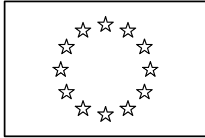

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Part I

COMMISSION STAFF WORKING DOCUMENT

Impact assessment on the Directive on the cross-border transfer of registered office

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1. EXECUTIVE SUMMARY

The need to address the legal issues arising from the cross-border transfer of a company's registered office within the EU was highlighted in public consultations carried out by the Commission in 1997 and 2002, as well as in the 2002 report of the High-Level Group of Company Law experts, which paved the way for the 2003 Commission Action Plan on modernising company law and enhancing corporate governance in the EU. It was flagged as an important initiative of the 2005 Community Lisbon Programme for growth and jobs. The specific question of whether and how the EU could act to address the issue of the transfer of registered office was again submitted to public consultation in 2005. The Parliament, in its Resolutions of 2006 on the Commission legislative and work programme and on recent developments and prospects in relation to company law[1] as well as the Court of Justice, in its *Daily Mail* case, have also highlighted the need for a legislative action on this matter.

As the law stands in most Member States, moving a registered office would typically imply the winding-up of the company in Member State A and its re-incorporation in Member State B. Given the high costs involved, the time involved and the related administrative burden, with sometimes more than 35 procedural steps to overcome, this hardly ever occurs and European companies are, in practice, deprived of the possibility of moving their place of registration within the EU.

Some Community measures, in particular the European Company Statute and the European Cooperative Society, already grant the right of transfer of registered office, however, this possibility is available only to companies established as *Societas Europea* (SE) or a European Cooperative Society. The practice to date has shown that not many companies decide to transfer their registered office on the basis of the SE Statute[2].

This impact assessment reviews the nature and scope of the problems raised by the absence of cross-border transfers of companies' registered offices within the EU and identifies policy options to address the situation at EU level.

The twin objectives of any initiative on this matter should be to improve the efficiency and competitive position of European companies by providing them with the possibility of transferring their registered office more easily and, hence, choose a legal environment that best suits their business needs, while at the same time guaranteeing the effective protection of the interests of the main stakeholders in respect of the transfer.

The report looks at different options which could further the achievement of these objectives.

Firstly, the 'no action' option is examined. In particular, the possible impact of existing legislation and legislation about to enter into force, notably Directive 2005/56/EC of 26 October 2005 on cross-border mergers which will enter into force on 16 December 2007[3] and the possible European Private Company Statute, is assessed. The impact assessment focuses on whether the time, costs and procedures required to complete the transfer of registered office would be substantially different from those required to carry out such transfer through a cross-border merger operation under the existing cross-border merger directive. Possible developments in the Community case law are also examined, in particular the currently pending case which concerns a transfer of registered office and whose outcome might affect the scope and content of a possible EU measure.

1 Resolution on the Commission legislative and work programme for 2006 (P6_TA(2005)0524); Resolution on recent developments and prospects in relation to company law (2006/2051(INI)).

2 According to the information gathered from the Commission's Company Law Expert Group 7 SEs have transferred their registered offices to another Member State and 2 are planning to do so in the near future.

3 This method of relocating the company's registered office between the states is commonly used in the US (cf e.g.: Roberta Romano, The Genius of American Corporate Law 34 et seq. (1993)).

The 'no action' option and its possible impacts are compared with options which would involve proposing Community action to facilitate the transfer of the registered office. The different options on the content and the possible instrument are assessed and compared according to clearly defined criteria.

As for the nature of the instrument, the assessment considers four main options which are also compared with the 'no action' option. Option 1 considers action by the Member States, i.e. signature of the convention on mutual recognition of companies. Option 2 envisages a non-binding and flexible instrument, i.e. a recommendation. The last two options concern the adoption of a binding Community instrument, a directive (option 3) or a regulation (option 4).

From the comparison of the different possible options the assessment concludes that 'no action' option or a directive would be suitable to achieve of 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. Since the practical effect of the existing legislation on cross-border mobility (i.e. the cross-border merger directive) is not yet known and that the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future, the assessment concludes that it might be more appropriate to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

Two public consultations launched by the Commission in 1997 and 2002 highlighted a need on the part of market operators for EU legislation allowing companies to transfer their registered office from one Member State to another without previous winding-up and subsequent re-incorporation.

On 4 November 2002 a High Level Group of Company Law Experts, appointed by the Commission, presented its Final Report on *A modern regulatory framework for company law in Europe*[4]. In this report the High-Level Group recommended the Commission to consider adopting a proposal for a Directive on the transfer of company's seat.

The Commission has stated in its Action Plan for Modernizing Company Law and Enhancing Corporate Governance in the European Union[5] that one of the means to achieve the overall aim of company law and corporate governance, i.e. to foster efficiency and competitiveness of business, is to ensure corporate mobility. Therefore, the Commission identified a proposal for a Directive on the cross-border transfer of registered office as a possible priority for achieving this.

The 14th Company Law Directive has also been listed as part of 2005 Commission Lisbon Agenda[6]. The European Parliament has repeatedly called on the Commission to submit, as soon as possible, a proposal for a directive on cross-border transfer of the registered office[7]. It has also adopted a resolution on this issue on 25 October 2007[8].

A general consultation on the possible Directive had been carried out in December 2005[9]. Stakeholders were consulted, inter alia, on whether they consider that there is a need for the

4 Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002; available at: http://ec.europa.eu/internal_market/company/modern/index_en.htm#background.

5Commission communication to the Council and the European Parliament on modernising company law and enhancing corporate governance in the European Union - A plan to move forward (COM(2003)284 final).

6 see SEC (2005) 981.

7 see note 1.

8 Resolution of the European Parliament of 25 October 2007 on the European Private Company and the Fourteenth Directive on the transfer of the registered office (PE: B6-0399/07).

9 The results of the public consultation and the summary report can be found at: http://ec.europa.eu/internal_market/company/consultation/index_en.htm.

EU measure on the transfer of registered office following the recent developments facilitating corporate mobility, in particular the recent judgements of the Court of Justice on the freedom of establishment and the adoption of the cross-border merger directive.

113 responses were received from a variety of stakeholders[10]. An overwhelming majority (79.6%) of the respondents considered that there is still a need for a directive on the transfer of registered office. In the view of stakeholders 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. Many of the respondents mentioned that the existing measures still do not provide for a straightforward transfer of the registered office (the transfer of registered office is only possible through a conversion into an SE or a cross-border merger) and, therefore, European legislation is necessary. Several respondents also emphasised that there is still uncertainty on the legal and tax consequences of transfer under present law and on the effects of the jurisprudence of the European Court of Justice on the freedom of establishment. The need for a directive to ensure legal certainty of the transfer as well as to guarantee a proper protection of the interests of creditors, shareholders and employees in relation to the transfer was underlined.

A minority (20,4%) opposed the initiative or did not consider it as a priority, stating that the existing measures (i.e. the SE Statute and the cross-border merger directive) and the case law are sufficient for the time being and that no new initiatives should be undertaken before the practical implications of those measures have been properly assessed. Some suggested focusing on the facilitation and adaptation of existing measures. A few respondents questioned the practical value of a potential directive as it would only tackle a corporate law aspect of the transfer while issues such as taxation or employee participation would not be solved.

Half of the respondents indicated specific elements to be covered by a directive. A considerable number of respondents stressed that for the practical usefulness of the directive it is necessary to clarify and regulate taxation issues related to the transfer of registered office and ensure tax neutrality of such transfer. One fourth of the respondents suggested that a possible directive should afford sufficient protection of the interests of stakeholders, in particular creditors and shareholders (including minority shareholders) in the case of transfer.

Many mentioned the need to regulate the procedure for the transfer and to ensure transparency and necessary supervision through proper cooperation and information exchange between the home and host Member States (e.g. in the area of insolvency or in the case of disqualification of directors). Some underlined that the directive should allow companies to change legal statute while providing guarantees in order to make sure that the freedom of establishment is not misused to circumvent mandatory regulations.

Several stakeholders took a position on employee participation, calling for a satisfactory standard of employee participation. A number of industry representatives opposed the inclusion of the employee participation regime in a directive.

A detailed summary of the replies to the consultation is available on the Commission website[11].

The expert groups (i.e. Company Law Expert Group and Advisory Group on Corporate Governance and Company Law) have assisted in the preparation of the impact assessment report. Within the European Commission an inter-service steering group composed of

10 32% of the responses originated from the industry, 17% from public intermediaries, 12% from investors, 8% from financial intermediaries and 7% from trade unions.

11 http://ec.europa.eu/internal_market/company/consultation/index_en.htm

representatives from Secretariat General and Directorates Generals for Taxation and Customs Union, Enterprise and Industry, Employment and Social Affairs, Economic Affairs had been set up in October 2006. The group was consulted throughout the preparation of the impact assessment report.

The IA report has been examined by the Impact Assessment Quality Board on 5 November 2007. Following the Board's opinion several improvements were made in the IA. In particular, an explanation on the possible link between the transfer of the registered office and the real seat has been added in section 3.4. A clearer distinction and explanation of what is comprised in the baseline and the 'no action' scenario has been provided in Chapters 3, 5 and 6. More consideration has been given, in different parts of the report, on why the SE and SCE Statutes have not been extensively used by companies for the transfer of the registered office and whether improving these measures could make them more attractive instruments for companies to transfer their registered offices. In section 6.2.4 a comparison of the two main options ('no action' option and the policy option) with the baseline was added and a table illustrating the costs of these three situations has been improved. In this section an explanation is given on how the current situation can be improved by the 'no action' option and compares it with the gains that would occur in the policy scenario. The reference is also made to the views expressed by stakeholders in the public consultation. A clearer link between the initiative and the Lisbon Agenda has also been shown in section 4.3. In Chapter 6 the baseline against which the options are compared was added. Some background information has been moved from Chapter 3 to the annexes.

3. PROBLEM DEFINITION

3.1. Background

3.1.1. Freedom of establishment enshrined in the EC Treaty and its limitations with respect to companies

The Treaty establishing the European Communities guarantees the freedom of establishment for Community nationals and companies formed in accordance with the law of the Member State and having their registered office, central administration or principle place of business within the Community[12]. In particular, Articles 43 and 48 of the Treaty secure the right of individuals and companies to move to another Member State to take up and pursue activities as self-employed persons and/or to set-up and manage undertakings in accordance with the conditions laid down in the law of that Member State for its own companies as well as to set up agencies, branches or subsidiaries in another Member State.

The right of establishment of natural persons has been clearly recognised in the Community[13]. In contrast, freedom of establishment of companies could not be fully achieved by the application of Article 43 and 48 of the EC Treaty due to the great differences of the Member States' laws with regard to company law matters (see section 3.1.2). It resulted in the recognition by Article 293 of the Treaty of the need for the adoption of agreements for the

12 According to Article 48: "Companies of firms formed in accordance with the law of the Member State and having their registered office, central administration or principle place of business within the Community shall be treated in the same way as natural persons who are nationals of the 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.

13 It was also confirmed by the secondary Community legislation, i.e. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (L 158/77, 30.04.2004).

mutual recognition of companies and the retention of legal personality in the event of transfer of their seat from one country to another[14].

3.1.2. Different traditional approaches of the Member States towards the transfer of company's seat

The Member States apply different principles to determine which company law applies in relation to a firm[15]. These differences have an impact on the rules governing the transfer of company's seat to another Member State.

There are two approaches in the Member States' laws with regard to the applicable company law within the Community: a) the principle of "the place of incorporation", according to which the company is governed by the law of the country where it is incorporated (registered)[16] and b) the principle of "the real seat" according to which the company is governed by the law of the country where its headquarters or principle place of business (i.e. head office)[17] are located[18]. Some Member States have adopted a mixed system having the characteristics of both of the above mentioned approaches[19].

There are direct consequences of these different approaches on the principles governing the transfer of a company's seat. As a general rule, the countries applying incorporation principle allow a company to transfer its head office to another Member State without dissolution and without a change of the legal regime governing that company (as the applicable company law is linked to the country of the company's registration). However, the cross-border transfer of the registered office from the incorporation country results in a change of the company law applicable to that company and is not possible without the dissolution of the company in the home State and its reincorporation in the host Member State.

For countries applying the real seat principle, the cross-border transfer of the head office was, until recently, either legally impossible as it resulted in a winding-up of a company[20] or restricted by certain conditions[21]. The transfer of registered office under the real seat principle is usually forbidden unless the company's head office is also transferred (and the latter results in a winding-up of a company).

The co-existence of the above two different approaches made it, in most of the cases, practically impossible for the companies to move the head office or registered office to another Member State. **Table 1** below illustrates this.

Table 1. The effect of different approaches for the transfer of the head office and the registered office.

	Transfer of the head office (HO)		Transfer of the registered office (RO)	
TO FROM	**Incorporation state**	**Real seat state**	**Incorporation state**	**Real seat state**
Incorporation state	**Possible** (no loss of legal status; the home MS recognises legal personality of a foreign company; transfer results in a change of applicable company law)	**Not possible** (the company needs to be re-incorporated in accordance with the law of the host MS)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the

14 Art. 293 of the EC Treaty states: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals (…) the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another (…)"

15 The company law with regard to a firm would normally cover the issues related to the setting-up, validity, functioning and winding-up of a company.

16 DK, IE, NL, UK, MT, SE, CZ, SK, FI, HU,CY.

17 The terms 'head office' and 'real seat' are used interchangeably.

18 BE, DE, ES, FR, LU, PT, EL, LT, PL, EE, NO, AT, SL, LV.

19 E.g. IT.

20 E.g. DE, FR.

21 E.g. FR (according to part of the doctrine), EL, ES, PT.

			State)	host Member State)
Real seat state	In principle **not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State or is restricted by certain requirements imposed by the home Member State)	In principle **not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State or is restricted by certain requirements imposed by the home Member State)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)

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

In its earlier case law, the Court of Justice considered that the restrictions stemming from the divergences in Member States' corporate law principles in respect of the transfer of company's seat cannot be solved by the Treaty freedom of establishment and recognised the need for a legislative action in this respect[22]. Since the *Daily Mail* judgement (delivered in 1988), the Court's approach to the freedom of establishment has developed and its recent case law[23] has partially addressed the problems related to the transfer of company's seat. Notably, the Court has made it clear that the transfer of the company's head office is, in principle, allowed under Community law.

