EUROPEAN PARLIAMENT

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European Added Value Assessment Note

Directive on the cross-border transfer of a company's registered office (14th Company Law Directive)

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On 26 June 2012, the Committee on Legal Affairs requested a European Added Value Assessment (EAVA) to support its work on the two legislative own-initiative reports on a directive for the cross-border transfer of company seats (14th Company Law Directive). These reports, dated 2009 and 2012 and drafted by Klaus-Heiner Lehne and Evelyn Regner respectively[1], contain recommendations to the Commission on the issues the directive should address, in Parliament's opinion, and how it should deal with them.

The legislative own-initiative reports adopted by Parliament call on the Commission to submit a proposal for a directive on the cross-border transfer of company seats (14th Company Law Directive) on the basis of Article 50(1) and (2)(g) of the Treaty on the Functioning of the European Union (TFEU).

The arguments in favour of this approach are set out in detail in this European Added Value Assessment, which draws on the expert research commissioned specifically for the purpose of this assessment and provided by:

- Jeantet et Associés, AARPI on the legal effects, and
- London Economics / LIEP Consortium, on the economic effects.

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[1] OJ C 87 E, 1.4.2010, p. 5 and P7_TA(2012)0019.

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Cross-border mobility is secured by the four freedoms enshrined in the Treaties: the freedoms of establishment, of services, of goods and of capital. Within company law, the freedom of establishment is particularly important. However, **in respect of companies the freedom of establishment remains incomplete and in need of reform**.

Current legal practice varies considerably across the Member States (MS), as there is no single system for identifying the law applicable to a company having its registered office in a given Member State.

In any event, experience has shown that, this being a sensitive matter deeply intertwined with national law, action at Member State level alone has not been able to address the consequences of not having a European regime for the cross-border transfer of a company's registered office[2].

According to the numerous resolutions adopted by Parliament, a **company law directive is the right instrument to achieve this goal**.

The **European Union needs** the 14th Company Law Directive **because it needs corporate mobility**. This is a clearly given fundamental freedom, and a right that is increasingly required by businesses operating in a global economy. The principal problem arising from the current unclear situation is that, given the Commission's refusal to enforce this right, there is **no comprehensive secondary legislation to guide the expectations of companies aspiring to cross-border mobility**.

This European Added Value Assessment supports **Parliament's position**, which is that there is an **inherent need for a 14th Company Law Directive in order to ensure the granting of a fundamental freedom**.

It identifies the benefits the requested directive can bring to the transfer process in terms of **legal certainty, clarity, transparency and simplicity**. It focuses on the extent to which the requested directive will **facilitate the cross-border mobility** of company seats and looks at some aspects of the associated **economic impact**.

[2] The company's 'registered office' is its official address in the Member State where it was incorporated and which is registered in the official register. The company's 'real seat' is the place where its centre of administration and control is located.

Finally, it provides an indication of the costs associated with the transfer of the registered office that could be avoided as a result of the proposed Directive.

Against this background, **it is reasonable to conclude that the proposed directive certainly provides for opportunities, rather than creating extra costs for companies**.

On balance, it would seem that, even with regard to the proportionality criterion, a **directive would be superior to a 'no action' policy, as it is overall a less onerous route for companies wishing to move their registered office cross-border**. A directive would therefore be more likely to deliver the single-market benefits of greater company mobility.

Methodology

This assessment note seeks to analyse the potential European added value of an EU directive addressing the procedure for the cross-border transfer of a company's registered office from one Member State (home Member State) to another (host Member State). In particular, it aims to support the views and political choices expressed by Parliament in its different resolutions on the matter.

Essentially, the approach adopted consists in breaking down the concept of European added value into different components for the purpose of the assessment, and then analysing various aspects of them.

Firstly, the assessment note investigates whether there is a rationale for taking action at EU level and whether the instrument proposed 'adds value' to what is already being done at European and national level.

Secondly, it looks at the impact of the European Court of Justice's case law in order to assess the extent to which the problems relating to the transfer of a company's seat have been addressed, and the most suitable alternative options for achieving the desired objectives.

Thirdly, it will look at the Commission's arguments against a directive and at present counter-arguments and bring a different perspective to the policy debate.

Lastly, it attempts to assess the direct and spill-over effects that may be expected from the proposed legislative measure, in particular by considering certain aspects affected by the absence of minimum European rules. These aspects are not intended to be exhaustive or to lend themselves to precise measurement, but rather to provide an overview of some of the possible effects.

Overall, the assessment aims to produce specific findings about European added value and to raise awareness of the need to introduce a directive at European level in the policy area under consideration.

The inevitable limitations linked to the degree of precision that may be expected from this EU-wide added value assessment do not affect its overall conclusions, which are based on findings that are sufficiently robust and reliable for the purpose of this policy assessment and the decision subsequently to be taken.

Political background

The prospect of a directive providing for a European regime for the cross-border transfer of a company's registered office is not new. In fact, it has been on the European agenda for nearly 10 years now.

The issue was a short-term priority of the Commission Action Plan on Modernising Company Law (2003)[3]; three consultations by the Commission between 2003 and 2006 showed broad support for a directive, which still featured in the Commission Legislative and Work Programme 2007[4] (CLWP). Furthermore, the Advisory Group on Corporate Governance and Company Law (an advisory body to the Commission) also supported the initiating of a directive on cross-border transfers[5].

However, in December 2007 the Commission published an impact assessment on a prospective directive on this issue. The document presented the pros and cons of possible policy actions, including an evaluation of the consequences of not undertaking any regulatory action in this field. The Impact Assessment Board (IAB) looked at the Commission's impact assessment and validated it, making a number of comments[6].

Having weighed up the arguments put forward, **the Commission decided there was no need for action at EU level** on this issue, **even though such a directive had originally been included in the Commission's Legislative and Work Programme for 2007 as a priority initiative**. Work in this area was therefore discontinued.

Most recently, in 2012 the Commission launched a public consultation on the future of company law. The majority of respondents expressed their interest in, and support for, solutions at EU level which could facilitate cross-border transfers[7]. An action plan outlining future initiatives in the area of company law was adopted in December 2012, and further investigation announced as regards a possible initiative on the cross-border transfer of company seats. Another

[3] Communication of 21 May 2003 from the Commission to the Council and the European Parliament entitled 'Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to Move Forward' (COM(2003)0284).
[4] Commission Legislative and Work Programme 2007 (COM(2006)0629), 24.10.2006.
[5] Minutes of the meeting of 27 January 2006, p. 4, retrievable at http://ec.europa.eu/internal_market/company/advisory/index_en.htm
[6] http://ec.europa.eu/governance/impact/ia_carried_out/cia_2007_en.htm#markt
[7] 373 out of a total of 496 replies (337 in favour of a directive, 36 in favour of other measures); the replies received are available at: http://ec.europa.eu/internal_market/company/modern/index_en.htm#consultation2012

targeted public consultation has been launched in early 2013[8], and subsequently the Commission will consider the appropriateness of a legislative initiative.

