. These national requirements must be in compliance with the principles of equivalence and effectiveness (*Vale*[29]).

For a more detailed description of ECJ case law regarding cross-border corporate cross-border transfers, please see ***<u>Annex 1</u>.***

- **Concept of "establishment" and "economic activity" under article 49 TFEU**

The concept of establishment within the meaning of the Treaty's provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period (*Vale*[30]).

However, the Court has not defined minimum criteria to fulfill those conditions.

Our approach is that minimum activity in the Host MS is sufficient; this minimum activity would, for example, include the capacity of the company to be represented by a manager or a duly authorized person in the Host MS. The real seat should therefore be understood as falling within the concept of "establishment".[31]

[26] ECJ 13 December 2005, Sevic Systems AG, C-411/03, para. 22 and 23.
[27] ECJ 12 July 2012, VALE Epitési kft, C-378/10, para. 36.
[28] ECJ, 29 November 2011, National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-317/10.
[29] ECJ 12 July 2012, VALE Epitési kft, C-378/10, para. 48, 56 and 61.
[30] ECJ 12 July 2012, VALE Epitési kft, C-378/10, para. 48, 56 and 61; ECJ, 25th July 1991, Factortame and Others, C-221/89 [1991] ECR I-3905, para 20; ECJ 4 October 1991, Commission v United Kingdom, C-246/89 [1991] ECR I-4585, paragraph 21-23 ; ECJ, 12 September 2006, Cadbury Schweppes et Cadbury Schweppes Overseas, C-196/04, Rec. P. I-7995, point 54.
[31] ECJ, 25th July 1991, Factortame and Others, C-221/89 [1991] ECR I-3905, para 20; Case 205/84, Commission v Germany, [1986] ECR 3755, para 21; Case C-251/98 Baars [2000] ECR I-02787; Case C-60/90, Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, [1991] ECR I-03111, paras. 13-14 and Case C-142/99, Floridienne SA and Berginvest SA v Belgian State,

For a more detailed discussion of this topic, see ***Annex 2****.*

- **Justifications for a restriction of the freedom of establishment**

Article 49 TFEU prohibits any restriction on the freedom of establishment. This can either concern a directly or indirectly discriminatory measure or also rules which merely hinder the freedom of establishment.

Article 52 TFEU provides justifications for a restriction to Article 49 TFEU. These justifications are public policy, public security and public health.

On top of these, non-discriminatory restrictions can be justified on the basis of mandatory requirements. This is an open-ended list of justifications introduced by the ECJ.

This means that a MS can bring forward its own justification grounds, such as employee or creditor protection, which can be used if the Court accepts them. Yet, as shown by a series of case-law, including the latest *Vale* case, the Court nowadays applies mandatory requirements to discriminatory measures. It is important to note that the Court does not accept economic justification even if the underlying national legislation has the same goal as EU internal market law such as ensuring competition on the market.[32]

Having a valid justification ground does not mean that a restriction can also be justified. In order to do so, the restriction must also be proportionate. The restrictive measure must be suitable to attain the objective and shall not go beyond what is necessary.

> In the Vale case, a measure restricting the freedom of establishment regarding cross-border conversion may be justified on the basis of overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions, "*on the condition that such a restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them*" (see *Vale*, paragraph 39, see also *SEVIC Systems*, paragraphs 28 and 29).

For a more detailed discussion of this topic, see ***Annex 3****.*

1.3. Mobility in EU legislation on the SE, SCE, FE and cross-border mergers

European legislative instruments that enable a transfer of the registered office and focus on the transfer procedures existing in EU legislation are twofold, namely:

[2000] ECR I-09567, paras. 17-19; Joined Cases C-51/96 and C-191/97, Deliège, [1999] ECR I-02549, para 46 and Case C-55/94, Gebhard, [1995] ECR I-416.

[32] Case C-367/98 Commission of the European Communities v Portuguese Republic [2002] ECR I-04731; Case C-171/08 European Commission v Portuguese Republic [2010] ECR I-06817.

- Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (the "***CBM Directive***") and,

- Regulation Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (the "***SE Regulation***") and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (the "***SE Directive***").

Furthermore, cross-border transfers are also possible based on the SCE statute and the European Economic Interest Grouping. Yet, due to the specific dimension of both corporate forms, their use is rather limited.[33]

The possibility to transfer the registered office of a company is also foreseen in the proposal for a European Private Company and under the proposal for a European Foundation (FE).[34]

These tools have been designed to promote corporate mobility in the EU. In order to determine what could be the framework of an active legislative approach on cross-border transfers, it is useful to draw an overview of the transfer procedures under the three main EU instruments.

1.3.1. Overview of procedures under the SE, SCE, the CBM Directive and the proposal for a European Foundation

The procedures for cross-border mobility under the SE, SCE or FE statute and the CBM Directive follow the same set of main steps,[35] as briefly summarized below, as they are often taken as a model for the MS having implemented a procedure for outbound transfers.

- **Draft terms of the transfer/merger drawn up by the management organ[36]**

The management organ must draw up the draft terms of the merger/transfer[37]. Such document mainly includes:

[33] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1–9.
[34] Proposal for a Council Regulation on the Statute for a European private company, COM(2008) 396/3; Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final.
[35] It can be noted that the procedure for the FE is slightly shorter based on the specific nature of this company law form.
[36] See D. Van Gerven (ed.), Cross-Border Mergers in Europe (Cambridge University Press, Cambridge 2010); in D. van Gerven and P. Storm (eds.), The European Company: Volume I (Cambridge University Press, Cambridge 2006).; W.J.M. van Veen (ed.), De Europese naamloze vennootschap (SE): Een nieuwe rechtsvorm in het Nederlandse recht (Kluwer, Deventer 2004); H.J.M.M. van Boxel, Grensoverschrijdendie fusies van kapitaalvenootschappen naar Nederlands recht (Kluwever, Deventer 2011); K. Oplustil, C. Teichmann, The European Company - All Over Europe: A State-By-State Account of the Introduction of the European Company (De Gruyter, 2004).

- the proposed registered office of the company;
- the proposed modified articles of association of the company;
- any consequence the proposed operation may have on employees' involvement;
- the proposed timetable;
- any rights provided for the protection of shareholders and/or creditors.[38]

- **Publication of the transfer plan for the information of stakeholders**

The transfer/merger proposal must be published in the official gazette of the MS concerned and filed with the competent registry[39].

- **Report drawn up by management explaining the consequences of the transfer to inform shareholders**

The report discusses the legal and economic aspects of the operation and should deal with the consequences for shareholders, creditors and employees.

Shareholders and creditors have the right to inspect the report at least one month before the general shareholders' meeting[40].

For the SCE this includes also the holders of other rights and any other body which according to national law can exercise this right.

Under the CBM Directive employees have the right to inspect the report. Under the other instruments this is not the case; however, employees will generally be able to access the report though their works' councils. Furthermore, if the management or administrative organ of the company receives an opinion from the representatives of the employees in a timely manner, this opinion must be appended to the report.[41]

Finally regarding all three legislative instruments, the parties must be able to obtain copies of these documents free of charge at the location of the registered office.

- **Protection of stakeholders**

A period of two months is required between the publication of the merger/transfer plan and the general meeting at which shareholders will decide on the merger/transfer. Generally, during this period, stakeholders, i.e. creditors and holders of other rights and

[37] Article 8 (2) SE Regulation; Article 7 (2) SCE Regulation; Article 5 CBM Directive; Article 37(1) of the proposal on the Statute for a European Foundation.
[38] Article 8 (1) SE Regulation; Article 7 (1) SCE Regulation; the requirements under the CBM Directive are more elaborate. Please see Article 4. Since these requirements are not specific to cross-border transfers, they are not elaborated here; Article 37 (2) of the proposal on the Statute for a European Foundation.
[39] In accordance with Article 3 of Directive 68/151/EEC.
[40] Article 8 (3) and (4) of the SE Regulation; Article 7 (3) and (4) of the SCE Regulation; Article 7 CBMD.
[41] Article 7 CBMD.

minority shareholders receive protection mechanisms through national law.

In the SE and SCE Regulations and the CBM Directive, the different stakeholders are provided with the following protections:

- Shareholders receive information in the form of the transfer plan and the transfer report. In the case of a cross-border merger, they can also receive an additional report from independent experts.[42] Moreover, they have a right to vote at the general shareholder meeting.[43]

- Minority shareholders are protected in the same way as all shareholders. MS have the option to implement further protection mechanisms.[44] For example, minority shareholders can be provided with a withdrawal right.[45]

- Creditors equally have a right to receive information in form of the transfer report (see above).[46] Moreover, the EU instruments give national law the option to implement further protection mechanisms.[47] For example, creditors can receive the right to demand additional guarantees or security interests if the recovery of their claims could be endangered by the transfer.[48]

- Employees can also receive a right to receive the transfer report under the CBM Directive (see above). Moreover, their participation rights are protected through a system consisting of a negotiation system or standard rules. These rules will be explained in more detail below.

- Public authorities have a right to oppose the transfer based on public policy grounds[49].

It should furthermore be noted that all stakeholders are protected in the sense that the competent authority to deliver the conformity certificate will examine whether all legal requirements, such as the individual stakeholder protections, have been complied with before it will issue the certificate.[50] Without this certificate, the transfer/merger cannot take place.

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[42] Article 8 of the CBM Directive.
[43] Article 9 of the CBM Directive; Article 6 and 59 of the SE Regulation; Article 6 and 62(4) of the SCE Regulation.
[44] Article 8 (5) SE Regulation Article 4(2) of the CBMD.
[45] See for example Article 2:333h of the Dutch Civil Code.
[46] Article 8 (4) of the SE Regulation; Article 7 (4) of the SCE Regulation; Article 7 CBMD.
[47] Article 8(7) SE Regulation and Article 4(2) of the CBM Directive.
[48] See for example Article 2:316(2) of the Dutch Civil Code.
[49] Article 8 (14) SE Regulation and Article 7 (14) SCE Regulation within the two-month period from the publication of the transfer plan; Article 4 § 1 b of CBM Directive (national authorities can oppose a cross-border merger based on public interest if national law also provide so for internal mergers).
[50] Article 8 (8) of the SE Regulation; Article 7 (8) SCE Regulation; Article 10 (2) of the CBM Directive; Article 37(3) of the proposal on the Statute for a European Foundation.

In the SE and SCE Regulations, there is no mandatory provision for a renegotiation on the involvement of employees in case of cross-border transfer[51]. Nevertheless, the articles of association must not conflict with the arrangements for employee involvement which have already been determined[52]. Should the transfer require a change in the articles of association regarding the arrangements for employee involvement, a re-negotiation of those arrangements with the employee representatives could be necessary.

Unlike with the SE, the treatment of employee participation is an important subject for cross-border transfers conducted under the CBM Directive.

The CBM Directive provides as a general rule that the employee participation system of the MS applies where the registered office of the merged company is situated.[53] Yet, there are three exceptions to this rule.

(i) The first one is where one of the merging companies has more than 500 employees within the six months prior to the publication of the merger proposal and an employee participation scheme is applicable to such company.

(ii) The second exception is where the national law applicable after the merger does not provide for the same level of participation as the one existing before the merger.

(iii) The third exception refers to establishments which are situated in a MS other than the company resulting from the merger and which do not provide for the same employee participation rights as applicable at the location of the registered office.[54]

If one of the exceptions applies, a negotiation procedure and standard rules will be available. These rules are globally the same as under the SE Regulation because various references are made to the system of the SE Directive which is supplementary to the SE Regulation.[55] Under this Directive, a negotiation procedure must be followed between the employee representatives and the management of the companies involved. Should there be no agreement after six months, standard rules will apply. Under the SE Regulation the standard rules apply if at least 25% of the employees were previously covered by a participation system. This has been changed for the CBM Directive. There, the threshold is 33.3%.[56]

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[51] K. Oplustil, C. Teichmann, The European Company, (2004), All Over Europe: A State-By-State Account of the Introduction of the European Company (De Gruyter, 2004), p. 223.
[52] Article 12 (4) SE Regulation; Article 11(4) SCE Regulation.
[53] Article 16 (1) CBMD. See also M. Andenas, F. Woolridge, European Comparative Company Law (Cambridge University Press, 2009), p. 501 et seq.
[54] Article 16 (2) CBMD.
[55] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.
[56] Article 16 (3) (e).

Under the CBM Directive, the relevant organs can also choose to make the standard rules immediately applicable. Moreover, unlike the SE Regulation, the CBM Directive does not contain provisions on information and consultation in respect of employees.[57]

The 2009 Study on the functioning of the SE[58] provides figures showing to what extent MS implemented protection mechanisms. For example, under the SE Regulation:
- 64% of all MS implemented provisions protecting minority shareholders
- 48% of all MS implemented provisions protecting creditors and holders of other rights;
- 52% of all MS provided a national authority with the right to oppose a transfer on public policy grounds.

- **The shareholders' meeting votes on the transfer plan**

As stated, two months after the publication of the transfer plan, the general meeting of shareholders will vote on a transfer/merger proposal.

Under the CBM Directive[59], the quorum will be decided upon by national law. Under the SE Regulation, the decision has to be taken by a two-third majority.[60] Furthermore, the SE Regulation provides that if there are different classes of shares, the decision of the general meeting must be subject to separate votes by these classes.[61]

- **A competent authority to scrutinize the legality of the operation**

After a transfer/merger decision taken by the shareholders, an independent authority, designated by the national laws (normally a court or a notary), must scrutinize the legality of the operation in accordance with the law of the Home MS. This authority must issue a certificate attesting the completion of the formalities.[62] This for example also entails scrutinizing whether the new articles comply with the employee involvement requirements.[63] A registration in the Host MS is not possible without this certificate.

- **The transfer is effective upon registration of the company in the Host MS**

The transfer will subsequently take effect on the date on which the company is registered

[57] M. Andenas, F. Woolridge, European Comparative Company Law (Cambridge University Press, 2009), p. 499.
[58] Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482, p. 75.
[59] Under the CBM Directive, if a company acquires a subsidiary in which it holds all shares and other securities and is entitled to vote in the general meeting, a simplified procedure is applicable (Article 15 (1) of the CBM Directive). This means amongst others that an independent expert report is not required and the general meeting of the subsidiary to approve the merger does not have to be convened (Article 15 (1) of the CBM Directive).
[60] Even a higher majority can be required by the Member State itself. See Article 59 (1) of the Regulation. A Member State can require that if at least half of an SE's subscribed capital is represented, a simple majority of votes is sufficient (Article 59 (2)).
[61] Article 60 (1).
[62] Article 8 (8) of the SE Regulation; Article 7 (8) SCE Regulation; Article 10 (2) of the CBM Directive; Article 37(3) and (5) of the proposal on the Statute for a European Foundation.
[63] See article 11 (1) of the CBMD.

in the commercial registry of the Host MS. The registry of the Host MS will notify the registry of the Home MS, which will perform the de-registration of the company from its registry.[64]

The registration in the Host MS and the de-registration in the Home MS shall be published in accordance with EU and national law.[65]

As soon as the new registration is published, third parties can rely on the new registered office in the Host MS. Before this is the case, third parties can rely on the old location in the Home MS unless the company can prove that the third parties were aware of the new location.[66]

- **Further protective provisions under SE and SCE Regulation**

Finally, there are two further protection provisions for the SE and the SCE.

Firstly, if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against the company, it cannot transfer its registered office.[67] This also exists under the proposal on the Statute for a European Foundation.[68]

Moreover, regarding any cause of action that has arisen prior to the transfer of the registered office, the seat is deemed to be located at the Home MS, even if the company is sued after the transfer.[69]

1.3.2. Overview of the use of the European instruments

Which of the SE, SCE and CBM Directive is used to reach mobility generally depends on the situational context of the companies involved.

- **Use of CBM Directive to perform transfers**

If the CBM Directive is used, the company will not only transfer its seat but primarily will merge with a newly incorporated or already existing company in the Host MS.

Companies participating in the merger may be dissolved and their assets and liabilities transferred to a continuing company already formed in a MS.

Consequently, through a merger, the participating companies may effectively transfer their seat to another MS.

The CBM Directive has thereby provided for an effective route for companies that

[64] Article 8 (10) and (11) of the SE Regulation.
[65] For the SE, a publication must be made in the Official Journal of the European Union. Yet this is hardly ever done because it is not clear who is responsible for it. See Article 13 and 14 of the SE Regulation. See also Article 13 CBMD and Article 7 (12) SCE Regulation.
[66] Article 8 (13) of the SE Regulation; Article 7 (13) of the SCE Regulation.
[67] Article 8(15) of the SE Regulation; Article 7 (15) of the SCE Regulation.
[68] Article 36(3) of the proposal on the Statute for a European Foundation

In most of the cases, it is not possible to provide statistics on how many transfers of company seats have taken place since 2007 according to the CBM Directive since such information is not publicly available.

In the following MS which do not allow carrying out a direct cross-border transfer of registered office under their national legislation, we identified

- In **Ireland**, which does not allow carrying out a direct cross-border transfer of registered office under its national legislation, we identified that there have been 35 outbound transfers and 20 inbound transfers under the CBM Directive.
- In **Finland,** there has been a total of 48 cross-border mergers initiated as of the amendment of the 2007 Companies Act.
- In **Lithuania,** there have been at least 21 cross-border mergers as of 2009.
- In **Estonia**, there have been 33 cross-border mergers since 2007 (including SEs). 12 of these mergers have been outbound, 21 have been inbound.
- In **Sweden**, there have been a total of 92 applications for cross-border mergers to the Swedish Companies Registration Office. 40 of these mergers have been inbound, and 52 have been outbound.

want to transfer from their Home MS to a Host MS without liquidation.

Our research has shown that:

- When the companies concerned have no employees[70] and the absorbed company is a 100% owned company (with only one shareholder), the cross-border merger is easy to perform, is not time consuming (average of three months) and is not overly costly;
- When the companies concerned have employees and must create a special negotiating body and negotiate the participation of the employees in the absorbing company, and when a lot of stakeholders are concerned, the process can be time consuming, and consequently, costly. But this requires a case-by-case analysis, as the situation is different according to the companies concerned, the number of employees concerned, etc. To our knowledge, negotiations with employees in most of the cases under the CBM Directive have not been longer than six months.

For a more detailed discussion of this topic, see ***Annex 4*** *(available only in electronic format).*

- **Use of SCE Regulation to perform transfers**

In order to perform a cross-border transfer under SCE Regulation, the company must already be an SCE or must first convert to an SCE (the SCE can only be used for cooperatives).

[69] Article 8 (16) of the SE Regulation; Article 7 (16) of the SCE Regulation.
[70] This does not mean that the company has no activity. The employees can be located in a different entity within the group.

It is not possible to provide statistics on how many transfers of company seats have taken place since 2007 according to the European cooperative status since such information is not publicly available.

For a more detailed discussion of this topic, see ***Annex 4*** *(available only in electronic format).*

- **Use of SE status to perform transfers**

In order to perform a cross-border transfer under SE Regulation, the company must first be an SE or must convert to an SE (as the transfer can not take place at the same time as the conversion into an SE occurs).

Unfortunately, there has been no central registry organised at the European level for SEs yet. Nevertheless, information on SEs can be gathered from ETUI statistics[71].

Since the introduction of the SE in October 2004, the number of SEs has increased steadily year by year (almost at exponential growth rates).

In June 2012 the ETUI European Company Database (ECDB) released information on a total of 1286 SEs which could be found in 25 countries of the "EU-27+3" (Norway, Liechtenstein, Iceland). Germany is home to almost half of the known normal SEs.

The SE Regulation allows the SE to set up further SEs as subsidiaries. Particularly in Germany and the Czech Republic (recently in the United Kingdom too), a market for SE shelf companies has developed. Often a shelf SE serves as a vehicle to set up further shelf SEs ("incubator SE") which are then sold to interested clients. The new owner subsequently activates the SE by transferring employees into it and/or by starting business activities.

> ➔ This development represents a potential threat to worker involvement rights in an SE. As the SE Regulation and Directive do not provide for provisions regarding the changes in the structure of the SE after its incorporation, the SE, created with no employee and no agreement on the involvement of employees at the time of its creation, can hire employees after its incorporation without having to create a special negotiating body to negotiate the workers involvement rights in the SE. **Some MS such as France implemented provisions in their national law to avoid such practice.**[72]

In certain MS, the SE statute can, in practice, be the only way to perform a cross-border transfer of the registered office. For example, regarding joint stock companies (*sociétés anonymes*) in France, a decision made by the unanimity of shareholders is required to

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[71] ETUI (2012), Facts and Figures: http://www.worker-participation.eu/European-Company/SE-COMPANIES/Facts-and-Figures.

[72] Article L 2354-4 of the French Labor Code provides that any structural change in the SE after its incorporation which leads to a modification of the agreement on involvement of employees entered into at the time of incorporation is subject to a renegotiation of such agreement with the employees. But nothing has been provided for in the case where an SE is created with no employee and no agreement on the involvement of employees entered into at the time of the incorporation of the SE.

adopt the transfer; as unanimity can never be reached in listed companies, the SE statute, requiring a decision taken under the majority rules provided for extraordinary general meetings, is the only way available for listed companies to perform a cross-border transfer of their registered office.

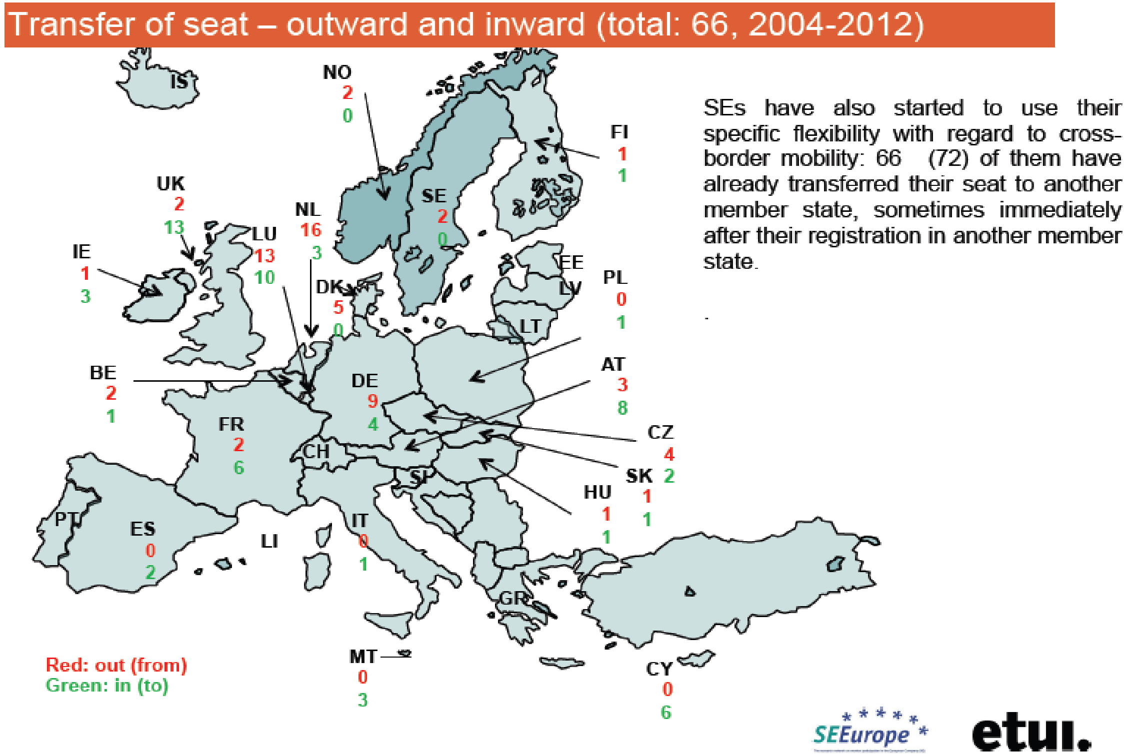
Information on how many transfers of company seats have taken place thanks to the SE statute is available:

Since 2007, 66 SEs (not including 3 transformed and 3 de-registered SEs) have moved their seat into another country. This represents 5.59% of all the registered SEs. Hence, a cross-border transfer is not the main purpose of companies deciding to adopt the SE status.

Regarding outbound SE transfers, most of the SEs concerned moved from the Netherlands, Luxembourg and Germany.

Regarding inbound transfers, most of the SEs concerned moved to the UK and Luxembourg.

Map 1: Inbound and outbound transfers of SEs' seats (2004-2012)



Source: ETUI

Cross-border transfers have been performed by both listed and unlisted SEs.

The actual reason behind the transfer is rarely known. Most of the companies refer to their international re-organization processes.

For some companies[73], the only reason for the adoption of the SE status was to perform a cross-border transfer of the company's seat.

- When the company has no employees and is a 100% owned company, the conversion into SE followed by the cross-border transfer are easy to perform, not time consuming (average of 3 months) and not costly;

- When the company has employees and has to create a special negotiating body and negotiate the involvement of the employees in the SE, the process can be time consuming, and consequently, costly. But this requires a case-by-case analysis, as the situation is different according to the company concerned, its position in the group's structure, the number of employees concerned, how many stakeholders are concerned and/or have to approve the transfer, etc. To our knowledge, the negotiation with employees in most of the cases has never been longer than six months.

To our knowledge, the cost and administrative requirements for setting up an SE are actually not the main obstacles deterring companies from transferring their registered office through an SE, where it appears to be the only legal mechanism available.

In the completion of SE cross-border transfers, the following main issues have been noted:

- Even if the company has adopted the SE status, the cross-border transfer will change certain laws applicable to the company and its stakeholders. This may challenge the rights acquired by those stakeholders under the Home MS. As European company law is not fully harmonized, it is difficult to provide the stakeholders with an exhaustive list of the consequences of a transfer.
- One of the great difficulties for companies will be to find rights in the Host MS equivalent to existing rights in the Home MS for shareholders and holders of securities giving access to share capital.

  Example: Double voting rights exist in France but do not exist in Luxembourg. An SE registered in France having issued shares with double voting rights that transfers its registered office to Luxembourg will have to find an equivalent system to be set up with effect on the day of registration in Luxembourg so as to not cause the holders to lose their rights when the transfer is completed. Unless an equivalent system can be found in the national law of the Host MS, the managers of the SE may be forced to abandon the transfer.

[73] Such is the case for the companies of the French real estate group, Foncière LFPI. SE status was adopted at the level of the Dutch holding companies solely for the purpose of carrying out a cross-border transfer of their corporate seat from the Netherlands to France, which would not have been possible for Dutch BV companies.

- Between the registration in the Host MS and the de-registration in the Home MS, the SE will be in a transitional situation which may cause legal uncertainty. The correct coordination between the commercial registries of the involved countries is essential.

  Example: situations can be encountered where an SE was registered in the Host MS, but due to some specific reasons, the registry of the Host MS made late notification to the registry of the Home MS; hence, the SE remained registered in two different MS during the transitional period.

- When a MS provides for the right of a competent authority to oppose the transfer based on grounds of public interests (SE Regulation, art. 9 § 14), this is a cause of uncertainty for the SE as there is no definition of public interests and the SE is not able to anticipate any opposition to the transfer. As the cross-border transfer is a fundamental right attached to the SE status, it would be favourable for the company if the opposition right of national public authorities took place at the time of creation of the SE and not at the time of the transfer.

- The SE transfer could be more difficult in some MSs because of the lack of knowledge on the SE statute in the Host MS and/or of an incomplete implementation of the SE rules. The consequences could be time-consuming for the SE.