In particular, following the above rulings it has been widely accepted that a company validly incorporated in a Member State must be recognised in any other Member State to which it decides to move its real seat or operations[24]. In other words, the situation where a company is moving its real seat into a Member State has been solved in a way that a host Member State has to accept that a foreign company operates on its territory according to the company law rules of its home Member State.

As regards the situation where a company is moving its real seat from a Member State in which it is incorporated to a foreign country, the Court of Justice has not clearly forbidden or limited the Member States' power to impose restrictions on the transfer of the real seat of a company incorporated under their law to another Member State[25]. Therefore, a company may be required to fulfil certain conditions when moving its real seat from a Member State in which it is registered if such country decides to impose such requirements (such as obtaining an approval from certain public authorities).

Since the home country may have legitimate reasons to impose certain requirements on companies wishing to transfer their real seat abroad (in particular to prevent any cases of abuse). However, in the Commission's view, these requirements should be proportionate and justified on public interest grounds as otherwise the Treaty freedom of establishment would be rendered meaningless.

The situation resulting from the development of Community case law is illustrated in **Table 2**.

Table 2. The effect of the case law on the possibility of transfer of the head office and the registered office.

Transfer of HO	Transfer of RO[26]

22 Daily Mail, § 23 (see Annex II for a summary of the case)

23 Centros (C-212/97), Überseering (C-208/00), Inspire Art (C-167/01).

24 Even though the host Member State may impose on such company some additional requirements, they must be proportional and justified by a public interest reason (such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions).

25 Daily Mail, §20 ("a Member State was able, in the case of a company incorporated under its law, to make the company's rights to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country").

26 Some Member States have introduced the right to transfer the registered office from and into their jurisdictions provided that the other jurisdiction to or from which the company is moving permits such transfer and continuation of the company (CY) or that there is an international treaty or specific legislation in that respect (e.g. SK, CZ, FR, ES). However, no international treaty has been signed and since in most Member States such transfer it is not foreseen by the law, moving the registered office from or to the Member States allowing it is impossible in practice.

TO FROM	Incorporation state	Real seat state	Incorporation state	Real seat state
Incorporation state	**Possible** (no loss of legal status; the home Member State recognises legal personality of a foreign company; transfer results in a change of 'nationality' of a company; company governed by the home state rules)	**Possible** (the company has to be recognised by the host Member State[27]; the company governed by the home state rules; the host state may impose certain additional requirements of its national law)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)
Real seat state	In principle **possible** (however, the home state could impose restrictions on the transfer[28])	In principle **possible** (however, the home state could impose restrictions on the transfer[29])	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)	**Not possible** (requires winding-up of a company in the home Member State and re-incorporation in the host Member State)

3.2. The current situation (status quo)

At present European companies, once incorporated in one of the Member States, can transfer their headquarters and business operations to other Member States. They may relocate their real seat to another country, provided that they fulfil all the necessary requirements and formalities imposed by their home country. Those requirements differ from one country to another.

Newly established companies have the choice

Newly formed companies may incorporate in a Member State which they think has the most advantageous corporate regime and subsequently transfer their real seat to a different Member State. As an empirical study conducted by M. Becht, C. Mayer and H.F. Wagner[30] shows, following the judgements of the Court of Justice allowing the transfer of the company's real seat to another Member State, many companies registered in one Member State transfer their head office to another Member State. In particular, there were numerous new companies registered in the UK (considered as one of the cheapest and efficient regime for company formation) which had all their operations in other EU countries. **Table A1**[31] reports new incorporations of private limited companies in the UK from other European states. In 2005 there were **19,686 companies registered in the UK, having their head offices in other Member States** (i.e. 5 times more than in 2001, before the relevant judgements of the Court of Justice were delivered[32]). In particular, in 2005 there were 12,019 companies registered in the UK and operating in Germany (as compared to 516 in 2001). Similarly, there were 2,127 companies registered in the UK and operating in the NL in 2005 (as compared to 91 in 2001).

In 2005 alone 2401 German companies and 621 Dutch companies incorporated in the UK. This amounts to respectively 3% of all private limited liability companies incorporated during that year in DE and 1% in NL [33].

Existing companies – currently available means of transferring the registered office

The above analysis reveals that there is a high interest among companies to locate their registered office in another country than the country of their head office in order to benefit from what they consider to be a more favourable company law system. However, this option

27 Centros, Überseering.
28 Daily Mail, § 70.
29 Daily Mail,§ 70.
30 M. Becht, C. MAYER H.F. Wagner, "Where do firms incorporate", ECGI Law Working Paper N° 70/2006, September 2006.
31 See Annex I (references to tables in Annex I are marked with letter A).
32 See Table A7.
33 See Table A7.

is currently available only to companies which are being established, but not to existing companies. This results from the lack of recognition in the EU of the right to move a registered office between the Member States for all companies.

Existing companies, in order to move the place of the registered office to another Member State, could use alternative means of achieving the equivalent result.

The first possibility would be to create a **European Company (SE)** or a **European Co-operative Society (SCE)** and subsequently transfer its registered office to another Member State[34] as the EU law gives such a right to these European legal forms.

However, the SE can only benefit a limited number of companies since it is designed for large companies (the minimum subscribed capital of the SE is EUR 120 000), which are already operating in more than one Member State.

The likely costs involved in creation of the European Company and subsequent transfer of its registered office would be considerably higher than that of the direct transfer of registered seat. Besides, this option is not available to all companies.

The 3-year experience has shown that the take up of a European Company is lower than initially expected (so far around 100 SEs have been created). The main reasons for a limited interest in this form indicated by stakeholders are: absence of a truly unified legal regime for SE, lack of harmonisation in many areas of law with respect to SE (e.g. specific requirements in the banking or insurance sectors, tax legislation), complex and long negotiation process for employee participation, lack of tax incentives. Further evaluation of the SE Statute with the aim to assess its attractiveness and propose necessary improvements will be carried out in 2008/2009 and the report will be published in 2009.

The European Co-operative Society, even though it may be created 'ex novo' (by 5 or more natural persons and/or 2 or more legal entities), it cannot be used by capital companies due to its principles specific for co-operatives. It is too early to provide a detailed assessment of the application of the SCE as it entered into force only in August 2006 and no single establishment of the ESC has been reported. An evaluation report on the ESC is foreseen for 2011.

Concluding, it appears from the above considerations that currently the only realistic possibility for existing companies to carry out the transfer of the registered office is to **wind up the company in the home Member State and create a new company in the host Member State.** Such operation involves substantial costs, including administrative burden, time, financial, social and tax costs. In particular, an average number of procedures involved in winding up and re-incorporating a company could vary **from 13 to more than 35.** An approximate cost of winding up and re-incorporating a company could, for example vary from €39,500 to €169,500 if a company moves from UK to EL. Winding up of a company would also involve liquidation taxation. On top of that, there will be the hidden costs of paying creditors earlier than in a normal trading environment, and of losing the use of the company's cash and assets during the liquidation period.

Further information on costs of the current situation is presented in Chapter 6 where the status quo situation is compared with the main options, i.e. 'no action' option and the policy option.

The very high cost of the transfer of the registered office results in a disadvantageous position of existing companies as compared with newly created firms and creates opportunity cost for

34 See Regulation 2157/2001/EC (SE) and Regulation 1435/2003/EC (SCE).

them. The example below describes one of the possible cases, where a company loses business opportunities because it cannot move its registered office to another Member State. Further possible benefits for companies from the possibility to transfer the registered office are described in section 3.3.

Example

An average company needs financing and wants to attract investors and lenders. Investors and banks are more likely to trust a company incorporated in a country known for investor friendly regulations and/or good insolvency law and efficient debt recovery system (such as recovery in bankruptcy). Therefore, a company would gain more trust from investors and lenders and, therefore, would have better access to finance, if it were incorporated in such a country.

A company registered in CZ or EL, which according to the rating of the World Bank have the weakest systems in the EU as regards investor protection and recovery rate in bankruptcy[35], might be more attractive for banks and investors if it would move its registered office to IE[36] or UK[37] with much more efficient protection of investors' and lenders' interests. It is also likely that the cost of credit would be lower for a company registered in these countries.[38]

Since the CZ or EL company currently has no possibility to transfer its registered office to IE or UK, it looses the opportunity to have a better and cheaper access to finance. In this way it is also in worse position than companies incorporated in IE, UK or other more efficient corporate systems. In particular, the existing CZ or EL company has a competitive disadvantage towards a newly established company, which can subject itself to IE or UK corporate system by incorporating in those countries and subsequently transfer its headquarters and business operations to CZ or EL.

In addition, it should also be noted that the freedom of establishment of companies would be incomplete if the right to transfer the real seat would not be supplemented by the right to transfer the registered office. For instance, it would be unjustified if a company, after moving its headquarters and all business operations (real seat) from country A to country B, would still have to be subjected to the corporate law and jurisdiction of country A. Such company should be able to easily transfer its registered office to country B before, simultaneously or subsequently to the transfer of real seat. Currently this is practically impossible and the company has to wind up in country A and subsequently incorporate a new company in country B.

The case law of the Court of Justice could clarify the issue to some extent. However, its impact might be limited as it refers only to particular situations and could be subject to various interpretations by Member States' courts and legislators and could result in the adoption of different solutions at the national level. Besides, the judgements of the Court of Justice set up general principles without providing harmonised rules and procedures on how to apply those principles in practice[39]. Also, the Court of Justice, in its *Daily Mail* ruling, has referred to the need for legislative action to tackle the issue of the cross-border transfer of registered seat.[40]

How many companies are concerned?

There are **more than 10 million limited liability companies registered in the EU[41]** which could possibly benefit from the option to transfer the registered office. In particular, according to data provided by the European Commerce Registers Forum (ECRF), about 9.4 million private limited liability companies and about 700.000 public limited liability companies are incorporated in the EU Member States (the number of companies concerned is even bigger as the ECRF data does not cover 8 Member States).

Using the percentage of European limited liability companies incorporated in a different EU country (notably UK) in 2005 (approximately 0,6%, in some Member States even 3%) as a

35 Out of 175 countries worldwide CZ has 83. position for investor protection and 113. for recovery in bankruptcy, Greece has 156. and 34. position respectively.

36 IE has 5. position for investor protection and 7. for recovery in bankruptcy.

37 UK has 9. position for investor protection and 10. for recovery in bankruptcy.

38 See section 3.3.2.

39 The Court stated in Sevic that the Community harmonisation rules are useful for facilitating the exercise of the freedom of establishment. (para. 26).

40 Daily Mail, § 23: "the Treaty regards (…) the question whether the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the rights of establishment but must be dealt with by future legislation or conventions". While the transfer of the company's head office is possible following the recent case law of the European Court of Justice, the problem related to the transfer of the registered office has not been resolved by the rules on the right of establishment and, therefore, following the Court's reasoning in Daily Mail, must be dealt with by future legislation or conventions.

41 see Tables A3 and A4.

proxy, a rough estimate could be made that between 0,6-3% of existing companies would use the possibility to transfer their registered office to another Member State if it was possible without winding up and subsequent reincorporation and without loosing the legal continuity of a company. It means that **approximately 60.000-300.000 companies would likely use the option to relocate their legal seat to another EU country** (see **Table 3** below). This estimate, however, is based on the available data for the UK, which may not be representative for the EU as a whole. Given that this country's system is considered as particularly efficient, the number of relocations of registered offices to other Member States might be lower.

Table 3. Approximate number of companies moving the registered office to another Member State (in three different scenarios, based on the assumption that 0,6%, 1% or 3% of companies would use the option)

Type of companies	Private companies	Public companies	Listed companies	Total
Nr of companies moving the RO to another MS (in % of total number of companies)				
0,6%	56.400	4.200	55	**60.600**
1%	94.000	.7.000	92	**101.000**
3%	282.000	21.000	276	**303.000**

3.3. The possible benefits from the transfer of the company's registered office within the European Union

Since the transfer of the registered office would be an option for companies, the likely benefits of any instrument allowing such transfer could only be measured by looking at the possible advantages that companies could gain from moving the registered office. A closer look at the likely motives behind the companies' decision to transfer the place of registration is taken in this section.

Determining the reasons for the companies to move their registered office to another Member State is difficult at present since such possibility is not available to the companies and the alternative means are too costly. The requirement to go into liquidation in the home State and transfer the assets and liabilities to a new company in the host State effectively prevents the companies to engage in such transaction.

Therefore, possible motives that could drive a company to choose another corporate legal system would be based on the assumption that the transfer of the registered office is allowed. Since the transfer of registered office will be voluntary, the companies will only decide to transfer their office if the benefits of such transaction outweigh the costs. Every such decision would be a result of comprehensive weighting and balancing of pros and cons of a particular legal regime. The reasons would differ between companies and the overall motives behind a choice of a particular legal system would have to be assessed on a case by case basis.

Some could be based on the evidence from non-EU legal systems, in particular the experience of the United States, where the transfer of the company's registered office between the states is possible.

Re-incorporations - the American experience and possible implications for the European Union

American corporations are free to opt for a corporate law of a state other than the one where their primary place of business or headquarters are located to govern their internal affairs, since the US law applies the incorporation doctrine[42]. As a result of this freedom, the state of Delaware emerged as the most popular state for the companies' location. About one-half of the publicly-traded US firms[43] as well as the majority of firms going public for the first time are incorporated there. Also the vast majority of firms changing their domicile mid-stream reincorporate in Delaware[44].

Reportedly, the main reasons for the attractiveness of Delaware for corporations were its reputation for the most comprehensive corporate case law as well as its judicial and legal expertise in administering corporate law[45]. Major identified motives for existing businesses to reincorporate in Delaware are: a prospective public offering and the intended implementation of a merger and acquisition program. According to the studies[46] companies involved in such complex transactions, which may involve substantial transaction costs, look for the certain and predictable corporate legal rules (for which Delaware has reputation) to assist in structuring these transactions and reduce firms' operating costs[47]. As studies show, reincorporation in Delaware increases the company's stock-market value[48].