On Parliament's side, a number of resolutions and oral questions[9] have, indirectly or directly, dealt with the directive under consideration. In its March 2006 Resolution on restructuring and employment[10], Parliament called on the Commission to submit a proposal for a 14th Company Law Directive. It stressed that the protection of workers' acquired rights regarding their participation in company decisions (employee participation) must be both a fundamental principle and a declared objective of the directive. Moreover, the **transfer of registered offices should not be used to restrict workers' rights.**

In its July 2006 resolution on recent developments and prospects in relation to company law[11], Parliament again emphasised the need for a directive, **stating that it was crucial for the freedom of establishment, as the transfer of a company's registered office was currently either impossible or hindered by national requirements**. Such a directive, in Parliament's opinion, would add a missing piece to the system of the internal market for companies, and should do so while safeguarding employees' acquired rights as regards participation in company decisions.

In its October 2007 resolution on the European Private Company (*societas europaea*) and the 14th Company Law Directive on the transfer of the company seat[12], Parliament subsequently expressed its disappointment following the Commission's decision not to make any legislative proposal and reserved the right 'to take further action with regard to the question of cross-border transfers of company seats'.

The resolution's recitals mention not only Article 192 TEC (current Article 225 TFEU, which allows Parliament to request legislative action from the Commission through a legislative own-initiative report), but also Article 232 TEC (current Article 265 TFEU), which addresses failures to act by one of the institutions and allows the other institutions, including Parliament, to bring an action for failure to act.

[8] http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm
[9] For example, Oral Question O-0042/2007 of 20 June 2007 by Giuseppe Gargani, on behalf of the JURI Committee, to the Commission: State of play in the legislative proceedings on the 'Statute of the European Private Company' and of the 'Fourteenth Company Law Directive' (B6-0137/2007).
[10] OJ C 291 E, 30.11.2006, p. 297.
[11] OJ C 303 E, 13.12.2006, p. 114.
[12] OJ C 263 E, 16.10.2008, p. 671.

However, none of these steps taken by Parliament succeeded in convincing the Commission to continue with the initiative. Most recently, Parliament again called on the Commission to put forward a proposal for a directive based on Article 50(1) and (2)(g) TFEU.

Figure 1 - Key elements of the reports by Klaus-Heiner Lehne and Evelyn Regner[13]

Report by Evelyn Regner

The resolution stresses that **cross-border company migration is one of the crucial elements in the completion of the internal market**. It notes the **lack of consistency in legislation** on transfers and on procedures for transferring the registered office of an existing company or firm incorporated under national law from one Member State to another within the single market, and the **associated risks in terms of employment, along with the administrative difficulties encountered, the costs generated, the social implications and the lack of legal certainty**.

Given the disparities between the requirements imposed by the Member States for companies' migration, the European Court of Justice's (**ECJ) ruling in the *Cartesio* case confirms the need for a harmonised regime governing the cross-border transfer** of company seats.

It recalls that **it is for the legislators, not the ECJ, to establish**, on the basis of the Treaty, **the relevant measures to give companies the freedom to transfer their seat**. However, company mobility still entails significant administrative burdens as well as social and tax costs.

In this context, the Commission is requested to submit a proposal for a directive on the cross-border transfer of company seats, which should apply to limited liability companies within the meaning of Directive 2005/56/EC.

Essentially, the directive should **allow companies to exercise their right of establishment by migrating to a host Member State without losing their legal personality, through their conversion into a company governed by the law of the host Member State** without having to be wound up. The **transfer should not circumvent legal, social or fiscal conditions**. **Employees' participation rights should be preserved through the transfer.**

[13] P7_TA(2012)0019.

Report by Klaus-Heiner Lehne

The resolution calls on the Commission to submit to Parliament a proposal for a directive laying down measures for coordinating the Member States' legislation in order to facilitate the cross-border transfer within the Community of a company's registered office.

The cross-border transfer of a company's registered office **should not give rise to the winding-up of that company or to any interruption or loss of its legal personality**. Furthermore, the transfer **should not circumvent legal, social or fiscal legislation**.

The directive should **guarantee the coherence and substantive nature of employee participation procedures in the application of EU company law directives**.

The transfer of a company seat should be tax-neutral, and the exchange of information and mutual assistance between tax authorities should be improved.

Finally, any company against which proceedings for winding-up, liquidation, insolvency or suspension of payments have been brought should not be allowed to undertake a cross-border transfer of its registered office within the Community.

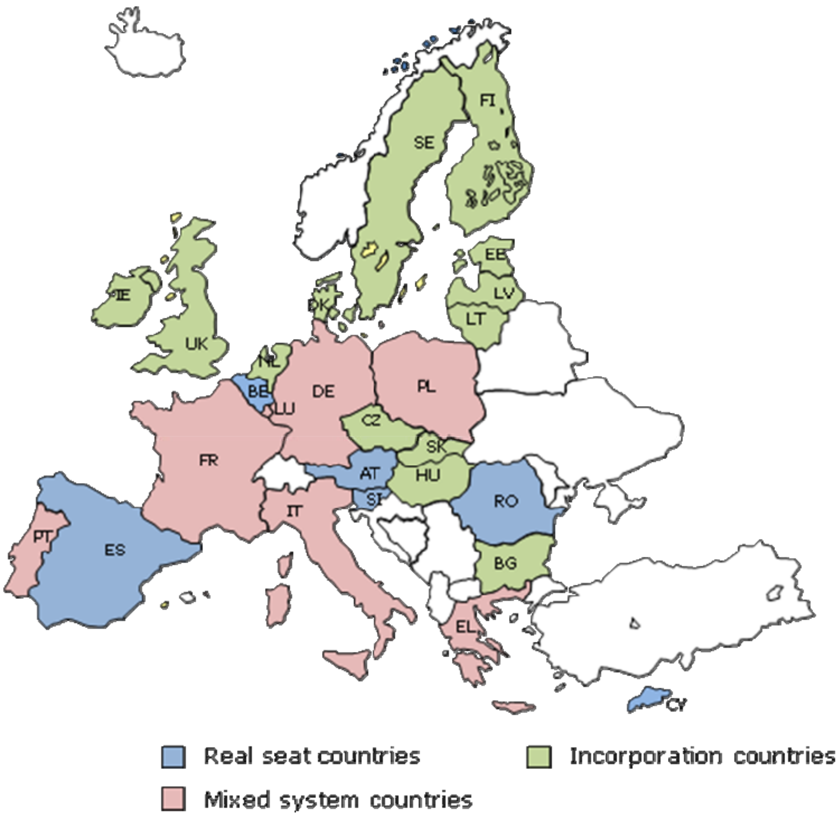
Paradoxical outcomes[14] of the current situation

The approach taken by Member States to the transfer of a company's seat from its original home country to a new host country varies across the EU. This is because the Member States apply differing principles in order to determine which company law is applicable to a particular company.

- In some Member States, the applicable company law regime is determined on the basis of the **principle of incorporation**. According to this principle, a company is governed by the law of the country where it has its registered office (i.e. where it is incorporated).
- In other Member States, it is company's **real seat** (i.e. the place where it has its headquarters or which is its principal place of business) that determines which company law regime is applicable.
- Lastly, some Member States have adopted a **mixed system** which incorporates characteristics of the two approaches described above.