*For a more detailed discussion of this topic, see **Annex 4** (available only in electronic format).*

2. The national approaches

According to the Report of the Reflection Group on the Future of EU Company Law[74]:

> *"This present condition of the Union provides for paradoxical outcomes. When considering the formation of a company, the founders may take advantage of the company law regime of any Member State in the Union and are free to choose between them, but once the company has been formed, it cannot directly change its company law regime to that of another Member State. A Member State may prevent its national companies from moving their real seat out of its territory, but it cannot prevent a company of another Member State from operating in its territory irrespective of where its real seat is located. MS can prevent their national companies from transferring to a different national company law regime and require them to keep their real seat in their territory, but they cannot prevent them from engaging in a merger with a company of another Member State which may effectively result in the adoption of a new company law regime and a transfer of the real seat as a result of the merger. The result is an uneven distribution of rights that requires companies to expend considerable resources and costs".*

2.1. Real seat theory *versus* incorporation theory

[74] This report was drafted previous to ECJ 12 July 2012, VALE Epitési kft, C-378/10

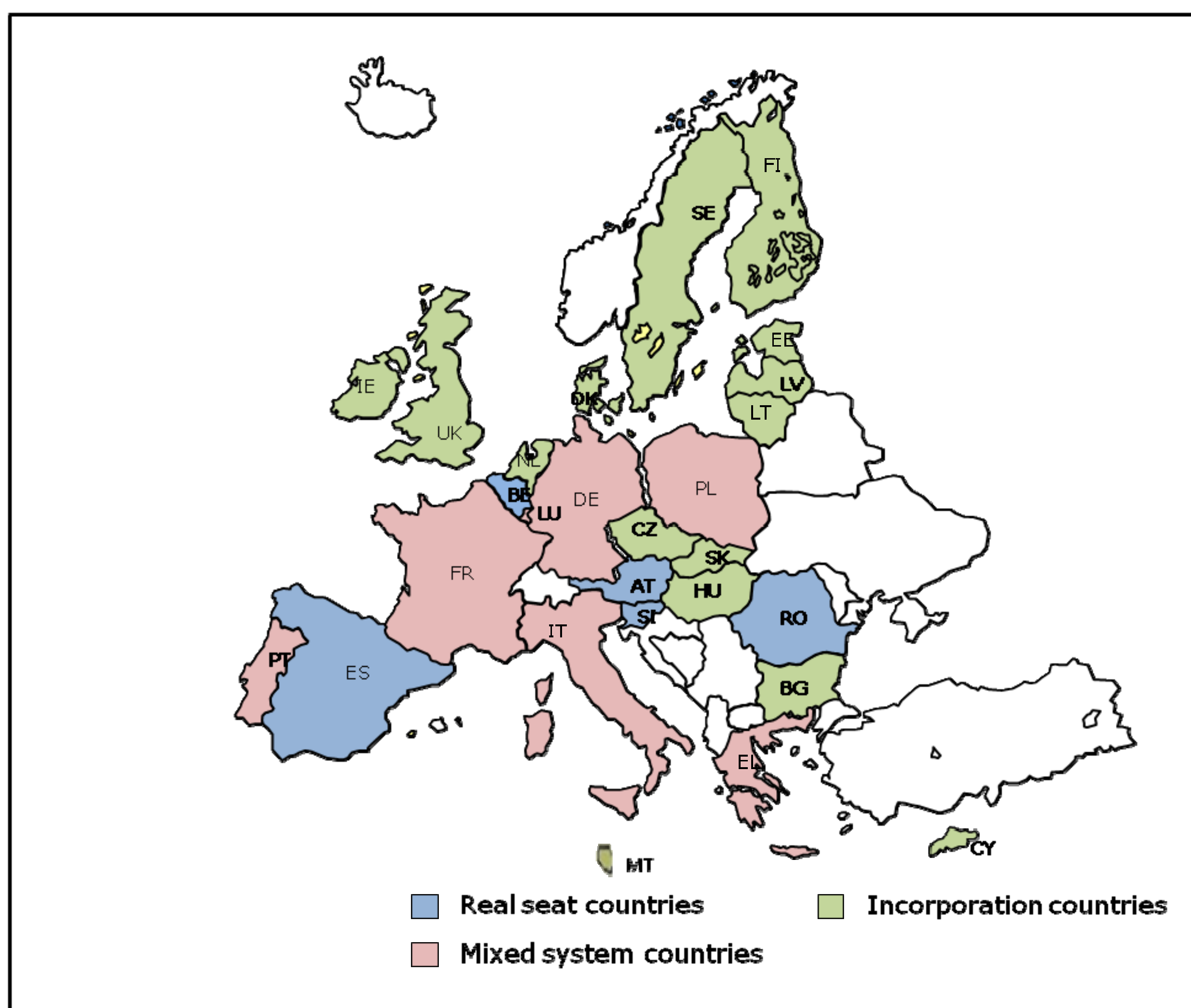
Two different theories can be found in MS national laws regarding the law applicable to a company (i.e., the *lex societatis*), namely:

- **The "Incorporation Theory"**: this theory selects the applicable company law by reference to the MS in which the company is incorporated (and registered with the national business registry operated by the MS).

- **The "Real Seat Theory"**: this theory selects the applicable company law by reference to the MS in which the company has its actual real seat (head office).

The real seat theory was inspired by the objective to maintain the presence of companies' management on their territory and also, with regard to large public companies, to maintain their listing on their home stock exchange, as well as to make tax evasion more difficult and to protect stakeholders and creditors. In fact today, many MS have adopted a mixed system.

Map 2 - The application of the real seat theory and the incorporation theory by EU MS



Source: JeantetAssociés

Examples of mixed systems:

- Some MSs require as a general principle that the registered office should correspond to the real seat. The presumption can be rebutted by proving that the registered office and the real seat of the company are located in different places[75]. The localization of the real seat is more difficult than that of the registered office as it depends on facts, such as the place where major decisions for the company are made. The national legislations concerned take into account that the company might not have changed the address of its registered office or that nobody is present at the address of the registered office (i.e. the head office is somewhere else) and provide protection for third parties in this respect. The provisions, then stipulate that third parties can claim the real seat (head office) of the company (FR, CZ, or LU for example).
- **German** Law actually applies both theories. First, if a foreign company from a non MS (e.g. Switzerland) is doing business (only) in Germany, it is treated as a German company as the Federal High Court of Justice has recently confirmed. Secondly, if a German company transfers its registered office abroad, it must be liquidated under German law. In other words, if German company law is supposed to be applied on a company, its officially registered office must be in Germany. However, since 1st November 2008, German companies are allowed to conduct their operations (only) abroad. Thus, a transfer of merely the real seat is allowed under German law (as long as their officially registered office remains in Germany).

*For a more detailed discussion of this topic, see **Annex 4** (available only in electronic format).*

2.2. Consequences of the different approaches on the feasibility of cross-border transfers

In order for a cross-border transfer to be feasible, it is necessary for the legislation of the Host MS to accept the transfer of companies incorporated in other MS, maintaining their corporate identities. As a result, when a company intends to transfer its seat from the Home MS to another MS, it should analyze the position of the Host MS's legal system in this regard. The possibility for Home MS companies to transfer their seat abroad is conditional upon the Host MS allowing for the legal personality of the company to be maintained.

In theory, without regard to ECJ case law, if a company of a MS applying the Incorporation Theory transfers its head office (real seat) to a MS applying the Real Seat Theory while the registered office remains in the Home MS of incorporation, the company could be subject both to the "incorporation" law of the Home MS and to the Host MS law. In the event a company of an MS applying the Real Seat Theory transfers

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

abroad the registered office while the main activity or the management office remains in the Home MS, the company shall remain subject to Home MS's law, but if the Host MS applies the Incorporation Theory, it could be subject both to the Home MS law and to the Host MS law. ECJ case law found solutions to these situations (see above, paragraph I, 1.2). Then, Host MS that have chosen to apply the Real Seat Theory could legitimately refuse to register a company that was transferring its registered office to its jurisdiction unless it transferred its real seat at the same time, whereas, a Host MS that has chosen to apply the Incorporation Theory could legitimately refuse to register a company that was transferring its real seat to its jurisdiction unless it transferred its registered office at the same time.

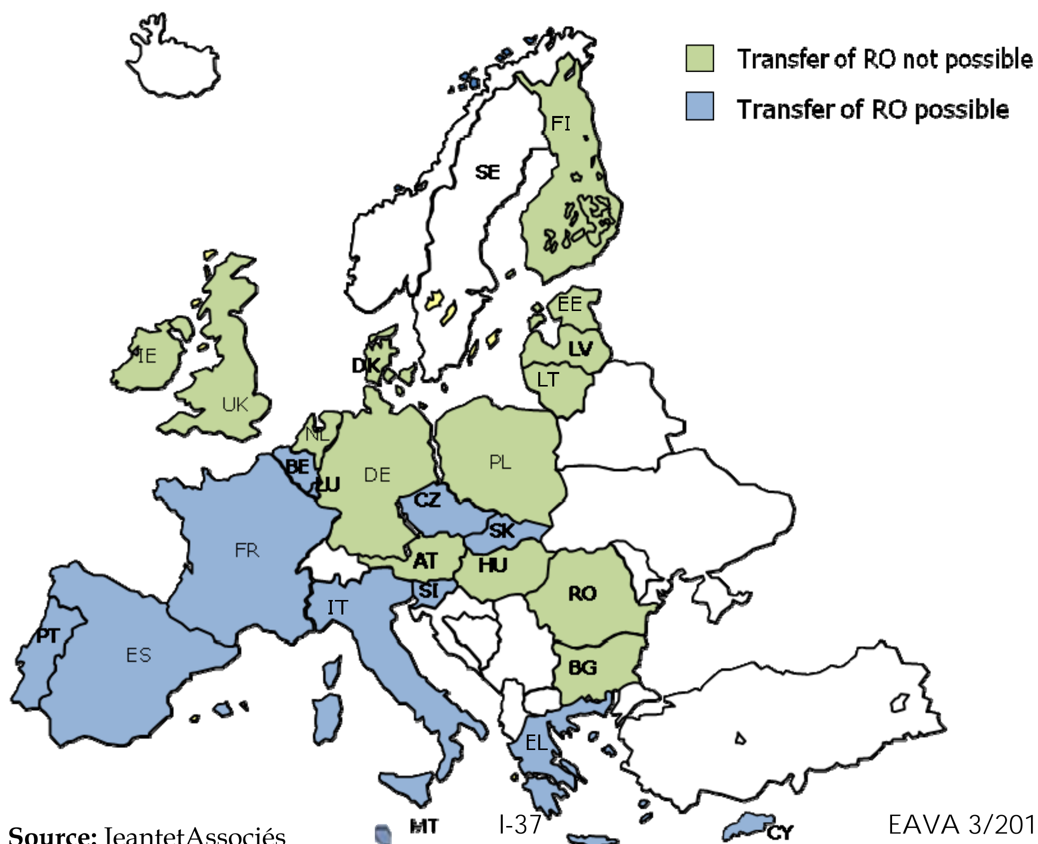
> **Example**: When an Austrian company moves to the UK. Austria adopts the Real Seat Theory, which means that a company can only be governed by Austrian jurisdiction if it has its real seat/management in Austria. If the company moves its real seat out of Austria to the UK, it is no longer recognised as an Austrian company, but it cannot be recognised in the UK either (if it does not incorporate in the UK), as the UK adopts the Incorporation Theory.

Performing a cross-border transfer is complicated in practice due to the lack of a common definition agreed among the MS of what constitutes the necessary link between a company and its Home MS.

2.3. National legislations on cross-border transfers

In recent years, a number of MS have adopted legislation to facilitate cross-border transfers of corporate seat (inbound or outbound) whereas other MS do not provide for specific provisions on the cross-border transfer of a company's registered office.

Map 3 - MS having national legislation allowing outbound transfer of the registered office ("RO") or not



Source: JeantetAssociés

*For a more detailed discussion of this topic, see **<u>Annex 4</u>** (available only in electronic format).*

2.3.1. MS with national legislation on cross-border transfers

MS having implemented legislation on cross-border transfer (e.g. **CY, CZ, ES, FR, IT**) allow inbound and outbound transfers.

2.3.1.1. <u>Description of national legislations</u>

In most of the legislations concerned, the transfer is considered to be a conversion of the company, whereby provisions on change of legal form and cross-border conversion apply.

National legislation on cross-border transfers is generally applicable to limited liability companies, joint-stock companies and cooperatives (in CZ for example).

For both transfers, inbound and outbound, specific requirements and conditions are to be met. The process of the transfer itself also varies depending on the direction of the transfer, inbound or outbound.

Generally, outbound transfers require more preparation and documents under the Home MS than inbound transfers.

In those MS where legislation on inbound /outbound transfers has been adopted, it is very easy in practice to carry out cross-border transfers, not very time consuming and not very costly. The most important part of the procedure is the decision of the shareholders' meeting in the Home MS deciding the transfer and adopting the amended articles of association in compliance with the Host MS company law.

The protection of stakeholders is not ensured in all the MS concerned.

A) Outbound transfers

The procedure for outbound transfers is, in most of the cases, highly inspired by the SE/ CBM Directive legislation.

Table 1 - Steps of the outbound transfer procedure: comparison of the SE Regulation, cross-border merger procedure and national legislation in selected MS authorizing cross-border transfer (CY, CZ, ES, FR, IT, LU)

(this only concerns selected MS which allow outbound transfers)

Steps of cross-border transfer procedure	SE Regulation	CBM Directive	National law
1. Draft terms of transfer	YES	YES	CZ, ES
2. Publication of transfer plan	YES	YES	CZ, ES
3. Report from management	YES	YES	CZ, ES
4. Report by independent experts	NO	YES	
5. Shareholder vote at general meeting	YES	YES	CZ, FR, IT, LU, ES, CY
6. Bondholder general meeting and holders of other rights	POSSIBLE (option)	POSSIBLE (option)	
7. Preparation of interim financial statement	NO	National law	CZ, CY
8. Publication of amendment of statutes / minutes of general shareholder meeting	YES	YES	FR, LU, CY
9. Step involving creditor protection	POSSIBLE (option)	POSSIBLE (option)	CZ, CY, ES
10. Step involving minority shareholder protection	POSSIBLE (option)	POSSIBLE (option)	CZ, IT, ES
11. Step involving veto by national authority	POSSIBLE (option)	POSSIBLE (option)	CZ, CY
12. Transfer certificate by competent authority /	YES	YES	CZ, ES
13. Submission of relevant documents to competent authority	National law	National law	FR, IT, LU, CY
14. Registration/ de-registration through inter-registration notification	YES	YES	
15. Registration in Host MS	YES	National law	CZ, FR, IT, ES, CY
16. Deregistration in Home MS	YES	National law	CZ, FR, IT, ES, CY
17. Publication of new registration and de-registration	YES	YES	

Source : JeantetAssociés

In certain jurisdictions (ES for example), the cross-border transfer expressly leads to a cross-border conversion, in the sense that the company of a Home MS will be converted, without liquidation or winding-up, and with tax neutrality, into a similar form of the Host MS, like an inland conversion.

In the following tables we focused on the protection of stakeholders provided for in national legislation on cross-border transfers.

Table 2 - Synthesis table of the protection of stakeholders in outbound transfers according to national legislations (CY, CZ, ES, FR, IT, LU)

(this only concerns selected MS which allow outbound transfers)

National approach of cross-border transfers (OUTBOUND TRANSFERS)				
MS	**Protection of minority shareholders**	**Protection of creditors/ bondholders**	**Specific protection of employees**	**Consent/ Opposition right of competent authorities**
CY	NO	YES The company must satisfy that: . there are no pending court cases or liquidation procedures against the company . all taxes and duties have been paid . creditors can submit an objection to the court	NO	YES . Confirmation from the relevant authorities that the company does not owe any taxes and customs duties . When the company is carrying out specific activities requiring permit, consent of the relevant authority for the transfer . Approval of the relevant Cyprus supervisory or regulatory authority, the Stock Exchange, the Cyprus Council of Securities and Exchange Commission, the Cyprus Securities when applicable
CZ	YES . Information right . Majority: 3/4 of the votes present . Shareholders who voted against the transfer are allowed to withdraw from the company and can require compensation for the shares	YES . Information right . May demand security . Czech courts are competent regarding disputes that have arisen before the transfer . Liability of shareholders	YES .Information right . Trade Unions have right to make written statement	YES . Consent of the Czech National Bank, when applicable
ES	YES	YES	NO	NO

National approach of cross-border transfers (OUTBOUND TRANSFERS)				
MS	**Protection of minority shareholders**	**Protection of creditors/ bondholders**	**Specific protection of employees**	**Consent/ Opposition right of competent authorities**
	. Majority: majority or 2/3 majority at second call in joint stock companies . Shareholders who have voted against the transfer are allowed to withdraw from the company and have a right to be reimbursed	. May demand security		(more flexible than for SE)
FR	YES . Majority: unanimity	NO . If publication requirements are not complied with, the transfer is not binding on third parties	NO	NO (more flexible than for SE)
IT	YES . Majority: qualified majority . Shareholders who voted against the transfer are allowed to withdraw from the company	NO	NO	NO
LU	YES . Majority: extraordinary general meetings but unanimity when commitments of the shareholders may be increased	YES . Unanimous consent of the bondholders required when their commitments may be increased (applicable to *sociétés anonymes* only)	NO	NO
Comparison with EU structures (SE, SCE)				
S.E.	Possible under national laws	Possible under national laws	YES	Possible under national laws on grounds of public interest
S.C.E.	Possible under national laws	Possible under national laws	YES	Possible under national laws on grounds of public interest

Source: JeantetAssociés

For a more detailed discussion of this topic, see ***Annexes 4*** *(available only in electronic format)* ***and 5.***

B) Inbound transfers

For inbound transfers, from the Host MS point of view (**CY, CZ, ES, FR, IT**), the same documentation as for the incorporation of a national company is generally required. In addition, they mainly require information to ensure that:

- the transfer with maintenance of the legal entity is not prohibited or complies with the requirements of the Home State (CZ);

> However, some jurisdictions (ES) are more flexible and presume that the legislation of the Home MS (and of all EEA countries) allows for the maintenance of the legal entity.

- the company is duly registered in the Home MS (certificate of incorporation);

- the transfer has been duly authorized (and published) by the competent body (resolution of shareholders and, as the case may be, debenture holders and/or creditors, notifications, etc.);

- the company is in good standing, solvent and no liquidation or insolvency or similar proceedings have been initiated against the company (statement of solvency, expert opinion showing that the company's assets are at least equal to the amount of the registered capital, etc.);

- the company's memorandum and articles of association comply with the legislation of the Host MS.

Some MS have additional requirements such as (i) rules on maintenance of registered capital (CZ), (ii) rules on balance sheet to be provided as of the date on which the company is incorporated in the Host MS (CZ).

The public notary can play an important role in the Host MS: when competent, his role is mainly to control whether the company met all the requirements under Host MS law (in CZ for example).

If the company is carrying out a licensed activity, it will need to satisfy the Host MS licensing criteria for the relevant activity.

The MS adopting the Real Seat Theory (IT for example) generally require the transfer of the registered office but also the transfer of the effective place of management and the real seat to the Host MS.

The national legislations provide for an incorporation in the Host MS before the de-registration in the Home MS and the notifications between the competent authorities (registries) of the MS concerned.

*For more detailed information on this topic, see **Annexes 4** (available only in electronic format) **and 5.***

2.3.1.2. Statistics

We received information and statistics regarding cross-border transfers carried out from Spain, Cyprus, Czech Republic and Malta where national legislation on cross-border transfers has been adopted.

In **Spain** (2010-2012):

- Outbound: 29 companies
- Destination: EU 62%
- 79.33% of them are *Sociedad limitada*
- 69% are companies with multiple shareholders.

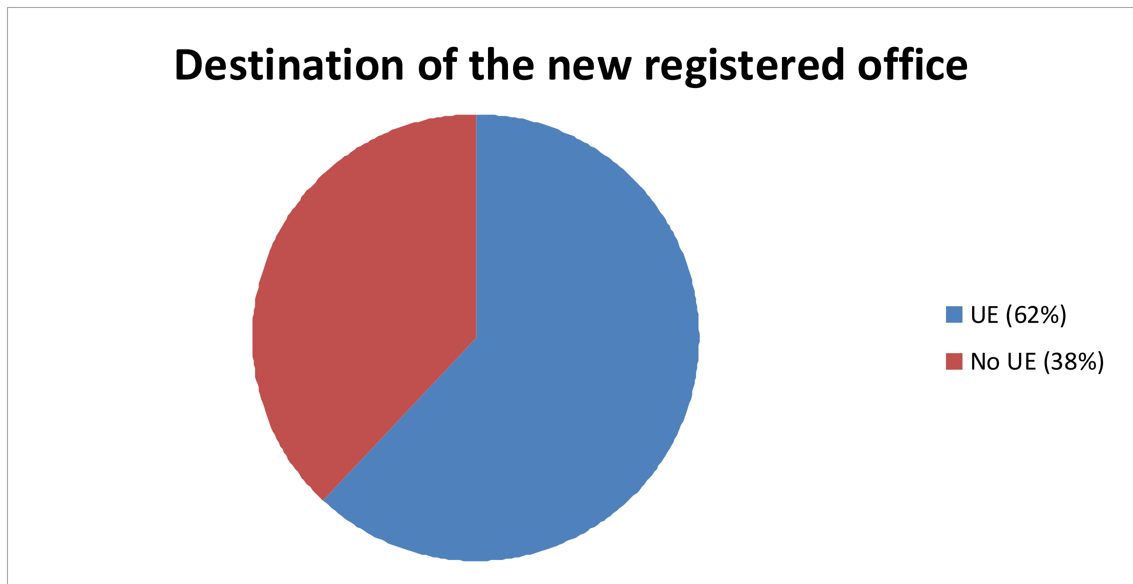
Table 3 - Statistics - Transfers of registered offices from Spain to other countries (2010-2012)

	Initial Company Name	New Company Name	Type of company	Place of Origin	Country of Destination	Status of the Transfer
1.	Kuo Europa, S.L.	Kuo Europa, S.A. de Capital Variable	S.A. de Capital Variable	Madrid (Spain)	México	In process
2.	BearingPoint Software Solutions, S.L.U.	BearingPoint Software Solutions Limited	S.L.	Madrid (Spain)	Bermuda	Registered (14.07.11)
3.	Biomedical & Cosmetic International Distribution, S.L.U.		S.L.U.	Madrid (Spain)	Italy	Registered (03.05.11)
4.	Brion Espña, S.A.U.	Brion Spain, S.L.	S.L.	Madrid (Spain)	Italy	Registered (27.02.12)
5.	Calatrava & Family Investments, S.L.U.		S.L.U.	Madrid (Spain)	Switzerland	In process
6.	Diakonia Hotelera, S.L.		S.L.U.	Madrid (Spain)	Portugal	In process
7.	EMFD Europa Inversiones y Marketing, S.L.U.		S.L.U.	Madrid (Spain)	Italy	Registered (14.12.10)
8.	Fernet Vittone Dal 1842, S.A.U.		S.A.U.	Girona (Spain)	Uruguay	In process
9.	GATX Spanish Holding Corporation, S.L.U.	GATX Global Holding, GMBH	S.L.U.	Madrid (Spain)	Switzerland	Registered (18.10.10)
10.	GMR		S.L.	Bilbao	Malta	In process

	Infraestructure Overseas, S.L.			(Spain)		
11.	Grupo Eurocasa Dorada, S.L.		S.L.	Barcelona (Spain)	Perú	In process
12.	Grupo Eurocasa XXI, S.L.		S.L.	Barcelona (Spain)	Perú	In process
13.	Hotel Salinas Mar, S.L.		S.L.	Madrid (Spain)	Portugal	In process
14.	Invesglob Holding, S.L.	Invesglob Holding, S.R.L.	S.L.	Barcelona (Spain)	Italy	Registered (15.06.11)
15.	Meadwestvaco Spain, S.L.U.		S.L.U	Bilbao (Spain)	Luxembourg	In process
16.	Mecazteca, S.L.		S.L.	Madrid (Spain)	México	In process
17.	Milenton Inversiones, S.L.		S.L.	Madrid (Spain)	Perú	Registered (27.06.12)
18.	Moog Europe Holdings y Cia. Sociedad Comanditaria Simple		S.C.S.	Bilbao (Spain)	Luxembourg	In process
19.	Novacere, S.l.		S.L.	Madrid (Spain)	Italy	In process
20.	Open Source Security Information Management, S. L.		S.L.	Madrid (Spain)	United States	In process
21.	Pharmacies Europeennes Holdings, S.A.		S.A.	Madrid (Spain)	Perú	In process
22.	Prader Inversiones 2007, S.L.U.		S.L.U.	Madrid (Spain)	Italy	In process
23.	Tenivi, S.L.		S.L.	Bilbao (Spain)	Portugal	Registered (17.05.12)
24.	Tubérculos y bulbáceos, S.A.		S.A.	Madrid (Spain)	Uruguay	In process
25.	Upthehill, S.L.U.		S.L.U.	Ibiza (Spain)	Malta	In process
26.	Valcerrada Inversiones, S.L.		S.L.	Madrid (Spain)	Luxembourg	In process
27.	Varipromo, S.L.		S.L.	Barcelona (Spain)	Luxembourg	In process
28.	Wyckstrynam Propiedades, S.L.	Wyckstrynam Propietes, S.A.	S.A.	Málaga (Spain)	Luxembourg	In process
29.	Zermatt Pharmaceutical, S.L.		S.L.	Madrid (Spain)	Perú	In process

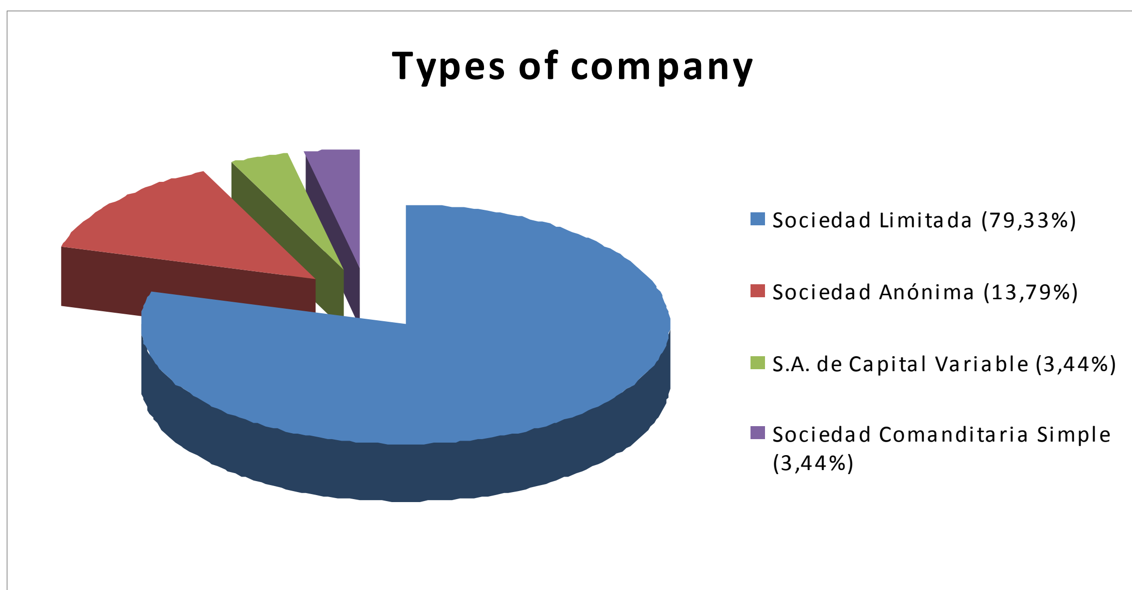
Source: Gomez-Acebo & Pombo

Figure 1 - Destination of outbound transfers from Spain (2010-2012)



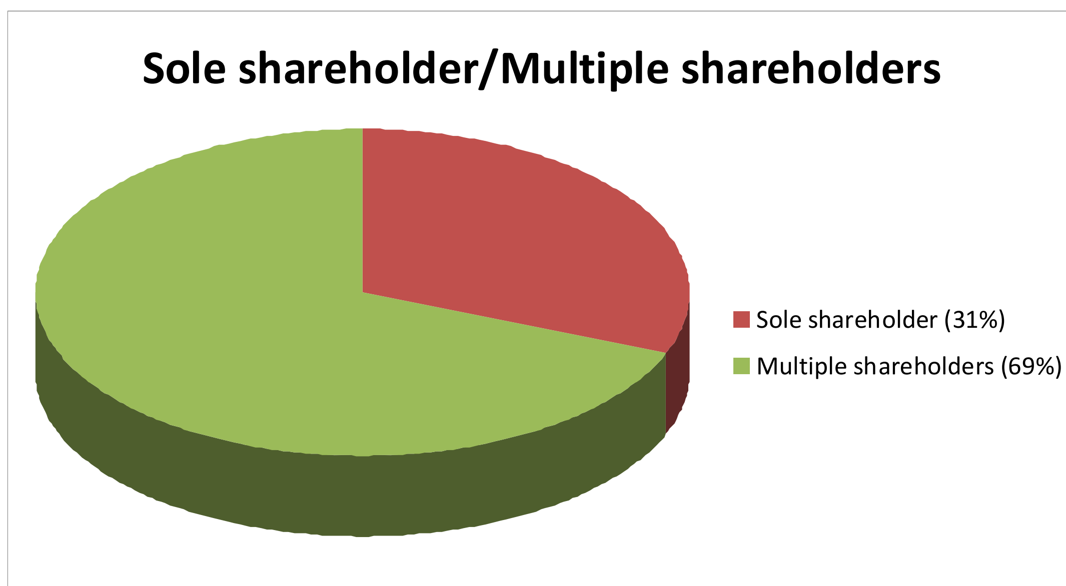
Source: Gomez-Acebo & Pombo

Figure 2 - Types of companies moving out of Spain (2010-2012)



Source: Gomez-Acebo & Pombo

Figure 3 - Shareholding of companies moving out of Spain (2010-2012)



Source: Gomez-Acebo & Pombo

Cyprus: In view of the competitive advantages of Cyprus as a jurisdiction, the movement is expected to be predominantly inbound rather than outbound.