The driver for Delaware to develop an efficient judicial system seems to be based on the relevance of the incorporation business for such a small state as Delaware at least on two counts: 1) incorporation fees; 2) the beneficial effects on the local legal profession.

This last point seems to be particularly relevant to explain the existence of a "defensive competition" on the part of the other US states, "whose local bar advocates' law reform so as to be able to offer a local domicile choice to their clients".[49]

The Delaware case is acknowledged to be a case of positive regulatory competition ("race to the top") for the US legal system. The Delaware migration has encouraged other US states to modify their national legislation towards guaranteeing a more efficient legal environment for US companies.

According to Romano[50] "one of the advantages of a competitive corporate law regime is that it is less likely to make regulatory mistakes than a centralized one, and any mistakes by a particular state are more easily corrected."

Differences in terms of quality of national legislation/outside investor protection

According to Roberta Romano (2005) Delaware is the quickest state among the US states to introduce more efficient new legislation. However, in the long term other US States appear to follow Delaware. The result is that Delaware superiority is made in the short term also of legislative innovation on top of the efficiency of the judiciary. In the EU case, differences also encompass the quality of corporate legislation, not just the efficiency of court and the legal system in general. In particular, according to La Porta (2000) the quality of measures on investor, creditor protection and the accounting standards as well as the efficiency of judicial system varies across European legal traditions **(**see **Table A6** which shows differences in these measures among four main legal traditions in the EU).

The likely European scenario

As we have seen, the reason for US companies to move their incorporation state is to seek a more efficient legal environment as far as company law is concerned. The US system, even though different in many aspects from the European system, could serve as an example of how the corporate mobility functions in other legal systems. The American experience shows that the motives for corporate mobility in the US are predominantly corporate law driven (companies seek more efficient legal environment in company law). One could imagine that at least some of the US developments could occur also in the EU, where the national company laws and judicial systems are much more divergent than those between the US states[51]..

Language diversity and diversity of legal systems: (for whom) would it matter?

Language diversity and considerable divergence between the national legal systems in Europe could discourage (at least some) companies from moving to a foreign legal system. Moreover, access to locally provided finance, goods or services can also be hindered, specially for SMEs, by the fact that these providers would be dealing with a foreign legal form.

In particular, for smaller companies migration might be hindered by the language barrier. However, Becht et al. (2006), using a newly constructed dataset of companies from other EU countries incorporating in the U.K. between 1997 and 2005, find a large increase in new incorporations of limited liability firms from EU Member States. The authors find that incorporation costs, in particular minimum capital requirements, and delays in incorporation are significant factors for firms' location decisions. **Table A7** shows that almost 20.000 private limited companies from the rest of the EU incorporated in the UK in 2005. Apparently, foreign language was not considered as a significant obstacle.

To identify the possible motives underlying a company's decision to move its registered office in the EU, one has to determine which part of the legislative framework applicable to a company would change as a result of such transfer (see **Table 4** below).

Table 4. The effect of the transfer of the registered office to another Member State on the applicable law (provided that there is no simultaneous transfer of the company's activities).

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42 See Franklin A. Gewurtw, Corporation Law 36 (2000). According to the incorporation doctrine the internal affairs of a corporation are governed by the law of the state of incorporation, regardless of where the corporation's headquarters is located.

43 Cf. Delware state's official website, Division of Corporations, Why Choose Delaware as your corporate home?, available at: http://www.state.de.us/corp/default.shtml (last visited December 17, 2006), claims that "More than half a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500."

44 E.g., Robert Daines, "The Incorporation Choices of IPO Firms,"New York University Law Review, vol.77 (2002), pp. 1559-1611, p. 1571 (IPO firms); Curtis Alva, "Delaware and the Market for Corporate Charters: History and Agency," Delaware Journal of Corporate Law, vol. 14 (1990), pp. 885-920, p. 887 (largest firms); Robert Daines."Does Delaware Law Improve Firm Value?," Journal of Financial Economics, vol. 62 (2001), pp. 525-58, p. 538 (NYSE firms); Roberta Romano "Law as a Product: Some Pieces of the Incorporation Puzzle," Journal of Law, Economics, and Organization, vol. 1 (1985), pp. 225-83, pp. 244, 261 (reincorporating firms and largest firms).

45 Roberta Romano, The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters, ECGI Law Working Paper Series, Working Paper No. 34/2005.

46 Idem.

47 Romano, The Genius pp. 244-59.

48 Robert Daines, Does Delaware Law improve Firm Value?, 62 J. Fin. Econ. 525 (2001) (finding 5% positive Delaware effect using Tobin's Q Analysis). Earlier event studies trying to determine the reincorporation effect on stock prize cf. e.g. Allen Hyman, The Delaware Controversy – The legal debate, 4 J. Corp. L. 368, 385-7 (1979) (positive abnormal returns in the days and weeks surrounding the announcement of the move to Delaware); Roberta Romano, The Genius 271-2 (significantly positive abnormal returns in a 10-day period surrounding the reincorporation).

49 See Romano 2005a, p. 4-5.

50 Romano 2005a, p. 3.

51 Cf. T. H. Troger, Choice of Jurisdiction in European Corporate Law: Perspectives of European Corporate Governance, p. 17 (stating that the US corporate law is relatively uniform). For instance, insolvency law in the US is governed by federal law and, therefore, is not subject to competition between the states, while in Europe insolvency law is not harmonized at the European level. One could therefore expect that cost savings are likely to be superior for EU companies than for US companies.

Change of Applicable Law/Court Jurisdiction	
COMPANY LAW AND CORPORATE GOVERNANCE RULES	The law of the host Member State applies. There is a change of the applicable law, including the rules on employees´ participation in the governance of the company.
INSOLVENCY LAW	The law of the host Member State applies. There may be a change of the applicable law. The applicable insolvency law would be determined by the court of the main insolvency proceedings, which is presumed to be the court of the company's registered office (unless it is proved that 'the centre of company's main interests' is located in another country). [52]
JURISDICTION ***(competent court)***	The jurisdiction of the host Member State for some company law and insolvency law matters (see section 3.3.3 for details)
NO Change of Applicable Law/Court Jurisdiction	
TAX LAW	The law of the Member State where the "place of effective management" is situated applies (with some possible exceptions)[53]. Therefore, if only the registered office of the company is transferred (i.e. no transfer of head office or activities of the company is effected simultaneously) the company's situation with respect to taxation in general does not change.
LABOR LAW	The transfer of the registered office of a company would not imply any change in the labour law applicable to a company, insofar as it would not relocate its activity to the host Member State. By virtue of the Rome convention[54], the law applicable to the employment contract does not change if there is no change in the country where the employee habitually carries out his work. As for the rules applicable to information and consultation of workers' representatives these are the rules of the country where the representatives carry out their functions, i.e. where they are employed. Moreover, since the employer would be a different legal person but the identity of the economic entity would be maintained, the transfer of registered office would entail a transfer of undertaking within the meaning of Directive 2001/23/EC[55]. In accordance with Article 3 of this directive, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, transferred to the transferee, with the only exception of complementary pension rights. In accordance with Article 4 of this directive, the transfer cannot constitute grounds for dismissal.
ENVIRONMENTAL LAW	The law of the Member State where the activities are performed applies. There is no change of the applicable law.

3.3.1. Company law and corporate governance related motives

According to the available indicators, differences in corporate law efficiency across the EU Member States are larger than across the US States. These differences may constitute reasons for companies to move to a different EU jurisdiction.

The box below lists the factors which may motivate existing companies to move their registered office to a different company law and corporate governance environment:

- reduced capital requirements;
- the increased efficiency and the reduction in the cost of the management of business (e.g. administrative and legal expenses[56]);
- more flexible merger/division rules outside the scope of the 3rd and the 6th company law directives;
- less stringent company law, more freedom to define the content of the articles of association;
- the scope of disclosure requirements (e.g. less burdensome obligations for listed companies with regard to disclosure requirements stemming from the Transparency Directive, e.g. absence of the requirement to provide quarterly financial information and/or auditing of the half-yearly financial statements);
- more choice as to the board structure (unitary or two-tier boards);
- the rules on employee participation (this issue will be further discussed in the options section);
- more transparency and accessibility of the company law (thus minimising the cost of professional advice);
- the corporate law with more lenient standards dealing with majority-minority conflicts (could have a value for a majority shareholder even if this could adversely affect the share value);the increased protection for investors.

52 Art. 3(1) and 4 of the European Insolvency Regulation (EIR).

53 It cannot be excluded that in double taxation conventions concluded between Member States or between Member States and the third countries the criterion "place of incorporation or registered office" determines the fiscal residence. In such a case the transfer of the registered office triggers a change of the fiscal residence of a company and shift of taxing rights on the income received from other countries from the home Member State to the host Member State.

54 Convention on the Law applicable to Contractual Obligations opened for signature in Rome on 19 June 1980. The consolidated version of the Convention as well as the First protocol on the interpretation of the Convention by the Court of Justice and the Second Protocol conferring on the Court of Justice powers to interpret the Convention have been published in the OJ C27 of 26.1.98, p.34).

55 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses. OJ L 82 of 22.3.2001, p.16.

56 Graphisoft SE foresaw to save an estimated EUR 150,000 to 200,000 a year in administrative and legal expenses as a result of a relocation of its registered seat from the Netherlands to Hungary (cf: Proposal to transfer the seat of Graphisoft SE, Annex II: Report by the Board of Directors on the consequences of the proposed transfer of the seat of Graphisoft SE).

For instance, significant differences across the EU concern such a key corporate governance issue as shareholder protection.[57] **Table A8** provides indications on the ability of national systems to protect investors, with a particular focus on minority shareholder protection against misuse of corporate assets by directors and controlling shareholders. The World Bank's Investor Protection Index[58] for the EU Member States varies from 3 for EL and 3.7 in AT to 7 for BE and 8 for UK (the latter having the most investor friendly regulations). The systems providing the broadest transparency of transactions are FR, UK and CZ. According to the Ease of Shareholder Suit Index PL (with 9), CZ and LV (with 8) provide for the strongest shareholders' control over directors.

Another proxy for the efficiency of the legal system could be the World Bank's indicators on the bureaucratic and legal hurdles an entrepreneur must overcome to incorporate and register a new firm (i.e. the number of procedures, the time and cost of setting-up a company in the EU Member States), illustrated in **Table A9**. The number of procedures varies from 3 (in DK and FI) to 10 in CZ, PL and ES and 15 in EL. Translated in number of days, the most efficient Member State appears to be DK (5 days) while at the other end of the spectrum we find ES and SL (47 and 60 days respectively).

More general indicators can also be used as a proxy for the efficiency of corporate legal system. The most widely used indicator, the World Bank's *Doing Business* annual survey, ranks the world economies according to ease of doing business. **Table A10** reproduces the ranking for EU Member States covered in the World Bank report. It takes into account the issues that would be relevant for the transfer of the registered office, i.e. the investor protection and the efficiency of bankruptcy proceedings. In addition, the rankings on the costs of starting a business and on the enforcing contracts are taken into account as a general proxy for the efficiency of the corporate legal and judiciary systems of the Member States. A high ranking on the ease of doing business index means that the regulatory environment is favourable to the conduct of business. **Table A10** shows a wide dispersion of EU Member States across the world ranking, with the Ireland and Denmark ranking respectively 10th and 11th and Italy and Greece 82st and 109th.

On the basis of the World Bank ranking, it could be expected that companies registered in countries with less efficient regulations could decide to transfer their registered office to countries to benefit from the more efficient corporate legal regime.

3.3.2. Motives related to access to finance driven by company law, insolvency law and the efficiency of bankruptcy procedures[59]

According to the World Bank's indexation, there are great differences in the Member States' legal systems with regard to investor protection (see **Table A8**) as well as the quality and efficiency of the judiciary system (see **Table A18**).

According to the World Bank's Investor Protection Index, as referred to in section 3.3.1, the EU countries indexes vary from 3 for EL (the weakest investor protection) to 8 for UK (the strongest investor protection). Since the shareholders' law suits (e.g. concerning the validity or nullity of the decisions of the company's organs) would be adjudicated in the forum of the company's registered office[60], investors might be more inclined to invest in the company incorporated in the country with efficient corporate courts. The scope of rights of

57 For a general introduction to the subject see Kraakman et al. 2004, particularly chapters 2, 3 and 8.

58 It is a widely used indicator provided by the World Bank; it combines three following indexes: transparency of transactions (Extent of Disclosure Index); liability for self-dealing (Extent of Director Liability Index); shareholders' ability to sue officers and directors for misconduct (Ease of Shareholder Suit Index).

59 As regards the rules related to the bankruptcy jurisdiction and the applicable insolvency law, the possible regulatory competition would be especially available to companies which operate in different Member States. The European Insolvency Regulation gives room for selection of the forum (and hence the law) from among the jurisdictions in which the company carries out its operations (with the presumption that the main forum for the bankruptcy proceedings is in the Member State where the registered office of the company (debtor) is located). See also note 69.

60 See note 69.

shareholders' control over directors' misconduct is also important for investors (according to the Ease of Shareholder Suit Index PL (with index 9) and LV (with index 8) provide for the strongest shareholders' control over directors).

The time and cost of bankruptcy proceedings in Member States is also an indicator of the efficiency of the national judiciary systems. According to the World Bank's indexation, the bankruptcy procedure may last from 9 years with a recovery rate of 18,5% (in CZ) to 5 months with a recovery rate of 88% (in IE).

A company may therefore decide to move its registered office to a country where company law and insolvency law are considered as more attractive for investors and lenders in order to boost the corporate value of a company, have better access to finance and financial markets (both equity and debt), or chose preferred location for a future public offering.

The US 'Delaware case' shows that the transfer of the company's registered office to a legal system considered as efficient may have a positive effect on the firm's value. Reportedly, the positive effect of reincorporation of a company in Delaware on its stock price is 5%[61]. Taking into account that legal systems of the Member States are more divergent than those of US states, it is likely that the impact of the transfer of the registered office on the share price of a company might be even greater in the EU.