[14] According to the Report of the Reflection Group on the Future of EU Company Law, the patchy situation at national level has generated "paradoxical outcomes", page 18, available at: http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

Figure 2 - Application of the real seat and incorporation principle by EU Member States[15]



The different legal regimes result in an unlevel playing field between companies wishing to move their real seat. The greatest difference between the two principles is their effect on the cross-border transfer of a company's seat. The differences are significant from the perspective of both the company's home and host Member States. When it comes to the incorporation principle, it does not matter where the company's real seat is located (i.e. the law governing the existence and organisation of the company is not dependent on the location of its real seat). The real seat principle, on the other hand, makes the company subject to a different national legal order each time its real seat moves to another Member State, which in effect means the non-recognition of the cross-border transfer of the company's real seat.

Companies wishing to move their registered office cross-border from a Member State applying the real seat approach, without having to wind up the company in their home country, can use one of two mechanisms:

[15] Source: Research paper written by Jeantet et Associés AARPI, Law Firm annexed to this assessment note.

- registering the company as a **Societas Europaea (SE)**[16], a statute which provides for the creation of a truly pan-European company and allows the company to move its registered office cross-border by simply notifying the company registers in its home and host Member States. A cross-border move of the company seat under the SE statute consequently does not require the winding-up of the company in its original home country. However, this implies that the company needs to be constituted as a SE, in detriment of other alternative company forms which might be more suitable.
- the possibilities offered by the **Cross-Border Merger (CBM) Directive**[17], which became fully applicable on 16 December 2007 and gives all limited companies the option of transferring their registered office. A company wishing to move its registered office cross-border can merge with a company in the host country (either an established subsidiary or a new company created *ex novo* for the explicit purpose of the cross-border move).

The complexity of the situation has given rise to a number of landmark law cases, which have clarified to some extent the existing scope under EU law for transfers of company seats. At present, however, in a number of Member States it remains very difficult, if not practically impossible, for companies to move their head office cross-border to another Member State without incorporating as a SE or carrying out a cross-border merger.

As a result of this patchy situation, in order for a cross-border transfer to be feasible, the legislation of the host Member State must accept the transfer of companies incorporated in other Member States, allowing them to maintain their corporate identity. Accordingly, when a company intends to transfer its seat from its home Member State to another Member State, it should analyse the position of the host Member State's legal system in this regard.
The possibility for a home Member State company to transfer its seat abroad is conditional upon the host Member State allowing the company to retain its legal personality.

In theory (without regard to the ECJ's case law), if a company in a Member State applying the incorporation principle transfers its head office (real seat) to a

[16] See Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10. 11.2001, p. 1 and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.
[17] See Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

Member State applying the real seat principle, while the registered office remains in the home Member State of incorporation, the company could be subject both to the 'incorporation' law of the home Member State and to the law of the host Member State.

Figure 3 - Example of cross-border transfer: Austrian company moving to UK

Austria applies the real seat principle, which means that a company can only be subject to Austrian jurisdiction if it has its real seat in Austria. If the company moves its real seat out of Austria to the UK, it is no longer recognised as an Austrian company; however, it is not recognised in the UK either (unless it incorporates in the UK), as the UK applies the incorporation principle.

In the event that a company in a Member State applying the real seat principle transfers its registered office abroad, while the main activity or management office remains in the home Member State, the company will remain subject to the law of the home Member State; however, if the host Member State applies the incorporation principle, the company could be subject to the law of both the home and the host Member States.

In addition, a host Member State having chosen to apply the real seat principle could legitimately refuse to register a company that is transferring its registered office to the jurisdiction of that Member State unless it transfers its real seat at the same time; similarly, a host Member State having chosen to apply the incorporation principle could legitimately refuse to register a company that is transferring its real seat to the jurisdiction of that Member State unless it transfers its registered office at the same time.

Accordingly, it is reasonable to conclude that **carrying out a cross-border transfer is complicated in practice**.

This situation is even more complicated by the fact that in recent years a number of Member States have adopted legislation to facilitate cross-border transfers of corporate seats (inbound[18] or outbound[19]), whereas other Member States do not have specific provisions on the cross-border transfer of a company's registered office. In those Member States that have adopted legislation on transfers, in practice it is relatively easy and not very time-consuming or costly to carry out cross-border transfers.

[18] Situation of the host Member State when a company moves its seat from another Member State into the jurisdiction of the host Member State.
[19] Situation of the home Member State when a company moves its seat outside the jurisdiction of that Member State.

However, a number of **shortcomings have been noted** in these jurisdictions **on account of the fact that the provisions in place are not exactly the same in each Member State**[20]; in particular, the cross-border transfer may change certain laws applicable to the company and its stakeholders and challenge the rights acquired by those stakeholders under the legislation of the home Member State. Besides the company, between its registration in the host Member State and its de-registration in the home Member State, will be in a transitional situation which may cause legal uncertainty.

Other Member States do not have any legislation on cross-border transfers, which means that in practice they have no system in place to enable companies to maintain their legal personality when they transfer their seat within the EU. In this context, the transfer of a company's seat abroad is a controversial issue; nevertheless, in the light of recent ECJ case law, some legal writing supports such transfers by legal analogy to national company conversion legislation. However, the extent to which this analogous application could be valid remains unclear.

Figure 4 - Facts and figures on cross-border transfers carried-out from Spain, Cyprus, the Czech Republic and Malta where national legislation on cross-border transfers has been adopted[21]

Although is extremely difficult, if not impossible, to provide complete statistics on transfers into and out of Member States, since such information is not systematically collected or publicly available, it is possible to draw some conclusions based on the data available.

- **Spain:** between 2010 and 2012, 29 companies moved their seat out of Spain (outbound), principally (62%) within the EU countries. 79.33 % of them were 'sociedad limitada'.

- **Cyprus:** in view of the competitive advantages offered by 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), so more changes of seat through the conversion of companies may follow. The only case known 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 a company's registered office from one of the Member States to Malta or from Malta to another Member State. (The figures for the last three years are as follows: 33 transfers in 2010, 31 in 2011 and 12 up to 30 June 2012.)

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[20] For more detailed information on the national legislation in place with regard to inbound and outbound transfers, see Jeantet et Associés AARPI research paper annexed to this assessment note.

[21] Source: Research paper written by Jeantet et Associés AARPI, Law Firm annexed to this assessment note.

The general perception is that, in the **absence of clear common rules** (even limited to a minimum set of rules), **it is time-consuming and costly for companies to transfer their registered office**. These constraints and other obstacles (see examples given in Figure 6 below) are generally perceived as a deterrent which prevents companies from carrying out transfers.

Figure 5 - Main obstacles identified by companies[22] to "company cross-border transfers in the EU"

- Lack of a harmonised system for cross-border transfers in the EU;
- complicated, expensive and time-consuming systems for cross-border transfers under the SE Regulation and the CBM Directive[23];
- legal uncertainty created by the complicated rules of ECJ case law;
- differences in legal systems between civil and common case law countries;
- exit taxation.

Finally, it should be noted that because national approaches are not harmonised, company mobility sometimes results in a number of complicated (e.g. if the home and host Member States apply incompatible national provisions) and 'unregulated' transfers, with no guarantees concerning the provision of information to all stakeholders (e.g. employees, creditors and minority shareholders). This situation obviously threatens the completion of the internal market.