Czech Republic: The national regulation on cross-border transfers is very new (effective since 1 January 2012) and therefore more changes of seat via conversion of company might follow. The only case known to our correspondent so far is of a limited liability company that moved its seat from Italy.

Malta: The Maltese registry of companies has recorded 102 cross-border transfers of registered office from one of the MS to Malta or from Malta to another MS during the last three years. Divided among the last three years, the statistic is the following: 2010: 33 transfers; 2011: 31 transfers; 2012: 12 transfers (figures registered up until 30 June 2012).

In these jurisdictions, the following issues have been noted:

- the cross-border transfer will change certain laws applicable to the company and its stakeholders and may challenge the rights acquired by those stakeholders under the Home MS,
- between the registration in the Host MS and the de-registration in the Home MS, the company will be in a transitional situation which may cause legal uncertainty. The correct coordination between the commercial registries of the involved countries remains essential.

According to our investigation in the MS concerned, the advantages of such national legislation for companies are twofold:

(i) a company may "forum shop" for the most convenient jurisdiction in which to continue its activities whether in tax, organization, market demand or other terms;

(ii) a company may effect such a move without having to endure liquidation or winding-up proceedings in its jurisdiction of incorporation. Such a transfer should produce the same effects as a cross-border merger which in accordance with the EU Tax Merger Directive[76] is tax-neutral (see CY comments in ***Annex 4*** for example. Note: annex available only in electronic format).

However, if the company does not need to keep its history and does not insist on its continuance and it merely needs (for any purpose) to change its seat abroad, the manner of winding up the current company and establishing a new one abroad might be easier and cheaper.

First, if the company needs to move its business quickly, it can establish a limited liability company abroad, which in most jurisdictions is very easy. There are also many providers of so-called shell companies and therefore only minimum time is necessary (approximately two to four weeks depending on the jurisdiction). The registration process of such company has already been accomplished by a different company which holds the shell company and keeps it dormant until it is purchased. A shell company can start trading as soon as directors are appointed and shares are transferred to the purchaser. The costs are also lower, as expert opinions and reports are not required. The process of winding up is of course linked to formal and financial difficulties (depending on the size of the company); however, in most cases the company does not need to be wound up immediately and sometimes it might be even advantageous to keep an "empty" (i.e. not performing) company alive (see CZ comments in **Annex 4** for example).

2.3.2. MS with no national legislation on cross-border transfers

Most MS' legal systems have no mechanism ensuring that companies can maintain their legal personality when they transfer their seat within the EU (AT, DE, NL, UK for example).

The transfer of a company's seat abroad is controversially discussed and considered to be null and void or qualified as a dissolution of the company in its Home MS (AT).

Any foreign legal entity attempting to transfer to such MS would not be recognized as such.

[76] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

Nevertheless, in light of the most recent ECJ case law (see paragraph I. 1.2 above), part of legal writing supports the transfer by means of legal analogies to national company conversion legislation. However, there is no case law in this respect and the exact manner of how such an analogous application could take place remains unclear.

It is highly difficult, even impossible, to provide statistics on inbound and outbound transfers from and out of those MS since such information is not publicly available. Nevertheless, we can observe that the legislative basis for the SE or the SCE is not specifically used in those MS to perform a cross-border merger (see above).

The question here arises whether it could be in theory possible to perform transfers (i) according to national laws when there is no specific national legislation dealing with the procedure of cross-border transfer and (ii) under article 49 TFEU without any cross-border transfer procedure implemented in national laws.

Our findings show that the co-existence of two different approaches makes it practically impossible, in most cases, for companies to move their registered office to another MS.

One of our concerns was to identify whether the registry of a Host MS will accept to incorporate a company by way of a cross-border transfer on the basis of an affidavit issued by the legal representative of the company, a lawyer or any other person from the Home MS stating that, although the Home MS does not provide for such transfer, the transfer is regularly carried out in compliance with article 49 TFEU and EU case law.

The answers are different according to the jurisdictions. In such a situation, the registry of the Host MS can refuse or accept to incorporate the company. Some registries answered that they could decide depending on the company concerned or the interest of the Host MS to have the company incorporated in its MS.

Furthermore, we should assume that the transfer could be challenged in the Home MS itself, by creditors for example but also by the State (of the Home MS) itself.

As from the incorporation of the company in the Host MS, we assume that the transfer should not be declared void but the risk is that stakeholders could seek damage indemnification.

Nevertheless, on the basis of ECJ case law, in the event of a refusal of incorporation by the Host MS, the company would be able to bring an action before the ECJ for violation of the freedom of establishment since national legislation of the Host MS on conversion of national companies allows such operation. But this is a theoretical, time consuming and costly option for the company, the constraints of which should deter it from carrying out any action.

In those MS with no national legislation on cross-border transfers, we tried to identify whether companies use the CBM Directive or the SE status to operate transfers. As in most of those MS, it is not possible to receive accurate information, so it was not possible to answer this question.

For example, in Finland, Finnish legislation allows to perform a transfer only with respect to SE. In this MS, only 2 transfers of registered office of SE have been identified (1 inbound and 1 outbound, see Map 1). According to the information received from the Finnish National Board of Patents and Registration, Trade Register department, a total of 48 cross-border mergers have been initiated as of the 2007 amendment of Companies Act which made cross-border mergers possible in Finland (18 outbound and 10 inbound mergers have already been implemented).

For a more detailed discussion of this topic, see ***Annex 4*** *(available only in electronic format).*

2.3.3. General comments from stakeholders

Interviews have been conducted with several French, Italian and German listed and non-listed companies operating in many MS and in areas such as telecommunications, mining, finance and pharmaceuticals as well as with stakeholders in the selected MS.

Here below is the summary of their views on three strategic questions:

- **Perception of cross-border transfers by stakeholders**

In general, cross-border transfers have been perceived as an important topic but not as a mass movement.

The majority of the companies had not performed a cross-border transfer of the registred office.

One company had done so on the basis of French legislation, another on the basis of the SE Regulation and a last based on the CBM Directive.

Some were also aware of companies in their business environment that had transferred their seat within the EU. Only a small number have used other means of cross-border mobility such as a demerger or a partial transfer of assets, creation of subsidiaries in different MS or the winding-up, liquidation and incorporation of a new company in a different MS.

Only half of the company respondents deemed the topic of cross-border transfers to be important for their company. The same picture emerges with respect to the question as to whether the mobility of companies within the EU is an instrument to ensure competitiveness in a globalized world. For some it was decisive, for some useful and for others cross-border mobility was insignificant.

Other parties perceived the topic from different angles. Even though generally being in favour of cross-border transfers, stakeholders related to the State primarily stressed the risks that cross-border transfers could pose and therefore the need for adequate protection (France, Czech Republic) and also referred to their own recently adopted legislation on the matter of cross-border transfers and in reaction to ECJ case-law (Czech Republic). Others, such as financial advisors, stressed the opportunities that cross-border transfers could bring (Ireland) or also pointed to simple practical issues, such as what it means for the attendance of shareholders at general meetings. If a seat is transferred to a different MS it could be that less shareholders would attend such a meeting which could change the way in which a company is run (Ireland).

- **Obstacles to company cross-border transfers in the EU**

As main obstacles, companies identified the non-harmonized system on cross-border transfers in the EU, exit taxation and time-consuming and complicated systems for cross-border transfers under the SE Regulation and the CBM Directive.

Further main obstacles were the legal uncertainty created by the complicated rules of ECJ case-law, differences in the legal systems between civil and common law countries and also the expensive system for cross-border company transfers under the SE Regulation and the CBM Directive.

- **Should the EU legislator take action to facilitate the cross-border transfer of a company's registered office?**

All interviewed companies expressed that the EU legislator should take action (Italy, France, Germany).

Other stakeholders have more diversified opinions on this topic. Industry representatives are likely to agree, as their companies are generally in favour of EU legislation (Czech Republic, Ireland, France).

Government authorities are less enthusiastic and stress the risks that cross-border company cross-border transfers can pose to different stakeholders (France).

Yet, a general agreement seems to exist that principles should be developed on the European level and that national legislators should deal with the more detailed provisions. Yet, at the same time it was also noted that the EU legislator should give guidance in respect to certain issues such as the criteria for opposition rights for national authorities (France).

For a more detailed discussion of this topic, see ***Annexes 4 and 8*** *(available only in electronic format)***.**

3. The tax standpoint

A reminder and synthesis of the following regimes should be provided to indicate the level of tax harmonization and the scope of these measures which is not limited to SE:

- Corporate income tax regime applicable to cross-border transfers of corporate seats under the EU tax merger Directive[77] and ECJ case law (namely *National Grid* Indus BV,[78]);

- Corporate income tax regimes applicable to the said operations under domestic tax laws (namely in France);

- Registration duty regimes applicable depending on the MS where the transfer is realized (host country);

- Corporate income tax regime applicable to cross-border mergers under the EU tax merger Directive.

However, even harmonized, applicable tax regimes still provide areas of uncertainty:

- ECJ case law applicable to the transfer of corporate seats (elimination of any condition relating to the maintaining of a permanent establishment in the original country) could trigger tax dumping and, in return, so much uncertainty regarding further developments (legislation work or further case laws at EC and/or domestic level) that cross-border operations could be contested.

- Flexibility provided by recent ECJ case law (immediate taxation vs. deferred taxation together with warranties and/or late interest/penalties) would leave further harmonization work in the hands of domestic parliaments and/or courts (triggering different rules in each jurisdiction within the EU).

- Cross-border mergers themselves could also be in the scope of such uncertainty due to the fact the EU tax merger Directive also provides for a permanent establishment condition which might in turn be considered contrary to the freedom of establishment.

3.1. State of European tax harmonization regarding transfers of seat

A harmonized tax regime applicable to transfers of seat within the EU is provided, for *societas europaea* ("SE") and assimilated entities ("SCE"), by the EU tax merger Directive.

[77] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

[78] ECJ 29 November 2010, *National Grid Indus BV*, C-371/10,

Such operations can be carried out under tax neutrality when the following conditions are met:

- Assets located in the Home MS are maintained in this MS as attached to the balance sheet of a permanent establishment located in such Home MS;
- Amortization and provisions booked by the SE remain recorded as if the transfer had not been realized.

When these conditions are met:

- Capital gains realized on the assets (difference between their market value at the time of the operation and their tax value) of the transferred entity at the time of the transfer are not taxable;
- Gains or income generated by the shareholders of the transferred entity at the time of the said transfer are not taxable.

However, the said EU tax merger Directive provides for the possibility for MS to tax the gain to be further realized on any disposal of the shares of the transferred entity.

3.2. Unfinished tax harmonization regarding transfers of seat to be compensated by ECJ case law

Some remarks could be made to highlight the fact that this harmonization process is only partial and could be broadened and rendered more permissive when considering freedom of establishment.

Indeed,

- The EU tax merger Directive does not provide the tax consequences of such transfer of seat for the shareholders (individuals and/or corporations). Such consequences are thus provided by domestic tax provisions, mostly domestic regulations (particularly in the case of France) issued by the local tax authorities referring to tax regimes available for exchange of shares in the case of a merger.

- The scope of the provisions of the EU tax merger Directive concerning transfers of seat does not encompass corporations' forms which are not SE or SCE. Tax regimes applicable to transfers of seat of other forms of corporations are provided by domestic tax provisions such as French tax code, art. 221, 2. However, such provisions are slightly unclear as they simply indicate that the tax consequences of the cessation of a business (taxation of latent capital gains) are not applicable to transfers of legal seat to another MS. For French Tax authorities, based on unwritten practice/regulations, the non-taxation of the transfer by a French resident company of its legal seat to another MS is conditioned by the setting up of a French permanent establishment in which all or part of taxable assets remain located in France[79], France thus remaining the jurisdiction entitled to tax both (i) business profits generated by the business conducted in France and (ii) further capital gains to be generated by any

[79] Unpublished Official Tax Bulletin 4 A-…-05 n°16.

disposal of assets recorded in the balance sheet of the said French permanent establishment.

- Significant registration duties might be applicable in the Host MS. For example, in case of a transfer of seat including a transfer of ongoing concern (the latter not being maintained in the permanent establishment set up in the Home MS), registration duties of 5% might apply to the market value of the asset thus materially transferred from the Home MS to France (host MS).

- The domestic provisions governing the tax regime of transfers of seat across EU borders but also the EU tax merger Directive providing for tax neutrality were to some extent regarded as contrary to the freedom of establishment provided by the EU Treaty. Indeed, the condition for tax neutrality referring to the necessity to leave a permanent establishment in the Home MS when transferring the seat of a company is *per se* a limit to such freedom. This position was actually confirmed as ruled by recent ECJ case law in *National Grid Indus BV*[80]regarding the transfer of seat of a Dutch company in the UK.

According to this case law, the non-taxation of such an operation should not anymore be conditional upon maintaining assets in the Home MS (to be regarded as a permanent establishment). Indeed, the Court has underlined that:

- Article 49 of the Treaty is compatible with a MS's legislation providing that the amount of tax on unrealized capital gains relating to the company's assets would be definitively assessed at the time where the company stops collecting taxable profits in the first MS due to the transfer of its legal seat in another MS;

- The MS's legislation laying down the immediate payment of the tax on unrealized capital gains relating to the assets of the company transferring its seat in another MS, at the time of the transfer, would be disproportionate to the public objective of a balanced distribution of the taxing power.

The measure forbidding, tightening and/or making less attractive the exercise of the freedom of establishment is thus regarded as an unjustifiable restriction to this freedom.

The EU judges have underlined that a local legislation solely providing a mandatory taxation mechanism at the time of the transfer would be contrary to the freedom of establishment. They thus state that to cope with such freedom, domestic tax legislations would have to provide the company transferring its seat with the choice between (i) an immediate payment of the tax (creating a drawback for cash management purposes) on the one hand, and (ii) a tax deferral (which would trigger an administrative burden related to the monitoring of the transferred assets) on the other hand.

Moreover, EU judges have stated that tax authorities could ask, together with the deferred payment, for the payment of late penalties and the provision of bank guarantees

[80] ECJ 29 November 2010, *National Grid Indus BV*, C-371/10,

to ensure later payment of deferred tax. These later aspects could be debatable in light of the freedom of establishment principles.

3.3. Open questions in the framework of existing European tax legislations

Transposition of the principles emerging from the *National Grid Indus BV* case law (i.e., application of tax deferral conditioned upon the maintaining of a permanent establishment in the Home MS is contrary to the freedom of establishment) in domestic legislations is likely to reveal unresolved questions.

A first issue is to manage the tax treatment of the transfers which would be realized over the period between the date of the *National Grid* case law and the date of transposition of such case law into the domestic tax system. Indeed, when transferring its legal seat in another MS – with no creation of a permanent establishment in the Home MS – a corporation might in the meantime adopt one of the following two solutions:

- A definitive exemption of the unrealized capital gains in the Home MS; or
- A deferral of taxation in the Home MS (as applied in Italy or in the Netherlands).

The possibility of benefitting from a definitive tax exemption in the Home MS seems however highly uncertain. It seems more prudent to apply for a deferral regime (through special/informal notices to be provided to the Home MS' tax authorities and referring to the *National Grid Indus BV* case law) even if such deferral is not yet provided by domestic provisions.

Other questions remain open and their potential answers still appear uncertain:

- Determination of the tax basis and applicable tax rates. Three solutions might be chosen by domestic legislators (or EU legislator if a Directive is adopted):
    - Introduction of a deferment of taxation: the tax basis and tax rate would be determined at the time of the disposal of the asset;
    - Introduction of a tax deferral: the tax basis and tax rate would be determined, and thus crystallized, at the time of the transfer of the legal seat[81];
    - Introduction of a regime mixing rules of the above two mechanisms.

- Further tax treatment of the gain thus realized

A question also arises concerning the tax treatment of the gain realized at the time of the transfer, namely how the Host and Home MS would apply domestic tax regimes such as participation exemption regimes and whether the Host and Home MS would compute the holding period as of the date of acquisition or as of the date of the transfer of seat.

- Definition of events ending the deferral of taxation

Host MS domestic laws could allow stepping up the basis of the assets for accounting and tax purposes (together with the possibility to further amortize such reevaluated basis). In such cases, it is uncertain whether the basis step up of the assets transferred (and eventually the corresponding further amortization) would be regarded in the Home

[81] This hypothesis could be justified by the position of the UE case law, which proposes a mechanism deferring only the assessment of the tax.

MS as an event triggering the end of the tax deferral applied at the time of the transfer. It would thus be necessary to clarify which events could end the deferral of taxation.

- Valuation of transferred assets

In particular, situations could arise where the Host MS would require the use of valuation methods differing from those used in Home MS. Such situations should limit the freedom of establishment as requiring the taxpayer to liaise with tax authorities namely to discuss the valuation of the transferred assets in order to secure the operation (evaluation at fair market value, amortization methods, etc.).

As a conclusion, it could be noted that the lack of completeness of the tax harmonization triggers additional tax uncertainty which should be regarded as a *per se* contradiction to the freedom of establishment guaranteed by the Treaty. Further case law developments are indeed not sufficiently broad to answer all questions relating to complex operations.

It should finally be noted that leaving harmonization completeness in the hands of the ECJ is also a way to re-open questions that were considered already closed.

3.4. Uncertainty triggered by ECJ case law

ECJ upheld the *National Grid Indus BV* case law where EU tax provisions regarding transfers of seat within the EU were incomplete and not sufficiently clear. As already discussed here above, such case law leads to regard domestic legislations conditioning tax neutrality upon the recognition of a permanent establishment in the home MS as contrary to the freedom of establishment.

Such considerations could also be used where applying the EU tax merger Directive provisions regarding both transfers of seat of SE/SCE (art. 12) and cross-border mergers of corporations within the EU (art. 4). Indeed, the said operations (transfers of seat of SE/SCE and cross-border mergers of corporations within the EU) are to be carried out under tax neutrality only in cases where a permanent establishment remains in the Home MS.

The *National Grid Indus BV* case law could be read as a way to perform cross-border mergers within the EU or transfers of seat of a SE/SCE with no requirements attached to the further recognition of a permanent establishment in the Home MS.

As a matter of fact, it should be thus concluded that the relative no-action approach used in the tax field at the EU level leads to a certain level of tax uncertainty:

- No harmonized corporate/personal income tax regime for shareholders of the company transferring its seat;
- No actual corporate tax regime harmonization for non SE/SCE companies transferring their seat but the *National Grid Indus BV* case law;
- No transfer tax harmonized regime for transfers of seats of all kinds of corporations including SE and SCE;

- Open questions on the potential impact of the *National Grid Indus BV* case law on the conditions set out by the EU tax merger Directive to perform cross-border mergers and/or transfers of seat of a SE/ SCE;
- Open questions regarding further consequences of the transfers of seat on both the event subject to trigger the end of the tax deferral applied at the time of the transfer and on the way to tax further capital gains, namely on the assets where special tax regimes, such as the participation exemption, are available.

Therefore, and in order to get more tax certainty together with EU harmonization and a respect of the fundamental principles provided by the EU Treaty, so that transfers of seat would be realized in a tax-neutral manner as they are in other quite similar jurisdictions (e.g., the US and Switzerland), the legislative approach should also be recommended in the tax field.

4. First conclusions on legal and taxation issues

A cross-border transfer of a company seat can be performed through EU legislation if the transfer is based on the SE or SCE Regulation or the CBM Directive.

The ECJ considers that a cross-border transfer must be possible based on the condition that the pursuit of an actual economic activity through a fixed establishment for an indefinite period of time is envisaged. Consequently, it presupposes an actual establishment of a company concerned in the MS and the pursuit of genuine economic activity there.

Moreover, such an operation remains subject to national legislation of both the Home MS and the Host MS. So far, there is no legislation harmonizing the cross-border conversions. This can lead to legal uncertainty and very complicated situations, making it under certain circumstances impossible for companies to transfer their seat.

Furthermore, a cross-border conversion will change certain laws applicable to the company and its stakeholders and may challenge the rights acquired by those stakeholders under the Home MS.

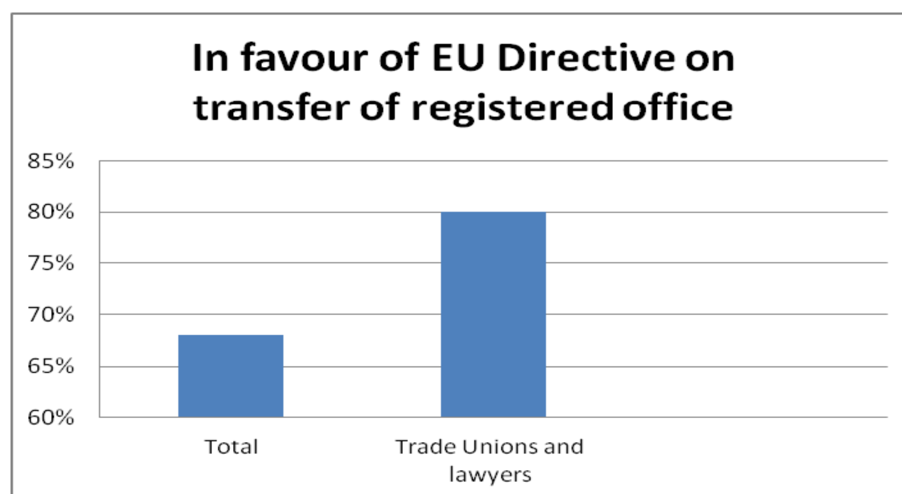
4.1. From a legal standpoint

- **Conclusions from the 2012 Commission's public consultation**

The European Commission consultation on the future of European Company Law released in 2012[82] dealt with the topic of cross-border transfers of the registered office and showed strong support for the EU facilitating the cross-border transfer of a company's registered office (80% of the respondents were supporting the initiative). A strong majority of 68% was in favour of a Directive. Within the group of trade unions and lawyers, even 80% support such an instrument.

[82] European Commission, (2012), Feedback statement: Summary of responses to the public consultation on the future of European company law (July 2012), p. 9-10.

Figure 4 - Answers to the European Commission's public consultation in favour of a EU Directive on transfer of registered office



- **Lessons from comparisons of transfer procedures under existing status**

In the MS where legislation on inbound /outbound transfers has been adopted (CY, CZ, ES, FR, IT, LU), it is very easy in practice to carry out cross-border transfers, not very time consuming and not very costly, but the protection of stakeholders is not ensured in all the MS concerned.

- **Our first conclusions**

The regimes of the SE and SCE, the CBM Directive and case law have worked in making it easier for European limited companies to transfer their seat.

On the basis of ECJ case law, businesses wanting to exercise their freedom of establishment to move the registered office by way of a cross-border conversion within the EU could rely on ECJ case law even when national legislation of the Home MS and the Host MS does not provide any specific rules.

Nevertheless, such conversion is subject to national law provisions on domestic conversions governing the incorporation and functioning of a company. National approaches are not harmonized and company mobility sometimes remains an unresolved issue.

- ✓ It runs the risk that both the Home MS and Host MS decide to apply their national provisions regarding conversions which could be highly complicated, even impossible, for companies if the conditions are not compatible.
- ✓ It runs also the risk of resulting in "unregulated" transfers, with no guarantees on the provision of information to all stakeholders - employees, creditors or minority shareholders - in the absence of specific legal provisions.
- ✓ It threatens the completion of the Internal Market.

According to our investigations in the various MS, the **disadvantages of an active legislative approach** could be summarized as follows:

1. It is asserted that creditors and minority shareholders would not be able to stop the transfer (CZ)
2. Harmonization of existing national legislation on cross-border transfers could lead to more administrative burdens and a complication of the process, with suitable transitional provisions required (CZ)
3. The easier migration of companies might strengthen the internal market, but on the other hand might have a substantial negative impact on third parties if their protection is not adequately ensured (for more details, please refer to Table 4 and Table 5 on the consequences of a transfer for stakeholders)
4. Due to an easier movement of company seats, creditors might have difficulties in enforcing their rights. On the other hand, if a company winds-up with the transfer of its assets and liabilities into a new company created abroad, the original company may not have sufficient resources to face all its debts so that the creditors' position might be even worse than if the company merely moved its seat without liquidation
5. Lack of coordination amongst the different countries, since a common legal system does not exist for all the involved countries that could in practice facilitate the transfer of the registered office
6. A EU-wide legislation facilitating inbound mobility may be viewed as dilution of some MS high standards, in particular related to creditor protection (AT)
7. If the EU legislation is either poorly constructed or implemented, it would give rise to new difficulties for the companies which they could avoid by keeping their registered office in their Home MS and doing business in another MS (DE)
8. Less flexibility (LU)
9. Some MS governments (NL, FR for example) are reluctant to develop a legislative basis for the purpose of cross-border conversion of companies. It is generally held that through such conversion, companies can circumvent or escape from (mandatory) provisions of a MS's corporate law relating to capital requirements, constitutional requirements, interests of minority shareholders, sectorial regulations or creditor protection[83]
10. A transfer of seat could be used to avoid more burdensome jurisdictions or judicial systems (forum and law shopping)
11. There might be insufficient protection for creditors, employees[84] and other stakeholders, as they could be based in one MS, but with the company itself being governed by a separate MS
12. There might be insufficient protection for minority shareholders.

[83] L. Timmerman, (2009), *Willen we dit?*, Ondernemingsrecht 2009, 18.

[84] National legislation of the Home MS could provide for, as a condition precedent to the completion of the transfer, the conclusion between the managers of the company and the employees concerned of an agreement on the participation of employees in the company after the transfer if such participation rights exist before the transfer.

According to our investigations, the **minimum aims of an active legislative approach** would be the following:

1. Adequately respond to the growing internalization of economic operators and facilitate the single market in accordance with Article 4 TFEU
2. Provide more legal certainty
3. Lead to the unification of the legal legislations in all MS, thus easing the process
4. Assure compatibility among the several jurisdictions, in particular with reference to the transfer of the registered office by way of the conversion of the company. This means that the EU legislation should regulate at least the allocation of the "competence" of the Home MS and the Host MS with respect to the implementation of the corporate formalities, the protection of the shareholders and the creditors, the circumstances in which the transaction must be not allowed due to fraud (i.e. in the event the sole purpose of the transaction is the avoidance of the application of certain laws by the Home MS)
5. Provide companies with a practical and reliable scheme to transfer them into a company under the respective foreign law while retaining its identity
6. Provide safeguards to stakeholders, including shareholders and ensure the protection of employees
7. Ensure that the transfer of seat is not misused for avoidance (of tax or social security obligations) purposes
8. Ensure that employees must always be duly informed of a planned cross-border transfer
9. For an active and successful legislative approach it should be required that there be some form of harmonization in the EU, firstly in the field of corporate governance; in the event the MS would essentially apply the same corporate governance standards, there would be less reluctance in some MS for cross-border conversion of companies
10. Reduce costs, as it is expensive and cumbersome to dissolve a company in one country and incorporate a new one in another country
11. Make it simple for small businesses to transfer their seat
12. Consolidate the two inconsistent principles which exist (i.e. the Incorporation Theory and the Real Seat Theory)
13. Increase transparency, flexibility and uniformity, as there will be improved information exchange; and
14. Facilitate a less complex system for takeovers.

Accordingly, our first conclusions on minimum aims of an active legislative approach are in line with the recommendations given by the European Parliament in the 2009 Lehne report and the 2012 Regner report. These reports also stress the need for legal certainty, adequate stakeholder protection and that it should not be misused for avoidance purposes.

As stated above, we have also identified certain disadvantages of an active legislative approach as put forward by interviewees in different MS. **Yet, in view of the possibilities provided for by the ECJ *Vale* judgment, the need for legal certainty and predictable procedures, and adequate stakeholder protection, the advantages of an active legislative approach outweigh the disadvantages**.

4.2. From a tax standpoint

Further legislative work would be required within the framework of the tax treatment of cross-border operations to aim at ensuring the applicable regime to such cross-border transfers of seat, but also at strengthening the possibility of carrying out cross-border mergers.

It would also be of importance to balance the needs for the tax authorities to obtain warranties ensuring, for instance, the payment of tax on capital gains, together with the management of an additional administrative burden for taxpayers, namely regarding the follow-up of latent capital gains generated over a period including the transfer of seat.

Part II - Lessons to be drawn from non-European models

1. The US system

Due to the Delaware effect,[85] which for many years has triggered discussions on the impact of cross-border transfers in the US, it is crucial to consider the United States system and analyze which conclusions can be drawn from this system for the EU.

As a consequence, it is important to outline several aspects of inter-state cross-border transfers in the US, such as how a US reincorporation can be conducted, which choice of law theory the US applies, which stakeholders can be affected and so on. This discussion will come to the conclusion that even though the US has a long-standing tradition in the field of company cross-border transfers, the situation is fundamentally different and as a consequence, conclusions drawn for the US, such as with regard to stakeholder protection, regulatory competition or incentives for cross-border transfers, should be treated with utmost caution.