The efficiency of bankruptcy proceedings in a Member State may have an important impact on credit ratings. As said earlier the length and cost of the bankruptcy procedures varies among the EU countries (see **Table A13**). A different degree of efficiency corresponds to higher or lower legal costs of credit recovery by banks[62]. Therefore, faster and easier enforcement of creditors' (banks') claims would presumably translate into lower credit cost[63]. It is therefore possible that credit institutions may extend better credit offers (lower interest rates) to companies incorporated in a country with efficient debt recovery system. It is, therefore, likely that in such a case companies wishing to have cheaper credit could decide to move to the Member States in which credit recovery is faster. However, the lower legal costs of credit recovery by creditors would have to be calculated against the higher cost of conducting bankruptcy proceedings in a foreign country.

The possibility of recovery of creditors' loans through enforcement or bankruptcy procedures constitutes a powerful incentive for debtors to respect the terms of loan agreements. Efficient bankruptcy legislations not only translate into greater percentages of credit recovery in case of non-payment, but above all into more favourable contractual terms for debtors, that is in a lower cost of credit. Santella (2004) evaluates the efficiency of bankruptcy in several EU Member States to the degree of creditor protection offered by the legal system and to the efficiency of the civil justice system. The cost for banking creditors of bankruptcy procedures according either to the powers of banking creditors and the time of recovery of credits is very differentiated across the EU **(Table A11)**. This translates into widely differing percentages of credit recovery (**Table A12**).

There are very important differences both in the administrative costs entailed by bankruptcy proceedings and in the percentages of the credits recovered at the end of the procedures, as **Table A13,** containing an assessment of the costs of bankruptcy proceedings across the EU, shows. Administrative costs go from 1% to 22% of the total value of the estate.

Therefore, choosing to locate the registered office in a country with efficient judiciary could improve a company's access to finance. Case studies presented in **Table A19** illustrate what

61 Robert Daines, Does Delaware Law improve Firm Value?, 62 J. Fin. Econ. 525 (2001) (finding 5% positive Delaware effect using Tobin's Q Analysis) see also studies quoted in note 47.

62 See Table A11 which shows a relation between the length of the bankruptcy procedure and the legal cost of bankruptcy for banking creditors.

63 See Zadra (2001), pp. 188-9.

possible benefits the option to transfer the registered office could bring to European companies.

3.3.3. The Jurisdiction. Motives related to the efficiency of the judicial system

The company may also decide to move its registered office because of the generally more efficient judicial system (i.e. the speed of rendering judgements, the expertise of judges and the legal advisors[64]) of another Member State.

According to the World Bank database, there are substantial differences in the efficiency of judicial systems between the EU Member States. Looking at the indicators related to contract enforcement (number of procedures, time and cost), DK and IE seem to have the most efficient systems. To enforce a contract in DK takes 190 days and requires 15 procedures. For IE it takes 18 procedures and 217 days respectively. In other countries it could take more than 3 years and require over 30 procedures. Similarly the indicators for the length and cost of bankruptcy proceedings could be a proxy for the efficiency of the Member States judicial systems. [65]

Since the duration and cost of proceedings in the EU varies greatly from one Member State to another the company could decide to relocate its registered office to a country with more efficient enforcement system in order to subject the corporation's internal and external affairs to the forum of that state[66]. However, the gains from the more efficient judicial system would have to be assessed against the costs related to the necessity to litigate in a foreign country (in particular language barriers and reliance on the foreign legal advice due to the substantial differences between EU legal and judicial systems).

The quality of the judiciary of a particular Member State can be an important indication for investors and lenders (see section 3.3.3).

3.3.4. Other motives

The transfer of registered office to another Member State may be related to an earlier or subsequent move of the real seat of the company to that state. A company wishing to build up or relocate its head office or operations to another country (e.g. due to market developments or a change of geographical focus of its activities) may consider registration in that state under the national corporate form of that Member State. Such relocation of registered office could positively contribute to the company's local image and facilitate contact with its clients.

A company could also wish to change the place of registration to have easier market entry by choosing to operate under a national corporate form which has good reputation and is easily recognised by the market participants (e.g. a company from a new Member State could be interested to operate under the form of GmbH, which is more familiar and trusted by the market participants).

64 J. C. Damman, The U.S. Concept of Granting Corporations Free Choice among State Corporate Law Regimes as a Model for the European Community, p. 35-39 (available at SSRN: http://ssrn.com/abstract=418660 or DOI: 10.2139/ssrn.418660).

65 See Tables A13 and A18 illustrating the indicators for the cost of bankruptcy and court efficiency in contract enforcement in the EU Member States may serve as an indication.

66 The internal affairs, according to Art. 22 (2)(1) the Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, have to be litigated in the Member State where the corporation's "seat" is located. This wording leads to the question of whether the real seat or the statutory seat is to be decisive. Art. 22 (2) (2) of the Regulation answers that question as follows: In order to determine the seat of a corporation, the court which is seized of a matter, shall apply its own, national rules of private international law. According to the state of incorporation doctrine, however, a corporation's "seat" is understood to be its statutory seat. Provided that the incorporation doctrine would be applied in all Member States, certain internal matters including the dissolution of the corporation as well as the validity or nullity of either the corporation or the decisions of its organs would have to be litigated in the courts of the state of incorporation (mandatory jurisdiction). As regards company's external affairs, Article 23 (1) of the Regulation allows to choose an incorporation state as a forum by mutual agreement of the parties: "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction…that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise." If no forum selectin clause is agreed the third parties could sue the corporation in the Member State of its incorporation (Article 2(1), 60(1)(a).

A company may choose to incorporate in a Member State with a view to transfer its registered office to another Member State at a later stage[67] (e.g. because in one country it is cheaper to start-up a company, but a different legal system offers more advantages at the later stage of a company's life).

The possibility to transfer registered office may also be attractive to foreign investors who may then be more confident in deciding to start an investment in a new market (one of the Member States) if they know that they can easily change the place of registration and, hence, the legal regime, at the later stage.

3.4. Are there any risks involved?

As explained in the previous section due to bigger differences between the national corporate legal systems in the EU than in the US, European companies may be more likely to use the possibility to relocate their registered office than companies in the US. However, differences in the national systems could also pose risk that companies could use the possibility to relocate their registered office in order to avoid the application of more burdensome rules of the national law (e.g. to benefit from more lenient rules on creditor protection or lower standard or lack of employee participation in another Member State). Such use of the possible measure should be minimised and the appropriate protection of stakeholders should be ensured. To a large extent such risks are already eliminated by the rules harmonised at the EU level. For other possible risks further safeguards need to be provided at the EU level and/or the national level. **Table 5** below illustrates the possible benefits and risks of giving the option to transfer the registered office. The necessary safeguards (either existing in the harmonised legislation or to be provided by future EU or national measures) to minimise the identified possible risks are provided in the right hand side of the Table.

67 For instance, Graphisoft converted its legal form into an European Company (SE) solely in order to be able to transfer its registered office in the long/medium term to Hungary, where most of its operations were based. In this particular case the reason for establishment of a company in another country (the Netherlands) was a wish to be established in an EU country (at that time Hungary was not yet an EU Member). Following the accession, the company decided to move the registered office back to Hungary (cf: see supra 8). Project director of Elcoteq SE mentioned in her presentation at the UNICE seminar held in Brussels on 31 May, 2006 that the possibility to transfer the registered office offered by an SE form was considered as an important added value speaking in favour of the transformation into an SE.

Table 5. Benefits and risks related to the transfer of the registered office (implying the change of applicable law)

Expected benefits for companies	Possible Risks for stakeholders	Safeguards
Cheaper re-registration and lower amount of minimum capital required	More lenient capital maintenance rules may lead to the risk of insufficient protection of creditors	It is questionable whether the legal capital is an efficient means of creditors' protection (while harmonised rules on minimum capital requirement do not exist for private companies, there is such requirement for public companies in the 2nd Company Law Directive (min. €25.000)); Further safeguards seem necessary at the EU level and in the Member States' laws (a requirement that the Member States put safeguards for creditors' claims in relation to the transfer).
Cheaper management of business	-	-
Choice of board structure (one-tier/two-tier, no board)	-	-
Lower standard of disclosure requirements for listed companies (cheaper listing)	Lower level of transparency	Transparency Directive ensures necessary minimum level of disclosure
-	8) Loss/diminishing of employees' participation rights	Further safeguards seem necessary at the EU level ensuring that no loss/diminishing of existing employees' participation rights after the transfer occurs
-	More lenient standards dealing with majority-minority conflicts (benefit for the majority shareholder) = diminishing of minority shareholders' rights	Further safeguards seem necessary at the EU level and the Member States' laws (qualified majority for the decision on the transfer, national protection measures)
Better investor protection (= positive effect on firm value)	Reduced investor protection	Further safeguards seem necessary at the EU level (investors/shareholders should decide by qualified majority about the transfer)
More takeover friendly system (easier to complete takeover bid)	Moving to legal system where anti-takeover mechanisms are broader	Further safeguards seem necessary at the EU level (qualified majority for the decision on the transfer). The directive 2004/25/EC on takeover bids gives Member States the option to transpose or not the directive's main provisions on the lifting pre- and post-bid takeover defences. The way the Member States transposed the directive may induce companies to move their registered office. However, the analysis of the implementing legislation of the takeover bids directive shows that the avoidance of regulatory competition was one of the main reasons not to endorse the directive's liberal rules. Transfers driven by takeover law are unlikely in the EU. The Commission is currently studying the possibility of an action to improve the proportionality between capital and control, which may have an impact on anti-takeover mechanisms.
Better and cheaper access to finance (because of better and more efficient creditor protection in case of bankruptcy and more efficient resolution of corporation's affairs)	Forum and law shopping to the detriment of shareholders' or creditors' interests (i.e. choice of a less creditor and investor friendly judicial system and more lenient rules on creditor protection in case of bankruptcy (could result in higher cost of credit)	Further safeguards seem necessary at the EU level and the Member States' laws (requirement that the Member States put safeguards for creditors' claims in relation to the transfer; qualified majority requirement for the shareholders' decision on transfer) Big credit institutions such as banks are likely going to include safeguard clauses in the loan contracts or mitigate risks by adjusting interest rates
Possibility to locate the registered office in another Member State than the head office (more flexibility, more efficiency in running business)	Legal uncertainty for the third parties	The First Company Law Directive provides for the minimum disclosure requirements (it requires companies to disclose the location of their registered office in their commercial communication).
More efficient regulatory regime	Risk of a *'race to the bottom'* and lowering the level of protection of stakeholders, i.e. tendency to enact more lenient rules by the Member States in order to attract companies registrations	The minimum standards and safeguards are harmonised at the European level (acquis communitaire); lack of clear fiscal incentive for the Member States to attract the companies' incorporations; institutionalised structures of stakeholders' protection (e.g. trade unions)
	Introduction of an uncertainty factor in the relationships with the existing stakeholders based in the home Member State	

	Legal costs for existing stakeholders would be higher because they would need counselling on the new status of the company	

Possible benefits and risks for the Member States

The possible measure would increase flexibility for existing companies to freely choose a corporate legal environment. Companies might choose the country which has the most efficient regulation. This could result in the emergence of "more popular" countries for the location of the companies' registered office. Those countries would gain regulatory control in corporate law matters over the companies registered on their territory. Such development might create an incentive for other companies, both from the EU and from the third countries, to incorporate there (new companies) or move their registered office there (existing companies).

However, the Member States attracting companies' registrations would not gain tax revenues, as tax residence is associated with the real seat of a company. Only if the company would decide to move its headquarters (effective management) together with or subsequently to the transfer of the registered office, would there be a tax gain for the host Member State. Similarly, the transfer of the registered office as such would have no impact on employment in the host country, as the applicable labour law is with the country where the company is operating.

Opening the possibility for companies to change the place of incorporation could also result in the loss by some Member States, in particular those with more burdensome business regulations, of companies' registrations and hence regulatory control as regards the matters concerning the registration and functioning of the company, for the benefit of the legal systems with more accessible and efficient corporate law. Moreover, the change of the law applicable to corporate matters might endanger national policies aiming at promoting balanced participation of women and men in companies' bodies.

The risk that some Member States would lose tax revenue will not occur in relation to the transfer of the registered office as taxation is related to the place of company's effective management, which would not be relocated. Nevertheless, one may not exclude that the company would transfer its central management, and hence, tax residence, to the host Member State at a later stage. However, in such a situation the home Member State may impose certain conditions on the transfer of the real seat and prevent the company from using the transfer as a means to circumvent national tax provisions[68].

It is also relevant to ask the question whether the transfer of a company's registered office, if it were made easier, would lead to an increase in cross-border transfers of real seats. At present, given the high costs of transfer of registered office referred to above, in sections 3.2 and 6.1, the Commission is only aware of limited number of cases of such transfers. On the basis of the information provided by company law experts it seems there have been some cases of Italian companies transferring their registered offices to Luxembourg and a case of a Luxembourgish company transferring its registered office to Spain. In these cases the transfer of the registered office without winding-up and re-incorporating a company was possible[69] but it was not followed by the transfer of the real seat[70]. It is difficult to draw any conclusions on the basis of existing evidence. Other sources of information have been explored (consulting the expert groups, business

68 See Communication of the Commission on exit taxation (COM(2006)825 final) for information on possible abuses.

69 However, it was reported that in Italy the courts have changed the approach and considered that a transfer of the registered office of a company facing bankruptcy abroad triggers the winding-up of a company in Italy. Apparently Italian companies were transferring registered offices in order to avoid the application of Italian bankruptcy law.

70 In the case of a company transferring its registered office from Luxembourg to Spain the real seat was already in Spain.

organisations such as BusinessEurope and Medef, the services within the Commission, in particular Directorate General for Economic Affairs and EU Statistical Office and the academic sources), but no relevant data on this issue was found.

In the US it seems companies often register first in the state where they conduct business (i.e. they have their real seat) and only on a later stage they move their registered office to Delaware. The *de facto* seat, however, in most cases stays in the state of a primary registration.

Whilst no firm conclusion can be drawn, it seems that the transfer of the registered office would not be a crucial triggering event in relation to the transfer of the real seat. Companies may already transfer their real seats abroad if all necessary conditions are fulfilled. Adding a possibility to transfer the registered office would only be an additional flexibility offered to companies, but would not substantially change the current situation in respect of the transfer of business activities.