The end result, according to the Report of the Reflection Group on the Future of EU Company Law[24], is that this patchy situation has generated '**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. [...] The **result is an uneven distribution of rights that requires companies to expend considerable resources and costs** in order to enjoy the flexible freedom of movement within the Union that should be the birth right of all citizens and companies in the Union; a **loss of resources that could be put to better use by the companies in creating jobs** and is often outside the reach of SMEs".

[22] Source: Research paper written by Jeantet et Associés AARPI, Law Firm annexed to this assessment note.
[23] Council Directive 2001/86/EC of 8 October 2001 and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005.
[24] Available at:
http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

Current legal status following European Court of Justice (ECJ) decisions

In recent years, the European Court of Justice (ECJ) has played an essential role in the process, bridging on a case-by-case basis the gap created by the lack of legislation at EU level. The Court has tried to develop case law covering certain cases (see details in Figure 7 below), but has acknowledged the **difficulties of providing a holistic framework**.

According to the ECJ, **it is for the legislator to provide such a framework**.

Along the same lines, the 2007 impact assessment[25] carried out by the Commission, pointed out that it is not the role of the Court to fill the legislative vacuum created by the inertia of the legislator. The impact of the Court's rulings **may be limited, as they refer only to particular situations** and **could be subject to various interpretations by the Member States' courts** and legislators, resulting in the adoption of different solutions at national level. In addition, the Court's judgments lay down general principles without providing harmonised rules and procedures for their application in practice.

Figure 6 - Summary of the ECJ's position regarding corporate cross-border transfers

- Companies are creatures of national law, and Member States can determine their incorporation and functioning. Member States have the sovereignty to define both the connecting factor required of a company if it is to be regarded as incorporated under their 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*,[26] *Cartesio*[27] and *Vale*[28]).
- Companies established in a home Member State have the right to transfer their seat (centre of administration or principal (or only) place of business) without cross-border conversion to a host Member State if they remain in compliance with the connecting factor required by the home Member State. The host Member State must recognise these foreign companies (*Centros*,[29] *Überseering*[30] and *Inspire Art*[31]).
- However, companies established in a home Member State have the right to transfer their seat to a host Member State through cross-border conversion

[25] SEC(2007)1707, Impact Assessment on the Directive on cross-border transfer of registered office, p. 13.
[26] ECJ, 27 September 1988, *Daily Mail* and General Trust Plc, C-81/87, paragraph 19.
[27] ECJ, 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, paragraph 104.
[28] ECJ, 12 July 2012, VALE Epitési kft, C-378/10, paragraph 27.
[29] ECJ, 9 March 1999, Centros Ltd v Erhvervs-og Selskabsstyrelsen, C-212/97.
[30] ECJ, 5 November 2002, Überseering, C-208/00, [2002] ECR I-9919.
[31] ECJ, 30 September 2003, Inspire Art, C-167/01.

without losing their legal personality, on the basis of the freedom of establishment (*Cartesio*[32] and, in particular, *Vale*[33]).

- Neither the home nor the host Member State may discriminate between domestic and cross-border rules on cross-border transfers or company conversions. If a Member State lays down such rules for domestic operations, the freedom of establishment obliges it also to lay down rules for cross-border operations (*Sevic*[34] and *Vale*[35]).
- Within certain the limits, neither the home nor the host Member State may block a cross-border transfer or refuse a cross-border conversion unless national regulation can be justified under Treaty derogations or serves overriding requirements in the public interest (*Centros*, *Überseering*, *Inspire Art*, *National Grid Indus*[36], *Cartesio*, *Vale*).
- Since secondary EU law does not lay down specific rules governing cross-border conversions, the provisions enabling such an operation to be carried out have to be found in national law, namely the law of the home Member State and that of the host Member State, to which the company resulting from the conversion will be subject.
- A company seeking to transfer its registered office to a host Member State must comply with the national law of that Member State, including requirements as to change of company form, registration with the national company registry, place of registered office, real seat, etc. These national requirements must comply with the principles of equivalence and effectiveness (*Vale*[37]).

According to the Commission's 2007 position, one of the reasons for not submitting a legislative proposal was the ***Cartesio* judgment, still pending at the time, which was expected to bring 'new insights' into the legal situation in the EU.**

Today, it seems reasonable to conclude that, irrespective of the outcome of the *Cartesio* ruling, there is still a need for a directive (see details in the following section, point 3). Obviously, this does not prevent the legislator to consider the principles mentioned in that specific case during the legislative process leading to the adoption of a possible 14th Company Law Directive.

[32] ECJ, 16 December 2008, Cartesio Oktato és Szolgàltato bt, C-210/06, paragraphs 111 and 112.
[33] ECJ, 12 July 2012, VALE Epitési kft, C-378/10, paragraph 49.
[34] ECJ, 13 December 2005, Sevic Systems AG, C-411/03, paragraphs 22 and 23.
[35] ECJ, 12 July 2012, VALE Epitési kft, C-378/10, paragraph 36.
[36] ECJ, 29 November 2011, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-317/10.
[37] ECJ, 12 July 2012, VALE Epitési kft, C-378/10, paragraphs 48, 56 and 61.

Figure 7 - Summary of *Cartesio* and *Vale* cases

<u>Cartesio (2008)</u>

Cartesio is a Hungarian limited partnership whose application for registration of the transfer of its seat to Italy was rejected by the Hungarian Court of Registration. Cartesio intended only to transfer its *de facto* head office to Italy, while continuing to operate under Hungarian company law.

The ECJ was asked to determine whether Articles 43 and 48 of the EC Treaty precluded Hungary from imposing an outright ban on a company incorporated under its legislation transferring its *de facto* head office to another Member State without having to be wound up in Hungary first, and on having the seat transfer entered in the Hungarian Company Register. It should be emphasised that the *Cartesio* case is to a considerable extent similar to the ECJ's *Daily Mail* decision, since it also raises the question of the transfer abroad of a company's *de facto* head office.

The Court did not overrule its *Daily Mail* decision, which allows the national law of a Member State to restrict the transfer of a company's central administration abroad. On the contrary, the ECJ reaffirmed its *Daily Mail* doctrine. It stated that, as Community law currently stood, **Articles 43 and 48 of the EC Treaty were to be interpreted as not precluding the legislation of a Member State of origin from barring domestic companies from transferring their seat to another Member State while retaining their status as companies governed by the law of the Member State of incorporation**.

On the question of whether the freedom of establishment also covers the possibility of a company converting itself into a company governed by the law of another Member State (a *de facto* transfer of its registered office), the Court sees '(...) 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'.

By admitting that, as they currently stood, **Articles 43 and 48 of the EC Treaty[38] were powerless to resolve certain disputes, the *Cartesio* ruling left much to national legislation and thus may lead to differing treatment of emigrating and immigrating companies and of companies emigrating from 'real seat' countries and 'incorporation' countries**.

[38] Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU).

