

Cross-border transfer of company seats

1. INTRODUCTION

In its 2017 research programme the Committee on Legal Affairs requested the Policy Department for Citizens' Rights and Constitutional Affairs to commission a **study on company seats and the freedom of establishment in the Single Market**. The study would aim to analyse the different legal traditions of company seats in the European Union (EU) and the relevant case-law of the Court of Justice of the European Union (CJEU), as well as to submit policy recommendations.

In this regard, the European Parliament has already gathered **a wealth of expertise and evidence-based information on the legal and economic benefits that a harmonised framework could bring to company cross-border mobility**. This includes a comparative appraisal of national approaches, an assessment of the company law landmark rulings of the CJEU as well as a list of detailed recommendations as to the scope and content of a possible legislative intervention at EU level. Furthermore, the European Commission has very recently published the results of a **comprehensive study investigating the possibility of harmonising the conflict of law rules applicable to companies** in the EU, which also deals with cross-border transfers.

This briefing therefore provides an **overview of the legal issues** at stake as well as of the current legal landscape. It **takes stock of the work carried out and the initiatives taken in this field** by both the European Parliament and the Commission. It finally supplies a **summary of the expertise** recently submitted to both the European Parliament and the Commission as well as of the **key findings** thereof.

Taking into consideration the already available literature, **the Policy Department suggests not commissioning any further comprehensive studies at this stage**. With a view to reviving the debate the Policy Department stands ready to provide supplementary expertise either in the form of a workshop or in the form of in-depth analyses. This would take into account the feedback of the latest public consultation on the cross-border transfers of registered offices of companies and the findings of the very recent Commission's study recommending common EU conflict of law rules in this area as well as harmonised rules and procedures for cross-border conversions.

2. LEGAL BACKGROUND

Although Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) guarantee freedom of establishment of all companies and firms, **cross-border mobility of companies remains incomplete**. The EU has not yet adopted a legislative instrument specifically dealing with the cross-border transfer of company seats.

In the absence of a harmonised legal framework, **national laws apply**. As the law currently stands in most Member States, the cross-border transfer of a company's registered office

normally requires the winding-up of the company in the home Member State and its establishment as a new legal entity in the host Member State. These operations however entail the loss of legal and business continuity. Moreover, the process of cross-border transfer is extremely complex as **national approaches to determine the law applicable to companies differ quite considerably**. While some Member States opt for the **incorporation principle** (i.e. a company is governed by the law of the country where it has its registered office), other Member States adopt the **real seat approach** (i.e. a company is governed by the law of the country where the headquarter or principal place of business is located). These differences have an impact on the rules and procedures governing cross-border operations. In addition, cross-border transfers involve **risks for stakeholders**, in particular for **minority shareholders, creditors and employees** as national rules on their protection differ. Cross-border transfers may therefore challenge the rights acquired by stakeholders in their home Member State.

As a result of the disparity of national laws, companies wishing to move to another Member State inevitably face legal difficulties, substantial costs including administrative as well as social and tax burdens.

Alternative options are offered by **EU legislation on the [European Company \(SE\)](#)¹, on the [European Cooperative Society \(SCE\)](#)² and on [cross-border mergers \(CBM\)](#)³**, which provide **indirect mechanisms for cross-border mobility** within the EU without the need for the company to be wound up in its home Member State. On the basis of these instruments, a company can either convert into a SE (or a SCE) and transfer its seat according to the procedure laid down in Article 8 of the Regulation on the SE (or Article 7 of the Regulation on the SCE), or merge with a company already existing or established for this purpose in the host Member State. Both options however involve a number of **procedural steps and costs**, including the cost of the conversion into a SE or of the acquisition of a company in the host Member State. Moreover, the legal status of SE is only available to companies complying with the requirement of a minimum subscribed capital and already operating in more than one Member State and is therefore not designed for all companies, in particular SMEs.

The requirements and limitations imposed by these EU company law measures ultimately make the transfer process **more time-consuming and costly than a direct transfer**.