3.5. 'No action' scenario

If the European legislator were to decide not to undertake any action on the transfer of the registered office, companies wishing to carry out such a transfer could use alternative means of achieving the equivalent result, which would soon be available.

In particular, possible improvements of the existing legislation (i.e. the SE Statute and the Statute for a European Co-operative Society)[71], legislation already in the pipeline (notably Directive 2005/56/EC of 26 October 2005 on **cross-border mergers** and a possible **Statute for a European Private Company**) as well as **possible developments in the Community case law** may clarify the legal situation in Europe and sufficiently improve the companies' current position in the single market.

3.5.1. The cross-border merger directive

The cross-border merger directive, which will become fully applicable on 16 December 2007, will give all limited liability companies, including SMEs, the possibility to effectuate the transfer of the registered office by means of a cross-border merger. They could do so by setting up a subsidiary in the Member State to which they want to move and then merging the existing company into this subsidiary.

It is worth noting that this method of transferring companies' registered offices is commonly used by American companies to move registered offices between the US states. The US law does not provide for a direct transfer of the registered office between the states. Such transfer can only be effectuated by means of a cross-border merger operation (i.e. a merger of the existing company with a subsidiary set up in the state to which it wants to move its office).

The fact that the US has not decided to introduce an option for a direct transfer of the registered office in addition to the provisions on cross-border mergers should be considered in the context of introducing a new legislation on this issue in the European Union.

3.5.2. The case law of the Court of Justice

Further developments of the European Court of Justice's case law could, to some extent, address the problems related to the transfer of the company's registered office in a long

71 See section 3.2 for more details.

term. Notably, in the most recent judgement, *Sevic*[72], the Court of Justice has given a very broad interpretation of the concept of freedom of establishment[73]. In particular, it recognised that cross-border merger operations constitute particular methods of exercise of the freedom of establishment. Given a general language used by the Court, it could be inferred from the ruling that other cross-border transformation operations, including the transfer of the company's seat, may also be considered as particular methods of exercise of the freedom of establishment. However, further clarification is needed in that regard.

Some issues related to the transfer of the company's seat are likely to be clarified in the Court's ruling in the currently pending case *Cartesio*[74]. It concerns a Hungarian company wishing to transfer its registered office to Italy. The Courts judgement may bring clarification of the Community approach to the Member States' legal traditions on the transfer of a company's seat and set up Community principles in this regard. A possibility should therefore be considered to wait with an action in this field until a possible clarification by the Court is given.

3.5.3. Statute for a European Private Company

In its Company Law Action Plan 2003[75], the Commission suggested that companies' mobility might be improved by a **Statute for a European Private Company (EPC).** The primary aim of the Statute would be to provide a common legal framework for a European legal form facilitating the operation of business in several Member States of small and medium sized companies. Such measure could provide an EPC with a possibility to transfer the registered office. However, the transfer of the registered office would be available only following a company's transformation into the EPC form. It could nevertheless be a viable alternative in the future, in particular for SMEs, if a possible statute would allow for a quick and cheap formation of an EPC. The Commission has indicated its intention to make a proposal for an EPC Statute in mid-2008[76].

Full analysis of the possible impact of the 'no action' option is provided in Chapter VI.

3.6. Does the Community have the right to act?

3.6.1. The legal base

One of the basic objectives of the Community is to ensure the freedom of establishment. Ensuring the right to transfer the registered office from one Member State to another contributes to achieving freedom of establishment for companies. Article 44(1) of the EC Treaty requires the Council to act by means of directives to attain freedom of establishment. Besides, the Court of Justice referred to the need for legislation on the issue of the transfer of the registered office in its *Daily Mail* judgement.

3.6.2. Necessity test

The existence of highly diverse national legal systems of the Member States on the matter of the transfer of registered office of a company can constitute an obstacle to the exercise of freedom of establishment of companies in the Community. The need for a

72 Sevic, C-411/03.

73 Sevic, § 19.

74 C-210/06 Cartesio.

75 See Chapter II.

76 See the speech of Commissioner McCreevy at the European Parliament Legal Affairs Committee on 4 October 2007 at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592&format=HTML&aged=0&language=EN.

common solution at the transnational level has been recognised by Article 293 of the EC Treaty and by the Court of Justice in *Daily Mail* judgement.

The difficulties encountered by the companies wishing to move their registered seat, at the legislative and administrative level, necessitate, with a view to the completion and functioning of the single market, Community provisions which would facilitate the carrying-out of such transfers. Ensuring necessary coordination of safeguards for the protection of the interests of the third parties (i.e. creditors, shareholders and employees) on the occasion of the transfer of the company's registered office needs a supranational solution as well.

The above-mentioned objectives cannot be sufficiently attained by the Member States in so far as they involve laying down rules with common features applicable at transnational level, in particular a common procedure of the transfer of registered office with all the necessary safeguards for the stakeholders involved in this operation.

However, these objectives might also be achieved by other Community instruments. The existing and forthcoming measures, such as the European Company Statute and the cross-border merger directive, might be found sufficient in meeting the abovementioned objectives. In particular, they lay down common rules facilitating a cross-border transfer of a companies' registered office as well as provide for safeguards necessary in cross-border operations. Their effectiveness in achieving the above mentioned goals remains to be tested.

4. OBJECTIVES

The aim of providing an option to transfer a registered office within the EU is to improve efficiency and the competitive position of existing European companies. However, achievement of this objective may not be achieved without providing necessary protection to other stakeholders. The transfer of the registered office should not negatively affect the interests of shareholders, creditors or employees. Therefore, appropriate safeguards protecting these interests should be taken into account.

4.1. The objective: Improve efficiency and competitive position of existing European companies

To achieve the objective of improving efficiency and competitive position of existing European Companies, the following specific objectives are defined:

(a) *Ensure the same business opportunities for all European companies.*

– All companies, new and existing, should have the same possibilities with regard to the choice of the corporate legal framework applicable governing their registration and functioning.

Operational objective:

- Guarantee legal continuity of the company transferring the registered office

(b) *Ensure legal certainty of the rules governing the transfer.*

– Any action might establish common rules governing the cross-border aspects of the transfer procedure and provide for information and disclosure obligations ensuring the minimisation of risks implied by the transfer for companies and all interested stakeholders.

Operational objectives:

- Ensure efficient cooperation between the competent authorities during the transfer procedure;
- Ensure transparency and access to information to all stakeholders which could be affected by the transfer.

(c) *Promote integration of the company in the host Member State after the transfer of the registered office.*

– The proposal would ensure that the host Member State applies the same conditions to companies moving their registered office to its territory as those laid down for the companies established there.

Operational objective:

- Ensure that the company fulfils all the requirements of the host Member State at the time of its re-registration.

4.2. Necessary protective measures complementary to the main objective: Guarantee the effective protection of the interests of the main stakeholders

This general aim of improving efficiency and competitive position of existing European Companies may not be achieved without providing necessary protection to other stakeholders who may be affected by the transfer of a company's registered office. The following specific safeguards protecting the interests of the main stakeholders should be taken into account:

(a) *Ensure the protection of shareholders' rights, in particular:*

- Ensure that shareholders have easy access to information about the transfer and its implications.
- Ensure that rules on minority shareholders' protection in relation to the transfer are provided by the Member States.

(b) *Ensure protection of creditors' interests , in particular:*

- Ensure that creditors are properly and timely informed about the transfer and its implications.
- Ensure that creditor protection rules in relation to the transfer are provided by the Member States.

(c) *Ensure protection of employees' rights , in particular:*

- Ensure that the employees' rights arising from the employment contract are safeguarded.
- Ensure that after the transfer employees' participation rights are not diminished.
- Ensure that employees are properly and timely informed/consulted about the transfer and its implications.

4.3. Consistency with the main EU policies and objectives

One of the main goals of the Lisbon Strategy relaunched in Spring 2005 is to boost growth and jobs by increasing Europe's attractiveness as a place to invest and work. The Communication "Working together for growth and jobs. A new Start for the Lisbon Strategy"77 indicates that removing remaining barriers in the internal market will create new opportunities for market participants and the resulting competition will spur investment and innovation. A single market that functions well is essential if European companies are to compete in the global market place. Improving efficiency and the competitive position of existing companies by providing them with the possibility to choose the corporate legal framework that best suits their needs, while ensuring that the interests of the stakeholders are properly protected, contributes to the achievement of the Lisbon objectives. Making an option to transfer registered offices available to European businesses would make EU markets more open and enhance corporate mobility. Opening the borders for companies would also increase the pressure on EU Member States to make their laws more flexible and business friendly. This would contribute to the Lisbon aim to simplify and modernise regulatory environment and cut the red tape.

77 Communication to the Spring European Council Working together for growth and jobs. A new Start for the Lisbon Strategy, COM (2005) 24.

5. POLICY OPTIONS

In this chapter different possible policy options will be considered. First the status quo situation, already explained in Section 3.2, will be shortly presented for clarity. Secondly, 'no action' option, explained in detail in section 3.5, will be recalled. It will be followed by a presentation of different content options of a possible measure. In this section, different choices with regard to the content/substance of a possible action will be defined (5.2). It will be followed by a section (5.3) on different possible instruments to achieve the defined objectives according to the chosen content options.

5.1. Status quo

In summary, if there were no further developments in the field of company law existing companies wishing to transfer their registered offices to other EU countries would have to establish an SE or SCE and use the transfer option available under these Statutes or, alternatively, wind up a company in the home Member State and re-establish it in the Member State of destination.

5.2. The 'no action' option

This option would imply no policy change and awaiting the impact of other developments, such as the practical effects of the cross-border merger directive, the developments of the Community case law or an action on a European Private Company.

5.3. Community action: the content of the possible measure

5.3.1. The principle

Taking into account the different legal traditions of the Member States (see section 3.1.2) and the recent developments in the case law of the Court of Justice there are two options:

Option A.1: The limited approach

According to this approach, the Member States applying the real seat principle could require that the company moving its registered office to their territory transfers its real seat/head office as well. As a result, companies could relocate their registered office alone when moving to the incorporation state, but would have to relocate both real and registered seat when moving to the real seat state. In all cases, the applicable company law would change with the transfer: the company would no longer be subject to the company law of the home Member State and will be subjected to the company law of the host Member State.

Table 6. Effect of the transfer of the registered office in option A.1:

Transfer of the registered office		
TO FROM	Incorporation state	Real seat state
Incorporation state	no transfer of HO necessary	**transfer of HO necessary**
Real seat state	no transfer of HO necessary	**transfer of HO necessary**

HO= head office

Option A.2: The extensive approach

According to this approach the host Member State, irrespective of whether they apply real seat or incorporation principle, could not require that the company moving its registered office to their territory transfers also its real seat. As a result the companies could relocate their registered office alone (i.e. without having to move the head office at the same time) when moving to any Member State.

Table 7. Effect of the transfer of the registered office in option A.2:

Transfer of the registered office		
TO	Incorporation state	Real seat state
FROM		
Incorporation state	no transfer of HO necessary	no transfer of HO necessary
Real seat state	no transfer of HO necessary	no transfer of HO necessary

5.3.2. The applicable law determining the legal form of the company

Option B.1: The application of the company law of the home Member State

This option would foresee that the host Member State would have to recognise the corporate legal form of the company as acquired in the home Member State. That would imply that all Member States would have to recognise all national corporate legal forms from all Member States.

Option B.2:The application of the company law of the host Member State

This option would envisage that a company has to adopt a corporate legal form available in the company law of the host Member State.

5.3.3. Shareholders' rights

Option C.1: No shareholders' rights

The management or the administrative organ of the company would make the decision on the transfer of the registered office without the involvement of the shareholders.

Option C .2: Information rights

Shareholders could not vote on the transfer of the registered office, but would be informed in due time about the conditions of the transfer of the registered office and its consequences.

Option C.3: Information rights and decision to be taken by simple majority at the general meeting

In addition to information rights, shareholders would have the right to approve the transfer by simple majority at the general meeting.

Option C.4: Information rights and decision to be taken by qualified majority at the general meeting

In addition to information rights, shareholders would have the right to approve the transfer by the majority that is required to modify the memorandum and the articles of

association in the home Member State.

5.3.4. Minority shareholders´ protection

Option D.1: No additional protection

The instrument would not address the issue of the protection of the minority shareholders who oppose the transfer. They would have the rights given to minority shareholders by the law of the home Member State.

Option D.2: Right of veto

As a means of protection of the minority shareholders the proposal would give them a possibility to thwart the transfer of the registered office. Therefore, the transfer decision would have to be taken unanimously at the general meeting.

Option D.3: Sell out rights

In this case the shareholders who opposed the transfer would have the right to sell their shares to the company or to the other shareholders. The company would have the obligation to buy the shares offered.

Option D.4: Member States shall decide on the means of protection

This option would allow the Member States to decide what kind of minority protection measures they wish to introduce.

5.3.5. Creditor protection

Option E.1: No creditor protection

The proposal would not address the issue of creditor protection. Therefore, the Member States would be free to introduce creditor protection rules in relation to the transfer or not.

Option E.2: Information rights

Creditors would be informed in due time about the characteristics and consequences of the transfer of the registered office.

Option E.3: Information rights and security for claims

In addition to information rights the minimum protection rule would be included requiring a company transferring its registered office to provide for an appropriate security for the creditors' claims due before the transfer.

Option E.4: Right of veto

The company would need the agreement of the creditors in order to transfer its registered office.

Option E.5: Information rights and the requirement that the Member States decide on other means of protection

In this case the proposal would require the Member States to introduce creditor protection rules in relation to the transfer, but leave them discretion as to their content and scope.

5.3.6. The employees' involvement rights

Option F.1: Information/consultation rights and application of the rules of the host Member State concerning participation

Apart from the right to be properly and timely informed/consulted about the transfer and its implications in a timely way this option would imply that the employee participation rules of the host Member State would apply after the company's transfer of the registered office to that state. In the case where a company would move to a Member State where no employees' participation rights are recognized or these rights are weaker than in the home Member State, the employees would lose these rights or their rights would be diminished.