<u>Vale (2012)</u>

Vale is a mirror image of *Cartesio*. An Italian company wished to dissolve in Italy and re-incorporate in Hungary and to have its Italian predecessor recognised as its legal predecessor, meaning that all the rights and obligations of the old company would be transferred to the new[39].

The Court decided in favour of Vale, arguing that if nationally incorporated companies in Hungary may convert and transfer all their rights and obligations to the new company, any restrictions on foreign companies employing this mechanism come within the reach of Article 49 TFEU (formerly Article 43 TEC) and therefore contravene EU law.

The added value of the 14th Company Law Directive

For some years now, all major initiatives of the Commission have been accompanied by an impact assessment, and the 14th Company Law Directive is no exception. A roadmap was also attached to the 2007 CLWP, and it did not indicate any expected negative impact of the directive.

On the contrary, it stated that **the directive would facilitate the mobility of European companies, in particular SMEs, and allow them to locate their business in the Member State that best suits their needs**. It would also offer companies, in particular SMEs, flexibility to **choose the company law environment** in which they wish to operate, independently of the actual location of their economic activity[40].

As already mentioned, in 2007 the Commission announced that it would not submit a proposal for a directive on the cross-border transfer of a company's registered office, arguing that the results of the impact assessment were 'inconclusive'.

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[39] This procedure is allowed in Hungary for Hungarian companies, in particular via a change of company form. Vale's application for registration was rejected because under Hungarian law it is not possible to register a company moving to Hungary with a predecessor in another Member State. At issue, therefore, were the transfer of a 'seat' to a host Member State, de-registration in the Member State of origin and the adoption of a new instrument of constitution under the laws of the host Member State, along with registration in the respective commercial register.
[40] This effect, commonly known as *law shopping*, is considered by some to be a negative by-effect, but by others to be advantageous, as it fosters regulatory competition among national legislators.

However, the same impact assessment pointed out that, given the significant costs, time and administrative burden (sometimes involving more than 35 procedural steps) entailed in corporate mobility, European companies were, *de facto*, being deprived of the possibility of moving their place of registration within the EU[41].

The main reasons for abandoning the legislative proposal were, in short, **political feasibility**, the **lack of an economic case, the fact that cases were pending before the Court of Justice** which might affect the scope and content of possible future EU measures and, lastly, the fact that **companies would already have the legal means to effect cross-border transfers** (e.g. the possibilities offered by the European Company Statute or a cross-border merger).

In the following sections, this European Added Value Assessment will look at the Commission's arguments against a directive, present counter-arguments and bring a different perspective to the policy debate.

1) Lack of political feasibility

The Commission argues that Member States follow very different approaches, to which they are strongly attached and which they are not willing to give up for the sake of harmonisation. It is true that Member States have enjoyed lawmaking autonomy in the field of company law for a very long time, and it is understandable that they would be somewhat reticent to give it up, but **this is a matter of political expediency and the situation could change if the European legislator makes a sufficiently strong case, which is the intention behind Parliament's resolutions.**

The freedom of establishment is one of the 'four freedoms' of the internal market, which has the goal of enhancing the competitiveness and welfare of all Member States by abolishing barriers between them and simplifying rules. Together with the free movement of goods, workers, services and capital, it was included in the Treaty of Rome back in 1957. Accordingly, corporate mobility should not be a problem at this stage of European integration.

In addition, it is worth mentioning that there is abundant evidence that **practitioners and stakeholders in general want a clear solution in this area**[42].

41 SEC(2007)1707, p. 5.
42 See in particular SEC(2007)1707, section 2, p. 6.

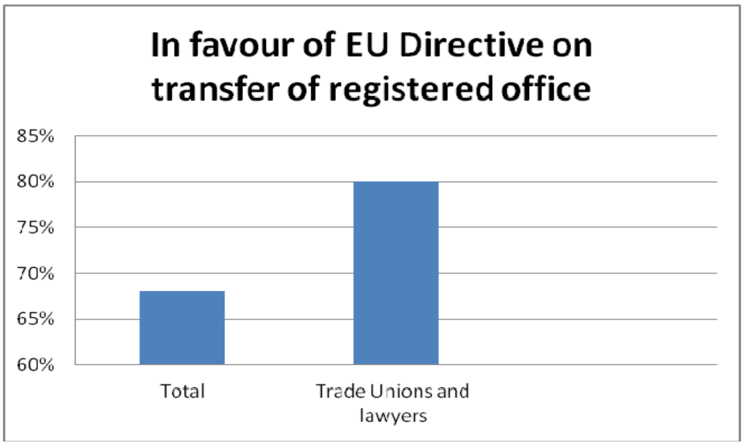
The rounds of public consultation in 1997 and 2002 emphasised that the business world wished companies to be given the possibility of relocating, through a smooth and quick transaction, into the country they considered to offer the best corporate climate. Should companies avail themselves of this transfer possibility, they ought to be able to do so without losing their legal personality.

In its final report of 4 November 2002[43], the High-Level Group of Company Law Experts recommended that the Commission urgently consider adopting a proposal for a directive on the transfer of a company's registered office. It also suggested that certain aspects of the transfer of a company's *de facto* head office be clarified[44].

In 2004, the Commission consulted on a planned proposal for a 14th Company Law Directive on the cross-border transfer of a company's registered office[45]. The responses to the consultation showed **overwhelming support for the introduction of a process for the cross-border transfer of a company's seat which does not involve winding up the company**. Overall, 88 % of the consultation participants were of the view that 'the transfer of the registered office should not entail the company's being wound up in the home Member State' (question 13 of the consultation). Most recently, the Commission has carried out public consultation on the future of European company law[46]. With regard to cross-border transfers of a company's registered office, a significant percentage of stakeholders were in favour of the EU facilitating such transfers (80 % of the respondents supported such an initiative). A **significant majority (68 %) were in favour of a directive**. Within the group of trade unions and lawyers, support for such an instrument was as high as 80%.

[43] See Report of the High-Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002.
[44] See webpage of the Commission's DG Internal Market and Services at: http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm
[45] See webpage of the Commission's DG Internal Market and Services at: http://ec.europa.eu/yourvoice/results/transfer/index_en.htm
[46] European Commission, 2012, Feedback statement: Summary of responses to the public consultation on the future of European company law (July 2012), pp. 9 and 10, available at: http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf

Figure 8 - Responses to the European Commission's public consultation on an EU directive on the transfer of a company's registered office[47]



2) Existence of other legal means of effecting cross-border transfers

The main EU instruments dealing with company mobility are the Treaties, the legislation on company law, which includes a large number of instruments (e.g. the regulations on EU groupings, such as the Statute for a European Company Regulation[48] and Directive[49] and the Cross-Border Merger (CBM) Directive[50]), and, lastly, the ECJ's case law.

Freedom of establishment within the EU, as derived from Articles 49 (with reference to nationals) and 54[51] TFEU[52], is offered to all forms of companies governed by civil or business law, including cooperatives and other legal entities incorporated under public or private law.

[47] Source: Research paper written by Jeantet et Associés AARPI, Law Firm annexed to this assessment note.
[48] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (the 'SE Regulation').
[49] 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').
[50] 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').
[51] Article 54 (ex Article 48 TEU): 'Companies or firms formed in accordance with the law of a Member State 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 Member States. "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.'
[52] Consolidated version of the TFEU, OJ C 83, 30.3.2010, p. 47.