1.1. The US inter-state cross-border transfer procedure

It is important first to state that in the US, incorporation ("company seat") is a matter of state law, not federal law. Each of the 50 US states has its own corporate law, which governs the corporation's "internal affairs" and is the main source for corporate law concerning the companies incorporated therein.

Inter-state transfers are in the US primarily possible either through a merger into a newly-formed corporation or a domestication, which is principally a conversion into a foreign company law form through an inter-state transfer. The Model Business Corporation Act (MBCA) was fairly recently amended to provide for "domestication.".[86] Domestication must be permitted by both jurisdictions. The following parts will also focus on a domestication procedure.

1.2. No actual economic activity

There is no requirement that a company's operations be located in the State where the company is incorporated; indeed, most large publicly-traded companies are incorporated in Delaware but very few have any substantial corporate operations there. A corporation incorporated in a state must have a "registered office" and a "registered agent" (for service of process, so they can be sued in the state)[87].

Corporations may have to file forms to authorize them to do business in states other than the one in which they are incorporated (this is sometimes called "qualification to do

[85] The Delaware effect signifies that jurisdictions compete for reincorporations.
[86] See MBCA Section 9.20.
[87] See, for example, MBCA Section 5.01, and DGCL Sections 131 and 132.

business as a foreign corporation”). What it means to do business — what triggers the need to file the form — varies, but the filings are typically not onerous.[88]

1.3. Protection of stakeholders

1.3.1. Protection of shareholders

Depending on the type of transaction, a shareholder vote might be required; it is also possible that shareholders might get appraisal rights[89].

The law varies from state to state[90].

Shareholders may have other ways to take action regarding a transaction they oppose. For instance, they are allowed to sue directors and officers of a company for “breach of fiduciary duty,” which may include some fact relating to one of these transactions. But the hurdles on shareholder action are fairly high.

Federal securities law is also relevant, both for domestication (or conversion) and for alternative means of achieving a “reincorporation.” It governs solicitation of “proxies” for shareholder votes, specifying what information shareholders must receive and various other mechanics related to the approval process for public companies. [91]

1.3.2. Protection of creditors

MBCA 9.20(f) relates to creditor rights. The clause provides in effect that references to mergers in loan and related documents shall be deemed to include references to domestication[92].

Where domestication/conversion is not possible or 9.20(f) is not enacted or effective, in many types of transactions, creditors continue as creditors of the new corporation. Moreover, many types of creditors will negotiate provisions in their credit agreements that cover their rights in the event of major changes; the debtor will promise not to make certain major changes unless it in effect either seeks creditor agreement or the creditor’s rights will not be impaired by the change.

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[88] See, for example, DGCL Section 371, and MBCA Chapter 15.

[89] Shareholders get to vote on many significant sales of assets; they rarely if ever get to vote on purchases of assets. Shareholders also may get “appraisal rights” in connection with mergers or merger-like transactions or asset sales.

[90] Many excellent treatises exist, including those by S. M. Bainbrdige (2003), Mergers and Acquisitions (Foundation Press); W. J. Carney (2009), Mergers & Acquisitions: The Essentials (Wolters Kluwer).

[91] State law also contains provisions governing the mechanics of shareholder voting.

[92] Also see comment 6 to MBCA Section 9.20, discussing 9.20(f). The annotated version of the MBCA also contains a very helpful list of states adopting provisions based on MBCA Section 9.20. Delaware’s analogue for non-Delaware jurisdictions in the US is in DGCL Section 265 (conversion of other entities to Delaware corporations) and 266 (conversion of domestic [Delaware] corporation to other entities). (Its analogue for non-US jurisdictions is DGCL 388 and 390; I will refer to these provisions in my answer to question 2 below).

There are also provisions in state law — different states have different provisions — governing creditors' rights, and shareholders' liabilities, if a company dissolves. Creditors may be barred from seeking recovery if the company gives notice and they do not come forward within some prescribed period of time.[93]

1.3.3. Protection of employees

We did not identify any special corporate law provisions that would provide any kinds of rights for employees in the types of transactions that result in a company remaining intact albeit incorporated in another jurisdiction.

The reason why creditors or employees are less protected could be the following: in the US, seat transfers only affect manager-shareholder or minority-majority shareholder relationships. A main reason is that the US legal system uses neither the incorporation theory nor the real seat theory as a rule of private international law. The 'internal affairs doctrine' applies.[94] The fundamental difference to the theories used in the EU is that this doctrine only deals with the internal affairs of a corporation and therefore does not affect other stakeholders, such as creditors or employees. An important difference regarding creditors is that insolvency law is regulated in the US on the federal level.[95] Yet, in the EU, European rules only provide for conflict of law rules for cross-border insolvency proceedings, which are then regulated by national law. Therefore, in the EU opportunistic seat transfers for insolvency law reasons can take place. Finally, US corporate law does not have rules on employee representation on corporate boards as do EU Member States such as Germany or the Netherlands. As a consequence, in the US, it is also not necessary to provide for specific protection regarding employee participation.

1.4. Alternative means to achieve mobility

If there is no statute allowing domestication or conversion, "reincorporation" can nevertheless be accomplished, albeit using alternative routes. A transaction could be structured as, for instance, a merger (typically using a subsidiary or holding company) or a sale of assets. It might, or might not, need to include a dissolution.

1.5. Inbound transfers

Recent law on domestications permits non-US companies to domesticate as US companies if both jurisdictions' laws so allow[96]. In states without laws permitting

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[93] See, for example, DGCL Sections 280-282 and Sections 14.06-09 of the MBCA. See also the discussions of "successor liability" in the short treatises (Bainbridge and Carney) mentioned above for other contexts in which creditors of an entity somehow get rights against another entity with some relationship to the first entity or succeeding to its assets.

[94] Federico M. Mucciarelli, Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U., NYU Law & Economics Research Paper Series No 11-07 (2011), p. 8 et seq and p. 37 et seq.

[95] Federico M. Mucciarelli, Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U., p. 43.

[96] MBCA Section 9.20; DGCL Section 388, both dealing with non US-US domestications.

domestication or something comparable, the alternative means mentioned in the previous section may apply. Corporate law has permitted, and should permit, a series of transactions through which an EU company could become a US company.

1.6. Outbound transfers

The law on domestication directly addresses outbound transfers in the states in which it has been adopted.

DGCL Section 390 also allows corporations that domesticate to another jurisdiction from Delaware to continue to exist in Delaware.

For other States, corporate law should not limit a company incorporated in a US state from "reincorporating" in some manner to another jurisdiction absent special circumstances. Certainly, companies originally in the US sometimes, through a series of transactions, come to be incorporated in another jurisdiction, yet continue their activities in the US. Again, it seems likely that the structure of the transaction would require a shareholder vote. The discussion as to provisions creditors may negotiate in their agreements, and the possibility of some sort of continuing liability by reason of "successor liability" in the event of a dissolution, would apply here.

Some companies incorporated in the US and with extensive operations in the US attempting to become incorporated outside the US for tax reasons have elicited some controversy. One company planned to reincorporate outside the US and then abandoned the attempt after unfavourable publicity.

1.7. Exploring the differences and similarities between the US and the EU system of transfers of the registered office

If a comparison is made with the SE Regulation,[97] the CBM Directive[98] or national cross-border transfers procedures such as in the Czech Republic or Spain, it becomes apparent that in the US, company stakeholders are less protected than in the EU. A reason can be that in the US, cross-border transfers affect only manager-shareholder or minority-majority shareholder relationships. This is the case because the US legal system neither uses the incorporation nor the real seat theory as private international law rules. It rather applies the 'internal affairs doctrine'.[99]

The fundamental difference to the theories used in the EU is that this doctrine only deals with the internal affairs of a corporation and therefore does not affect other stakeholders, such as creditors. For example, important creditor protection mechanisms used in the US,

[97] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
[98] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.
[99] Federico M. Mucciarelli, Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U., NYU Law & Economics Research Paper Series No 11-07 (2011), p. 8 et seq and p. 37 et seq.

such as fraudulent transfers or veil piercing are not part of this doctrine.[100] Other measures such as the equitable subordination are regulated through bankruptcy law on the federal level. Another important difference regarding creditors is that insolvency law is regulated in the US at the federal level.[101] Yet, in the EU, European rules only provide for conflict of law rules for cross-border insolvency proceedings, which are then regulated by national law.[102]

Therefore, in the EU, cross-border transfers can take place based on insolvency law shopping motivations which is not the case in the US. Finally, US corporate law does not provide rules on employee representation on boards of directors as European countries such as Germany or the Netherlands do.

Due to the reason that company cross-border transfers in the US mainly deal with board-shareholders or minority-majority shareholder relationships, the reasons for cross-border transfers in the US can also be found in this field: company owners or the management seek more favourable rules, e.g. applying to their group. The effect that this creates is also known as the Delaware effect. Studies have shown that cross-border transfers to the state of Delaware can increase the corporation's stock market value.[103] Already for nearly 100 years Delaware has this dominating position in the market for reincorporation. In 1913, Delaware adopted liberal corporate rules and since then companies reincorporate in this state. It is stated that Delaware has attracted 82 percent of publicly-traded companies which incorporated between the 1960s and the 1990s and 90% of the New York Stock Exchange-listed companies that transferred their seat between 1927 and 1977.[104]

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[100] Federico M. Mucciarelli, Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U., p. 41-43.

[101] Federico M. Mucciarelli, Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U., p. 43.

[102] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. See also M. Virgos and F. Garcimartin, European Insolvency Regulation: Law and Practice (Kluwer Law International, The Hague 2004), p. 8.

[103] See e.g. R. Daines, 'Does Delaware Law Improve Firm Value?', Columbia Law School Center for Studies in Law and Economics Working paper No. 159 (1999), arguing that Delaware corporate law improves firm value and facilitates the sale of public firms. Yet, see for later studies that do not confirm this effect L. Bebchuk & A. Cohen, 'Firms' Decisions Where to Incorporate', 46 J.L. Econ. (2003) or G. Subramanian, 'The Disappearing Delaware Effect', Journal of Law, Economics & Organization, Vol. 20, No. 1, (2004). See on this topic also L. A. Bebchuck, A. Cohen and A. Ferrell 'Does the Evidence Favour state competition in corporate law?', California Law Review, Vol. 90, pp. 1775-1821 (2002).

[104] L. A. Bebchuck, (1992), Federalism and the corporation: The desirable limits on the state competition in corporate law, Harvard law Review Vol. 105, No. 7, pp. 1443-1510 (1992), http://papers.ssrn.com/abstract_id=415301, p. 8. Referring to R. Romano, The State Competition Debate in Corporate Law, 8 Cardozo L. Rev. 709, 709 (1987) and P. Dodd & R. Leftwich, The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation, 53 J. BUS. 259, 260-61 (1980). See for recent studies on Delaware also B. H. Kobayashi and L. E. Ribstein, 'Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies', University of Illinois Law Review, Vol. 2011, No. 1, 2011 (focusing on LLCs) or M. D. Cain and S. M. Davidoff, 'Delaware's Competitive Reach', Journal of Empirical Legal Studies (2012) (focusing on governing law and forum clauses in merger agreements).

As companies can easily reincorporate in the US, they can also easily 'vote with their feet' as to corporate law issues. Therefore, there has been a vast discussion on regulatory competition between US states on the basis of company cross-border transfers. Particularly after the case *Centros*,[105] this has also triggered a major discussion in the EU as to whether such regulatory competition could also arise as a consequence of more liberal rules on cross-border transfers.[106] Different to the EU, a main incentive for US states to engage in this competition is that states benefit from re-incorporations in terms of franchise tax and fee revenues.[107] Yet, there is no conclusive data for the US whether this competition actually triggers a race to the top or a race to the bottom or whether there is actually regulatory competition at all.[108] A race to the top would mean that states attempt to provide shareholders with rules that enhance the shareholder value. A race to the bottom means that the competition harms shareholders because states loosen constraints on managers and controlling shareholders.[109] It should be realized that both theories in the US are compared to the standard of shareholder value, which is the ultimate objective of US corporate law.[110] In the EU, this is different. MS follow different regulatory systems that do not necessarily focus on shareholder value only.[111]

1.8. Regulatory competition

Moreover, an important question is whether the EU offers the context that cross-border transfers will take place to such an extent that it would trigger meaningful regulatory competition. It is submitted that this is not to be expected.

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[105] ECJ 9 March 1999, Centros Ltd vs. Erhvervs-og Selskabsstyrelsen, C-212/97

[106] P. S. Ryan, (2005), Will there ever be a "Delaware of Europe?", Columbia Journal of European Law, Vol 11:2, p. 187. See for an excellent article also T. H. Troeger, 'Choice of Jurisdiction in European Corporate Law - Perspectives of European Corporate Governance', European Business Organization Law Review, Vol. 6, No. 1 (2005). D. Martin, F. G. Alogna, 'A European Delaware: The Nascent Regulatory Market in Europe', Corporate Finance & Capital Markets Law Review (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345005.

[107] L. A. Bebchuck, (1992), Federalism and the corporation: The desirable limits on the state competition in corporate law, Harvard law Review Vol. 105, No. 7, pp. 1443-1510, http://papers.ssrn.com/abstract_id=415301, p. 7.

[108] M. Kahan and E. Kamar, (2002), The Myth of State Competition in Corporate Law, 55 Stanford Law Review 679. For the opposite opinion see R. Romano, 'Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?', ECGI - Law Working Paper No. 26/2005.

[109] L. A. Bebchuck,(1992), Federalism and the corporation: The desirable limits on the state competition in corporate law, Harvard Law Review Vol. 105, No. 7, pp. 1443-1510 (1992), http://papers.ssrn.com/abstract_id=415301, p. 9-16; M. J. Roe, 'Delaware's competition', Harvard Law Review, Vol. 117, No. 2 (2003), p. 593-596, 635 et seq.

[110] See for shareholder value M. Becht, P. Bolton, A. Röell, 'Corporate Law and Governance', in A. M. Polinsky, S. Shavell (eds.), Handbook of Law and Economics Volume 2 (Elsevier North Holland, Amsterdam/Oxford 2007), p. 842-843 et seq; H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' (2000), http://papers.ssrn.com/paper.taf?abstract_id=204528; R. Kraakman et al., The anatomy of corporate law (Oxford University Press, Oxford 2009), p. 35.

[111] See e.g. M.J. Roe, Political determinants of corporate governance: political context, corporate impact (New York: Oxford University Press, 2003).

In the last decade, stakeholders and academia have yet presumed so.[112] For example the European Commission estimated in its impact assessment from 2007 that up to 303,000 companies (282,000 private companies, 21,000 public companies and 276 listed companies) would potentially transfer their registered office to a different MS if there was a European instrument on the transfer of the registered office. If companies moved in such numbers, a US-like situation would presumably be created and it can well be imagined that regulatory competition would take place. This would not necessarily be linked to tax issues but to public interests not to lose national champions or other important companies.[113]

The figures from the European Commission were based on a study from 2006 that showed that after the cases *Centros*, *Überseering* and *Inspire Art*,[114] 19,686 companies had their registered office in the UK, but operated in a different MS. This was five times more than before the Court had issued its judgments opening new possibilities for company cross-border transfers.[115] The European Commission took the percentage of companies incorporated in a different MS (0.6 to 3 percent) and by that arrived at a potential number of between 60,600 and 303,000 companies out of a total of 10 million limited liability companies registered in the EU that potentially would make use of the possibility to transfer the registered office to a different MS.

Yet, even though the SE figures also show that roughly 5 percent of this company type transfers its seat,[116] which could trigger an even higher total number of potential companies transferring their seats, five years after the European Commission impact assessment, their assessment seems too optimistic.

So far there is only one study showing that many foreign companies used the *Centros* case-law in order to circumvent capital minimum requirements such as existing in Germany. This company migration was very specific. It did not concern transfers of the registered office but of the real seat. In countries following the incorporation theory, this is possible without using any procedure and therefore it is very easy. Mainly it concerned Germans residing in Germany setting up a company in the UK and moving the real seat

[112] See for an academic argument J. Armour, 'Who should make corporate law? EC Legislation versus Regulatory Competition', ECGI Working Paper No. 54/2005, particularly p. 8-32 and W. W. Bratton, J. A. McCahery and E. P. M. Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', ECGI Working Paper No. 91/2008.
[113] See for further reasons also a very interesting paper by J. Armour, 'Who should make corporate law? EC Legislation versus Regulatory Competition', ECGI Working Paper No. 54/2005.
[114] ECJ 5 November 2002, Überseering BV vs. Nordic Construction Company Baumanagement GmbH, C-208/00
[115] M. Becht, C. Mayer and H.F. Wagner, (2006), Where do firms incorporate', ECGI Law Working Paper N° 70/2006, September 2006.
[116] From 1268 SEs having been established until June 2012, 66 have transferred their seat. See A. Carlson, M. Kelemen, M. Stollt, Overview of current state of SE founding in EUrope (1 June 2012), http://www.worker-participation.eu/content/download/4578/61599/file/SE_Currentstate-updated-figure-1-06-2012-final-web.pdf.

of this company back to Germany where the undertaking would also operate.[117] This is fundamentally different from a company existing for several years moving its seat to a different country which might also entail an actual migration of the persons controlling the company.[118] Secondly, the figure mainly concerned very small companies.[119] This is different from medium-sized to big companies moving their seats to a different MS. The latter creates considerably higher legal risks for the company. Examples can be if before a cross-border transfer civil law applies to a company and after the transfer common law applies, or unclearness about the recognition of certain security rights and so forth. For similar reasons, major conclusions should not be drawn from a rather limited amount of SE companies, particularly if one considers that some of them will have been set up with the goal to achieve a cross-border transfer later on.[120] Finally, in this context, it is also important to consider that Article 49 TFEU requires a transfer of economic activity.[121] Therefore, a mere transfer of the registered office as in the US will not be possible, which again will limit the number of cross-border transfers.

This should by no means signify that one cannot expect a considerable amount of cross-border transfers in the next years on the basis of the *Vale* judgment or on the basis of future legislation on the transfer of the registered office.[122] Yet, it will rather concern companies looking for a specific solution to individual legal problems, such as a specific restructuring instrument,[123] specific corporate group legislation, specific tax provisions and so on. Thus concluding, particularly together with language barriers between MS and a civil-common law divide in the EU, it is not to be expected that there will be a US-like situation as to the amount of cross-border transfers involving several hundred thousand companies transferring their registered office.

Considering the above mentioned points, certain main differences between the US and the EU systems can be found. In the US, cross-border transfers are possible between all US states on the basis of the "domestication" legislation and through cross-border mergers. In the EU, only a few states allow to transfer the registered office based on national law. Yet, in the EU, cross-border transfers can also be conducted based on the CBM Directive and the SE Regulation. Whereas company cross-border transfers in the US only affect shareholders and the management, re-incorporations can also affect creditors and employees in the EU. This has also as a consequence that the US system does not

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[117] See figures on page 26 of W. W. Bratton, J. A. McCahery and E. P. M. Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', ECGI Working Paper No. 91/2008.

[118] A main difference is already that this person would have to give up its social environment and would move to a different country.

[119] W. W. Bratton, J. A. McCahery and E. P. M. Vermeulen, (2008), How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', ECGI Working Paper No. 91/2008, p. 27.

[120] Study on the operation and the impacts of the Statute for a European Company (SE) (2009), p. 212 stating that the transfer of the registered office is one of the 'positive drivers' of the SE.

[121] ECJ 12 July 2012, VALE Epitési kft, C-378/10.

[122] ECJ 12 July 2012, VALE Epitési kft, C-378/10.

[123] See the case *Schefenacker*. The German automotive parts manufacturer Schefenacker migrated to the UK in order to undertake a debt-for equity swap under an English voluntary agreement. The restructuring took place in 2007. See W.G. Ringe, 'Strategic Insolvency Migration and Community

protect creditors or employees, whereas these parties are protected under national laws and also under the European legislative acts which allow cross-border transfers. A further difference is that in the US, corporations transfer their seats in order to benefit from more favourable rules applying to boards or shareholders. So far in the EU, cross-border transfers take place in order to benefit from different tax or creditor protections rules. The latter includes for example capital minimum requirements as can be seen with the case *Centros* or insolvency law as can be seen with cases such as *Schefenacker*, *Hans Brochier* or *Wind Hellas*. This does not exclude that in the future European companies will use cross-border transfers for the same reasons as their US counterparts. A final important difference is that in the US, transfers of the registered office do not require to transfer also economic activity. Transfers based on the freedom of establishment require so in the EU.

In a nutshell, conclusions concerning cross-border transfers in the US should be treated carefully in the EU context. The situation in both jurisdictions is very different. Moreover, as noted, regarding the subject of regulatory competition, there is no clear evidence as to whether it triggers a race to the top or to the bottom in the US, which limits any conclusions for the EU.

For a more detailed discussion of this topic, see ***Annex 6.***

2. The Swiss system

2.1. Transfer from one canton to another canton

A change of the corporate seat from one canton to another canton only requires a change to the company's organizational documents, in particular the articles of association.[124]

2.2. Inbound transfer

Under Switzerland's Federal Act of Private International Law (article 161),[125] a foreign company may, without liquidation and reincorporation, by way of a continuation submit itself subject to Swiss law provided this is permissible under the law of the jurisdiction it had previously been subject to.[126]

The foreign company must satisfy the requirements stipulated by the applicable law and must be able to adapt to one of the organizational forms of Swiss law.[127]

Law', in W-G Ringe, L. Gullifer and P. Thery, Current Issues in European Financial and Insolvency Law (Hart Publishing, Oxford 2009).

[124] Article 123 of the federal ordinance on the commercial register (CRO).

[125] See also Article 126 CRO.

[126] Markus Weidmann, Immigration von Kapitalgesellschaften in die Schweiz, IFF Forum für Steuerrecht 2010, P. 4; BSK IPRG-Girsberger/Rodriguez, 2. Ed., Basel 2007, Art. 161 N 4; Vischer, Zürcher Kommentar zum IPRG, 2. Ed., Zürich 2004, Art. 161 N 8.

[127] BSK IPRG-Girsberger/Rodriguez (Fn 5), Art. 161 N 5 ff.; ZK-Vischer (Fn 5), Art. 161 N 9 f.; Weidmann (Fn 5), P. 4.

The Federal Council may in addition authorize the submission to Swiss law even if the requirements stipulated by the foreign law are not satisfied, particularly if significant Swiss interests are involved.[128]

The migration procedure is as follows:[129]

- obtaining a certified and apostilled excerpt from the competent commercial registry or an equivalent document, such as a certificate of incorporation, proving the existence of the company;
- obtaining a certified and apostilled "Memorandum of Association", "Articles of Association", or similar document;
- obtaining resolutions by the competent bodies (e.g., board of directors, general meeting of shareholders) on the de-registration of the company from the foreign jurisdiction and registration in Switzerland, all in accordance with applicable foreign law and the organizational documents;
- obtaining from the Swiss Institute of Comparative Law a confirmation that the laws of the applicable foreign jurisdiction permit a transfer of the corporate seat of the company to Switzerland, without liquidation and reincorporation;
- obtaining from the Swiss Institute of Comparative Law a confirmation that the current legal form of the company may be adapted to an organizational form permissible under Swiss law;
- obtaining a confirmation by the competent body of the company that the center of activity of the company to be re-domiciled has been transferred to Switzerland;
- obtaining a confirmation by the competent body of the company that the company has been adapted to the laws of Switzerland. This will generally be evidenced through resolutions of the general meeting of shareholders (or equivalent body), whereby the meeting is held pursuant to Swiss law and recorded in a Swiss public deed;
- adoption of new Articles of Association;
- in case of corporations or similar companies, obtaining a confirmation from a licensed expert auditor within the meaning of the Federal Act on the Oversight of Auditors of December 16, 2005 that the company's capital is covered in accordance with the requirements of Swiss law; and
- submission of an application to, and registration with, the competent commercial registry.

Special requirements apply to companies owning real estate in Switzerland.

In the last few years there have been a number of relatively large (mainly public) companies that have moved their corporate seats from a foreign jurisdiction to Switzerland (for example, Tyco International, Transocean Ltd., Noble Corporation, Weatherford International, Garmin Ltd., Foster Wheeler Ltd., Shire plc or Ineos).

[128] Botschaft IPRG, Ziff. 296; ZK-Vischer (Fn 5), Art. 161 N 11 f.; BSK IPRG-Girsberger/Rodriguez (Fn 5), Art. 161 N 13 f.

[129] Article 126 CRO.

2.3. Outbound transfer

There were a few transfers of corporate seats from Switzerland to EU member countries. Note, however, that many EU jurisdictions limit these kinds of transactions to transactions between EU MS.

Different structures were used. For example, structures were put in place through a public tender offer of a new holding company, or through a change of the corporate seat. The procedure is similar as for immigrations into Switzerland. In addition, a company that intends to move its corporate seat out of Switzerland must give public notice to its creditors who, under certain circumstances, may request security for their claims.[130]

2.4. Tax aspects

The transfer of the corporate seat from one canton to another canton does not have any adverse Swiss tax consequences[131] (apart from minimal duties levied by the respective commercial registries).[132]

The transfer of the seat of a company moving from a foreign jurisdiction to Switzerland does not trigger any Swiss tax consequences in general.[133] However, 1% issuance stamp duty may be levied on nominal capital created in the year before the transfer (abuse of law concept).

Under Swiss (tax) laws it is possible to have the head office in Switzerland, even though the company is registered outside Switzerland.[134]

In a nutshell, cross-border transfers in Switzerland are organized by national legislation.

Inter-cantonal transfers are not relevant as Swiss corporate law is governed by federal law, and not cantonal law; a change of the corporate seat from one canton to another only requires a change to the company's organizational documents. Federal legislation regarding inbound or outbound transfers (from/to Switzerland) contains no particular provisions which could impact our conclusions regarding EU transfers.

For a more detailed discussion of this topic, see ***Annex 7*** *(available only in electronic format).*

[130] Article 271 SchKG.
[131] Article 24 para. 2 lit. b StHG; Peter Locher, ASA 65 (1996/97), P. 629; Markus Reich, Steuerrecht, 2. ed., Zürich/Basel/Genf 2012, §21 N 11, 13.
[132] Article 123 CRO.
[133] Helbling A. (2010), Internationale Sitzverlegungen und Umstrukturierungen von Kapitalgesellschaften im schweizerischen Gewinnsteuerrecht, Zürich/Basel/Genf 2010, §7 N 220 ff., 224.
[134] Reich (Fn 2), §23 N 1 ff. Examples are Glencore (Jersey company with tax seat in Switzerland) or Xstrata (UK plc with tax seat in Switzerland).

Part III - Legal protection of stakeholders involved

1. Definition of the stakeholders involved

Cross-border transfers with the resulting change of law can have negative effects on the rights of stakeholders such as:

- Creditors;
- Minority shareholders;
- Employees;
- National authorities, (i.e. national administrations);
- Third parties (contractors, consumers, etc).

2. Risk incurred by the stakeholders

2.1. Context

Through *lex societatis*, cross-border transfers may involve a change in applicable rules in the event of insolvency, applicable rules in the representation of workers within corporate bodies, rules applicable to certain contracts, but also to certain creditors. What also may be modified are rules governing competent jurisdiction, which would then make more difficult, for example, the pursuit of the company by its creditors. All these elements must be contemplated because they have a direct impact on the rights arising from the different partners of the company who risk being subjected, by reason of the transfer of the company seat, to a change in rules applicable to their situation, and more precisely to their detriment.

However, insofar as companies benefit from the freedom of establishment, they must be able to transfer their registered office into a new MS without stakeholders being able to oppose it. In other words, if legislation ensuring the protection of their acquired rights appears legitimate, an absolute protection of such acquired rights through a veto or equivalent (in substance) right does not appear to be advisable.

It is from the standpoint of this rationale that the stakeholders' situation could be taken under consideration by a future directive on cross-border transfers.

To this effect, it is important to take into consideration acquired rights and the consequences for stakeholders of changes in the economic and legal status of the company deciding to transfer its seat.

However, it is not expected that new legislation on cross-border transfers would lead to a more frequent delocalization of production sites because it is already very easy to set up subsidiaries or branches (see for example, interview from Estonia, Annex 4.15).

2.2. Risks and guarantees

In order to identify the risks for stakeholders in a cross-border transfer and the protections which could be granted, we shall first attempt to identify the consequences of a transfer for stakeholders. For this purpose, we have identified four possible types of cross-border transfers:

- The transfer of the registered office only;
- The transfer of the registered office as well as of the real seat with no transfer of economic activity;
- The transfer of the registered office as well as of the real seat with partial transfer of economic activity;
- The transfer of the registered office as well as of the real seat with total transfer of economic activity (transfer of assets and employees, change of place of listing, etc.).