Option F.2: Information/consultation rights and application of the rules of the host Member State with the safeguards ensuring that existing employees' participation rights are not diminished or lost without their consent

Apart from the right to be properly and timely informed/consulted about the transfer and its implications, this option would envisage that, in principle, the employee participation rules of the host Member State would apply after the company's transfer of the registered office to that state. However, a provision would be included ensuring that, in the case where a company would move to a Member State with no or weaker employee participation rights than in the home Member State, these rights would not be lost or diminished as a consequence of the transfer of the registered office without the employees' consent.

Option F.3: Right of veto

This option would foresee that the transfer of the registered office is subject to the approval of the employees' representatives.

Option F.4: *Information/consultation rights and application of the rules of the home Member State*

Apart from the right to be properly and timely informed/conuslted about the transfer and its implications, this option would imply that the employee participation rules of the home Member State would continue to apply following the transfer of the registered office.

5.4. The instrument to be used

5.4.1. Convention

A possibility to tackle the issue of the transfer of registered office without direct Community intervention would be to use a delegation contained in the EC Treaty. Article 293 of the EC Treaty foresees the arrangements for the transfer of the company's seat: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals (…) the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another (…)".

5.4.2. Recommendation

This option would foresee an instrument non-binding for Member States. This instrument would guarantee maximum flexibility to Member States as they would have discretion on whether and to which extent implement it into their national legal regime.

5.4.3. Directive

The Directive would be an instrument legally binding for Member States. However, it would give Member States some flexibility for their national specificities.

5.4.4. Regulation

A Regulation would introduce uniform obligatory rules, directly applicable in the Member States, irrespective of the national specificities.

5.5. Screening and preliminary assessment of the options

The following tables present a screening of the options (both in terms of the content and the instrument to be used) that have been discarded at this early stage together with the reasoning. A more detailed analysis of the retained options will be presented in section 6.

Table 8. Discarded content options

Discarded content options	Reasoning
Shareholders' rights *Option C.1: No shareholders' rights* *Option C.2: Information rights*	The transfer of the registered office to another Member State is a major decision in the company's life and has important impact on the shareholders as well. For that reason the decision should be taken by the general meeting.
Minority shareholders' protection *Option D.1: No additional protection* *Option D.2: Right of veto*	Option D.1 would not address the issue of the protection of the minority shareholders who oppose the transfer. As a result these shareholders would have the rights provided by the law of the home Member State. In the case option C.4 is chosen the requirement of the qualified majority decision would create some minority protection. If no additional minority protection is provided for in the proposal, in many cases the minority shareholders would be left with no way out of the company in the case they oppose the transfer. The transfer of the registered office may have beneficial effect on the minority interest (e.g. when the company would move to a more investor friendly legal system), but may also be detrimental (e.g. if the majority shareholder(s) would decide to move to a legal regime with weaker minority protection rules). This option would leave the minority shareholders without remedy but it would ensure high level of freedom for companies. While option D.2 would mean the absolute protection of shareholders who voted against the transfer, it would also make it nearly impossible (especially in cases of dispersed ownership) to transfer the registered office, as it would require the unanimity of all shareholders. There are less burdensome options to protect minority shareholders.
Creditor protection *Option E.1: No creditor protection* *Option E.4: Right of veto*	Option E.1 would place creditors at a disadvantage in the case of cross-border transfer. Ensuring information or other rights to creditors would depend on the Member States' decision. If some Member States would decide not to introduce any protective measures in their national legislation, creditors would have to take into account the higher level of risk in their crediting policy in respect of such countries. It may result in the rise of costs of credit for enterprises. At the same time, this solution would put the least burden on companies. Option E.4 would fully protect creditors but would also make it very difficult for companies to exercise the freedom of establishment. Other options can duly protect the interest of creditors but do not create unreasonable obstacles to the transfer.
The employees' involvement *Option F.3: Right of veto*	This option would imply an absolute protection of the employees' rights, but at the same time would have a negative impact on the right of the company to exercise their freedom of establishment, making it dependant on employees´ agreement. Sufficient protection of employees' participation rights, but with no unnecessarily obstructive effect on the freedom of establishment is guaranteed by option 2, which is, therefore, more balanced than option 3.

Table 9. Discarded instruments.

Discarded instruments	Reasoning
Convention	The attempt undertaken in 1968, to find a workable solution in the Convention on the Mutual Recognition of Companies and Firms[78] has failed as no agreement could be reached among Member States due to the differences in national approaches towards the transfer of the company's seat (see section 3.1.2). It is, therefore, rather unlikely that such convention could be concluded in a near future, given that no attempt to sign such agreement was undertaken after the failed attempt in 1968. Besides, the procedure for the adoption of the convention is very complex and lengthy and requires the consent of all parties. Therefore, it would not provide for a short term solution. Moreover, in the public consultation the Member States expressed their support for a directive on this issue.

The following tables present the retained options whose impacts will be analyzed in depth in section 6.

Table 10. Retained options.

No action

Retained content options.

Content options	
A. The principle	*Option A.1: The limited approach* *Option A.2: The extensive approach*
B. The applicable law determining the legal form of the company	*Option B.1: The application of the law of the home Member State* *Option B.2: The application of the law of the host Member State*

78 Draft Treaty of 27 February 1968, Convention on the Mutual Recognition of Companies and Firms, see M. MENJUCQ, La mobilité des sociétés dans l'espace européen, Paris, 1997, nr. 118.

C. Shareholders' rights	*Option C.3: Information rights and General Meeting's decision by simple majority* *Option C.4: Information rights and General Meeting's decision by qualified majority*
D. Minority shareholders´ protection	*Option D.3: Guarantee of their investment* *Option D.4: The requirement that the Member States decide on the means of protection*
E. Creditors' protection	*Option E.2: Information rights* *Option E.3: Information rights and security for claims* *Option E.5: Information rights and the requirement that the Member States decide on other means of protection*
F. Employees' involvement	*Option F.1: Information rights and application of the rules of the host Member State* *Option F.2: Information rights and application of the rules of the host Member State with the safeguards ensuring that existing employees' participation rights are not diminished or lost without their consent* *Option F.4: Information rights and application of the rules of the home Member State*

Table 11. Retained instruments.

Instruments		
Recommendation	**Directive**	**Regulation**

6. ANALYSIS OF IMPACTS AND COMPARISON OF THE RETAINED OPTIONS

In this section a detailed analysis of the main impacts of the retained options is presented and compared with baseline (status quo). The tables presented in this chapter contain essentially qualitative information and are only meant to illustrate the assessment and comparison of different options.

After presenting the impacts, the options will be compared according to their effect on some pre-defined criteria (corresponding to the main issues that may be affected by the choice of a particular option). **The comparison of the 'no action' option and the option providing for a measure** on the transfer of a registered office against the baseline (status quo) **will be presented in this Chapter**. It will **focus on the assessment of the cross-border merger directive** (which is a measure providing for a comparable legal framework to that of a possible measure on the transfer of registered office and of which the rules are already established) **as against the option providing for a measure on a direct transfer of registered office. The 'no action' option will be compared with the best suggested content options for a possible measure.**

6.1. Status quo

This would involve substantial costs and lengthy procedures. **Table 12** below indicates the costs and procedures related to the transfer of the registered office in the status quo situation (i.e. the costs of winding up and re-incorporating a company).

Table 12. The costs of winding up of a company in one country and creating a new company in another country[79].

Cost of status quo	Voluntary winding up of a company	Setting up a new company
Administrative burden	The number of procedures for winding-up of a company may vary across the EU and depends on the complexity of the particular case. E.g. a voluntary winding up of a private limited liability company in the **UK**[80] (150 shareholders, € 6,5 mio in cash, no creditors, employees) requires approx. **10 steps**[81]; in **FR** the liquidation of a limited liability company requires approximately **20 steps**[82] and in **DE more than 20 steps.**[83]	The number of procedures necessary to set-up a company is comprised **between 3** (DK, FI, SE) **and 15** (EL), with an average of 7. As a general rule, there are 5 categories of procedures/requirements needed to set-up a company[84]: screening, tax-related, labour/social security, safety and health, and environmental related procedures. The particular procedures vary across MS, depending on the type of company and the sector in which it operates. **Table A14** in the Annex I lists the main mandatory procedures. The number of procedures needed to register the property of the new established company is comprised between 1 (SE) and 12 (EL) with an average of 5.
	An average number of procedures involved in winding up and re-incorporating a company could vary **from 13 to more than 35.**	
Time	Comparable data on the time needed for a voluntary winding-up of a solvent company is not available and it would depend on the complexity of the case. E.g. in CZ the average time: **6 months**, in SE: **7-8 months**, in DE: **min. 1 year**.	Setting-up a company takes between **5 days** (DK) **and 2 months** (SL), with an average of 24 days. Registering property for the new established company may take from 2 (SE) to 391 (SL) days with an average of 72, 5 days.
Financial cost	The financial cost of winding-up a company varies greatly, depending on the volume of business of the company, the cost of liquidator, number of creditors etc. E.g.: **UK**: the estimated out-of-pocket cost for members´ voluntary liquidation of a private company varies between **€20.000 and €150.000**, if no unusual problems arise. Above this, hidden costs due to paying creditors earlier than expected and to the inability to use cash and assets during the liquidation period should be added. **IE**: a voluntary winding-up of a company (5 mio assets) will cost on average between **€15.000 and €30.000** (including the liquidator's fees and the legal fees of the solicitor and excluding VAT and outlays), providing that no contentious issues arise. **DE**: a liquidation of a shell company costs approx. **€2.200,** plus the fees of the liquidator for a company with an ordinary line of business **(easily €120.000 per year).** **FR:** three types of costs, i.e. costs related to mandatory formalities with the authorities (approx**. €200** or more); mandatory publications (approx. **€5**); the liquidation operations (substantial costs; different in every case).	An average set-up cost for a private limited liability varies from €285 (FI) and €6,715 (DK) and for public companies from €285 (FI) to €7,000 (AT). The minimum capital to set-up a company varies from €1-2 (UK, IE, FR, CY) to €35,000 (AT) for private companies and from €8,850 (CY) to €124,580 (PL) for public companies The costs of re-incorporation of a company would vary depending on the choice of the country of destination (e.g. in IE **approx. €1,500**, in EL **€19,500**).[85]
	Approx. cost of winding up and re-incorporating a company in the above cases could vary for example from **€39,500** to **€169,500** if a company moves from UK to EL.	
Social cost[86]	The rights of workers are safeguarded by virtue of the Directive 2001/23/EC; however: Employees' rights under complementary pension schemes might not be continued (depending on the Member State)	

79 The evaluation of the costs is based mainly on data of the Doing Business Database of the World Bank, which provides objective measures of business regulations and their enforcement. The Doing Business indicators are comparable across 175 economies. They indicate the regulatory costs of business and can be used to analyze specific regulations that enhance or constrain investment, productivity and growth (http://rru.worldbank.org/DoingBusiness/). Some data has been gathered from the company law experts advising the Commission.

80 Example provided by a Member of the Advisory Group on Company Law and Corporate Governance.

81 I.e. (i) pre-liquidation review, (ii) statutory declaration of solvency, (iii) General Meeting to approve the liquidation by a 75%, (iv) filing of liquidation documents with the Registrars of Companies, (v) communication to creditors and shareholders, (vi) press advertisements, (vii) tax computations and returns, (viii) payment of creditors, (ix) distribution to shareholders, and (x) final dissolution.

82 See Table A16 for the list of particular steps required.

83 See TableA17 for the list of particular steps required.

84 See Djankov, S., La Porta, R., Lopez de Dilanes, F. and Shleifer, A. : The Regulation of Entry, Quarterly Journal of Economics, 117, pp. 1-37, Feb. 2002, Table I (List of procedures for Starting-up a Company).

85 See Table A15 in Annex 1.

86 This process would imply a transfer of undertaking within the meaning of Article 1 of Directive 2001/23/EC. The rights of workers are mainly safeguarded by virtue of the directive, but there are still some effects for workers. As to the scope, the directive does not cover all types of activities (sea-going vessels are explicitly excluded).

	The participation rights would be governed by the company law of the host MS, which may in some cases result in workers' rights being diminished or lost.	
Tax implications	Profits from liquidations distributed to shareholders would be taxed. Capital gain taxation would be triggered in every country where the dissolved company has permanent establishments (a **corporate income** tax would be levied on such gains, which may vary **from 10% in CY to 33% in FR, 34% in BE, 37 % in IT and 38% in DE**). Other charges would arise, derived from the liquidation of the company and the transfer of the ownership of fixed assets[87].	The company may lose specific tax advantages or benefits that would not be rolled over to the new company. Transfer and registration taxes may arise. Some MS (EL, ES, CY, LU, AT, PL and PT) charge capital duty on the incorporation of a company. Stamp duty is levied on listed companies in several Member States.

87 See (http://ec.europa.eu/taxation_customs/taxation/gen_info/info_docs/tax_inventory/index_en.htm) for an overview of such taxes in 27 Member States.

Not all the costs and procedural requirements presented in **Table 12** are to be considered as unnecessary and unjustified restrictions. Some of the requirements and procedural steps related to the move of the legal seat to another country are legitimate and necessary to protect various legitimate interests, such as the interests of creditors, employees or minority shareholders as well as the public interest. The costs related to the requirements on protection of legitimate interests would not be eliminated by the two main options (‘no action’ option and the policy option). Therefore, the costs that these options could reduce mainly concern administrative burdens and social and tax costs related to winding-up of a company in one country and setting up a new one in another. **The comparison of the costs of the three situations, i.e. (I)** carrying out the transfer of the registered office in the current situation **(status quo), (II)** the costs of carrying out a transfer through a cross-border merger **('no action' option)** and **(III)** directly on the basis of a possible measure (**the policy option**) is presented in **Table 13**.

6.2. ‘No action’ scenario

If no policy action is taken at the Community level, companies will not be able to carry out a direct transfer of the registered office. Such right would remain available under the SE and SCE Statutes.

However, future developments in the field of companies' mobility may open new possibilities to companies and provide them with alternative means of achieving the result equivalent to the transfer of the registered office, making the need for a measure on the transfer of the registered office less pressing.