The ability to transfer a company's registered office from one Member State to another is the logical corollary of the freedom of establishment guaranteed by Articles 49 and 54 TFEU. However, the principle of freedom of establishment provided for by the Treaty does not in practice permit a company to move from its home Member State to another Member State while preserving its legal capacity.

As regards secondary legislation, it is worth mentioning that cross-border transfers are also possible on the basis of the SCE statute[53] or the European Economic Interest Grouping[54]. However, the specific nature of these corporate forms means that their use is rather limited.

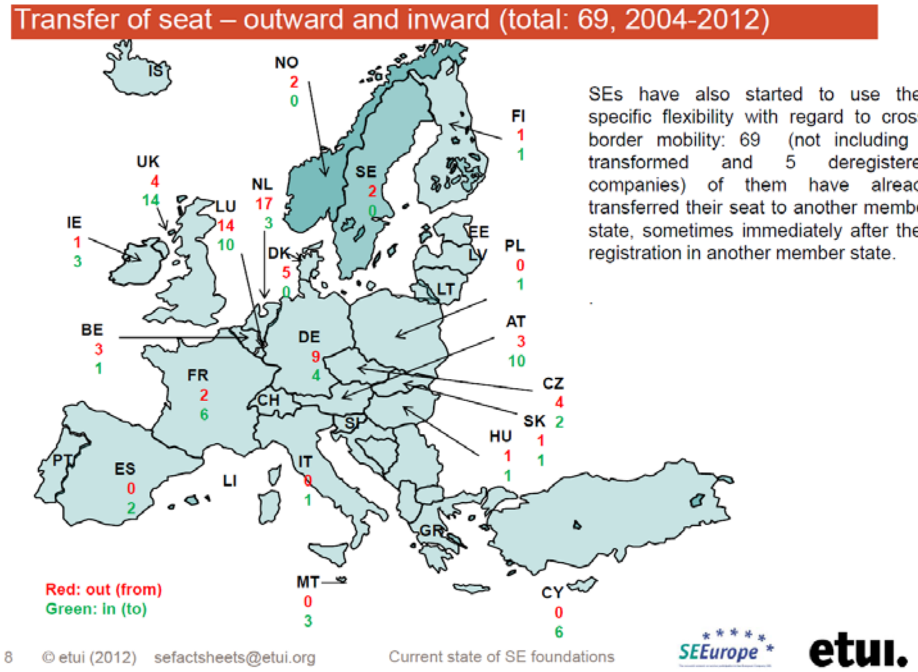
Finally, the possibility of transferring a company's registered office is also foreseen in the proposals for a European private company and a European foundation (FE), respectively[55]. These tools have been designed to promote corporate mobility in the EU; some of their elements could potentially be used to determine the framework for an active legislative approach to cross-border transfers.
The second argument put forward by the Commission in 2007 for concluding that there was no need for a 14th Company Law Directive **was the existence of other legal means of transferring a company's registered office** (two, in fact: the Societas Europaea Statute and the CBM Directive).

Basically, the Commission's expectations were that the use of the SE statute and the CBM directive would help achieve the objective of permitting the cross-border transfer of a registered office without having to implement a specific directive.

However, to date practice has shown that **not many companies decide to transfer their registered office on the basis of the Societas Europaea Statute.** Over the 2004-2012 period, **a total of 69 SEs of the more or less 1 500 established SEs moved**.

[53] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 49, 17.2.2007, p. 35.
[54] 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.
[55] Proposal for a Council Regulation on the Statute for a European private company (COM(2008)0396); Proposal for a Council Regulation on the Statute for a European Foundation (FE) (COM(2012)0035).

Figure 9 - Cross-border mobility of SEs[56]



Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies[57], which entered into force on 16 December 2007, establishes a framework in which, as a general rule, each merging company is governed by the provisions of its national law applicable to domestic mergers. A company can undertake the cross-border transfer of its registered office by setting up a subsidiary within a potential host Member State (to which it wishes to move) and merging into that subsidiary.

Figure 10 - Cross-border mobility according to the CBM Directive[58]

It is often not possible to provide statistics on how many transfers of company seats have taken place since 2007 under the CBM Directive, since such information is not publicly available.

Based on the information available, the following cases have been identified in Member States whose national legislation does not allow the direct cross-border transfer of a company's registered office:

[56] Data source: ETUI´s European Company (SE) database mainly based on the Supplement to the Official Journal of the EU (TED), national registries and ETUI own research, available at: http://ecdb.worker-participation.eu/

[57] OJ L 310, 25.11.2005, p. 1.

[58] Source: Research paper written by Jeantet et Associés AARPI, Law Firm annexed to this assessment note.

- in **Ireland**, 35 outbound transfers and 20 inbound transfers under the CBM Directive;
- in **Finland,** a total of 48 cross-border mergers initiated since the amendment of the 2007 Companies Act;
- in **Lithuania,** at least 21 cross-border mergers since 2009;
- in **Estonia**, 33 cross-border mergers since 2007 (including SEs), 12 of them outbound and 21 inbound;
- in **Sweden**, a total of 92 applications to the Swedish Companies Registration Office for cross-border mergers, 40 of them inbound and 52 outbound.

It should be pointed out that, while it may already be possible to transfer a company's registered office, **the methods currently available for such transfers have important disadvantages** that the transfer of a company's registered office under a specific directive would not have[59].

Instead of two (downstream merger) or three (SE) separate operations, each including several procedural steps depending on the various specific requirements, a single operation would suffice. A **directive on the transfer of a company's registered office would thus be cost-saving**.

Figure 11 - Carrying out transfers by means of a SE or a cross-border merger

European Company Statute

- Firstly, a (public limited) company in a Member State converts or transforms itself into a SE.
- Secondly, the SE transfers its registered office to another Member State.
- Thirdly, the SE converts back into a public limited company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken until two years have elapsed since its registration, under Article 66 of the SE Statute.

Cross-border merger

- Firstly, it should be recalled that a new company has to be incorporated in another Member State, which can be rather burdensome.
- Secondly, the merger is typically an operation involving two companies, each of which must comply with the provisions of its own national law.

The cost of carrying out the conversion to SE status in the home Member State depends on the size of the firm involved, and can be significant (see examples given in Figure 12 below).

[59] Vossestein, G.-J., 'Transfer of the registered office: The European Commission's decision not to submit a proposal for a Directive', *Utrecht Law Review*, Volume 4, Issue 1 (March 2008), retrievable at www.utrechtlawreview.org

Figure 12 - Examples of the costs of conversion to SE status[60]

- BASF estimates the cost of its re-incorporation in the SE corporate form at EUR 5 million (0.007 % of its operating turnover in 2010).
- Allianz SE estimates the cost of re-incorporation in the SE corporate form at EUR 95 million (0.08 % of the value of gross premiums). [61]

Instead of going through two operations (in the case of a downstream merger) or three operations (in the case of a company having to transform itself into a SE), each including several procedural steps, a single operation would be sufficient; there would be no need to set up a new corporate form in the host Member State, and a simplified procedure could be followed.