Table 4 - Synthesis table of the consequences of a transfer for stakeholders (managers, shareholders, creditors)

	Managers / directors	Shareholders/ minority shareholders	Creditors/ bondholders
Transfer of corporate seat only	- Change of company law. Change of liability regime applicable to directors - Potential change of insolvency law and of the directors' liability regime	- Application of the new *lex societatis* might change shareholders rights and obligations - Changes disclosure obligations under the Prospectus Directive 2003/71/EC and the Transparency Directive 2004/109/EC as amended by Directive 2010/73/EU - Mandatory bid rule and permissible takeover defenses under the Takeover Directive 2004/25/EC	- Insolvency law might change depending on the COMI localization (Regulation No 1346/2000); - Might change contract law if not defined in the contract (especially corporate guarantees) (Regulation (EC) No 593/2008); - Might be a problem that a security interest does not exist in the host MS and therefore the transfer of the corporate seat could deprive the lender of a guarantee ; - Might change jurisdiction law (Regulation (EC) No 44/2001); - Change in public policy statutes; - General creditor protection rules can change, such as capital requirements and rules dealing with related party transactions.

	Managers / directors	Shareholders/ minority shareholders	Creditors/ bondholders
Transfer of corporate seat + transfer of real seat with no transfer of economic activity	- Change of company law and/ or insolvency law; change of the liability regime applicable to directors. This can also have the consequence that certain actions leading in one MS to civil liability will result in a different MS in criminal liability. - If managers move to a different MS, they might fall under a different tax regime	Application of the new *lex societatis* might change shareholders rights and obligations	- Change of insolvency law; - Might change contract law if not defined in the contract (especially corporate guarantees); - Might be "surviving" problem for some securities (especially pledges over securities or financial instruments); - Might change jurisdiction law; - Change in public policy statutes.
Transfer of corporate seat + transfer of real seat with partial transfer of economic activity	idem	Application of the new *lex societatis* might change shareholders rights and obligations	Same as above
Transfer of corporate seat + transfer of real seat with full transfer of economic activity (assets and employees, change of place of listing, etc.)	idem	Application of the *new lex societatis* might change shareholders rights and obligations	Same as above

Source: JeantetAssociés

Table 5 - Synthesis table of the consequences of a transfer for stakeholders (employees, national authorities, State, tax administration)

	Employees	National authorities/ State/ tax administration
Transfer of corporate seat only	Change of company law might change the board structure and therefore the employee representation system according to applicable company law Provisions regarding workers' collective representation in companies will not necessarily be modified (works council, right to consultation and information, etc.).	National authorities from the Home MS might lose control over the company whereas the economic activity remains in the Home MS. The regulator from the Home MS might lose its jurisdiction to the benefit of the Host MS regulator. For example, for listed companies which remain listed in the Home MS, the competent regulator will be the Host MS regulator. This could lead to "race to the bottom" Maintaining of taxation rights as long as a permanent establishment is recognized further to the transfer.
Transfer of corporate seat + transfer of real seat with no transfer of economic activity	Change of company law might change the board structure and therefore the employee representation system according to company law applicable to the company Provisions regarding workers' collective representation in companies will not necessarily be modified (works council, right to consultation and information, etc.). But access by staff representatives to information held by the company seat may pose a problem.	Same as above.
Transfer of corporate seat + transfer of real seat with partial transfer of economic activity	Significant consequences for the permanently transferred employees (new employment agreement; new social security regime). Potential impacts on the functioning of the original staff representative bodies and the setting up of representative bodies at the European level (ex: European works council).	Same as above. Possible loss of taxation rights on worldwide income if the corporate seat or the real seat determine the residence for tax purposes but also as part of the business is not maintained in the permanent establishment maintained locally.

	Employees	National authorities/ State/ tax administration
Transfer of corporate seat + transfer of real seat with full transfer of economic activity (assets and employees) change of place of listing	Significant consequences for employees (new employment agreement and change of applicable law for the transferred employees; challenge to the collective agreements; new social security regime, possible redundancies resulting from the transfer; challenge to the staff representative bodies).	Loss of all competence Possible loss of all taxation rights if the company becomes a non-resident for taxation purposes and transfers all of its economic activity (no permanent establishment maintained locally).

Source: JeantetAssociés/ Arsène Taxand

The next table summarizes what risks and effects (intended or unintentional) can be expected by stakeholders and suggests solutions to overcome such issues.

Table 6 - Risks and effects expected by stakeholders

Stakeholders	Risks	Protection required	Proposed solutions
Creditors	See Table 5	Information	Available information regarding the transfer plan: - Right to consult transfer plan; - Right to consult reports.
		Safeguard conditions for legal actions	Prohibition of transfer in case of winding-up, liquidation, insolvency, suspension of payments or similar proceedings
		Safeguard acquired rights	Opposition right (right to ask for reimbursement or guarantees) and determination of guarantees (adequate complementary security interests or guarantees (the "Complementary Protection"))
Minority shareholders	See Table 5	Information	Available information regarding the transfer plan: - Right to receive transfer plan; - Right to receive reports.
		Safeguard acquired rights	Opposition right Repurchase right Unanimity in case of increase of obligations of shareholders Qualified majority Protection as provided for a conversion in national law
		Safeguard conditions for legal actions	See Third Parties

Employees	See Table 5	Information Safeguard acquired rights Safeguard conditions for legal actions	Available information regarding the transfer plan: - Right to receive/consult transfer plan; - Right to receive/consult reports. Same system as applicable to the CBM Directive and/or the SE Directive? New system based on MS of origin See Third Parties
National authorities	See Table 5	Information Safeguard acquired rights Safeguard conditions for legal actions	Available information regarding the transfer plan; Opposition right on the basis of public interest. Exit taxation on unrealized capital gains. Possibly together with a deferral of payment and if necessary with a complementary guarantee and application of late penalties. See Third Parties
Third parties	See Table 5	Information Safeguard acquired rights Safeguard conditions for legal actions	Available information regarding the transfer plan: right to consult transfer plan; Any party involved in legal action relying on a dispute that arose before the transfer could maintain its right to bring it before the court that originally had jurisdiction and have the issue ruled according to the law applicable at such time (Home MS). When the Host MS law is more favourable to claimants, provide for an exception to this principle: claimants could rely on the law of the Host MS before a competent court in said Host MS even if the dispute arose prior to the transfer? But in any case the transfer itself should not be challenged and shall remain effective as soon as the company is registered in the Host MS. Then, introducing a time limit such as a "purge" period, after which all disputes would be subject to the law of the Host MS even if they arise before the transfer: 1 year should be sufficient for possible claimants to begin proceedings under the applicable law of the Home MS?

Source: JeantetAssociés

2.3. General comments from our interviews of stakeholders

Interviews have been conducted with several French, Italian and German listed and non-listed companies operating in many MS and in areas such as telecommunications, mining, finance and pharmaceutical as well as with stakeholders in the selected MS.

Here is a summary of their views on five strategic questions:

- **Coupling or decoupling of seats**

The question was to identify whether there is a need to have the registered office of a company and the head office in the same Member State ("coupling of seats"), as it required for the SE and the SCE, or it is relevant to authorize the division of the seats between different MS but in the EU (as for the FE) or to have one seat in a MS and one seat out of the EU (for example the registered office located a MS and the head office located in Switzerland) ("decoupling of seats").

A majority of companies was against a coupling of the seats.

Yet, a number of companies also expressed that a coupling is preferred because otherwise transfers will primarily be motivated by fiscal reasons. Of a similar opinion were also other stakeholders such as the Notary Chamber of the Czech Republic stating that a divide of the registered and the administrative seat may lead to widespread circumvention of the protective measures of the EU MS. It could also lead to problems regarding accountancy and publicity of public registries. A division of seat could furthermore affect consumers and employees as well. Action against the company would have to be delivered abroad, which would lead to delays in proceeding. This view is also supported by the French Ministry of Justice which stated that this issue had also led to blocking the adoption of a statute for the SPE (European Private Company).

- **Stakeholder protection in cross-border transfers**

The interviewed companies did not have a clear position as to whether they preferred more flexibility or more stakeholder protection. Some preferred more flexibility, others preferred more protection.

With regard to stakeholders associated with the State, it was stressed that cross-border transfers pose risks and therefore stakeholder protection is highly important[135].The same position was also taken by employee and industry representatives (Czech Republic, France). Yet, a financial advisor also stressed that national systems can already provide adequate protection (Ireland).

[135] Notary Chamber of the Czech Republic, Autorité des Marchés financiers – AMF (France), Ministry of Justice (France). See Annex 8.

From our experience and from our interviews, it is important to note that, even when legislation requires the company to inform its stakeholders of the consequences of the transfer, it is in practice merely impossible to cover all the consequences due to, namely, the many differences between legal regimes of MS.

- *Minority shareholder protection*

The majority of companies were of the opinion that minority shareholders should be protected through legislation.

A minority was of the opinion that this was not necessary because they benefit from additional rights under shareholder agreements and for listed companies, stock exchange rules would already provide a high level of protection.

A slight majority was also of the opinion that minority shareholders were not able to protect themselves on a contractual basis. A minority stated that this group of stakeholders could do so based on the articles of association of the company. Furthermore, they could sell their shares.

Finally, there was also not a clear position as to whether the national or the European legislators would be in a better position to regulate minority shareholder protection. A slight majority was in favour of the European legislator and brought forward arguments such as that the European legislator considers all MS and can better coordinate action and find a uniform solution.

In addition, national authorities dealing with financial markets deemed it to be of high importance to protect minority shareholders. They also stressed that there should be fixed principles on the European level; however, it should be left to national law to set the specific conditions.

- *Creditor protection*

All interviewed companies were in favour of creditor protection during cross-border transfers through legislation.

According to a slight majority, creditors are not able to protect themselves contractually. Yet, some also stated that lenders and banks are generally in a position to protect themselves and that creditors can restrict cross-border transfers through negotiations.

A majority was in favour of the European legislator regulating creditor protection.

The reasons for and against regulation on the European or national level were the same as regards the minority-shareholder protection.

The view that creditors require protection during cross-border company transfers was also supported by other stakeholders, such as employee representatives (Czech Republic) and national authorities (Czech Republic and France) and also law firms (Czech

Republic). It was remarked by an industry representative that this should happen on the European level (France, Czech Republic).

- *Employee protection*

Interviews have been conducted with several French, Italian and German listed and non-listed companies with 250 to 171,949 employees and a turnover of up to 45 billion Euros operating in areas such as telecommunications, mining, finance and pharmaceutical. We also interviewed trade unions such as the Moravian Confederation of Trade Union and ministries such as the Ministry of Industry and Trade of the Czech Republic and the French Ministry of Justice.

A clear majority stated that it is necessary to protect employees during cross-border transfers through legislation. Yet, it was also remarked that the level of protection should not compromise the process of a cross-border transfer.

A majority considered that employees were not able to protect themselves contractually. Finally, regarding the regulatory level, there was not a clear picture as to whether this issue should be regulated by the national or the European level. It was for example stated that European law would add to the existing complexity and burden.

A majority also expected that cross-border transfers would be used in order to fall under a company law regime that does not provide for employee participation.

Yet, it should be noted that some companies thought differently, stating that this would not be sufficiently relevant to perform a cross-border transfer.

Employee protection is also heavily supported by national authorities, employee representatives (France, Czech Republic) and Trade representatives (France). Generally, it is stated that the standard under the SE or SCE Regulation (Czech Republic, France) and the CBM Directive (France) is appropriate.

For more detailed information on this topic, see ***Annex 8*** *(available only in electronic format)***.**

- *Protection of other stakeholders*

Half of the respondents advocated that other stakeholders such as local communities and authorities should also be protected through legislation. A majority was of the opinion that these stakeholders could not protect themselves on a contractual level and that the European legislator should be responsible for regulating the matter. This view was also shared by industry representatives (France).

It has also been argued that the freedom of establishment might have to be subjected to a reasonable level of public interest protection at the MS level. For instance, transfers of seats should not legitimately aim at avoiding MS regulations governing foreign investments in so-called "sensitive" sectors, unless for instance the MS has approved of the transfer first, hence forfeiting its jurisdiction over the company from a foreign

investment control perspective or general interest protection. The issue of whom shall exercise this control (for instance the Public prosecutor (*Procureur de la République*) in France regarding SE seat transfers) and based on which Public Interest criteria remains a complex issue though (French regulations or practice regarding SE seat transfers offer no guideline so far in this respect).

- **Tax neutrality**

All company respondents were of the opinion that a legislative instrument on cross-border company transfers should ensure tax neutrality. This is also supported by national authorities (Czech Republic), law firms (Czech Republic) and industry representatives (France).

- **Regulatory competition**

A majority of respondents is convinced that a higher degree of mobility within the EU will lead to regulatory competition and that this would help regulators to adapt more quickly to market needs and lead to simpler rules for companies.

- **The benefits of cross-border transfers in the EU**

The main benefits associated with cross-border transfers identified in the interviews with companies were the shift of economic activity to a different MS and benefits from different tax law regimes.

Also deemed to be important were benefits from different rules dealing with minority-majority shareholder conflicts.

Only two companies stated that they associate the benefits of cross-border transfers with a more flexible employee representation system. Also mentioned were benefits from different merger and division rules outside the EU Directives, more flexibility in a company's articles of association, better shareholder protection and benefits from a different judicial system.

For a more detailed discussion of this topic, see ***Annexes 4 and 8*** *(available only in electronic format)*.

3. Conclusions regarding stakeholders' protection

3.1. Comparison of stakeholders' protection by national legislations under SE Regulation or under direct transfer

As the SE statute provides for legal protection of stakeholders in company cross-border transfers, we have compared the implementation of SE Regulation in the national legislations with the national situation for direct transfer in the same MS.

Table 7- Comparison of stakeholder protection in outbound transfers of the registered office under the SE Regulation (national implementation of the SE statute or EU level) and under national legislation

(this only concerns selected MS which allow outbound transfers and protections that have to be implemented under the SE Regulation, such as a withdrawal right for minority shareholders or a creditor's right to receive guarantees)

MS	Protection of minority shareholders			Protection of creditors/ bondholders			Specific employee protection			Opposition right for competent authorities		
	SE	**National**		**SE**	**National**		**SE**	**National**		**SE**	**National**	
CY	NO	NO	=	YES	YES	=	YES (EU level)	NO	-	YES	YES	=
CZ	YES	YES	=	NO	YES	+	YES (EU level)	YES	=	NO	YES	+
ES	YES	YES	=	YES	YES	=	YES (EU level)	NO	-	YES	NO	-
FR	YES	YES	=	YES	NO	-	YES (EU level)	NO	-	YES	NO	-
IT	NO	YES	+	NO	NO	=	YES (EU level)	NO	-	NO	NO	=
LU	NO	YES	+	NO	YES	+	YES (EU level)	NO	-	NO	NO	=
= same protection as SE + more protection than SE legislation - less protection than SE legislation												

Source: JeantetAssociés

3.2. Lessons to be drawn up

The following lessons may be drawn up concerning the protection of stakeholders:

- Without any European legislation protecting stakeholders, there is a risk for stakeholders to have no protection hat all in cross-border transfers;

- Yet, this risk also exists if European legislation, such as the SE Regulation, provides for stakeholder protection but makes it merely optional for MS. Indeed there is no certainty that the MS make use of this option especially if there is no protection of stakeholders in their national legislation on seat transfers.

Part IV - General conclusion – recommendations

1. Regarding the objectives of the contemplated legislation

- **Regarding the general principles**

The objectives of the contemplated legislation would be:

- to ensure the objective of an increased satisfaction of EU citizens in relation to the completion of the internal market and sustainable competitiveness;

- to improve the efficiency and competitive position of European companies by providing them with the possibility of transferring their registered office more easily and choosing a legal environment that best suits their business needs;

- the cross-border transfer of a company seat should be tax-neutral;

- the recommendations respect fundamental rights and the principle of subsidiarity;

- it is for the legislators and not for the Court to establish on the basis of the Treaty the relevant measures to accomplish the freedom of a company to transfer its seat.

- **Regarding the procedure of transfer**

The objectives of the contemplated legislation would be:

- to ensure that registration in the Host MS should not be more difficult than for a company incorporated *ex nihilo;*

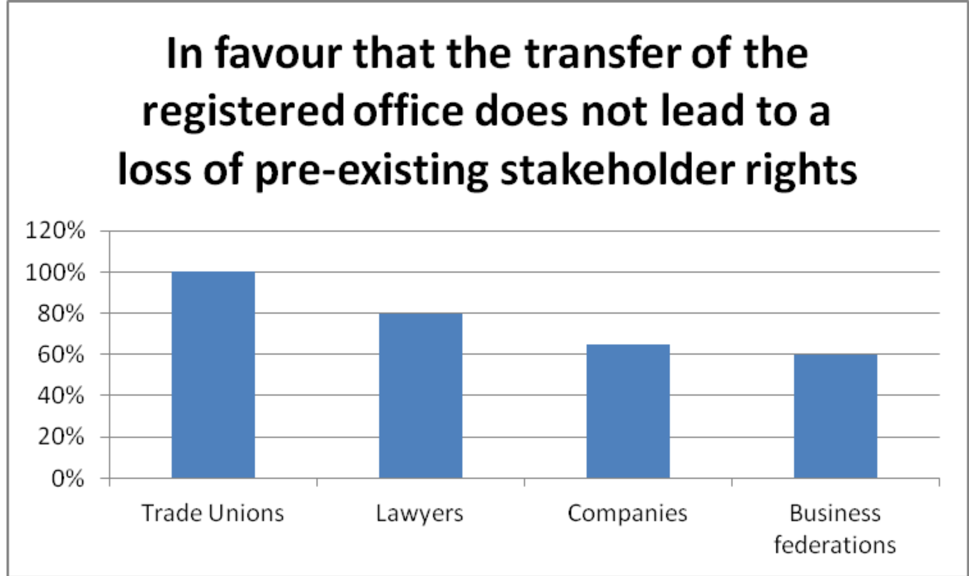
- to ensure that de-registration should not be completed in the Home MS before notification of registration in the Host MS.

- **Regarding the protection of stakeholders**

We paid attention to the conclusions of the Commission's public consultation on the future of EU company law[136], which are the following: 100% of the trade unions, 80% of lawyers, 65% of companies and 60% of business federations were in favour of a system whereby the transfer of registered office would not result in a loss of the pre-existing rights of shareholders, creditors and employees.

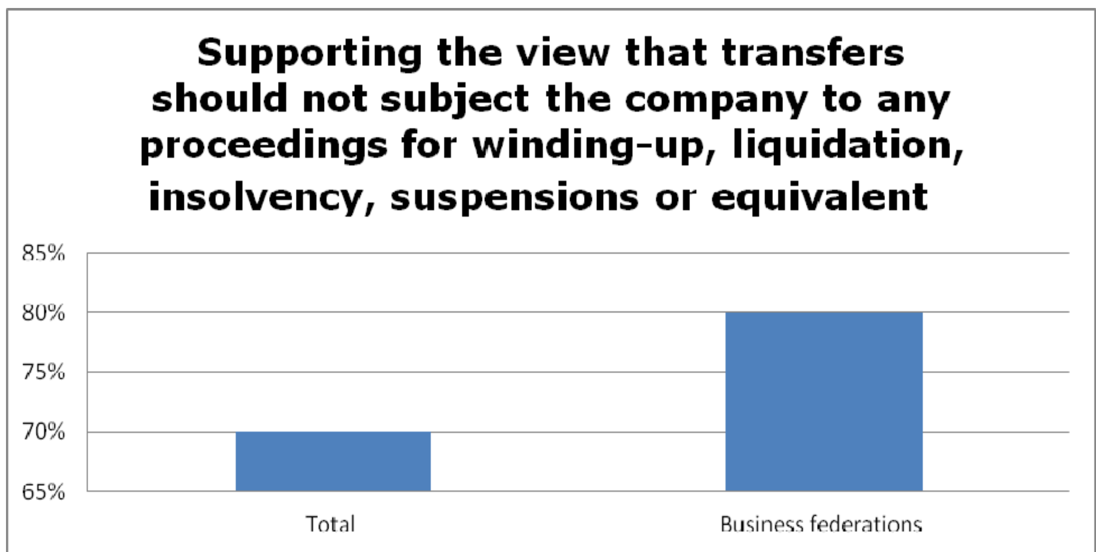
[136] European Commission, (2012), Feedback statement: Summary of responses to the public consultation on the future of European company law, p. 9-10.

Figure 5- Answers to the European Commission public consultation in favour that the transfer of the registered office does not lead to a loss of pre-existing stakeholder rights



Source: JeantetAssociés

Figure 6 - Answers to the European Commission public consultation in favour of transfer of the registered office if the company is not subject to any proceedings for winding-up, liquidation, insolvency, suspensions or similar



Source: JeantetAssociés

Nearly all Trade Unions were in favour.

Based on the above, the objectives of the contemplated legislation would be:

- to guarantee the effective protection of the interests of the main stakeholders in respect of the transfer;

- to prohibit any company from transferring its registered office when facing winding-up, liquidation, insolvency, suspension of payments or similar proceedings;

- the misuse of letter-box companies[137] and shell companies with a view to circumventing legal, social and fiscal conditions should be prevented;

- the transfer procedure should be governed by strict rules as regards transparency and information to stakeholders prior to the transfer being carried out.

In accordance with the employees' right of involvement conferred by EU law, regulations at the EU level relative to a transfer of seat must include:

- Provisions allowing to guarantee the informing and consulting of works councils, in particular on the transfer plan, and especially in the event of a transfer of a real seat, access by the works council to information held by the registered office.

- Special provisions aimed at ensuring that the transfer of the seat does not entail, *ipso facto*, the disappearance or reduction of employees' participation rights existing within the company before the transfer. According to the European social law, it is a fundamental principle to secure employee's acquired rights as regards involvement in company decisions. Three options could be contemplated:

  - A regime based on the application of the MS law of origin and the possibility of establishing arrangements for participation by negotiation between the parties (option 1).

    This option proposes a solution easy to implement and it allows immediate protection of the employees' participation rights without a prior negotiation. This option does not obstruct the application of the host MS' law if this one is more favourable to the employees. It also constitutes a flexible solution because it allows the parties to negotiate possible arrangements or dispensations.

  - A regime analogous to that provided by Directive 2005/56/CE on cross-border mergers. (Option 2). These rules are those provided for by the CBM Directive (Directive 2005/56/EC). These provisions are more appropriate than the provisions of the European company Directive (Directive 2001/86/EC).

[137] Letter box companies, also called pseudo-foreign companies, have their registered office located in one MS and their real seat located in a different MS. In that way, companies can 'circumvent' requirements imposed on its domestic companies by the MS of the real seat. In Centros, Überseering and Inspire Art, the ECJ stipulated that MS cannot impose extra requirements on these companies.

This option adopts existing rules which have already shown their efficiency at the European level. It realizes a reasonable and acceptable balance between the divergent positions of the various stakeholders (trade-unions, employers, etc.).

  - A regime analogous to that provided by Directive 2001/86/CE on the European Company.

- The provisions of this Directive are more restrictive than those of Directive 2005/56/CE (cross-border merger) because they do not allow the companies involved to choose to directly apply, without prior negotiation, the standard rules.

  Employee trade union organizations (in particular the CES) ask that Directive 2001/86/CE (European company) constitutes the minimum standard of reference.

  The companies and the employers' organizations are not favourable to this solution.

2. Regarding the degree of harmonization of the contemplated legislation

We attempt to answer the following main questions:

- **Should the contemplated legislation concern all types of companies or only the limited liability companies?**

Freedom of establishment should apply to all legal entities covered by Article 54 TFEU. However, considering the wide variety of legal entities in use in the various MS, **legislation should at first concentrate on the limited liability company[138]** as it is the most common form of legal entity used throughout the Union and it also has the great advantage in that it is a legal form well known in all MS and subject to a high degree of transparency by the 1st Company Law Directive[139]. The list of legal forms of company to which the 14th directive would apply would be clearly defined.

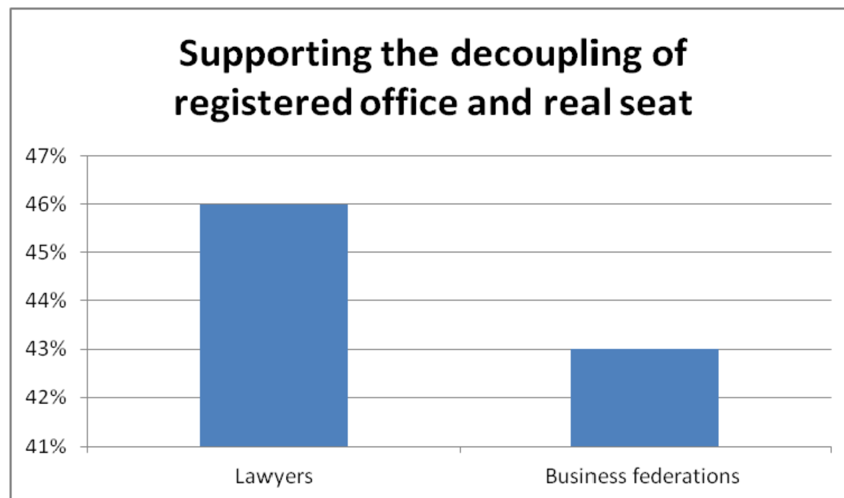
- **Should it provide a requirement to have the registered office and the head office located in the same MS?**

We paid attention to the conclusions of the Commission's public consultation on the future of EU company law[140]. This is an issue that did not receive a majority in favour or against. The decoupling of the registered office and the real seat was

[138] Both Rapporteurs Lehne and Regner have agreed that it should be applicable "only" to limited liability companies.
[139] Limited liability companies are those defined in Directive 2009/101/EC of 16 September 2009 and in Directive 2005/56/EC on mergers.
[140] European Commission, (2012), Feedback statement: Summary of responses to the public consultation on the future of European company law, p. 9-10.

supported by 46% of lawyers, 43% of business federations but did not gain much support from the trade unions. The compulsory attachment of the real seat to the registered office during a transfer was the most favoured option by the trade unions but only received the support of around 30% of all participants.

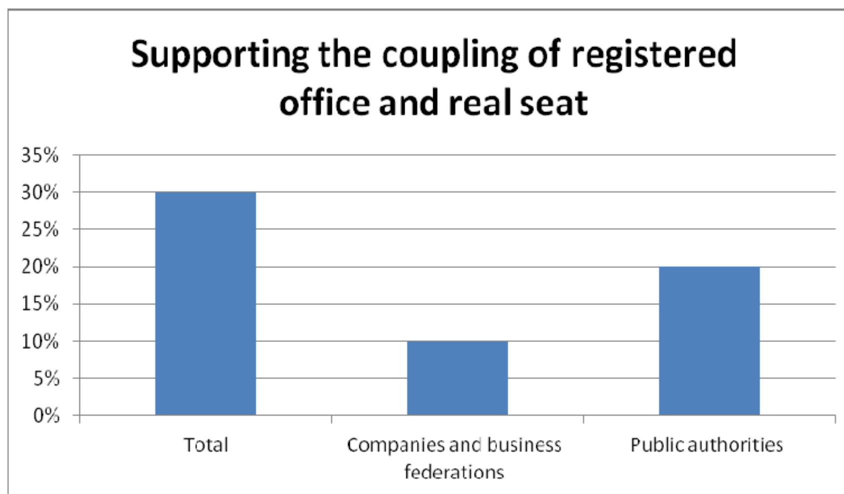
Figure 7 - Answers to the European Commission's public consultation in favour of decoupling of registered office and real seat



Source: JeantetAssociés

This option did not gain much favour from the trade unions.

Figure 8 - Answers to the European Commission's public consultation in favour of coupling of registered office and real seat



Source: JeantetAssociés

Regarding the transfer of registered office only, statistics show that most of the stakeholders are not against this option. Particularly only 30% are in favour of a coupling of the real seat and the registered office.

As shown in table 6, on the matter of a mandatory coupling of registered office and real seat to allow cross-border conversions, the analysis has shown that the risk to stakeholders is higher in this situation than in the case of a transfer of registered office only (notably modifications of tax law, insolvency law).

Besides, the freedom of establishment allows the transfer of registered office if it "*involves the actual pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period*"[141]. Consequently, we consider that, upon the above mentioned conditions, a transfer of registered office should be possible under a European legislative instrument.

3. Synthesis of the different alternatives and appropriateness

	Alternative 1: The no action approach
Description and scope	Performance of cross-border transfers with current tools available: cross-border merger, SE, SCE, national approaches. Cross-border transfer on the basis of ECJ and national laws.
Advantages	• No costs of implementation of European legislation regarding cross-border transfer; • National laws keep control on stakeholders' protection under the conditions of ECJ case law.
Disadvantages	• No "level playing field" [142] among MS legislations; neither, among companies; • No minimum harmonization of stakeholders protection; • Uncertainty of the feasibility of the cross-border transfer; • Uncertainty of the legal regime of the cross-border transfer; • Increased transaction costs.