In particular, one should consider whether the cross-border merger directive and a possible Statute for a European Private Company (see section 3.5 for details) could sufficiently meet the policy objectives defined in Chapter IV. Furthermore the future developments in the Community case law as well as in other policy developments at EU and Member States’ level may affect the situation in the market.

6.2.1. The cross-border merger directive

Once the Directive 2005/56/EC of 26 October 2005 on cross-border mergers is implemented into the national laws of the Member States, i.e. after 15 December 2007, it will be possible to effectuate the transfer of the registered office by means of **a merger of the existing company with a subsidiary set up in the Member State to which it wants to move its office (the host Member State)**[88]. Since this option is not yet practically possible in the EU it is difficult to predict whether and how many companies would use it to transfer their registered office to another Member State. However, even though no precise data could be provided, it is possible to make a preliminary estimation. In particular, one should examine whether the costs involved in completing of the direct transfer of registered office would be substantially different from the costs involved in carrying such transfer through a cross-border merger operation. This comparison seems reasonable, especially when looking at other legal systems, notably the US, where, in the absence of specific legislation providing for a direct transfer, the cross-border merger law is commonly used by companies to transfer their offices between US states (see section 3.5.1).

88 This method of relocating the company's registered office between the states is commonly used in the US (cf e.g.: Roberta Romano, The Genius of American Corporate Law 34 et seq. (1993)).

6.2.2. The European Private Company

The possible Statute for a European Private Company could improve companies', in particular SMEs' mobility as it would facilitate the operation of business in several Member States and could provide a possibility to transfer the registered office of an EPC. The Statute, if allowing for a reasonably cheap and quick formation of a company, could be attractive for companies, also SMEs, as a tool for transferring registered offices across the EU. More detail analysis of this possible measure would only be possible once its form and content are clearly defined.

6.2.3. The Community case law

As already mentioned in section 3.5, the Court of Justice may clarify in the course of 2008 Community law as it applies to the Member States' legal traditions in relation to the transfer of a company's seat. In particular, the case currently pending before the Court, i.e. *Cartesio*, relates to an issue of the transfer of the registered office, the very subject of the possible EU measure. The outcome of the Court's judgement may affect the scope and content of such measure. Should a principle of freedom of transfer of the registered office be established on the basis of the Treaty, the need and possible scope of an EU action would have to be reconsidered.

Considering that the practical effect of the cross-border merger directive is not yet known and that the Community approach to the issue of the transfer of the registered office might soon be clarified by the Court of Justice, it might be advisable to wait until the impacts of those developments can be fully assessed and the need and scope for the EU action better defined.

6.2.4. The comparison of the current situation (status quo) with 'no action' option and the policy option

Before presenting a possible content of a possible Community measure (section 6.2) it should be considered to what extent the problems of the current situation (**status quo**) could be solved in the case no Community action is undertaken (**'no action' option**). The latter should then be compared with the situation when Community action would be embarked on (**the policy option**). **Table 13** contains a comparison of these three scenarios and provides an indication on their costs.

The status quo situation involves substantial burdens in terms of administrative costs (procedures), time, financial costs as well as social and tax costs involved in winding-up and re-incorporating a company. The cost of winding-up of a company appears to cause the biggest problem as usually the company, even if solvent needs to go through all the liquidation proceedings, which can last even for several years and require sometimes more than 35 procedural steps to complete. Furthermore, there are also the hidden costs of paying creditors earlier than in the normal trading environment (which is less advantageous) and of losing the use of the company's cash and assets during the liquidation period (as the management of a company has to be ceded to an appointed liquidator) which can last from several months to several years. The examples of the list of procedural steps involved in winding-up of a company are provided in **Tables A16** and **A17**).The comparison of the status quo with the two main options shows that the latter provide for less costly solutions. In particular, both options ensure the legal continuity of a company transferring its registered office to another country, therefore, no loss of business and the costs involved therein, occur. A company would not have to go through a burdensome winding-up procedure, but a specific, much easier and less costly,

procedure for cross-border merger or for the transfer (see **Table 13** for details). Both options ensure (or would ensure) tax neutrality of the transaction and provide safeguards for employees, which is not legally guaranteed in the current situation.

The cross-border merger directive (one of the elements of the 'no action' option) addresses already many of the problems related to the status quo, in particular it ensures that no interruption of business occurs, i.e. it reduces the costs of winding-up of a company. It also ensures tax neutrality in case of cross-border transfer through a merger operation and secures that employees' existing rights are not lost in the case of cross-border transfer.

The cross-border directive would not reduce costs of setting up of a new company in the host Member State as also in this option a subsidiary has to be created which an existing company is then merged into. In this respect the policy option providing for a direct transfer of the registered office is more advantageous in addressing the problems related to status quo situation. However, the costs of setting up a company are not substantial in the cross-border transaction. The most burdensome part of the procedure is related to the cost of winding up of a business in the home Member State. Besides, recent developments and trends in the EU and Member States' policies suggest that the costs related to establishing a business in any of the EU countries are likely going to be reduced. In particular, the 'one stop shop' initiative making the setting up of a company easier and cheaper and the EU simplification program aiming at cutting red tape and reducing unnecessary administrative burdens imposed on businesses would significantly reduce the administrative cost of setting up companies. Therefore, it can be expected that in the future cost differences between the 'no action' option and the policy option will be even less significant than they are now. The two main options, if compared in the context presented above, would provide for a similar solution to the defined problem. The 'no action' option seems more proportional as no further EU action is required. The 'no action' option was preferred by a number of stakeholders in the public consultation. Those respondents considered the existing measures (i.e. the SE Statute and the cross-border merger directive) and the Community case law as sufficient for the time being and stated that no new initiatives should be undertaken before the practical implications of those measures have been properly assessed.

Table 13. A comparison of the costs of (I) status quo (current situation) with the costs of (II) 'No action' (i.e. carrying out a transfer through a cross-border merger) and (III) a policy option (i.e. carrying out a transfer directly on the basis of a possible measure). [more "€" indicates that the transaction is more costly; the comparison refers to absolute cost of the transactions, i.e. the baseline is not a benchmark against which the options (I) and (II) are assessed]			
Policy option / **Costs**	**(I) Status quo (i.e. winding up of a company in one country and creating a new company in another country**	**(II) 'No action' (i.e. transfer of the registered office through the cross-border merger directive)**	**(III) A policy option (i.e. a possible measure on the transfer of the registered office)**
Required procedures	An average number of procedures involved in winding up and re-incorporating a company could vary from 13 to more than 35. Approx. cost of winding up and re-incorporating a company could vary for example from €39,500 to €169,500 if a company moves from UK to EL. The company may lose specific tax advantages or benefits that would not be rolled over to the new company. Transfer and registration taxes may arise. Some MS[89] charge capital duty on the incorporation of a company. Stamp duty is levied on listed companies in several Member States. The number of procedures, the time and the financial cost of winding-up a company varies greatly, depending on the volume of business of the company, the cost of liquidator, number of creditors etc. as well as from/to which country a company is moving its registered office. In any case the number of procedures and the time needed to complete all winding-up procedures (which are not necessary in two other options) would be more burdensome thann in (II) and (III). On the top of that, there are also the hidden costs of paying creditors earlier than in the normal trading environment and of losing the use of the company's cash and assets during the liquidation period.	Transferring the registered office through a merger operation would require setting up of a new company (subsidiary) in a host Member State and, subsequently, an acquisition of an existing company by this subsidiary. This would imply the costs of setting up a company (Table 12) and the costs of carrying out a cross-border merger, which is subject to the following procedural formalities[90]: - the drawing-up of joint draft terms of merger; - the publication of the draft terms of merger in the national gazette; - the drawing-up of a report by the administrative or management bodies of each of the companies involved; - the approval of the merger by the appropriate organs of each of the companies involved (in principle the general meeting); - the drawing-up of an expert's report for each of the companies involved; - the judicial or administrative preventive supervision of the legality of the merger, or the drawing-up and certification in due legal form of the acts required for the merger, for each of the companies involved; - the publication of the merger.	The possible measure would have to provide for a procedure for a transfer of the registered office. It would have to include similar procedural steps as in the case of cross-border merger: - the drawing-up of a transfer proposal; - the publication of the transfer proposal in the national gazette; - the drawing-up of a report by the administrative or management bodies of the company; - the approval of the transfer proposal by the appropriate organs of the company (in principle the general meeting); - the drawing-up of an expert's report; - the judicial or administrative preventive supervision of the legality of the transfer, or the drawing-up and certification in due legal form of the acts required for the transfer; - the publication of the registration of a company in the host Member State. No setting up of a subsidiary in the host Member State would be necessary; however, there will be formalities necessary for the adaptation of a legal form of a company transferring its registered office to the requirements of the law of the host Member State.
Comparison	**€€€€€**	**€€€**	**€€**
Social implications	The rights of workers are safeguarded by virtue of the Directive 2001/23/EC; however: Employees' rights under complementary pension schemes might not be continued (depending on the Member State). The participation rights would be governed by the company law of the host MS, which may in some cases result in workers' rights being diminished or lost.	**Employees' individual rights**: Article 14(4) of Directive 2005/56/EC concerning states that "*the rights and obligations of the merging companies arising from contracts of employment or employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, **be transferred to the company resulting** from the cross-border merger on the date on which the cross-border merger takes effect*". **Collective rights**: the situation would be similar to that mentioned in Table 12 (social cost), except for participation rights, which are regulated in Article 16 of Directive 2005/56/EC. This provision provides, in a nutshell, that when one of the merging companies has more than 500 employees and is operating under a	**Employees' individual rights**: no change if no change of the place where an employee habitually carries out his work. Since the employer would be a different legal person but the identity of the economic entity would be maintained, the transfer of registered office would entail a transfer of undertaking within the meaning of Directive 2001/23/EC[91]. Article 3 of this directive: the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, **transferred to the transferee**, with the only exception of complementary pension rights. Article 4 of this directive: the transfer cannot constitute grounds for dismissal. **Collective rights:**

89 EL, ES, CY, LU, AT, PL PT

90 Directive 2005/56/EC on cross-border mergers states that the procedure for such mergers is governed in each Member State by the principles and rules applicable to domestic mergers (harmonised in the EU by the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies).

91 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses. OJ L 82 of 22.3.2001, p.16.

		participation system or the national legislation applicable to the company resulting from the merger does not provide for the same level of participation as operated in the relevant merging companies, the rules of Directive 2001/86/EC (European Company) apply mutatis mutandis.	- information and consultation: no change if not change of place of work, as the rules of the country where the workers' representatives are employed apply; - participation rights: the possible measure should contain provisions on participation rights.
Comparison	**€€€€**	**€€€**	**€€€**
Tax implications	Profits from liquidations distributed to shareholders would be taxed. Capital gain taxation would be triggered in every country where the dissolved company has permanent establishments (a corporate income tax would be levied on such gains, which may vary from 10% in CY to 33% in FR, 34% in BE, 37 % in IT and 38% in DE). Other charges would arise, derived from the liquidation of the company and the transfer of the ownership of fixed assets[92].	As regards tax implications, Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfer of assets and exchange of shares concerning companies of different Member States (Tax Merger Directive) provides for a principle of tax neutrality of the cross-border merger. It contains rules for the situation where there is an effective connection of the transferred assets and liabilities with a remaining permanent establishment and it plays a part in generating the profits and losses that are taken into account for tax purposes, but is silent on situations where these conditions are not fulfilled. The shareholders may benefit from the roll-over relief of the latent capital gains from the allotment of shares in exchange for the shares of the merged companies. However, any cash payment to the shareholder is subject to taxation.	Similar rules would apply if Tax Merger Directive's rules would be extended to cover the case of the transfer of the registered office of all companies.
Comparison	**€€€€**	**€€**	**€€**
Other costs	Costs of the legal advice, administrative costs are likely to be higher, in particular in respect of the winding-up of a company	Costs of the legal advice, administrative costs	Similar costs of the legal advice, administrative costs
Comparison	**€€€**	**€€**	**€€**

92 An overview of such taxes in 27 Member States is available at: http://ec.europa.eu/taxation_customs/taxation/gen_info/info_docs/tax_inventory/index_en.htm.

6.3. Community action: Content options

6.3.1. The principle

Option A.1: The limited approach

This approach, preserving the co-existence of the real seat principle and the incorporation principle, would result in a limited use by companies of the option to move the registered office to other Member States. The possibility to move the registered office without simultaneous transfer of the head office would only be possible if the company would move to an incorporation country (see **Table 6**). Since a number of Member States still apply the real seat doctrine, often a company would have to move its head office together with the registered office. In such scenario the benefit of the instrument would be very limited. It would result in a limited choice of the likely destinations for the move of the registered office as companies would move predominantly to countries applying incorporation principle (such as UK, IE or NL). These Member States are likely to become the most popular re-incorporation choices since the companies would prefer to move to a country with more flexible company laws rather than having to locate their registered and head office in the same Member State (which the real seat state would require). This may result in a disadvantageous position of the Member States applying the real seat principle as they may experience considerable outflow of companies registered in their territories and increased number of foreign legal forms operating on their national market.[93] It should be noted that, following the experiences of regulatory competition resulting from the case law of the Court of Justice (see section 3.2) some Member States applying the 'real seat' principle are considering to change the 'real seat' principle to 'incorporation principle' in their national law. For example, the German government, traditionally applying the real seat doctrine, has announced a reform of its corporate law which, inter alia, introduces the incorporation principle into German law allowing companies registered in Germany to conduct their business outside German territory. The motive for this change was to give German companies the same flexibility as the companies from other Member States enjoy[94]. Hungary has also recently introduced an incorporation principle in its national law[95].

In addition, the ‘real seat’ principle is more and more difficult to apply in the modern economy, where international companies are often managed from different locations. Different criteria used by the Member States to determine the real seat (e.g. the place of the location of headquarters, the principal place of the company's operations, the place where the general meeting is held) would make it very difficult to determine which legal regime should govern the company following the move of the registered office. This would go against the objective of ensuring legal certainty in relation to the transfer.

Option A.2: The extensive approach

This approach would provide a common framework facilitating the exercise of the freedom of establishment for companies based on a uniform, simple and easily applicable principle, i.e.