In addition, assuming that the cost of de-registering in the home country and registering in the host country were small under a directive on the subject, the said directive would yield significant savings for businesses relative to the three-step process currently available via the SE route.

Under the CBM Directive, a firm can undertake the cross-border transfer of its registered office by setting up a subsidiary within a potential host Member State (to which it wishes to move) and merging into that subsidiary.

The **key difference between the two approaches, however, is their potential cost**. The route of the CBM Directive entails substantial costs for firms, such as the cost of setting up a company in the host Member State and of carrying out a merger. These costs may be particularly significant for SMEs. By contrast, a directive would enable firms to transfer their registered office directly.

The proposed directive would entail significant savings for businesses wishing to transfer their registered office cross-border, as they would not have to bear the costs associated with a merger.

In summary, while a company's seat can already be transferred on the basis of the existing legal framework, a **directive would make the process easier and faster, and thus cheaper**.

3) The Cartesio judgment and the role of the ECJ

The third argument put forward by the Commission related to the ***Cartesio* judgment, still pending at the time, which (according to the Commission's**

[60] Data source: Research paper written by London Economics annexed to this assessment note.
[61] In this case, it should be noted that the conversion was done as part as a major cross-border merger, which would always entail considerable transaction costs.

impact assessment) was expected to bring 'new insights' into the legal situation in Europe[62].

Contrary to the Commission's expectations that case law would help to address the various legal impediments to the cross-border mobility of company seats, a number of **circumstances are still not covered by either legal texts or case law**.

Along the same lines, some academics argued that the outcome of *Cartesio* highlights an even more urgent need for such a directive because it leaves much in the hands of national legislation and thus may lead to different in treatment between emigrating and immigrating companies and between companies emigrating from 'real seat' countries to 'incorporation' countries. Although the judgment has direct effect, a directive may be a more effective mean, as case law always concerns individual cases resulting from specific circumstances and measures in a particular Member State.

A judgment in an individual case cannot replace transparent substantive and procedural rules on cross-border operations, or remove obstacles resulting from differing approaches to problems arising from the conflict of laws[63].

In addition, *Cartesio* and subsequently *Vale* are the latest judgments in a long line of case law in which the ECJ has **consistently indicated that** the introduction by the European legislator of **a legislative instrument** regulating the cross-border transfer of a company's registered office **would be advantageous**.

Accordingly, it seems reasonable to conclude that, irrespective of the outcome of *Cartesio*, there is still a need for a directive on the transfer of a company's registered office.

In light of the disparate requirements imposed by Member States for both inbound and outbound cross-border transfers of a company's seat, the creation of a harmonised regime governing the cross-border transfer of a company's seat through a cross-border conversion would certainly be one of the key aims of a possible 14th Directive.

Finally, it should be recalled that a possible 14th Company Law Directive would not preclude Member States from taking steps to prevent the possibility of abuses. The Court itself has recognised that Member States can take steps to prevent 'wholly artificial arrangements which do not reflect economic reality'

[62] See above for a brief analysis of the case law.
[63] Johnson-Stampe, J., 'The Need for a 14th Company Law Directive on the Transfer of Registered Office', University of Lund, 2010.

and which are aimed at circumventing national legislation. In particular, the right of establishment does not preclude Member States from being wary of 'letterbox' or 'front' companies[64].

4) The economic impact of a 14th Company Law Directive

As regards the potential economic impact, the 2007 impact assessment concluded that the results were 'inconclusive', which was a somewhat unexpected outcome.

The argument that not many companies move between Member States at present is not relevant, given the **complexity** and **costs** of such procedures where they are allowed and the **consequences** where they are not.

It is true that there is little empirical data or literature on the economic impact of transferring a company's seat; in fact, most of the literature on this topic is of a legal nature. Nevertheless, the limited evidence base makes it possible to draw a number of conclusions concerning the added value of a possible directive, and to identify a number of common points which can serve as a basis for drawing up some fundamental principles for further action.

In general terms, the added value of a new instrument in this field depends on the extent to which it introduces improvements to the existing legal framework (consisting of EU legislation transposed and implemented in individual Member States, together with national initiatives and action taken by individual companies), while the magnitude of its impact in individual Member States will depend on their existing practices.

A 2006 study[65] found that between 2002 and 2005, 52 000 new private limited companies were set up in the United Kingdom from other Member States. Of these, Germany accounted for 24 000, France for 6 000, the Netherlands for 4 800 and Cyprus for 4 100. These figures clearly show that companies are using the freedom of establishment to register outside the country in which they originate, *inter alia* for tax reasons and/or to achieve proximity to global financial markets, shareholders and, more generally, active business centres.

On the contrary, as regards the cross-border transfer of registered offices by SEs, not many companies have decided to transfer their registered office on that basis

[64] Advocate-General Maduro comments on how the Court allows for special treatment in cases where there is a suspicion that companies are 'abusing' the rights granted to them by the freedom of establishment.
[65] Becht et al., 2006.

to date[66]. While the total number of notifications of new SE has grown substantially[67], the number of cross-border transfers of a company's registered office did not follow any particular trend during the same period.

It can be argued that this is due **mainly to the costs, time and administrative burden entailed**.

Concerning the costs, the examples below provides an estimation of some of the current costs associated with the transfer of a registered office and which a Directive would help to reduce or eliminate.

Examples of costs associated with the transfer of a registered office[68]

As previously mentioned, a company can undertake the cross-border transfer of its registered office by setting up a subsidiary within a potential host Member State (to which it wishes to move) and merging into that subsidiary. In the case of the Cross-Border Merger Directive, start-up costs would arise in the form of the costs of setting up a subsidiary in the host Member State in order to merge with it. On the contrary, the proposed Directive would allow companies to transfer registered offices across Member States, thereby avoiding start-up costs.

In light of this difference, an indication of the start-up costs avoided as a result of the proposed directive can be estimated using the results from the Doing Business survey. It should be noted that start-up costs avoided (and indeed merger costs avoided) capture a narrow share of the savings expected from a directive. This is because the costs of winding-up a business would be also avoided.[69] In this sense, the estimates shown below represent a lower bound of the costs avoided as a result of a Directive.

[66] These data seem to support the previously mentioned "paradoxical outcome" according to which, 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

[67] With approximately 231 new SE firms in 2012 as compared with 2007.

[68] For more details on the costs associated with the transfer of a registered office see the research paper written by London Economics annexed to this assessment note.

[69] One cannot measure this latter cost because the data used do not permit such a calculation. The Doing Business survey provides the costs of winding up a business facing liquidity problems (including, fees of insolvency administrators) as opposed to costs of winding up any business. Using this data would therefore suggest that the costs of winding up a business avoided would be too high.