	Alternative 2: An EU directive on cross-border transfers of company seats with a high level of harmonization
Description and scope	Creating harmonized rules for companies to allow them to transfer their company seat. Scope: 1. Definition of the companies concerned; 2. Requirement to have the registered office and the head office located in the same MS; 3. Provide for a complete description of the transfer procedure including • a transfer plan produced by the management or administration bodies; list of minimum provisions of the plan

[141] ECJ 12 July 2012, *VALE Epitési kft*, C-378/10

[142] A "level playing field" means that all companies have the same opportunities to compete on a market. In the context of cross-border seat transfers, it means that rules on such operation are the same for all companies in the EU.

	• a report from the management or administration bodies; list of minimum provisions of the report • approval of the transfer and adoption of the new articles of association by the general meeting; quorum and majority rules • publication of the transfer plan before the decision to transfer is taken at the general meeting (1 or 2 months[143]?) • date of completion of the transfer 4. Provide for a procedure of review of the legality of transfers and identification of the competent authorities at MS level The management or board of a company planning a transfer should be required to draw up a report and a transfer plan. Before the management decides on the report and the transfer plan, the representatives of the employees or, if there are no representatives, the employees themselves, should be informed and consulted on the proposed transfer within the meaning of Article 4 of Directive 2002/14/EC[144]. The report should be submitted to the shareholders and to the representatives of the employees or, if there are no representatives, to the employees themselves. The report should describe and justify the economic, legal and social aspects of the transfer and explain its consequences for the shareholders, creditors and employees who may examine the report during a specified period which may be not less than one month or more than three months prior to the date of the meeting of shareholders approving the transfer. The transfer plan should include: (a) the legal form, name and registered office of the company in the home MS; (b) the legal form, name and registered office of the company in the host MS; (c) the memorandum and articles of association envisaged for the company in the host MS;

[143] Chambre de Commerce et d'Industrie de Paris, (2010), Fostering corporate mobility in Europe: Towards a 14th company law directive, 21 Oct. 2010.

[144] European Parliament and the Council (2002), Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[145] European Parliament and Council, (2009), Directive 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties.

(d) the timetable envisaged for the transfer;
(e) the date from which the transactions of the company intending to transfer its seat will be treated for accounting purposes as being located in the host MS;
(f) detailed information on the transfer of the real seat or principal place of business;
(g) the rights guaranteed to the company's shareholders, employees and creditors or the relevant measures proposed and the address where all the information thereon can be obtained, free of charge;
(h) if the company is managed on the basis of employee participation and if the national legislation of the host MS does not impose such a scheme, information on the procedures whereby the arrangements for employee participation are determined.

The report and the transfer plan should be submitted to the shareholders and the employee representatives of the company for examination within an appropriate period prior to the date of the company's general meeting of shareholders.

The transfer plan should be published in accordance with the provisions of Directive 2009/101/EC[145].

If the company is managed on the basis of employee participation, the shareholders' meeting may make completion of the transfer conditional on its expressly approving the arrangements for employee participation.

5. Provide for the same protection of the interests of the concerned stakeholders in all MS

   - include stakeholders' rights as provided for under the CBM Directives + additional protection offered by the SE Regulation;
   - provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer, for example, the right to retire from the company;
   - transfers cannot take place if winding up proceedings or proceedings for suspension of payments, etc., have been brought and that the company will be treated as still having its registered office in the previous MS if it is sued after the transfer takes place in respect of a cause of action that arose before the transfer.

Advantages	"Level playing field" among legislations and companies; - Minimum harmonization of stakeholders' protection; - Provide companies with a stable legal framework on cross-border mobility; - Avoid long time of implementation by MS and give an immediate applicable legislation to perform cross-border transfers.
Disadvantages	- Costs of implementation of European legislation regarding cross-border transfer; - National laws may, partially, lose some control on stakeholders protection. Nevertheless, this protection is under control of ECJ; - Could interfere with the national company law regime of MS; - General interest of MS may be deemed to be receiving a lesser protection than under MS legislation.

Synthesis on the appropriateness of the alternatives
The SE Regulation and the CBM Directive provide appropriate instruments for cross-border transfers. Yet, since ECJ case law confirmed the right for a company to perform a cross-border transfer, cross-border transfers shall also be able to be carried out outside of this existing harmonized framework. In order to protect stakeholders and create a "level playing field" between European companies, European legislation on the cross-border transfers is therefore needed, on the basis of the principles of subsidiarity.

4. Our recommendations

RECOMMENDATION I – Choice of instrument:

To respect the principles of subsidiarity and harmonize conditions of cross-border transfers, we consider that the adequate instrument would be a Directive. This Directive should not constitute maximum harmonization.

RECOMMENDATION II – Scope of the directive:

The directive should apply to operations of cross-border transfers of the registered office from one MS to another MS of incorporated companies formed in accordance with the legislation of a MS and having their registered office, their real seat or their main establishment inside the European Union.

RECOMMENDATION III – Conditions of transfer:

The minimum condition to perform cross-border transfers should be that one of the following conditions is fulfilled:

- the pursuit of an economic activity through a fixed establishment in the Host MS for an indefinite period;
- to have an establishment in the Host MS;
- transferring both the real seat and the registered office at the same time.

RECOMMENDATION IV – Conditions of transfer (2):

Cross-border transfers should only be possible from one form of a company stated in the Annex to another form stated in the Annex of the Directive. The form of company listed in the Annex will be limited liability companies (for example as defined by Article 1 of Directive 2009/101/CE).

RECOMMENDATION V – Transfer procedure:

We propose to refer to the SE procedure: article 8 par. 2. to 4. and 6. of Council Regulation (EC) N° 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

In the Home MS, the court, notary, lawyer or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

The registration in the Host MS may not be completed until the certificate referred to in the previous paragraph has been submitted.

RECOMMENDATION VI – Approval of the transfer by the general meeting of shareholders:

Transfer of the registered office and subsequent amendments to the company's articles of association shall require a decision by the general meeting of shareholders made by a majority which may not be less than two-thirds of the votes cast.

Where a company has two or more classes of shares, each decision by the general meeting of shareholders shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby.

RECOMMENDATION VII – Registration in the Host MS and de-registration in the Home MS:

The transfer of a company's registered office and the consequent amendment of its articles of association shall take effect on the date on which the company is registered in the registry of the Host MS.

When the company's new registration has been completed in the Host MS, the registry of the Host MS shall immediately notify the registry of the Home MS. Deletion of the registration in the Home MS shall be completed immediately on receipt of that notification, but not before.

Within fifteen (15) days from this notification, a publication in the OJEU is made by the registry of the Host MS.

If the deletion of the company's registration from the registry of the Home MS has not been completed within fifteen (15) days from the notification, third parties may not continue to rely on the registration of the company in the Home MS from that date.

RECOMMENDATION VIII – Shareholders and stakeholders protection:

A MS has the ability to adopt, for the companies registered on its territory, measures intended to guarantee an effective protection for the minority shareholders opposed to the transfer.

A shareholder opposed to the transfer is a shareholder who expressly voted against the transfer at the general meeting of shareholders.

However, this protection shall not amount to a **veto right** granted to the minority shareholders, who must abide by the rule of majority (except in case of abuse) just as in case of merger with another company or any other kind of change in the articles of association, unless it is proven (no presumption) that their legal commitments are significantly increased by the transfer (in which case, unanimity may be required and/or a withdrawal right may be granted).

A company which has transferred its registered office to another MS shall be considered, in respect of any cause of action arising prior to the transfer, as having its registered office in the Home MS even if the company is sued after the transfer.

A company may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it or are about to be brought against it (a certain period of time – e.g. six months – should be set separating the transfer from the launch of any such proceedings)

RECOMMENDATION IX - Creditors protection:

MS can implement measures to adequately protect the right of creditors and holders of other rights existing prior to the transfer. Such measures should be proportionate to the effect sought and shall not impose an undue burden on the company, amounting to a *de facto* veto for instance.

RECOMMENDATION X – Public interest protection:

The laws of the Home MS may provide that, as regards a company registered in that MS, the transfer of a registered office shall not take effect if any of that MS's competent authorities opposes it within two months from the publication of the transfer plan. Such opposition may only be based on grounds of public interest. The Directive could usefully provide guidance as to (i) what such grounds could be and (ii) what MS's competent authorities could be.

RECOMMENDATION XI – Tax neutrality:

In order to guarantee tax neutrality, cross-border transfers conducted within the framework of this Directive should be included in Directive 2009/133/EC. This inclusion will be consistent with the *Sevic System* case that considers mergers as a kind of a cross-border conversion.

RECOMMENDATION XII – Provisions relating to employees' information and consultation:

Senior management of a company whose registered office is transferred to another MS must, in a timely manner, inform and consult the existing staff representative bodies within the company or, if this is not possible, the company's employees.

RECOMMENDATION XIII – Provisions relative to employees' participation:

- (in the preamble of the Directive) If participation rights exist within the company before the cross-border transfer, they should be preserved and regulated. The cross-border transfer cannot have as its purpose or effects the loss of participation rights (or equivalent) in force in the Home MS unless a similar system is put in place offering at least the same rights and protection, consistent with applicable laws in the Host MS. MSs shall take appropriate measures with a view to preventing the misuse of the transfer of the seat for the purpose of depriving employees of rights to employee participation or withholding such rights;

- Employee participation is defined in accordance with the Article 2(k) of Directive 2001/86/CE (SE) as the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:
    - The right to elect or appoint some of the members of the company's supervisory or administrative organ; or
    - The right to recommend and/or oppose the appointment of some or all the members of the company's supervisory or administrative organ.

OPTION 1:

- As a matter of principle, participation rights are determined by legislation of the Home MS;

- If the rules of a MS relating to employees' participation in the administrative or supervisory organ applied before the cross-border transfer, all aspects of employees' participation shall continue to apply after the transfer. The participation regime as provided for by legislation of the Home MS remains applicable if all the conditions provided for by the legislation of such MS are met at the time of the transfer;

- MSs may provide that the relevant organ of the company and the representatives of employees can determine, by written agreement, arrangements and derogations for the employees' participation within the transferred company.

OPTION 2:

- As a matter of principle, participation rights are determined by legislation of the Host MS;

- This principle does not apply when the company employs, during the six-month period preceding the publication of the transfer plan, an average number greater than 500 in which at least 2/3 continue to work normally in the Home MS.
  It also does not apply when legislation of the Host MS does not provide for at least the same level of participation of the workers as that which applied in the Home MS or does not provide that the workers of the company's establishments located in other MS can exercise the same participation rights as those conferred upon the workers employed in the MS where the registered office is established;

- In the latter cases, the participation of the employees in the company whose seat is transferred shall be regulated by the MS, *mutatis mutandis* and subject to an agreement concluded pursuant to the principles set forth in Directive 2005/56/CE. MS shall confer on the relevant organs of the company whose seat is transferred the right to choose without any prior negotiation to be directly subject to the standard rules, fixed by the national legislation of the Host MS in accordance with Directive 2001/86/CE (Article 7 and Annex 1).

RECOMMENDATION XIV – Provisions relating to the possible consequences of a seat transfer on the employment contract of the concerned employees:

- As a matter of principle, legislation relating to the employment contract of the MS within which the employee normally carries out his/her duties remains in force;

- When the seat transfer brings about a transfer of personnel, the consequences for the employment contract of the concerned employees are dealt with in accordance with the provisions of Directive 2001/23/CE.

  Remark: Such express reference is necessary because in its current state, Directive 2001/23/CE only concerns transfers of a company or establishment or of a portion of a company or establishment to another employer resulting from a legal transfer or merger (article 1);

- If collective redundancies linked to the seat transfer are inevitable, the provisions of Directives 75/129/CE and 98/59/CE shall apply.

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- **Businesses interviewed**

Only companies who agreed to disclose their names are included in this list. The interviews covered a wide range of companies (listed companies, non-listed companies, companies whose activities are regulated, etc.)

- VODAFONE
- PENTA INVESTMENTS
- FRANCE TELECOM S.A.

- **Bodies consulted**
  - AMF (France)
  - CCIP (France)
  - MIDDLENEXT (France)
  - MEDEF (France)
  - Ministry of Justice (France)
  - COOP DE FRANCE (France)
  - HEAD OF THE COMMERCIAL AND COMPANIES REGISTER OF THE PARIS COMMERCIAL COURT (France)
  - Government, Legislative Council (Czech Republic)
  - Ministry of Industry and Trade (Czech Republic)
  - Ministry of Justice (Czech Republic)
  - Notary Chamber (Czech Republic)
  - National Bank (Czech Republic)
  - Moravian Confederation of Trade Union (Czech Republic)
  - American Chamber of Commerce (Czech Republic)

- **Other law firms consulted by our international team**
  - Weinhold Legal, v. o. s. (Czech Republic)
  - CMS Cameron McKenna (Czech Republic)
  - Squire Sanders (Czech Republic)
  - White & Case (Europe) LLP

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ANNEX 1

The impact of the European Court of Justice's case law on companies' freedom of establishment

Issue dealt with in this annex: to resume the ECJ's case law on a company's freedom of establishment

The ECJ's case law on a company's freedom of establishment has been discussing two main issues:

- Does freedom of establishment guarantee European economic operators the possibility of forming a company in one of the Member States,while situating its centre of administration or the principal (or only) place of business in an another European Member State, without being subject to specific discriminatory provisions?
- Can a forming company decide to move its seat from the European state of constitution to another European state by cross-border conversion without losing its legal personality?

In the first situation, in its ***Centros*** decision of 9 March 1999[1], the ECJ states that

> "*it is contrary to Articles 52 (43) and 58 (48) of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned*."

Save in the event of fraud, nationals of a Member State, in a Member State where company law in particular is stricter, can therefore freely create a company in another Member State of their choice to carry on a principal economic activity. This freedom has been further confirmed and reinforced by two other decisions of the ECJ.

Firstly, in the ***Inspire Art*** decision, the EJC states[2]:

[1] ECJ 9 March 1999, *Centros Ltd vs. Erhvervs-og Selskabsstyrelsen*, C-212/97, concl. A. La Pargola.
[2] ECJ 5 November 2002, *Überseering*, C-208/00, para. 96.

> *"The Court has also held that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State (**Segers**, paragraph 16, and **Centros**, paragraph 18)*.
>
> *"It follows that those companies are entitled to carry on their business in another Member State through a branch, and that the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person (Case 270/83 **Commission vs France**, 28 January 1986, ECR 273, paragraph 18 ; **Segers**, paragraph 13, and **Centros**, paragraph 2)"*[3].
>
> *"Thus, in the main proceedings, the fact that **Inspire Art** was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares does not mean that that company's establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 EC and 48 EC. As the Court held in Centros (paragraph 18), the question of the application of those articles is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation by having recourse to the possibilities offered by the Treaty"*[4].

Lastly, save in the case of fraud or abuse, the host Member State cannot impose any particular obligation on the foreign company carrying on its business and/or having its real seat in the territory of the host Member State and all the more so when it has its registered office there, as the third case[Note 22], ***Überseering***, indirectly affirms.

In the ***Überseering*** case law[5], the ECJ states:

> (i) *where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.*
>
> *(ii) where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A')."*

It can be seen from these three decisions that freedom of establishment guarantees the European economic operators the possibility of forming a company in one of the Member

[3] ECJ 5 November 2002, *Überseering*, C-208/00, para. 97.
[4] ECJ 5 November 2002, *Überseering*, C-208/00, para. 99.
[5] ECJ 5 November 2002, *Überseering*, C-208/00.

States while situating its centre of administration or the principal (or only) place of business in an another European Member State without being subject to specific discriminatory provisions. Furthermore, the Member State hosting the actual "centre of administration" of a company incorporated in another Member State is under an obligation to recognize it as a legal entity, to acknowledge its legal capacity and therefore its capacity to take legal action on its territory.

ECJ case law also discusses the situation of a forming company deciding to move its seat to another state without losing its legal personality (i.e., by having to be wound up and re-incorporated).

In its ***Daily Mail*** decision ECJ states[6]:

> **"***As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor...*
>
> *The Treaty has taken account of that variety in national legislation. In defining in Article 58 (Article 48 of the EC Treaty), the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company. Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one Member State to another. No convention in this area has yet come into force.*
>
> *It should be added that none of the directives on the coordination of company law adopted under Article 54 (3)(g) of the Treaty deal with the differences at issue here.*
>
> *It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.*
>
> *Under those circumstances, Articles 52 (Article 43 of the EC Treaty) and 58 (Article 48 of the EC Treaty) of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State*."

Save in the case of an SE or an SCE the ***Daily Mail*** decision unequivocally lays down the rule according to which only the State is competent to determine the connecting factors

[6] ECJ 27 September 1988, *Daily Mail and General Trust Plc*, C-81/87.

attaching a company to that State and that State can also draw all the consequences of a termination of such attachment.

This position has, however, evolved as the Court has accepted as part of the principle of freedom of establishment the right for the company to continue to exist, without losing legal personality, directly or indirectly, in a Member State other than that of its incorporation.This change in position was first evident in a decision concerning a cross-border merger[7].

This position was confirmed by the ***Cartesio*** decision[8]: For ECJ:

> "*a Member State... has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.*"[9]
>
> "*Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company should be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved*[10].
>
> *In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so*[11].
>
> *Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC*[12]*.*"

In fact, for the Court, any national measure which would prevent a company from being transformed into a company of the national law of a Member State other than that in

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[7] ECJ 13 December 2005, Sevic Systems AG, C-411/03.
[8] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06.
[9] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, § 109.
[10] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, § 111.
[11] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, § 112.
[12] ECJ 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, § 113.

which it was constituted, is contrary to the principle of freedom of establishment. That does not mean that the State of incorporation cannot require that certain conditions (which could no doubt be qualified as an obstacle by the Court) be met for such a transformation. This is possible if these measures serve overriding requirements of public interest and are proportional to the achievement of the goal legitimately pursued.As noted in the decision, this will certainly not be the case if the company wanting to transfer its registered office to a host State by being transformed into a company of the law of that State must first be wound-up in the State of incorporation.

Finally, the ECJ in the ***Cartesio*** case establishes a right, for the company being transformed, to benefit from continuation of its legal personality if the State to which the company wishes to transfer its registered office allows the company to be transformed into a company of its national law. The latter condition obviously depends on the fact, as illustrated above, that the criteria for attaching a company to national law is determined by the host State. It is therefore finally the host State which can restrict the movement of companies by refusing to permit their transformation into local law.

On this matter, the position of ECJ adopted in the ***Cartesio*** casehas recently been clarified. On the ***Vale*** case[13], ECJ considered:

> *"32. It is thus apparent that the expression 'to the extent that it is permitted under that law to do so', in paragraph 112 of Cartesio, cannot be understood as seeking to remove, from the outset, the legislation of the host Member State on company conversions from the scope of the provisions of the Treaty on the Functioning of the European Union governing the freedom of establishment, but as reflecting the mere consideration that a company established in accordance with national law exists only on the basis of the national legislation which 'permits' the incorporation of the company, provided the conditions laid down to that effect are satisfied.*
>
> *33. In the light of the foregoing, the Court concludes that national legislation which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of Articles 49 TFEU and 54 TFEU".*

In consequence, ECJ stated in the ***Vale*** case:

> *"1. Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.*
>
> *2. Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from*

[13] ECJ 12 July 2012, Case C-378/10, VALE Epitesi kft.

– refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and

– refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin".

To sum up the position of ECJ regarding the transfer of seat by cross-border conversion, we can say that:

- Companies established in a Member State have the right to transfer their seat by cross-border conversion without losing their legal personality.

- This right is based on the freedom of establishment. This involves for the company that wants to realize a cross-border conversion, according to ECJ case law, the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that Member State and the pursuit of genuine economic activity there[14].

- If those conditions are met, neither Member State in which the company was constituted, nor the host states[15] can block a cross-border conversionunless national regulation serves to meet overriding requirements in the public interest.

- But at the same time, since secondary law of the European Union, as it currently stands, does not provide specific rules governing cross-border conversions, the provisions which enable such operations to be carried out can be found only in national law, namely the law of the Member State of origin of the company seeking to convert and the law of the host Member State in accordance with which the company resulting from that conversion will be governed.

[14] ECJ 12 July 2012, Case C-378/10, VALE Epitesi kft., para. 34.
[15] If it allows national conversion.

ANNEX 2

The concept of economic activity under Article 49 TFEU and the transfer of the registered office

Issue dealt with in this annex: what should be the legal basis for a European legislative instrument regarding cross-border transfers of registered offices?

1. Legislation on the transfer of the registered office and the necessity for a legal basis

Enacting legislation at the European level requires a legal basis in the Treaties. This is provided by the principle of conferral as enshrined in Article 5 (1) TEU.

As the ***Tobacco Advertising*** case shows,[1] European legislature can be challenged if it oversteps its jurisdiction.

In the context of freedom of establishment, the logical legal basis is Article 50(1) TFEU. Yet, in order to be able to make use of this Article, the activity which is sought to be regulated through legislation must actually fall within the freedom of establishment, which assumes that an economic activity is transferred.

2. The minimum criteria for 'economic activity'

Three key questions:

1. Is it sufficient to transfer the central administration in order to be able to rely on Article 49 TFEU?
2. If it is not the plan to transfer the central administration together with the registered office, what are the minimum criteria for an economic activity to fall within the scope of said freedom?
3. Is it required to have an economic activity already in the Host Member State or is it sufficient to be able to plan an economic integration into the host Member State?

General statements can be made regarding these three questions.

Firstly, it should be taken into consideration that the Court of Justice of the European Union has not provided an answer specific to cross-border seat transfer cases.

Secondly, for all three questions it is important to explore how the Court defines "economic activity". Across internal market law, the Court defines "economic activity" as "any activity consisting in offering goods and services on a given market".[2]

Moreover, the term is also defined in secondary legislation such as the VAT Directive. Article 9 (1) thereof provides that:

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[1] ECJ 5 October 2000, *Germany v. Parliament and Council*, C-376/98.

[2] ECJ 12 September 2000, *Pavlov*, C-180/98 and C-184/98, para. 75; ECJ 18 June 1998, *Commission v. Italy*, C-35/95, para. 36 and ECJ 16 June 1987, *Commission v. Italy*, para. 7.

"[a]ny activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity".

The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."[3]

Unfortunately, so far the Court has not provided for a minimum set of criteria that must be fulfilled for an activity to constitute an "economic activity" (*vs*. for instance, a commercial, industrial or non profit activity…). This makes sense to a certain extent since economic activities can be very different from one another, hence it might not be appropriate to provide for minimum criteria similar to *de minimis* rules under competition law.[4]

Therefore, such minimum criteria can only be deducted from applicable case law.

Looking at prominent cases concerning the freedom of establishment, it becomes clear that the activities of a vessel, a professional sportsperson or a lawyer can be sufficient.[5] Moreover, it is important to note that in the case ***Commission v. Germany***, the Court stated that a company is established in the host Member State if it has "an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency".[6]

Here also, the economic activity of one single person was deemed sufficient. Within the context of the VAT Directive, the Court noted that the acquisition and holding of shares in a company are not sufficient to fall within the concept of economic activity. However, this is the case if this shareholding activity "**is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired**".[7]

2.1. Three main issues regarding the transfer of the registered office as "establishment"

The first of the three questions mentioned above is whether or not it is sufficient to transfer the central administration together with the registered office in order to fall within the scope of Article 49 TFEU.

The central administration is a domestic law concept, meaning that the criteria forming the central administration can differ between Member States. Yet as shown in cases such as ***Baars* or *Polysar***, the management of companies by a controlling shareholder falls within the scope of establishment[8] or can be considered an economic activity within the context of the VAT Directive. Thus, it can be assumed that this would also be the case if one would substitute the shareholder with a different corporate decision maker, such as the management board.

[3] It should be noted it does not necessarily to be the case that the definition of economic activity under Article 49 TFEU and the VAT Directive had to be the same. Yet, as also the Advocate-General notes in the opinion to case ECJ 10 January 2006, *Ministry of Economics and Finance/Cassa di Risparmio di Firenze SpA*, C-222/04, in note no. 26, concepts of European Union law should be defined in an identical manner.
[4] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid.
[5] See ECJ 25 July 1991, *Factortame and Others*, C-221/89, para. 20, para. 19; ECJ 11 April 2000, *Deliège*, Joined Cases C-51/96 and C-191/97, para. 46 and ECJ 30 November 1995, *Gebhard*, Case C-55/94.
[6] ECJ 4 December 1986, *Commission v. Germany*, Case 205/84, para. 21. Only recently confirmed in case ECJ 8 September 2010, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, para. 46.
[7] ECJ 20 June 1991, *Polysar*, Case C-60/90, para. 13-14 and ECJ 14 November 2000, *Floridienne SA and Berginvest SA v Belgian State*, C-142/99, para. 17-19. See also the ECJ 13 April 2000, *Baars*, C-251/98.
[8] Note that it concerned a sole owner of the shares in ECJ 13 April 2000, *Baars*, C-251/98.

In line with the above mentioned cases, a shelf company would fall under Article 49 TFEU when transferring its central administration. Yet, in line with the case-law of ***Cadbury Schweppes***,[9] Member States could block such a transfer on the basis of an abuse of law because such a company does not have any economic reality.

2.2. The next issue to be dealt with is to explore the minimum level of economic activity that must be transferred if it is not the objective to also transfer the central administration. As already stated, the Court has so far not established minimum requirements. Looking at prominent cases under freedom of establishment, it can be enough to outsource one person to the host Member State in order to conduct an activity there which contributes to the "economic activity" of the company.

In this context it should be stressed that it shall be done through a fixed establishment and set up in a way that leaves no doubt that it is not just a temporary activity.

2.3. Eventually, an interesting point is whether a company has to pursue economic activity in the Host MS before the seat transfer takes place. This is not a clear issue so far. Yet, in paragraph 35 of the *Vale* case, the Court states that "[i]n the present case, there has been nothing to suggest in the procedure before the Court that the activities of VALE Építési will be restricted to Italy and that the company will not actually seek to establish itself in Hungary, although that is a matter to be determined by the referring court."

Looking at the second part of the sentence, it would seem to appear that the Court would be satisfied if a company could show that it seeks to establish itself in the Host Member State at a later point in time. It is not clear what the criteria would look like for such a case. One could evidence this intent with contracts showing that the "establishment' criteria will be complied with.

3. Conclusion as to a legislative act on the transfer of the registered office

Based on the above, the following statements can be made regarding European legislation on the transfer of the registered office.

Without a judgment of the Court of Justice of the European Union stating so, the transfer of the registered office does not fall *per se* within the scope of "establishment" and therefore there might be no legal basis for enactment of European legislation on the isolated transfer of registered seats.

As a consequence, a European legislative act would have to provide for additional criteria bearing on such "items" that must be also transferred in addition to the mere registered office. A possibility would be to provide that:

1. The transfer of the registered office and the central administration is possible on the basis of European legislation. This would bring the legislative act also in line with the SE Regulation which also has a double seat requirement and connects moreover to the judgments in ***Baars* or *Commission v Germany***.
2. As a second option the Directive could stipulate that it is possible to transfer the registered office on its own if the company already has an establishment in the Host Member State.
3. As a third option, the Directive could allow the transfer of the registered office if the company offers evidence to the competent authority of the Host Member State that it has transferred or plans to transfer an actual economic activity for an indefinite

[9] ECJ 12 September 2006, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Case C-196/04.

period of time to such Member State. With regard to evidence, one can refer to *Schweppes* in which the Court stated:

"[a] finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the […] [company] physically exists in terms of premises, staff and equipment".

ANNEX 3

Justifications for a restriction of Article 49 TFEU created by national (or European) legislation

Issue dealt with in this annex: to what extent can the national or European legislator justify stakeholder protections in cross-border corporate seat transfers or a veto right for national authorities under the fundamental freedoms

Introduction

In the context of protections imposed by either the European or the national legislator on company stakeholders such as creditors, minority shareholders, employees, but particularly considering also the possibility of including a veto for national authorities, consideration must be given as to in how far restrictions to the freedom of establishment can be justified. It should be noted that stakeholder protections, such as granting an exit right to stakeholders or a right to demand a guarantee for creditors, can impede the freedom of establishment. This is the case because if the exit is not possible because the company cannot cash out a minority shareholder or give the guarantee to the creditor, it will not be able to transfer its registered office.

As a consequence, this part will examine on which grounds and to what extent restrictive national or European legislation can be justified with respect of cross-border company conversions. It will be argued that particularly in respect to veto rights granted to national authorities, legislators have to make sure that they comply with the requirements adapted by the ECJ in its case-law.