Against this complex background, **the CJEU case-law offers some guidance** as regards the scope within EU law for transfers of company seats. Through a number of landmark rulings, ([Daily Mail](#)⁴, [Cartesio](#)⁵, [Vale](#)⁶), the CJEU ruled that corporate mobility is inherent to the freedom of establishment enshrined in Articles 49 and 54 TFEU. Furthermore, it clarified that companies established in the home Member State have **the right to transfer their seat by cross-border conversion** to a host Member State without losing their legal personality. The host Member State has to allow cross-border conversions if and to the extent that it allows national conversions. Neither the home Member State nor the host Member State may refuse a cross-border conversion unless restrictions can be justified under the Treaties derogations or by overriding requirements in the public interest. Since EU law does not provide for harmonised rules, cross-border transfers are governed by national laws. National requirements must however be applied in compliance with the principles of equivalence (cross-border conversions must not be treated less favourably than national conversions) and effectiveness (cross-border conversions must not be made impossible or excessively difficult in practice).

Although the above-mentioned case-law provides some guidelines **a number of questions still remain open**, in particular as regards the **disparity of requirements** imposed by the procedures to be followed in the home and in the host Member States, including their interplay and **the protection of creditors and employees**. Furthermore, the case-law neither sets out the operational details of cross-border conversions nor provides a comprehensive regulation of this matter. In this respect, it may not be regarded as a substitute for a

harmonised regime which would remove the existing barriers on companies' cross border mobility and guarantee **legal certainty**.

3. THE 14TH COMPANY LAW DIRECTIVE ON AND OFF THE EUROPEAN AGENDA

The need to address the legal issues arising from the cross-border transfer of a company's registered office within the EU has been on and off the European agenda for over a decade.

Three public consultations on the matter already took place between 2003 and 2006. Following up on the results of the consultations and on the [2002 final report of the High-Level Group of Company Law Experts](#)⁷, with all supporting the need for and recommending EU action on the cross-border transfer of the registered office, the Commission carried out an [impact assessment in 2007](#)⁸. The assessment concluded that "no action' option or a directive would be suitable to achieve the policy objectives. However, when the proportionality test is applied, it is not clear that adopting a directive would represent the least onerous way of achieving the objectives set". The work on this initiative was therefore discontinued as the Commission was of the opinion that both the development of the case-law and the recently adopted CBM Directive could provide sufficiently clear guidelines for the cross-border transfer of registered offices of companies.

Most recently, the issue featured again in the Commission's [public consultation on the future of European company law \(2012\)](#), which revealed strong support for the option of facilitating cross-border transfer of registered offices by means of a harmonising directive. In its [2012 Action Plan on European company law and corporate governance](#)⁹, the Commission announced further investigation of the need for and feasibility of a directive.

With a view to collecting more data on the costs currently faced by companies transferring their registered offices abroad and on the real added value of a possible EU legislative action, the Commission launched a more targeted [public consultation on the cross-border transfers of registered offices of companies](#) and published the [results](#)¹⁰ thereof in September 2013. The 2013 consultation received 86 responses out of which only 28 were submitted by companies. The other replies were mainly provided by EU-wide public and private organisations. To the key question whether a company would consider transferring its registered office if a specific EU instrument were available, one fourth of the companies responded positively while the highest number of respondents did not have a clear view on this question. The overall majority of companies that responded positively also agreed that a specific EU instrument would reduce transfer costs. As regards the specific question of the employee participation model to be applied in case of cross-border transfer, 40% of the respondents backed a solution based on the SE legislation, 20% supported the model set out in the CBM Directive and 40% suggested another solution. The Commission announced that the results of the consultation would be taken into account by its analysis 'on the usefulness and appropriateness of possible next steps in this area'.

On its side, **the European Parliament has repeatedly called for a 14th Company Law Directive on the cross-border transfer of company seats** through a number of resolutions and oral questions¹¹, deploring the current lack of common rules that undermine corporate mobility and thus freedom of establishment.

In its [2007 resolution on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat](#)¹², the European Parliament stressed the need to **adapt the EU regulatory framework for company law** and corporate governance 'to take account of the **growing trend for European companies to operate cross-border** within the EU and of the continuing integration of European markets'. While expressing its disappointment about the Commission's decision not to make any legislative proposal for a 14th Company Law Directive following its 2007 impact assessment, Parliament announced its

intention 'to take further action with regard to the question of cross-border transfers of company seats'.