Figure 13 - Average annual cost of starting up a business per Member State[70]

Country	Cost (€)
Austria	3,490
Belgium	3,340
Bulgaria	140
Cyprus	5,580
Czech Republic	2,170
Denmark	170
Estonia	380
Finland	670
France	530
Germany	2,820
Greece	7,000
Hungary	1,350
Italy	8,950
Latvia	450
Lithuania	480
Luxembourg	2,070
Netherlands	3,810
Poland	3,010
Portugal	680
Romania	330
Slovak Republic	400
Slovenia	0*
Spain	2,030
Sweden	450
United Kingdom	370
Average	**2,020**

Note: *Reported cost per capita of starting up a business is 0.0
Source: London Economics analysis of World Bank survey Doing Business (www.doingbusiness.org)

Based on the assumption that a certain number of companies would make use of the proposed Directive, the aggregate avoided costs of starting up a business could be estimated between €2.27 and €22.7 million per year (see details under Figures 13 and 14 below).

It is worth mentioning that the 'high' scenario only involves 1 in 100 companies choosing to move, which is a quite cautious approach and far lower than the number of SE firms choosing to move[71].

[70] The results from the Doing Business survey provide the latest estimates for the costs of starting up a business by Member State (except for Ireland and Malta, for which data are not available) as a percentage of income per capita in US dollars. Using data on per capita income (also drawn from the Doing Business survey) and the average annual EUR/USD exchange rate (drawn from Eurostat), the average annual cost of starting up a business is computed by Member State.

Figure 14 - Percentage of firms moving per year

Scenario	Percentage of firms moving per year
High	1%
Medium	0.5%
Low	0.1%

Source: London Economics analysis of Eurostat data

Figure 15 - Start-up costs avoided per year as a result of a Directive on the Cross-border transfer of registered office

Scenario	Start-up costs avoided (€mn)
High - 1%	22.7
Medium - 0.5%	10.4
Low - 0.1%	2.27

Source: London Economics

Using the same scenario outlined above (Figure 14), the merger costs avoided per year (as a result of firms not having to use the CBM Directive) if companies were to use a Directive would be quite considerable. The Lebrecht Group[72], estimates the merger costs per company to be around €35,000 . One may argue that for smaller firms particularly, this expense could dissuade a cross-border registered office transfer.

Figure 16 - Merger costs avoided per year as result of a Directive on cross-border transfer of registered office

Scenario	Start-up costs avoided (€mn)
High - 1%	394
Medium - 0.5%	197
Low - 0.1%	39.4

Source: London Economics

Against this background and even assuming that very few firms would make use of the proposed Directive, it seems reasonable to conclude that the **costs avoided would be considerable**.

Qualitative assessment of potential impacts

More generally, the advantage to be gained by a company in transferring its registered office from one Member State to another may be identified in relation to the twofold need for the company to move:

[71] As a proportion of SE firms notifications, the total cross-border transfer was around 3.69%. For more details see the research paper written by London Economics annexed to this assessment note.
[72] http://www.thelebrechtgroup.com/

- to be able to adapt its location or organisational structure both to market changes and to changes in its position on those markets by choosing the national law which, in its view, best meets its requirements;

- to be relieved of the obligation, when making such an adaptation, to undergo liquidation proceedings.

Other potential cost-saving elements are linked to the 'regulatory competition' effect that a directive would have. Member States would probably have to adapt their legislation in order to offer attractive conditions for a company placing its registered office in their territory. This could potentially lead, for example, to more advantageous prices for finance.

Aside from these positive economic effects, some experts have spoken of an actual economic need for a directive in this field, a need that has become more acute during the current crisis. In the case of a company whose main business has moved to another Member State, companies or natural persons from the host Member State considering doing business with that company can then rely on similar guarantees to those applicable when dealing with other companies from their own Member State. This would lead to a significant reduction in information costs[73].

The Advisory Group on Corporate Governance and Company Law, in comparing cross-border mergers with cross-border transfers, clearly mentioned the fact that there would be no need to set up a new corporate vehicle in the destination country as being the first immediate benefit. **Other possible savings would be generated by a simplified procedure**[74].

Finally, the Advisory Group also identified **other possible benefits**, including the following:

- At EU level, **a directive would reinforce basic EU principles such as freedom of establishment, and would do so more quickly than through case law**. It would also be attractive for EU subsidiaries of overseas companies, which may change their mind during the lifetime of their business as to their Member State of establishment.

[73] Vossestein, G.-J. vid. supra, p. 61.
[74] Minutes of the sixth meeting of 8 March 2007, p. 5, available at:
http://ec.europa.eu/internal_market/company/docs/advisory-committee/minutes6_en.pdf

- For existing companies, moving to another company law regime is not attractive per se. What motivates companies is easier access to finance and cost savings. This financial aspect is important: if a company is going to be listed or wishes to raise finance for growth, **changing its company law regime may help to attract investors and lenders**.

- Other potential cost-saving elements emerge from a comparison of the impact of different national company law regimes on companies, including the cost of finance.

Conclusions

Free movement of companies is a clearly given Treaty right and **the EU should not subscribe to a *de minimis* approach to the fundamental freedoms**. It would be inconceivable to describe the free movement of workers as a failed exercise because only a minority of EU citizens choose to take advantage of the provisions.

The co-existence of the real and incorporation principles and the differing aims of national and European law, which meet so untidily in this area, are still problematic. Against this background, it is reasonable to say that regardless the level of demand, legislation is still needed. It is not acceptable that while there is full pan-European mobility at the time of the registration of the company, the scope for mobility is considerable reduced once registered.

While it must be acknowledged that the transfer of a company's registered office can already be carried out, **the methods currently available for such transfers have important disadvantages** that the transfer of a company's registered office under a specific directive would not have. Accordingly, the economic added value of such a directive would derive from the fact that such transfers could be carried out at a lower cost than is currently the case using the SE solution or the CBM Directive.

Companies wishing to move their registered office should be able to **use a much more cost-effective procedure than the more expensive and circuitous routes of first having to become a SE or undertake a cross-border merger**.

This EU Added Value Assessment has provided an indication of the current costs associated with the transfer of a registered office that a directive on cross-border transfer of company seat would reduce or eliminate. Against this background, it seems reasonable to conclude that a directive on the cross-border transfer of the registered office **could yield significant savings** (e.g. in merger costs and in start-up costs) and **would not entail extra costs for companies**.

Although it must be acknowledged that it is difficult to quantify all the potential benefits**, this assessment argues that the proposed directive provides for opportunities, rather than creating costs for companies**.

On balance, it would seem that, even with regard to the proportionality criterion, a **directive would be superior to a 'no action' policy, as it is overall a less onerous route for companies wishing to move their registered office cross-border**. A directive would therefore be more likely to deliver the single-market benefits of greater company mobility.

Recommendation

A Directive on the cross-border transfer of company seats would give a coherent solution to the current lack of freedom of movement and freedom of services that affect companies which wish to move their seat from one Member State to another. Case law has proven to be insufficient to solve the problem, as it would do so on a case-by-case basis, and there is consensus among companies and stakeholders that it would make the transfer process easier.

It would also bring legal certainty and simplify transfer procedures, thus saving costs.

A Directive which facilitates the cross-border move of company headquarters could yield significant on-going savings of the order of €207.4 million per year (€197 million in merger costs and €10.4 million in start-up costs) due to avoided registration costs and merger costs by firms moving cross-border between Member States. Even assuming very few firms make use of such a Directive (that is, 1 in 1000) **the avoided costs are €42.67 million per year** (€39.4 million in merger costs and and €2.27 million in start-up costs).

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