The first part will consider the general mechanism under the fundamental freedoms and will then consider the *Vale* judgment introducing the standard of equivalence and effectiveness.

1. The justification mechanism under the freedom of establishment

Article 49 TFEU prohibits any restriction on the freedom of establishment. This can either concern a directly or indirectly discriminatory measure or also rules which merely hinder the freedom of establishment. Yet, the Treaty recognizes that even though the objective of realizing an internal market is crucial, interests of other groups must also be taken into account. As a consequence, restrictions to the freedom of establishment can be justified in order to be able to strike a balance between the objective of the fundamental freedoms and the objectives of public interest.

In the Treaty, Article 52 TFEU provides justifications for a restriction to Article 49 TFEU. These justifications are public policy, public security and public health. On top of these, non-discriminatory restrictions can be justified on the basis of mandatory requirements. This is an open-ended list of justifications introduced by the ECJ. It means that Member States can bring forward their own justification grounds, such as employee or creditor protection, which can be used if the Court accepts them. Yet, as shown by a series of case-law, along with the latest *Vale* case, the Court nowadays also applies mandatory requirements to discriminatory measures. At this point, it should already be stated that the Court does not accept economic justification even if the underlying national legislation has the same goal as internal market law such as ensuring competition on the market.[1]

Having a valid justification ground does not mean that a restriction can also be justified. In order to do so, the restriction must also be proportionate. This means that the restrictive measure must be suitable to attain the objective and should not go beyond what is necessary.

Finally, it should be noted that Article 49 TFEU generally applies vertically, i.e. against the national (or European) legislator. Yet, under certain circumstances, Article 49 TFEU can also apply horizontally between private parties.[2] Therefore, theoretically, protection measures included by private parties in their contractual agreements can potentially lead to a restriction on the freedom of establishment that needs to be justified in order to be valid.

In the judgment in *Vale*, the court, after having outlined the general justification mechanism, applied to the substantive provisions forming such a conversion procedure, the principles of equivalence and effectiveness. According to the ECJ, these rules do not form a restriction to the freedom of establishment, nevertheless, they must conform to the standard of equivalence (non-discrimination) and effectiveness (should not render impossible in practice or excessively difficult the exercise of rights).[3] It is submitted here that following the logic of internal market law, Member States will nevertheless be able to rely on justification grounds even if they should violate both principles.

As a final point, it should be taken into account that justifications will predominantly not be scrutinized by the ECJ but by the national courts. The ECJ will only consider such an issue if a national court makes a preliminary reference. As a consequence, in the absence of clear rules, it is likely that the courts of 27 Member States will interpret the case-law differently and apply a multitude of different standards.

The next part will briefly consider the existing case-law dealing with justifications in the context of cross-border company seat transfers.

[1] ECJ 4 June 2002, *Commission of the European Communities v Portuguese Republic*, C-367/98; ECJ 8 July 2010, *European Commission v Portuguese Republic*, C-171/08.
[2] See ECJ 15 December 1995, *Bosman*, C-415/93, ECJ 11 December 2007, *Viking*, C-438/05 and ECJ 18 December 2007, *Laval*, C-341/05.
[3] ECJ 12 July 2012, *VALE Epitési kft*, C-378/10, para. 48.

2. The case-law of the ECJ on justifications in the context of cross-border company seat transfers

As already stated, the Court of Justice has so far not scrutinized a measure such as an exit right for minority shareholders, a right to receive a guarantee for creditors or a veto right for national authorities in the context of cross-border seat transfers. Yet, the Court has already stated that it will accept certain grounds.

It should be noted that, in *Überseering*, the Court stated that a full negation of the freedom of establishment cannot be justified.[4] Yet it acknowledged that measures can be justifiable on grounds of protection of the interests of minority shareholders, creditors, employees, and also tax authorities.[5] In *Inspire Art* and *Centros*, the Court also accepted the grounds of abuse of law and fraudulent conduct and fraudulent insolvency.[6] In *Vale*, the Court also referred to the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions.[7]

In *Überseering*, the German government attempted to justify that it applied German company law to all companies which had their central administration in Germany on the basis of creditor, employee and minority-shareholder protection and fiscal considerations.

Regarding creditor protection, the German government argued that German rules of private international law ensured that a company with its real seat in Germany has a fixed minimum share capital, which is crucial to protect creditors. Moreover, it also protects against a distortion of competition because all companies with their real seat in Germany are subject to the same requirements. Regarding minority shareholders, the German government merely stated that for the protection of this group of stakeholders, a Member State must be able to apply the same requirements to companies with the real seat on its territory. Concerning employee protection, the argument made was that the German codetermination system could be circumvented by setting up a company in a different Member State. Finally, the German government stated that the application of the real seat principle can be justified on fiscal grounds. If the incorporation principle is applied, there is a greater risk that companies can be tax resident in two Member State and might claim tax advantages in several Member States.[8]

The Court was very short in its reply and basically did not deal with the content of the justifications by stating:

> It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.

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[4] ECJ 5 November 2002, *Überseering*, C-208/00, para. 93.
[5] ECJ 5 November 2002, *Überseering*, C-208/00, para. 92.
[6] ECJ 30 September 2003, *Inspire Art*, C-167/01, para. 109.
[7] ECJ 12 July 2012, *VALE Epitési kft*, C-378/10, para. 39-40.
[8] ECJ 5 November 2002, *Überseering*, C-208/00, para. 87-90.

> Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.[9]

Also in the case *Centros*, the Danish government had already attempted to justify the imposition of minimum share capital requirements. There also, the Court had been of the opinion that there are less restrictive means that can protect creditors.[10] The Court argued that creditors can obtain information about the company with which they are contracting and by that know that the company is governed by UK company law. The Court argued in the same way in *Inspire Art*.[11]

Another case in which a government sought to justify legislation based on the protection of employee and minority shareholder protection is *Commission v. Germany.* This case is also known as the *Volkswagen* case dealing with golden shares held by Germany and the Land Niedersachen in the German car manufacturer Volkswagen.[12] The Court did not accept these justification grounds arguing that Germany had not been able to show how the golden shares regime was able to protect these stakeholders.[13]

In respect of these cases it can be stated that Member States will be able to bring forward justifications for legislation protecting stakeholders. Yet, the cases *Centros*, *Inspire Art*, *Überseering* and also *Commission v. Germany* show that the Court has so far applied a strict standard. For example regarding an exit right for a minority shareholder or a guarantee for creditors, the Court will examine whether or not there are not less restrictive means to obtain the same objective. Moreover, it will not suffice for national authorities to argue that their legislation protects the stakeholders in the general sense. The authorities must be able to show that the legislation has a very specific objective. In the general sense, an argument could be made that the golden shares indeed protected Volkswagen employees. Yet, German legislation did so primarily indirectly, in the sense that it ensured that a different shareholder would not gain enough control to be able to close certain factories, such as the ones in Wolfsburg. This is however not sufficient in order to fulfill a proportionality standard under the fundamental freedoms.

The next section will look at public policy and public security justifications in more detail.

3. The justification grounds of public policy and public security

The public security and public policy considerations are especially important regarding a veto for national authorities that could be included in a European instrument on the transfer

[9] ECJ 5 November 2002, *Überseering*, C-208/00, para. 92-93.
[10] ECJ 9 March 1999, *Centros Ltd vs. Erhvervs-og Selskabsstyrelsen*, C-212/97, para. 32-37. Emphasis added.
[11] ECJ 30 September 2003, *Inspire Art*, C-167/01, para. 135.
[12] For example discussed in J. Adolff, 'Turn of the Tide? The "Golden Share" Judgments of the European Court of Justice and the Liberalization of the European Capital Markets, German Law Journal, http://www.germanlawjournal.com/article.php?id=170.
[13] ECJ 23 October 2007, *Commission of the European Communities v Federal Republic of Germany*, Case C-112/05, para. 75-81.

of the registered office. This can for example be the case for companies within the military or energy sector.

So far, the Court has not yet dealt with the justification grounds of public policy and public security within the context of cross-border company seat transfers. As a consequence, it is only possible to provide general observations. However, it will be important to follow these closely.

Regarding public policy, the Court has stated many times[14] that

> As the Court has pointed out on numerous occasions, the concept of public policy, first, comes into play where a *genuine and sufficiently serious threat affects one of the fundamental interests of society and, second, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed* (see to that effect, in particular, Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 28; Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 49; and Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-0000, paragraph 50).
>
> It is also clear from the case-law that the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment *must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by* that Member State, and by precise evidence enabling its arguments to be substantiated (see, by analogy, *Commission* v *Luxembourg*, paragraph 51 and the case-law cited).[15]

The public/national security considerations have a strong link with public policy and apply the same kind of mechanism as just stated in the quotation above.[16] Yet, it might be important to stress that even though one can argue that measures aimed at the protection of national security are of a special nature, they do not fall outside of the scope of internal market law. As the Court states:

> According to the Court's settled case-law, although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of Community law (see Case C-273/97 Sirdar [1999] ECR I-7403, paragraph 15, and Case C-285/98 Kreil [2000] ECR I-69, paragraph 15). As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect public safety are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred

[14] See also ECJ 17 November 2011, *Petar Aladzhov v Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti*, C-434/10; ECJ 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxemburg*, Case C-319/06; ECJ 31 January 2006, *Commission of the European Communities v Kingdom of Spain*, Case C-503/03; ECJ 27 April 2006, *Commission of the European Communities v Federal Republic of Germany*, Case C-441/02; ECJ 29 April 2004, *Georgios Orfanopoulos and Others* (C-482/01) *and Raffaele Oliveri* (C-493/01) *v Land Baden-Württemberg*, Joined cases C-482/01 and C-493/01; ECJ 26 November 2002, *Ministre de l'Intérieur v Aitor Oteiza Olazabal*, Case C-100/01; ECJ 19 January 1999, *Criminal proceedings against Donatella Calfa*, C-348/96.

[15] ECJ 22 December 2008, Commission v Austria, C-161/07, para. 35-36.

[16] See e.g. the golden shares cases mentioned above and below.

> that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application (see Case C-186/01 Dory [2003] ECR I-2479, paragraph 31 and case-law there cited).[17]

A leading authority in the context of public security is the case *Campus Oil*. It dealt with Irish legislation requiring importers to purchase 35 percent of their oil requirements from the state-owned refinery at a price given by the Irish government. The measure was aimed at reducing oil imports in order to guarantee the viability of the state refinery. In this case the Court accepted that petroleum products are of a 'fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. The interruption of supplies of petroleum products, with the resultant danger for the country's existence, could therefore seriously affect the public security.'[18] The Court finally accepted the justification and the restriction as proportionate.

However, this should not lead to the conclusion that it will be rather easy to justify a government veto in fields such as energy security. This is reflected by the 'Golden Shares' cases. The cases deal with national schemes that permit Member States to intervene in decisions on ownership structure and the management of strategically important companies.[19] In these schemes, Member States also apply veto powers and in this sense, the cases relate to veto powers of national authorities in cross-border company seat transfers.

First of all, it is possible to state that the 'Golden Shares' cases have shown that the ECJ accepts essential national interests regarding the petroleum, telecommunications and electricity sectors.[20] As the Court states 'to ensure a secure energy supply in that Member State in case of crisis, war or terrorism may constitute a ground of public security'. [21] On the other hand, it does not presume so regarding tobacco producers and banks that do not carry out any functions of a central bank or a similar body.[22]

Having stated this, the Court has laid down specific criteria that have to be satisfied in order for a veto power to be accepted. In principle, a veto must concern specific issues determining that state intervention is only possible where there is a threat to a specific policy stated in advance. Such a system then must be based on objective criteria amenable to judicial review.[23] The Court has accepted such a veto only in the case of *Commission v.*

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[17] ECJ 15 December 2009, European Commission v Kingdom of Sweden, C-294/05.

[18] ECJ 10 July 1984, Oil Limited and others v Minister for Industry and Energy and others, 72/83, para. 32 et seq.

[19] See in this respect also H. Bjornebye, Investing in Eu Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production (Kluwer Law International, 2010), p. 82 et seq.

[20] ECJ 13 May 2003, Commission of the European Communities v Kingdom of Spain, C-463/00, para. 69.

[21] ECJ 11 November 2010, European Commission v Portuguese Republic, Case C-543/08.

[22] ECJ 13 May 2003, Commission of the European Communities v Kingdom of Spain, C-463/00, para. 70.

[23] ECJ 26 March 2009, Commission of the European Communities v Italian Republic, Case C-326/07, para. 71.

Belgium.[24] It concerned a veto of the Belgium government where the public authorities had been obliged to adhere to strict time limits and where the regime was limited to certain decisions concerning strategic assets. Moreover, the legislation determined that the minister was only allowed to intervene where there was a threat that the objectives of the Belgian energy policy were compromised. Finally, the intervention had to be done by a formal statement of reasons and was subject to review by the courts.[25] As the Court also stated in another case, '[such a veto] must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them.[26] Interesting to note is also that pre-authorization schemes have so far never been accepted by the Court.[27] In respect to seat transfers this would refer to a system where every seat transfer first had to be accepted by the government.[28]

The considerations from the last paragraph are highly important in respect to the veto power of national authorities during seat transfers. In order to comply with the freedom of establishment, national authorities cannot 'merely' implement a veto into national law circumscribing it as the power of the government to object to a seat transfer if it contravenes essential national interests which are determined when the threat arises. Member States have to implement this veto power in a way that it is based on objective and non-discriminatory criteria which are known to the undertakings in advance. This means for example that the Member State has to define in advance what it regards as genuine and sufficiently serious threats to invoke this veto. This regime has to adhere to a specific time frame and, an objection must be given in writing providing reasons for the veto and be subject to an appeal. In this context, it should also again be stressed that national authorities cannot make an objection based on economic reasons. For example, ensuring conditions of competition on a particular market or the prevention of a possible disruption of the capital market are not sufficient.[29]

4. The discretion of the European legislator

A brief point should also be made regarding the European legislator in the context of legislation that restricts the fundamental freedoms. Article 49 TFEU also applies to legislation that is enacted on the European level; however, one crucial difference exists: the European legislator has a wider discretion. The ECJ will only find a violation of the fundamental freedoms if the weighing of interests by the institutions has been manifestly wrong.[30] This signifies that in cases where the Court would find a violation on the national

[24] ECJ 4 June 2002, *Commission of the European Communities v Kingdom of Belgium* C-503/99.
[25] ECJ 4 June 2002, *Commission of the European Communities v Kingdom of Belgium* C-503/99, para. 48-52.
[26] ECJ 4 June 2002, *Commission of the European Communities v French Republic*, C-483/99, para. 46.
[27] See e.g. ECJ 4 June 2002, *Commission of the European Communities v French Republic*, C-483/99 or also ECJ 14 March 2000, *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* C-54/99.
[28] Not to be confused with the 'competent authority', which has to check whether a seat transfer complies to all legal requirements and can only then issue a transfer certificate.
[29] ECJ 8 July 2010, European Commission v Portuguese Republic, C-171/08, para. 70 and 71.
[30] ECJ 13 May 1997, *Germany vs Parlaiment and Council*, 233/94; ECJ 13 November 1990, *Fedesa*, C-331/88; C. Teichmann, Binnenmarktkonformes Gesellschaftsrecht (De Gruyter Rechtswissenschaften Verlag, 2006), p. 154.

level, it would not necessarily find so if the same legislation was adopted by the European legislators. Yet, it should be stressed that this only applies to pure European legislation. If the national level implements such European law, the national legislation has to fully comply with internal market law. This can be illustrated in the following way. The European legislator gives a veto right to national authorities for public policy reasons in cross-border company seat transfers but leaves it to the national level to determine the specific public policy reasons which can be invoked. In such a case, the criteria stipulated by the national legislator will have to fully comply with the fundamental freedoms.

Conclusion

In conclusion, reference can be made to the introduction. As shown, employee, creditor or minority-shareholder protections are valid justification grounds which could be used in the context of stakeholder protection in cross-border corporate seat transfers if the imposed measures are proportionate. National authorities can also justify veto powers. However, as shown, these have to be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them.

ANNEX 5

Overview of the procedure for cross-border transfer of the registered office under national law

Issue dealt with in this annex: to briefly set out the features of national seat transfer procedures by looking at Cyprus, the Czech Republic, France, Italy, Luxembourg and Spain.

The national procedures are similar to the procedures existing under the SE or SCE Regulation and the cross-border merger Directive. Yet, considering national procedures, a distinction has to be made between Member States such as the Czech Republic, Cyprus or Spain that have a specific procedure in place and Member States such as Italy or France which allow a cross-border company seat transfer but which do not provide for a specific procedure.

Notwithstanding the fact whether a specific procedure is in place, the main features as identified under the SE Regulation or the Cross-Border Merger Directive can be found.

1. Seat transfer proposal

Generally, under all seat transfer procedures, the management organ has to draw up a proposal for the seat transfer. This is required in order for a vote at a general shareholder meeting to be able to take place. For example in Spain, the proposal has to include (1) the name and registered office of the company as well as the registration number in the Commercial Registry; (2) the new proposed registered office, (3) the articles of association which will govern the company after the transfer, including, where appropriate, the new name, (4) the timing envisaged for the transfer, and (5) the rights provided for the protection of the shareholders and creditors, as well as the employees.

In the Czech Republic, this is called a 'project of cross-border seat transfer' and contains more information than the Italian counterpart. Apart from data such as the company name, seat and registration number, it also needs to include information about the new seat, changes to documents such as the articles of association, an assessmement of the consequences for employees and a schedule of the transfer. Moreover, information on the rights of shareholders, creditors and other entitled persons and information on the law governing the internal affairs after the transfer have to be provided.

2. Publication of seat transfer proposal

In Spain, the proposal has to be filed with the Commercial Registry, which will order publication in the Official Journal of the Commercial Registry.[1] This is also the case in the

[1] Ley de Modificaciones Estructurales de las Sociedades Mercantiles (LMESM), Section 95.

Czech Republic. The company simultaneously has to publish a notification on the submission, including a remark on the rights of the creditors in the Commercial Bulletin (in Czech *Obchodní věstník*). Under certain circumstances, the project can as an alternative also be published in electronic form on the company's website.

3. Expert (/director) report

In Spain and the Czech Republic, a report has to be prepared which explains in more detail the legal and economic aspects of the transfer, as well as the consequences for the shareholders, creditors and employees.[2] Again, this report has to be filed with the Commercial Registry in Spain. In the Czech Republic, the report shall be placed at the seat of the company for informational purposes at least one month before the general shareholder meeting, unless the report is made public on the company's website in the same manner as for publication of the project. Unique for the Czech Republic is that employees receive an explicit right in the seat transfer procedure to be informed about the seat transfer. The trade unions have the right to submit a written statement on the cross-border transfer of seat. If these statements are delivered to the seat of the company before the general meeting to approve the seat transfer takes place, the statements must be added to the report and the shareholders have the right to read the statements before voting on the seat transfer commences.

4. Right of objection for company stakeholders

As under the SE Regulation or the cross-border merger Directive, company stakeholders may receive the possibility to object to the transfer or to exit the company.

In the Czech Republic, creditors can demand security for their claims in case the recoverability of their claims worsens due to the seat transfer within three months of the publication of the transfer. Also in Spain, creditors can oppose a seat transfer if their claims are not sufficiently secured after the seat transfers.[3]

In Italy, Spain and the Czech Republic, minority shareholders can exit the company, which means that the company has to repurchase their shares.[4] This is only possible under certain conditions. In Spain, this is possible for shareholders that voted against the resolution to transfer the registered office. This can be done within one month counting from the publication of the transfer proposal in the Official Journal of the Commercial Registry. The same conditions also apply in the Czech Republic. Under Italian law, Article 2437, first paragraph, of the Italian Civil Code, grants the withdrawal right to the shareholders which do not participate in the resolution concerning the transfer abroad of the company's registered office.

It is also of note that public authorities can receive a veto right. This is for example the case in the Czech Republic and Cyprus. In Cyprus, this can be the approval of the relevant supervisory or regulatory authority. Likewise, if the company has listed its shares on the stock exchange, the Stock Exchange of the Cyprus Council of Securities and Exchange Commission has to give its approval. Similarly, if a company incorporated in Cyprus seeks

[2] For Spain see LMESM Section 96.
[3] For Spain see LMESM Section 100.
[4] For Italy see Article 2437 of the Italian Civil Code; for Spain see For Spain see LMESM Section 99.

to transfer its registered office to another Member State and carries out activities which require a specific permit, the consent of relevant authority for the continuation of the company from abroad is required. In the Czech Republic, there exist specific rules for companies subject to the supervision of an administrative authority or the Czech National Bank. In these cases (unless stipulated otherwise by a special legal regulation) the company can transfer its seat only with the consent of the supervising authority.

France or Luxembourg neither provide for an exit right for minority shareholders, nor an opposition right for creditors or public authorities.

5. Vote at the general shareholder meeting

In all analysed Member States it is fundamental that a general meeting is convened at which the shareholders vote on the transfer proposal. Yet, countries differ, for example regarding the majority that is required. In both Luxembourg and France, a unanimity vote is required. This majority protects minority shareholders substantially; however, it makes seat transfers in companies with dispersed ownership also very difficult. In Spain, a two-third majority is required in limited liability or joint-stock companies. [5] In Italy, a qualified majority has to be obtained.[6] In the Czech Republic, a three-quarter majority is generally needed for limited liability and joint stock companies. If the company issued different types of shares, the consent of three-quarters of shareholders for each type of share present at the general meeting is necessary for the approval of the seat transfer project.

6. Transfer certificate

After a transfer decision has been taken by the shareholders, an independent authority scrutinizes the legality of the operation in accordance with the law of the Home MS. This authority issues a certificate attesting the completion of the formalities. This can for example be seen in the Czech Republic and Spain.[7]

7. Successful accomplishment of seat transfer

Generally, it is the case that a seat transfer will take effect upon registration and publication in the Host MS. Only after registration in this jurisdiction, will the registry in the home MS will delete the company. This is for example the case in Italy. In Spain, evidence as to the new registration has to be provided. The de-registration will be published in the Official Journal of the Commercial Registry and in one newspaper widely distributed in the province where the company used to have its registered office.[8] In the Czech Republic, there must be 30 days between the general shareholder meeting and the registration in the new Member state. For deregistration in the home MS, another certificate is issued. Apart from information on the notary who issues it and identification of the company changing its seat, this certificate includes a statement by the notary that (i) a public document was submitted to him showing that the new seat of the company was already registered in the foreign Commercial Register and on which day the registration was carried out; (ii) contains the new seat of the company, its business name and its legal form; and (iii) specifies the new

[5] For Spain see LMESM Section 97 with reference to Section 199 and Section 201 of the LSC.
[6] Article 2369, fifth paragraph, of the Italian Civil Code.
[7] For Spain see LMESM Section 101.
[8] For Spain see LMESM Section 103.

Commercial Register in which the company is registered and the company's identification number. The notary cannot issue the certificate if the public document of the foreign state is older than six months.

8. Further protective provisions

As under the SE and SCE Regulation, national cross-border seat transfer procedures can provide for similar further protective provisions. In the Czech Republic, a seat transfer is not possible if the company is in liquidation or insolvency proceedings are reasonable. The same is the case for Spain. Another protective measure relates to the jurisdiction of Czech courts. According to these provisions any disputes from relationships that have arisen prior to the effectiveness of the transfer of seat shall be resolved by Czech courts regardless of whether the company is transferred abroad. The venue jurisdiction shall be the same as if no transfer had occurred.

ANNEX 6

The US System

- US questionnaire

- Transfer of the seat of a corporation in the USA: tax perspective

CROSS-BORDER TRANSFER OF COMPANY SEAT

Questionnaire USA

Contributor: CLAIRE A. HILL, James L. Krusemark Chair in Law

Note: I have given you my assessment of US corporate law, referencing general principles, Delaware law ("Delaware General Corporation Law"), to a limited extent, the Model Business Corporation Act ("MBCA"), and also to a limited extent Federal securities law. I have not done a survey of the specific laws in the different (50)states, nor does my analysis cover other bodies of law such as tax law, general commercial or bankruptcy law, or any specialized body of law relating to foreign ownership of particular types of businesses. I also do not consider other types of entities. (But, re: tax law, this Revenue Ruling may be of interest: Rev. Rul. 88-25, 1988-1 C.B. 116)

Following is some general explanatory material to put the answers below into context.

In the US, incorporation ("company seat") is a matter of state law, not federal law. Each of the 50 US states has its own corporate law, which governs the corporation's "internal affairs" and is the main source for corporate law concerning the corporations incorporated therein. (Corporations are also governed by other laws, including other laws of their own states and Federal laws; sometimes, other state corporate laws are applicable as well. One example of the latter is state takeover laws, some of which apply to companies not incorporated in the state but with significant numbers of shareholders, operations, etc. in that state.) The Model Business Corporation Act developed by the American Bar Association is highly influential, with many states using it as a basis for their corporate laws (not necessarily adopting its provisions verbatim, and not infrequently interpreting even verbatim adoptions differently). Delaware law is of course exceedingly important, given that many of the largest US public corporations are incorporated in Delaware. Some corporate law, especially Delaware corporate law, is "common law" (that is, developed through court decisions). While there are considerable differences among different states' corporate laws, there is considerable similarity as regards certain general concepts such as incorporation, mergers, asset sales, and dissolution. That is, the terms may be defined differently, and the rules may be different, but there are fundamental conceptual similarities. (Note that I use the terms "company" and "corporation" synonymously here. In both cases and throughout this analysis, I am referring to corporations incorporated under a state's business corporation law or its equivalent; these are the standard types of entities, and are what is usually thought of when one refers to "corporations" or "companies" in the normal course. There are other types of entities, which may have their own entity laws; as noted

above, my discussion does not cover such entities.)

As to your question about "registered office:" I interpret the question to relate to place (state) of incorporation (although there is a term, registered office, discussed below) and "head office" to mean something more substantive, such as company headquarters, where the company's operations are conducted and managed. The answer to this question is yes. There is no requirement that a company's operations be located in the state where the company is incorporated; indeed, most large publicly traded companies are incorporated in Delaware but very few have major, or even substantial, corporate operations there. A corporation incorporated in a state must have a "registered office" and a "registered agent" (for service of process, so they can be sued in the state). See, for example, MBCA Section 5.01, and DGCL Sections 131 and 132.

Corporations may have to file forms to authorize them to do business in states other than the one in which they are incorporated. (This is sometimes called "qualification to do business as a foreign corporation.") What it means to do business—what triggers the need to file the form-- varies, but the filings are typically not onerous. See, for example, DGCL Section 371, and MBCA Chapter 15.

1. Is there any legislation governing cross-border transfer of company seat in your jurisdiction (registration of a company from one State to another State in your jurisdiction by way of "transformation")?

- [x] Yes
- [ ] No

If no, explain in maximum 5.000 words

- Why?
- Do you have/use alternative means of reaching cross-border mobility of companies?
- Is there any economic problem? Any other problem?

If yes, in maximum 10.000 words :

- Explain under which conditions? do you have special provisions regarding protection of stakeholders (creditors, workers, minority shareholders,…)?
- Is there a possibility for the registered office (company seat) and the head office (management seat) to be in different States?
- Do you have identified special difficulties?

The Model Business Corporation Act was fairly recently amended to provide for "domestication," which is basically reincorporation.   See MBCA Section 9.20 and the comments thereto. The specific requirements for domestication include filings of forms, shareholder approval, and other things specified in Subchapter B of Chapter 9 of MBCA. Domestication must be permitted by both jurisdictions. MBCA 9.20(f) relates to creditor rights.   The clause provides in effect that references to mergers in loan and related documents shall be deemed to include references to domestication. (Also see comment 6 to MBCA Section 9.20, discussing 9.20(f).) The annotated version of the MBCA also contains a very helpful list of states adopting provisions based on MBCA Section 9.20. Delaware's analogue for non-Delaware jurisdictions in the US is in DGCL Section 265 (conversion of other entities to Delaware corporations) and 266 (conversion of domestic [Delaware] corporation to other entities). (Its analogue for non-US jurisdictions is DGCL 388 and 390; I will refer to these provisions in my answer to question 2 below).

If there were no statute allowing domestication or conversion, "reincorporation" could effectively nevertheless be accomplished, albeit using several steps. A transaction could be structured as, for instance, a merger (typically using a subsidiary or holding company) or sale of assets. It might, or might not, need to include a dissolution. Depending on the type of transaction, a shareholder vote might be required; it is also possible that shareholders might get appraisal rights. (Shareholders get to vote on many significant sales of assets; they rarely if ever get to vote on purchases of assets.   Shareholders also may get "appraisal rights" in connection with mergers or merger-like transactions or asset sales.) The law varies from state to state. Many excellent treatises exist, including those by Stephen Bainbridge ("Mergers and Acquisitions") and William Carney ("Mergers and Acquisitions: The Essentials").   Shareholders may have other ways to take action regarding a transaction they don't like- for instance, they are allowed to sue directors and officers of a company for "breach of fiduciary duty," which may include some fact relating to one of these transactions.   But the hurdles for shareholder action are fairly high.