Further action was indeed taken in [2009](#)¹³ and in [2012](#)¹⁴ when the European Parliament adopted **two resolutions** calling for a **legislative instrument enabling companies to transfer their seats cross-border without entailing their winding-up or interruption or loss of their legal personality** and providing specific **recommendations** as to the scope and content thereof. In particular, the recommendations lay down a number of detailed guidelines as regards the transfer procedure, transparency of information and adequate safeguards for employees' rights. Moreover, - according to those recommendations - a cross-border transfer should not circumvent legal, social or fiscal conditions; it should preserve employees' participation rights and be tax-neutral. Most recently, the European Parliament's Committee on Legal Affairs adopted an [own-initiative report on cross-border mergers and divisions](#)¹⁵, which reiterates the importance of establishing a comprehensive legal framework on corporate mobility 'in order to simplify the procedures and requirements applicable to transfers, divisions and mergers and to prevent abuses and fictitious transfers for the purposes of social or fiscal dumping'.

4. EXPERTISE COMMISSIONED BY THE EUROPEAN PARLIAMENT

The European Parliament's repeated calls on the Commission to propose specific legislation on the cross-border transfer of company seats have been supported by in-depth expertise specifically commissioned for the purpose of investigating the legal and economic issues at stake.

Study on cross-border mergers and divisions, transfers of seat: Is there a need to legislate?

[The most recent study](#), submitted by the Policy Department C for Citizens' Rights and Constitutional Affairs in June 2016, analyses whether and to what extent there is a need to legislate with respect to cross-border mergers, cross-border divisions and cross-border transfers of seat. While illustrating that the freedom to cross-border transfer is 'quite illusory without a clear and secure EU legal framework', the study provides strong legal and economic arguments in favor of a legislative intervention aiming at creating a level playing field between companies and at establishing harmonised standards for the protection of minority shareholders, creditors and employees. Considering that national rules on the law applicable to companies vary, **the study recommends that the adoption of a directive on cross-border transfer of seat be complemented by common standards on the law applicable to companies**, which should be preferably based on the incorporation principle.

It finally puts forward a number of recommendations as to the content of a legislative instrument on the cross-border transfer. With specific regard to the form of such instrument, the study interestingly suggests to **include the new EU rules on the cross-border transfer into a revised CBM Directive**, which should be restructured as a comprehensive cross-border mobility directive encompassing all rules related to the cross-border operations of companies, namely mergers, divisions and conversions.

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

With a view to supporting its latest legislative own-initiative resolutions, the European Parliament commissioned a [European Added Value Assessment of a Directive on the cross-border transfer of a company's registered office \(14th Company Law Directive\)](#), which was published in February 2013. The European Added Value Assessment analyses the legal arguments in favor of a legislative intervention at EU level and quantifies the costs associated with the transfer of the registered office, which could be avoided should the requested Directive be adopted. Finally, it puts forward a number of recommendations on the objective, scope and content of the 14th Company Law Directive, which largely reflect the

recommendations included in the European Parliament's resolutions. The findings of the European Added Value Assessment are based on two separate studies focusing respectively on the **legal effects** and on the **economic and social effects of the requested legislative instrument**.

The **first study** appraises the advantages and disadvantages of a non-action approach versus a legislative intervention. For this purpose, it first provides an **analysis of the existing EU legal framework (TFEU, SE, SCE, CBM) and of the CJEU case-law** enabling cross-border company mobility while outlining the legal and administrative requirements, procedural steps as well as the costs of seat transfers carried out by means of those EU instruments. This analysis leads to the overall **assessment of the advantages and drawbacks** of company mobility performed in accordance with the EU tools and with the guidelines set out in the EU jurisprudence.

Secondly, it offers a **comparison of national laws and practices** in a selected number of Member States and explains the impact of the different national approaches on the feasibility of cross-border transfers. Concrete examples illustrate the legal and administrative difficulties as well as the costs deriving from the disparity of national regimes.

The study further identifies the remaining obstacles due to the lack of a harmonised legal framework paying specific attention to the issues of the **legal protection of the stakeholders involved** and **tax treatment** of cross-border operations. In this respect, it provides a detailed summary of the consequences and implications of cross-border seat transfers for stakeholders (managers, shareholders, creditors, employees, national authorities and tax administration) and suggests solutions for safeguarding their acquired rights, their right to information and legal actions.

In addition, it investigates **whether lessons can be drawn from non-EU legal models**. For this purpose, it looks into the US and Swiss systems.

The legal analysis carried out in this first study is supported by **statistical work** attempting to provide reliable data on the real use of EU tools and on the number of cross-border transfers as well as by the feedback of **interviews** conducted with a number of companies operating in various Member States.

The study concludes that the adoption of **specific EU legislation harmonising cross-border seat transfer** would bring important **benefits** to companies wishing to move to another Member State in terms of **legal certainty, predictable procedures, transparency and adequate stakeholder protection**. Such conclusion is complemented by specific **policy recommendations** to the European legislator as regards the scope of EU legislative intervention, the conditions and procedure of a cross-border transfer, the protection of the stakeholders involved in the transfer, the safeguard of employees' information, consultation and participation rights as well as of the employment contract. Further recommendations include tax neutrality of the transfer and avoidance of the misuse of post-box offices and shell companies with a view to circumventing legal, social and fiscal conditions.

The **second study** aims at identifying the potential **economic and social effects** that a 14th Company Law Directive could bring to the process of cross-border transfer of a company. For this purpose, it first investigates the **drivers for business mobility** and provides **information on company mobility** within the EU.

It subsequently attempts to **quantify the potential costs of a cross-border transfer performed under the existing EU tools (SE and CBM)**. In this regard, the study shows that **a specific Directive** on the cross-border move of company seats '**could yield significant on-going savings in the order of €200 to €210 million per year** due to avoided merger costs and start-up costs (if a new company has to be created prior to the merger)'. It finally demonstrates that even assuming very few companies make use of such a Directive (that is, 1 in 1000) the avoided costs would amount to about €40 million per year.

The study therefore concludes that 'companies wishing to move their seat 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.**'

5. EUROPEAN COMMISSION'S STUDY ON THE LAW APPLICABLE TO COMPANIES

In June 2016 the Commission published a [study on the law applicable to companies](#), which aims at identifying and assessing the **practical problems to corporate mobility** caused by the lack of harmonisation of the conflict of laws rules applicable to companies. It also deals with **cross-border transfers** and provides a number of **policy recommendations** as regards a possible EU legislative intervention.

To this end, it first presents **data on the incorporation of foreign companies** in the commercial registers of all Member States, according to which '**corporate mobility is only a partial reality in the EU**'. It further provides and explains the findings of an **empirical survey** conducted among a large number of lawyers and practitioners from all Member States having expertise in company cross-border operations. The survey reveals **significant practical obstacles to corporate mobility**, major support for the harmonisation of conflict of law rules as well as a positive correlation between support for the harmonisation of both private international and substantive company law. As regards specific problems, the survey mentions **legal uncertainty, translation costs, the relationship with related areas of law such as insolvency law and questions of taxation**.

In addition to the statistical and empirical information, the study provides a thorough **comparative analysis of the conflict of law rules applicable to companies in all EU Member States**. With a view to tackling the significant legal uncertainty identified in the Member States, the study **recommends the adoption at EU level of common conflict of law rules** in a new 'Rome V Regulation,' which should generally be based on the incorporation principle. Finally, **it also suggests the adoption of a directive on seat transfers** providing harmonised rules and procedures for cross-border reincorporation and for the protection of creditors and other stakeholders.

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- ¹ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
- ² Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
- ³ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.
- ⁴ Court of Justice of the European Union, 27 September 1988, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, Case 81/87.
- ⁵ Court of Justice of the European Union, 16 December 2008, *CARTESIO Oktató és Szolgáltató bt*, C-210/06.
- ⁶ Court of Justice of the European Union, 12 July 2012, *VALE Építési kft*, C-378/10.
- ⁷ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, 4 November 2002.
- ⁸ Impact assessment on the Directive on the cross-border transfer of registered office, SEC (2007) 1707.
- ⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final.
- ¹⁰ Feedback Statement, Summary of the responses to the Public Consultation on cross-border transfers of registered offices of companies, September 2013.
- ¹¹ Oral question O-000110/2012 of 13 June 2012 by Klaus-Heiner Lehne, on behalf of the Committee on Legal Affairs, to the Commission on the future of European company law (B7-0117/2012). 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).
- ¹² European Parliament resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat.
- ¹³ European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).
- ¹⁴ European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)).
- ¹⁵ Committee on Legal Affairs, Report on cross-border mergers and divisions, adopted on 4 May 2017, (2016/2065(INI)).

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Contact: poldep-citizens@ep.europa.eu

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