Federal securities law is also relevant, both for domestication (or conversion) and for alternative means of achieving a "reincorporation." It governs solicitation of "proxies" for shareholder votes, specifying what information shareholders must receive and various other mechanics related to the approval process for public companies. (State law also contains provisions governing the mechanics of shareholder voting.)

What about creditors? See above re: MBCA Section 9.20(f). Where domestication/conversion is not possible or 9.20(f) is not enacted or effective, in many types of transactions, creditors continue as creditors of the new corporation. Moreover, many types of creditors will negotiate provisions in their credit agreements that cover their rights in the event of major changes; the debtor will promise not to make certain major changes unless it in effect either seeks creditor agreement or the creditor's rights will not be impaired by the change.   There are also provisions in state law – different states have

different provisions- governing creditors' rights, and shareholders' liabilities, if a company dissolves. Creditors may be barred from seeking recovery if the company gives notice and they do not come forward within some prescribed period of time. See, for example, DGCL Sections 280-282 and Sections 14.06-09 of the MBCA. See also the discussions of "successor liability" in the short treatises (Bainbridge and Carney) mentioned above for other contexts in which creditors of an entity somehow get rights against another entity with some relationship to the first entity or succeeding to its assets.

I am not aware of any special corporate law provisions that would provide any kinds of rights for employees in the types of transactions that result in a company remaining intact albeit incorporated in another jurisdiction.

2. Is there any legislation in your jurisdiction governing cross-border transfer of company seat allowing the registration of companies coming from foreign jurisdictions?

Recent law on domestications permits non-US companies to domesticate as US companies if both jurisdictions' laws so allow. See, again, MBCA Section 9.20; see also DGCL Section 388, both dealing with non US-US domestications. In states without laws permitting domestication or something comparable, the analysis in the previous section should hold. Corporate law has permitted, and should permit, a series of transactions by which an EU company could have/be as an end result a US company. Moreover, I am not aware of any reason why corporate law should not have allowed qualifications to do business by "foreign" companies not incorporated within the US.

- [x] Yes, please explain

- [ ] No

3. Is there any legislation governing the transfer of company seats from the USA to a foreign jurisdiction (EU jurisdiction)

- [ ] Yes
- [ ] No

If yes, in maximum 10.000 words:

- Explain under which conditions? do you have special provisions regarding protection of stakeholders?

- Is there a possibility for the registered office (company seat) and the head office (management seat) to be in different jurisdictions?
- Do you have identified special difficulties?

If no, explain in maximum 5.000 words

- Why?
- Do you have/use alternative means of reaching cross-border mobility of companies?
- Is there any economic problem? Any other problem?

The law discussed (on domestication) as my answer to questions 1 and 2 above directly addresses this in the states in which it has been adopted. Note also that DGCL Section 390 allows corporations that domesticate to another jurisdiction from Delaware to also continue in existence in Delaware. For other states, the analysis would seem to be the following. Corporate law should not limit a company incorporated in a US state from "reincorporating" in some manner to another jurisdiction absent special circumstances. Certainly, companies originally in the US sometimes, through a series of transactions, come to be incorporated in another jurisdiction, yet continue their activities in the US. Again, it seems likely that the structure of the transaction would require a shareholder vote. The discussion in my answer to question 1 as to provisions creditors may negotiate in their agreements, and the possibility of some sort of continuing liability by reason of "successor liability" in the event of a dissolution, would apply here.

One final point: some companies incorporated in the US and with extensive operations in the US attempting to become incorporated outside the US for tax reasons have elicited some controversy. One company planned to reincorporate outside the US and then abandoned the attempt after unfavorable publicity.

Transfers of the seat of a corporation in the USA
- Tax perspective -

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1. Introductory Observations.

A unified concept of "corporate seat," as a single determination of the state with which a corporation has virtually all of its most significant relationships, has relatively little significance in corporate law in the United States. The prerequisites and consequences of a "transfer of a corporate seat" are therefore somewhat ambiguous. This report will discuss the two primary counterparts of "corporate seat" in corporate law in the United States, the "place of incorporation" and the "place of doing business and/or corporate headquarters." [1]

As will be discussed below, in many of the contexts in which a single relationship between a state and a corporation must be deemed most important, the "place of incorporation" is the criterion used. [2] In no state must the place of incorporation for a general purpose corporation be the same as the principle place of business or the corporate headquarters, although for many smaller enterprises, all three will be the same.

The "place of doing business and/or corporate headquarters" is much more likely to be determined for each specific situation. For the purposes of most tax liabilities, no single "place of doing business" need be determined, because the states will be required to tax based only on their "allocable share" of the tax base.

2. Choice of law governing US Corporations with particular attention to taxation

2.1. The significance of "Place of Incorporation" in US corporate law generally. In the United States, the "place of incorporation" [3] has historically determined the law that

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[1] This report does not consider similar questions arising when the entity is not a "corporation" for US tax purposes, that is, the entity is organized under state laws that render it eligible to elect to be treated either as a corporation or as a partnership under the "check-the-box" regulations. (Under these regulations, for federal income tax purposes, if corporate status is not chosen and there is only one owner as a "disregarded entity.")

A useful starting point for understanding the proliferation not only in the choice of legal entity through which business may be conducted, but the models upon which states may base their statutes, see William H. Clark, The Model Business Corporation Act at Sixty: The Relationship of the Model Business Corporation Act to Other Entity Laws, 74 Law & Contemp. Prob. 57 (2011).

[2] This principle is implicit in the primary rules governing the choice of law to be applied to corporations: Restatement (Second) of the Law: Conflict Of Laws, § 296 (1969) ("In order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation is to occur regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled."); and § 297 ("Incorporation by one state will be recognized by other states").

[3] Many statutes and legal doctrines do not refer to the place of incorporation, but rather to the state in which the corporation is organized, or under whose law the corporation "exists." This report will simply use "place of

applies for most situations involving internal corporate governance and the obligations of corporate management to shareholders. Although federal law provides uniform rules for some aspects of corporate law when shares are publicly traded, many of the most important aspects of the laws governing corporations and their relationships with their shareholders are set by the legislatures and the courts of the state of incorporation. The issues determined under the law of the state of incorporation include those most important in corporate acquisitions, takeovers and restructurings; these topics include dividend policy, election of directors, charter amendments, shareholders' meetings, appraisal rights, mergers, indemnification of officers, and antitakeover defenses.[4]

The general assumption in the United States has long been that without extraordinary circumstances, State B cannot condition doing business in State B on the issuance of a State B charter.[5] State B can, as a condition to the conduct of business in State B,[6] require

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incorporation" and "state of incorporation" interchangeably, meaning the jurisdiction by which the charter of the corporation was issued.

The concept of the "domicile" of the corporation is very inconsistently used. For instance, the Restatement of the Conflict of Laws, section 11 comment 2, simply asserts that "When a domicil is assigned to a corporation, it is always in the state of incorporation," but this authority then urges that the concept of "domicil" developed for natural persons simply not be applied to corporations. Older law may make a corporation's domicile the "situs of its corporate stock," or less cryptically but no more usefully, the place where its corporate stock is owned. Delaware finesses any such analysis by creating an irrebuttable presumption that the for all purposes except taxation "situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State." 8 Del. C. § 169. Other authorities, however, use the expression "commercial domicile" to mean the primary place of doing business. E.g., Uniform Division of Income for Tax Purposes Act, section 1(b). [UDITPA. The full text of the uniform law as originally promulgated can be found at https://www.law.upenn.edu/library/archives/ulc/fnact99/1920_69/udiftp57.htm. Caution is advised in relying upon the text of this uniform law, since virtually all states adopting it have introduced substantial variations.]

[4] This approach has sometimes been referred to as the "internal affairs" rule. There have been attempts in some states (in particular California and Illinois) to deviate from the "internal affairs" rule when a corporation (sometimes called a pseudo-foreign corporation) not chartered by the state has virtually of its assets, business, employee or shareholders in such states and none in the state of incorporation. These episodes remain relatively minor incursions in the general approach.

There is general consensus that Congress has far greater power to regulate commercial activity, including corporate governance, than it has chosen to exercise. Several recently enacted federal statutes have undoubtedly encroached on the prerogatives of the states in corporate governance, including Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) and Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). These federal provisions still affect primarily publicly traded entities.

Although Congress has also left the regulation of ordinary commercial law to the states, there is a relatively high degree of predictability in the law applicable to ordinary sales and lending transactions as a result of the adoption of the Uniform Commercial Code (albeit with variations). Congress has exercised its power to provide a uniform set of rules dictating debtor and creditor's rights in bankruptcy.

[5] The sources in the US Constitution of this limit on each individual state's power to control corporate activities include the Commerce Clause ("The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States . . . .", Art. I § 8 cl.3), the equal protection clause of the fourteenth amendment (No State shall deny to any person within its jurisdiction the equal protection of the laws); and the full faith and credit clause ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, " Art. IV, §2).

The limitation on the states announced in the text applies only to the activities of corporations ***engaged in interstate commerce***, see, e.g., Railway Express Agency, Inc. v. Virginia, 282 U.S. 440 (1931) (upholding Virginia's requirement that a corporation seeking to engage in the business of insurance be chartered in Virginia). The meaning of "engaged in interstate commerce" for these purposes has clearly expanded substantially since this decision, and therefore the number of situations in which a new charter could be required have probably become more limited (primarily to insurance, banking, and certain other financial activities). Before the Supreme Court's recent decision in National Federation Independent Business v. Sebelius, 132 S. Ct. 2566 (June 28, 2012) many commentators would have concluded that "interstate commerce" encompasses virtually all market activity; the

a corporation chartered in State A to register an agent in State B, to notify State B of its place of business in State B, to file an annual report (and such other reports as necessary to reflect its presence in the state) be filed, and to pay a franchise fee. [7]

Many corporations do business in many states, and they have done so since the mid-nineteenth century. The law that will apply to a "foreign corporation" (that is, one not incorporated in the state, which will be referred to herein as "foreign [US state] corporation" to distinguish it from a "foreign [nation] corporation") with respect to any particular transaction (aside from corporate governance) will depend upon the choice of law rules that apply in the state in which the activities giving rise to a dispute and, if there is a relevant contract, the terms of the contract. A state is in general prohibited from applying a different substantive rules of law to a corporation simply because it is chartered in another state.[8]

2.2. The significance of "Place of Incorporation" in the federal taxation of corporations. In general, there are no federal income tax consequences to the choice of place of incorporation among the several states in the US. [9]

2.3. The significance of "Place of Incorporation" in the state taxation of corporations. Despite its importance for corporate governance law, the place of incorporation is not the most important factor in determining state tax liabilities. Although the place of incorporation can make a difference in determining some state tax consequences, the place in which business is conducted, where assets are located, and where management is located are generally far more important in determining the state and

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recent decision, finding an individual's decision not to purchase private health insurance not "interstate commerce," leaves that conclusion in some doubt.

[6] Each state is free to determine what its own threshold for "doing business" is. For instance, some but not all, states require registration prior to the opening of a corporate bank account or prior to conduct debt collection activities.

[7] See, e.g., Del. Code, sections 371 to 385. Franchise fees of this type are generally computed based on corporate capital, but generally do not increase (as income taxes would) with the profits of the entity. They may seem significant (Delaware's franchise fee for the largest corporations is capped at $165,000), but are in fact relatively insignificant when compared with the total combined income taxes paid by such corporations on an apportioned bases to all states in which such corporations are doing business. This franchise fee (which need not be apportioned) should not be confused with the income tax on corporations (technically called in some states, including California and New York, a franchise tax) which must be apportioned as described in the report.

States may impose additional requirements in appropriate circumstances. For instance, it appears that a state can require the registration by out-of-state construction contractors not just for the authority to do business generally, but also with the details of particular contracts and can also require the posting of bond. See, e.g., Clover Cable of Ohio, Inc. v. Heywood, 260 Ga. 341, 392 S.E.2d 855 (1990)(interpreting a Georgia statute so providing as an assistance in tax administration, and therefore allowing late compliance by a contractor seeking to capacity to bring suit in Georgia).

[8] However, a state may grant in its corporate charters special powers (for instance, the power to acquire property through eminent domain or to operate a public utility) without granting these same powers to all corporations doing business within its borders. Similarly, a state need not allow a foreign corporation to exercise all of the special powers contained in its foreign charter.

[9] Indeed, if Congress' power to impose a corporate income tax is only as an excise tax under Article I, section 8, the tax must be imposed uniformly. If a corporate income tax is also authorized as an income tax under sixteenth amendment, the nature of the equal treatment constraint is less clear.

local tax liabilities of a corporation.[10] *There are only limited situations in which a **single** most important location of management or headquarters must be determined.*[11]

The states are constrained (again under the commerce clause) to tax only what can be justified as their share of the base of the tax in question.

For income tax purposes, states may apply formulas to allocate the corporation's income based on where the corporation's assets, employees or sales are located. There is no uniform approach to determining what each corporation's share is.[12] Under current Commerce Clause doctrine, each state is allowed to devise its own formula, so long as, if that formula were applied by all states, there would be no "double taxation."

For sales tax purposes, only the sales properly attributable to State A may be taxed by State A. Again, however, each state is entitled to set forth the criteria according to which a sale is attributable to it, so long as uniform application of the formula would not result in double taxation.

There are some situations in which a state may set tax liabilities using the place of incorporation, or some other test for a single place of residence, but these situations in general do not involve the most substantial liabilities. [13] For instance, under UDITPA section 5(b), jurisdiction of the commercial domicile to tax rents and royalties from property can be greater if the object of the rental is not located in the state of incorporation. Under UDITPA sections 6 and 7, the state in which the corporation has its commercial domicile can tax dividends and capital gains when those dividends and gains are unrelated to the conduct of a business.

3. The mechanics of changing a Place of Incorporation in the United States.

3.1. Available statutory routes to changing the place of incorporation.

Except to the extent the transaction involves communications with shareholders that attract obligations under the federal securities laws, the possible routes to changing the place of incorporation are entirely matters of state law.

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[10] The place in which business is conducted is sometimes referred to as the "commercial domicile." See UDIPTA, section 1(b): "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.'"

[11] One such situation is the determination of diversity of citizenship for the purpose of the jurisdiction of the federal courts over state law claims under 28 U.S.C. § 1332(c)(1). That section provides that a corporation is a "citizen" for diversity purposes in both the place of incorporation and "its principle place of business." This statute is designed to ensure that "diversity jurisdiction" is made available only to parties whose primary contacts are with the same state. Therefore a rule that allows two states of "citizenship" is not inappropriate. There can be substantial factual problems, however, in actually administering the provision. See, e.g., Hertz Corp. v. Friend, (2010), analyzed in Keena M. Hausmann, Paul A. Rosenthal, and Sean-Patrick Wilson Home is Where the HQ is: Corporate Citizenship Following the Supreme Court's Decision in Hertz Corp. v. Friend, 7 Rutgers Bus. L.J. 128 (2010).

[12] Almost most experts would agree that Congress has the power to dictate the allocation of income, it has steadfastly refused to do so.

[13] The extent of the situations in which a state can tax without apportionment is still a matter of considerable debate. The issue arises less frequently than it might because both states and corporate taxpayers often prefer to concede that periodic income is business income, leaving only the proper measure of apportionment at issue. See, eg, Allied-Signal, Inc. v. Div. of Taxation, 504 U.S. 768 (1992) (apparently upholding the rule but finding it inapplicable because the dividends were a part of the corporation's business and therefore apportionment was required).

3.1.1. Merger into newly-formed corporation. Most corporations can change their state of incorporation relatively easily by entering into a transaction in which the existing corporation in Old State is merged according to statutory procedures into a new corporation chartered in New State.[14] (Only corporations that are heavily regulated, especially insurance companies, banks and some other financial institutions, face particularly burdensome obstacles in arranging such transactions.)

In the typical case, the New State Corporation will be newly created with this merger transaction in mind. (As discussed further below, the some of the more desirable tax consequences of the transaction are not available if the New State Corporation has engaged in enough activity that it already has a tax history.)

The creation of the New State Corporation is relatively straightforward in most states. A filing is made with the Secretary of State, an agent is named, a relatively small fee is paid, and a standard charter is available. Capitalization requirements for general corporations are minimal, where they exist at all.

Most of the legal requirements pertaining to shareholder relations when Old State Corporation merges into New State Corporation will be governed by the law of Old State (and, if either corporation is publicly traded, the federal securities laws). In all cases, shareholders must be notified, but in most states under most circumstances minority shareholders will not be able to block the transaction.

Rarely will there be regulatory obstacles imposed by Old State to the merger itself. In some cases, however, notice must be given to Old State regarding the change of name and, if appropriate, the complete withdrawal from the state.

3.1.2. Domestication: An alternative route, of limited availability within the United States. Despite the relative ease with which corporations can effectively reincorporate in another state in the United States using state merger forms, many states have "domestication" provisions allowing foreign [state] corporations to elect some (or all) of the rights and obligations of domestic corporations. Older versions of these statutes, for instance, that of Georgia, clearly did not contemplate the replacement of the corporation's charter with a Georgia charter. Many simply allowed a foreign [state] corporation some beneficial attribute, for instance, the ability to conduct business as a public utility without forfeiting the original foreign [state] charter.

More recently, states have enacted even more liberal "domestication" provisions (also sometimes called migration or continuation provisions), whereby a "foreign [US state] corporation" can be treated as a domestic corporation, as if a new charter were issued by the new (destination) state. The revised Model Business Corporation Act provides for such "domestication" in sections 9.20 and following. Under these provisions, a foreign [US state] corporation can file a plan of domestication to be approved by shareholders, and then file "articles of domestication" containing the provisions usually found in a corporate charter. Under the Model Act provisions, the charter of the foreign [US state] corporation is deemed surrendered and replaced by the "articles of domestication" and title to all real and personal

[14] Model Bus. Corp. Act Ann. § 11.02 (1984).

property and all liabilities "remain[.] in the corporation." Several states have enacted laws in general conformity with this Model Act.[15]

Others have enacted "domestication" statutes with considerable alterations or limitations on their operation. Delaware law, for instance, now allows "domestication" of a corporation "formed, incorporated, created or that otherwise came into being under the laws of any foreign jurisdiction;" this procedure requires both a certificate of domestication and (as of amendments in 2011) the issuance of a second (Delaware) corporate charter. Del Code section 388. Delaware law now also allows both a transfer to a foreign jurisdiction and dual incorporation. See Del. Code 389-390. Both of these provisions define "foreign" as including only to jurisdictions not within the United States; the rest of Delaware corporation law uses "foreign" to mean only other US states.

The conceptual underpinnings of the "domestication" procedures and many of the legal consequences of such procedures remain to be determined under the law of the particular jurisdiction in which they are enacted.[16]

3.2. The federal tax consequences of changing a Place of Incorporation.

United States tax law has (almost) always looked very favorably on transactions designed to allow a change in the place of incorporation, at least when that change is to another jurisdiction within the United States.[17] In fact, the first provisions affecting the taxation of corporate restructuring transactions (now codified in section 368 of the Internal Revenue Code) were enacted precisely to facilitate such changes after the federal tax authorities had challenged such transactions in the early 1910s and 1920s. Under these provisions, transactions that might have otherwise been treated as taxable transfers of assets (of Old State Corporation) in exchange for stock (of New State Corporation) and the taxable re-transfer of that stock to shareholders in liquidation of Old State Corporation were made nontaxable. These provisions remain in the Internal Revenue Code today, although they now also dictate the tax results in situations involving substantial changes in corporate assets, corporate shareholders and corporate funding.

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[15] E.g., Arizona Rev.ised Stat. 10-221; Fla. Stat. § 607.1801; Idaho Code § 30-18-503; Burns Ind. Code Ann. § 23-1-38.5-4 et seq.; Kansas S.A. § 17-78-503; 13-C Maine R.S. § 921; Ann. L. Mass. GL ch. 156D, § 9.20.

The Arizona domestication statute is more complete than many. It provides that upon the filing of articles of domestication in Arizona and a certificate of good standing issued by the appropriate authorities in the other state, "the corporation is deemed to be domiciled in and incorporated under the laws of this state, is considered to be the same corporation as that corporation that existed under the laws of the jurisdiction in which it was formerly domiciled and is considered to have been incorporated on the date it was originally incorporated in the former jurisdiction." Corporations domesticating out of Arizona lose their Arizona charter, and will, if they continue to do business in Arizona, be subject to the registration requirements applicable to all foreign [state] corporations.

[16] E.g., involving domestication from US state to US state: SAU # 59, Winnisquam Regional School District v. Lexington Insurance Co. (D.N.H. No. 09-cv-168-PB Oct. 13, 2009)(unpublished)(holding that an insurance company, using the special domestication provision for such companies, was no longer a corporation whose place of incorporation was NH, the state from which it was "re-domesticated); Missouri Pac. R.R. v. 55 Acres of Land, 947 F. Supp. 1301 (E.D. Ark. 1996) (concluding that the limited domestication available under Missouri law for public utilities did not result in incorporation in Missouri and did not effect a change of "principle place of business" for federal diversity purposes).

[17] Because federal income tax of corporations is dictated by the place of incorporation, and because corporations organized under the laws of a state in the United States are subject to tax on their worldwide income, an attempt to reincorporate in a foreign jurisdiction is viewed very differently for federal income tax purposes. Several different regimes apply to discourage such "outbound" reincorporations, including section 7478 and the regulations under section 367(a).

As the law of nontaxable reorganization stands today, there are several standard patterns of transactions through which a place of incorporation could be changed. If, as a result of any of these patterns of transactions, at the end of the transaction there is only a "mere change in form," as set out in section 368(a)(1)(F) of the Internal Revenue Code (frequently referred to as simply an "F reorganization"), there will be virtually no income tax consequences to any of the parties. In the second pattern of transactions, which will be referred herein as "other nontaxable mergers," more substantial changes will have been made either to the identity of the shareholders or to the assets held by the corporation. As a consequence, there may be some more substantial tax consequences than in the case of a "F reorganization."

The state law forms by which the transactions are completed (statutory merger, actual liquidation, actual transfer of assets) can be the same in either of these two patterns of transactions. The distinction between the two patterns lies in whether anything has happened as a result of the transaction except a change in the legal identity of the corporation, that is, whether there is only a "mere change in form."

Depending upon the corporate law forms available, nontaxable mergers can occur in several ways. If Old State Corporation is directly merged under state law into a New State Corporation, the transaction will be nontaxable to both the corporation (on the deemed retitling of its assets) and the shareholders (on the deemed exchange of their stock). If all of the stock of Old State Corporation is acquired by New State Corporation in exchange for its stock, and then Old State Corporation is merged or liquidated into New Corporation, the transaction will also be nontaxable, even though the transaction is more likely in some cases to be treated as if assets had actually been transferred.

If state law allows a simple "domestication" of a corporation already incorporated in another state into another US state, it would clearly qualify for federal tax purposes as a mere change in form under section 368(a)(1)(F). The Internal Revenue Service has confirmed this on several occasions. (Although these rulings have generally involved transactions that involved the change of place of incorporation involving a foreign [national] jurisdiction, the same result should perforce obtain in a "domestication" within the United States.[18]

"*Mere changes in form" compared to other nontaxable mergers.* If the transaction is an "F reorganization", all of the corporation's tax attributes will remain unaffected as a result of the transaction. If the transaction is not an F reorganization but instead is another type of nontaxable merger, there will be a limit imposed on some of the corporation's tax attributes

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[18] E.g., Rev. Rul. 88-25, 1988-1 C.B. 116 ("domestication" under state law that included filing of both a certificate of incorporation and a certificate of incorporation was a F reorganization). This ruling specified that the transaction would be analyzed for tax purposes as a transfer of assets in exchange for stock, followed by a liquidation of the old corporation; this characterization did not affect the overall conclusion. Under the US rules for the taxation of foreign subsidiaries controlled by US parents, this characterization can have enormous consequences for both domestications into and out of the United States. In Notice 88-50; 1988-1 C.B. 535, issued in connection with Rev. Rul. 88-25, the Internal Revenue Service indicated that, despite the fact that the transaction would be an "F reorganization," other provisions dictated that there nevertheless would be a closing of the taxable year for domestications from one foreign [nation] jurisdiction to another, but not for domestications within a single jurisdiction, for instance, from one US state to another. This reading of Rev. Rul. 88-25 was confirmed in Chief Counsel Advice Memoranda 200810023 (Nov. 17, 2009). The more recent private guidance issued by Internal Revenue Service suggests that this analysis is relatively stable, eg, PLR 201126023 (March 30, 2011); PLR 200803005 (Oct. 19, 2007).

as a result of the deemed closing of the taxable year as of the date of the transaction. In particular, the carryover losses of the corporation will be limited as a result of the closing of the corporation's tax year at the time of the transaction. If, in the course of the other type of nontaxable merger, there has been a substantial change in ownership, the corporation's losses will be limited under section 382, under a formula designed to allow no greater loss allowance than had the transaction not occurred. (If there is a discontinuation of the corporation's historic business, all loss carryovers will be disallowed.)

Regulations were proposed in 2004 that were intended to clarify the types of changes that could be made in connection with a restructuring transaction without jeopardizing its status as an F reorganization.[19] Although these regulations have not been finalized, it is clear that as long as (1) there is only one corporation that has a "tax history" involved in the transaction, (2) any absence of old shareholders could have occurred as a result of a redemption transaction (even if such a transaction might have been more difficult logistically) and (2) any distribution could have occurred as a simple dividend distribution, the transaction will be considered only an "F reorganization."

The state tax consequences of changing a place of incorporation. In general, state income tax consequences follow federal income tax consequences, since most states imposing an income tax conform their rules to the federal rules. There are, however, some exceptions, including the possible survival of carryover losses.[20] Even if a state required that the transaction must be viewed as a transfer of assets under state law, many (but not all) states will provide special exceptions for transactions that involve substantially all of the assets of a business,[21] or that are conducted under a state merger law.[22]

Changing the commercial domicile of a corporation. Because the Commerce Clause has limited the extent to which both state tax and state commercial law can distinguish out-of-state corporations from in-state corporations, the area in which the determination of the controlling state law is most important is corporate governance, including the rules determining when shareholder notification and or approval is necessary for significant transactions. Since it is well established that the state of incorporation's law will ordinarily apply in such cases, and given how easy it is to obtain a corporate charter, there is little need in the United States for a "transfer of seat" procedure in which an existing legal entity remains organized under the laws of State A while its more significant connections are

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[19] Prop. Reg. 1.368-2(m), REG-106889-04 (Aug. 12, 2004).

[20] The states do not always allow for survival of carryover losses, even in simple re-incorporation transactions, compare Grade A Market Inc. v. Commissioner of Revenue Services, 44 Conn. Sup. 377, 688 A.2d 1364 (1996); and Utah (Code Ann. § 59-7-110(5)(a) with N.J. Admin. Code. § 18:7-5.13(b) (specifically providing that loss carryovers are unavailable as a consequence of a mere change in state of incorporation). The justification for this treatment of carryover losses undoubtedly lies in the inability of the state to identify a properly "apportionable" part of such losses.

[21] For instance, Illinois has a sweeping exemption that applies to the sale of any non-inventory property, and the inventory transaction will not be subject to tax if the property is inventory in the hands of the buyer. 35 Ill. Comp. Stat. 120/2S.C. Code section 12-36-2120(42), and in most cases, if the sale is; 112 Wis. Stats. section 77.51(9). See generally Peter Faber, "Sales Tax Planning in Corporate Acquisitions," State Tax Notes, November 22, 1999.

[22] Eg, Wis. Stats. section 77.51(14g).

transferred to State B, or one in which the corporation previously organized in State A is both reorganized under the laws of State B and moves its more significant connections to State B.

The changes that must be made if a corporate seeks to move its "commercial domicile" from State A to State B, are less easy to generalize because "commercial domicile" depends upon real management and business activity. There is, however, no equivalent of a "deemed liquidation," or other tax-triggering event merely because the corporation has changed the location of its headquarters.

A corporation can be required to notify a state when it moves its registered office (which need not be its headquarters), its corporate headquarters, its principle place of business or when it withdraws entirely from doing business within the state.

In some circumstances, a corporation may have entered into a contract with a state (especially in exchange for tax concessions) that will be violated by a substantial change in the corporation's real activities in the state, especially regarding employment of workers. Since these situations will ordinarily involve the violation of a contract (even when aspects of this contract are embodied in state statutes), they will generally be applicable only to the particular corporation and its activities as of that time.

If a corporation sells only a portion of its assets, in connection with a change of headquarters, it can incur regular state sales and transfer taxes on those transactions.