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93 E.g. an existing Hungarian company could move its registered office to UK (which would imply that it would acquire a British corporate form and be governed by the British company law) and continue to operate under this form in Hungary. Such possibility is already available to new establishments of companies as a result of the Centros case law. Following the adoption of the directive this possibility would also be available to existing companies.

94 The press communication of the German Ministry of Justice (BMJ) on the reform (available at: http://www.bmj.bund.de/enid/0,c6eeea707265737365617274696b656c5f6964092d0932343639093a096d795f79656172092d0932303036093a096d795f6d6f6e7468092d093035093a095f7472636964092d0932343639/Presse/Pressemitteilungen_58.html) states in point 2(a): It is considered a competitive disadvantage that, according to the ECJ case-law in the Überseering and Inspire Art cases, foreign companies from EU Member States can choose to locate their true place of business in another State – i.e. in Germany too. These foreign companies are to be recognised as such in Germany. Conversely, German companies do not as yet have this possibility. As a result of the deletion of § 4a(2) of the GmbH Act, it is therefore to be made possible for German companies to choose a true place of business which is not necessarily the same as the registered place of business. This true place of business may also be located abroad. This increases the scope for German companies to conduct their business outside German territory as well. For example, this may be an attractive possibility for German groups to manage their foreign subsidiaries in the familiar legal form of the GmbH.

95 Act LXI of 2007, entered into force on 1 September 2007.

allowing companies to move their registered office to a different Member State without the obligation to relocate, at the same time, their headquarters or centre of business to that State. It would give all companies the possibility to freely choose the destination for their registration and change the applicable company law regime according to the needs of their businesses as well as to the developments of the national regulatory regimes.

The possible impacts (benefits and risks) of providing companies with the option to transfer the registered office have been already presented in sections 3.3 and 3.4. Therefore, in this section, only main conclusions are provided.

First of all, a new option (to transfer the registered office) would be open for companies, which is now prohibitively expensive and requires winding-up and subsequent re-incorporating of a company. On average, such transaction, taking as a proxy the data available for some countries, could cost €21.500-169.500, last up to one year and involve between 13 and more than 35 procedural steps. Providing the option to transfer the registered office would not eliminate all costs currently involved in conducting the transfer of the registered office, i.e. the costs of winding-up and re-establishing a company in another Member State. Some requirements imposed by the Member States on companies when they move the legal seat to another country are necessary to protect legitimate interests, such as the interests of creditors, employees or minority shareholders as well as the public interest. Those requirements need to be preserved. However, the costs of transferring the registered office would be significantly reduced and it would be ensured that companies do not lose their legal continuity and maintain control over their business throughout the transfer process.

The American experience has shown that the impact of providing companies with an option to transfer solely the registered office to another state works for the benefit of companies and has a positive effect on the quality and convergence of the corporate law and judicial systems. It can be expected that in the EU, where the national company laws and judicial systems are much more divergent than those between the US states, the cross-border mobility of companies would be even bigger. More than 10 million limited liability companies registered in the EU could potentially benefit from the option to transfer the registered office. Assuming that even 0,6-3% of EU companies would use this possibility, would mean a benefit for approximately 60.000-300.000 EU small and big companies could transfer their registered office to seek savings in credit costs and in their cost of capital. Applying the estimates released by the Italian Banking Association, only for Italian companies the possibility to transfer the registered office could translate in as much as 6 billion EUR savings in the cost of credit. In terms of cost of capital, using the estimates provided by the studies on shareholder expropriation, EU listed companies could increase their market value from 2% to 56%.

The transfer of the registered office may involve certain risks for different stakeholders. However, as **Table 5** (in section 3.4) shows the possible risks either are mitigated by the harmonised law already in place or would be minimised by the safeguards provided in the future EU legislation. Therefore, a risk that the possible measure would cause a 'race to the bottom' resulting in a lower level of protection of stakeholders' interests should not occur in the EU.

There would be no change in the tax and labour law applicable to a company, provided that the transfer of the registered office is not accompanied by the transfer of the company's headquarters and/or activities. The transfer of the registered office as such has no impact on the applicable tax and labour laws. According to the main principle applied in the EU countries, the fiscal residence of a company is determined by the place where its effective management (head office) is situated. As for labour law, the employment contract is governed

by the law of the country where the employee habitually carries out his/her work. The transfer cannot constitute grounds for dismissal of workers.

It should also be noted that in order to ensure that the transfer of the registered office is not rendered ineffective, the tax neutrality of the transfer should be guaranteed, i.e. that the transfer of the registered office to another Member State would not result in immediate taxation of unrealised gains on assets remaining in the Member State from which the office is transferred. However, this issue would need to be tackled by special action in the field of taxation, either at the EU or the national level. This could be achieved by extending the rules of the tax merger directive (currently ensuring tax neutrality in respect of cross-border mergers and the transfer of the registered office of the European Company) to cover the transfer of the registered office of all companies or by promoting co-ordination of Member States' tax policies in that respect[96].

This approach should give all companies the possibility to choose the corporate environment which best suits their needs and bring better allocation of business. The emergence of the most efficient corporate system(s) in the EU is likely to result, in the long term, in the increased convergence and efficiency of the national corporate regimes. The Member States with the company laws less responsive to the entrepreneurs' needs are likely to reform their legal systems in the quest for attracting local company incorporations[97], which in turn should have a beneficial effect on economic growth.

The studies prove that business regulations are an important determinant of growth. One of the most recent studies on the relation between business regulation and growth, conducted by the World Bank, has shown that more business-friendly regulations improve economic growth[98] and, in consequence, have positive impact on employment.

Some studies also show that small businesses will benefit the most, because they are the ones which suffer most from the existence of low quality regulation. As firms increase in size, fixed costs of regulatory compliance are spread over a larger revenue and employee base, which often results in lower regulatory costs per unit of output. A study by Crain[99] found that regulatory costs per employee decline as firm size—as measured by the number of employees per firm—increases. Crain estimates that the total cost of federal regulation was 45 percent greater per employee for firms with fewer than 20 employees compared to firms with over 500 employees.

This approach would also ensure legal certainty by introducing easily determinable and uniform principle on the applicable company law, i.e. the law of the company’s place of incorporation.

Comparing the options

96 E.g. by means of Communication.

97 The regulatory competition has already occurred with regard to the new company establishments (for explanation of the impact of the case law of the Court of Justice on regulatory competition see Section 3.1.3 and 3.2). As a result, Member States the most affected by the regulatory competition (Germany, the Netherlands) have undertaken reforms to ensure that their national corporate forms are more responsive to entrepreneurs' needs. For German reform see reference in note 97; for the Dutch reform see: http://english.justitie.nl/currenttopics/pressreleases/achives2004/-call-for-simple-flexible-law-private-companies.aspx (consulted on 19 December 2006).

98 Simeon Djankov, Caralee McLeish, Rita Ramalho, Regulation and Growth, The World Bank, 17.03.2006, p. 2-5 (vailable at SSRN: http://ssrn.com/abstract=893321). The analysis is based on objectives measures of business regulations in 135 countries (indicators of the Doing Business database of the World Bank in seven regulatory areas: starting a business, hiring and firing workers, registering property, getting bank credit, protecting equity investors, enforcing contracts in the courts and closing a business). The results of the study reveals that government business regulation is an important determinant of growth. According to the study the relationship between more business-friendly regulations and higher growth rates is consistently significant in various specifications of standard growth models. The study suggests that national growth policies should put priority on reforming business regulations, e.g. the number of procedures to register a business or property could be decreased by combining them at a "one stop shop" for businesses.

99 Crain, W.M. 2001. “The Impact of Regulatory Costs on Small Firms.” Report prepared for the Office of Advocacy, U.S. Small Business Administration.

This choice between limited and extensive approach will affect the extent of freedom of establishment given to companies. The limited approach would reduce freedom of companies to decide whether they want to transfer their registered office alone or together with the head office. In such case the potential impacts of the proposal will be limited. The extended approach, giving companies full freedom in that respect, will have a greater impact. Legal certainty provided by each option is the third relevant criterion in the assessment of the options.

Table 14. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria **The principle**	**Freedom of establishment**	**Expected impacts**	**Legal certainty**
Status quo	+	=	+
No action	+/++	=	+++
Option A.1: The limited approach	++	++	++
Option A.2: The extensive approach	+++	+++	+++

Concluding, in order to achieve a clear and easy solution for European companies Community action should be based on the principle that when the company moves its registered office to another Member State it should be free to decide whether it wants to move its real seat at the same time or not. This approach would provide flexibility to companies and at the same time would ensure that possible risks to the interests of stakeholders are eliminated. It would also enable regulatory competition between the Member States' company law systems and encourage reforms of the less efficient systems, which should have positive effect on the economic growth in the EU.

If no action is taken, companies could use the cross-border merger directive to carry out the transfer of the registered office. However, whether a company would have freedom to move its registered office together or without its headquarters would depend on whether the home and the host Member State apply the real seat or the incorporation principle. Therefore, freedom of establishment given to companies would be somewhat more limited than in the case of the extensive approach.

6.3.2. Applicable company law determining the legal form of a company

Option B.1: Application of the company law of the home Member State

This option would imply that a company would be governed by the company law of the home Member State even after it has transferred its registered office abroad. In this scenario, the transfer of the registered office would not result in a change of the applicable company law or a national corporate form acquired in the home Member State.

Even though this solution would allow companies to move their registered offices freely around the EU, it could cause legal uncertainty and the lack of proper administrative control over such company.

In particular, after the transfer of its registered offices to the host Member State the company would retain the national corporate form of the home Member State and would continue to be subject to its company law. However, the home Member State could no longer control the company's compliance with its national rules as the company would lose the link with its legal order (it would be removed from the home country’s commercial register). Even though such control could, theoretically, be exercised by the host Member State, this would require the application of a foreign (home Member State's) company law by that state. This solution is not currently feasible due to the considerable differences in the national company laws.

In this context it should be considered whether the principle of home country control, provided for in other Community measures (e.g. in the financial services sector), might also be followed in the company law field. Therefore, a solution allowing the Member State to exercise control over a company which is incorporated under its law would be superior.

Finally, this approach would not enable companies to change the legal regime applicable to them by transferring the registered office as the transfer would not imply a change of the applicable law.

Option B.2: Application of the company law of the host Member State

This option would envisage that, following the transfer of the registered office a company should adopt a corporate legal form available in the company law of the host Member State and would be subject to the corporate rules of that State. This would result in the necessity of adaptation of the form of the company to the requirements of the host Member State.

The advantage of this approach would be that the companies could change the legal regime applicable to them as well as the corporate form by moving to a country of their choice (see section 3.3 for the possible motives of the companies to move to a different country). It would also ensure efficient supervision and control over the proper application of the corporate law as it would be seized with the national authorities of the Member State where the company is registered. This option would not require the application and/or interpretation of foreign law by the national supervisory authorities, hence lesser disputes would emerge.

Comparing the options

This choice may affect mainly (i) the legal certainty and (ii) the complexity of the legislative framework as well as (iii) the level of supervision/control over the companies by the public authorities. Option B.2. would be better solution if the Community action is taken. The 'no action' option (i.e. the cross-border merger directive) would also result in the application of the host Member State's law following the merger. The degree of legal complexity of the cross-border merger transaction is not substantially higher than the direct transfer of the registered office, to the extent that a new company must be created in the host Member State in addition to the standard procedure (see the detailed comparison of the procedures in **Table 13**).

Table 15. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria **Applicable law**	**Legal certainty**	**Legal complexity**	**Supervision/Control**
Status quo	+	---	---
No action	++	+	++
Option B.1: Law of the home Member State	+	--	--
Option B.2: Law of the host Member State	++	++	++

6.3.3. Shareholders' rights

Option C.3: Information rights and decision at the general meeting by simple majority

This option would ensure that the decision on the transfer of the registered office is taken by the owners of the company, i.e. the shareholders. Such approach would be appropriate given the importance of the decision for the company's life and its likely effects for the financial and other interests of shareholders.

This option would also enable shareholders to take a fully informed decision at the general meeting following the examination of the draft terms of transfer and the management report

explaining and justifying the transfer.

However, the solution allowing a decision on transfer to be taken by simple majority would make it possible, in public companies with block-holdings, for one or two majority shareholders to decide on the transfer. In private companies, often SMEs, the personal aspects of the enterprise could be damaged.

Option C.4: Information rights and decision at the general meeting by qualified majority

This option, like option C.3, would ensure that shareholders are properly informed. It would also secure that the decision on transfer, crucial for the company, is taken by the same qualified majority as the majority required for other important issues, such as the amendment of the memorandum or the articles of association. Given that the transfer would result in a change of the company law regime applicable to the company a high level of consent between the shareholders of the company should be secured.

Qualified majority would also provide a means to protect minority shareholders as they would more easily achieve a percentage of votes required to block the decision.

Comparing the options

Two overall objectives have been defined on this project (i) improve competitiveness of existing companies by ensuring that companies can fully enjoy the freedom of establishment while (ii) guaranteeing that the rights of shareholders and stakeholders are protected. There is always a trade-off between both objectives. The more stringent are the protection rules the less space there is for a company to enjoy its freedom of establishment. Therefore, these options will be compared according to the extent to which they respect the freedom of establishment and the shareholders' and stakeholders´ rights. In the case of 'no action' (i.e. the cross-border merger directive) the situation would be similar to the option C.4 as the cross-border merger directive requires the general meeting's decision on merger to be taken by a qualified majority.

Table 16. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria Shareholders	Freedom of establishment	Shareholders´ rights	Minority shareholders' rights
Status quo	+	++	++
No action	++	+++	++
Option C.3: Simple majority	+++	++	-
Option C.4: Qualified majority	++	+++	++

6.3.4. Minority shareholders´ protection

Option D.3: Sell out rights

This option would provide for minority shareholder protection rules at the EU level, notably it would allow the shareholders who oppose the transfer to opt out, i.e. to sell their shares to the company (which would be obliged to buy them) or to the other shareholders.

While providing for solid protection of minority interests this solution would significantly raise the financial and time costs of the transfer for the company. Besides, the sell out right is very distant from some Member States' legal system and its introduction could compromise the success of the proposal. Choosing this option would disproportionately limit the freedom of companies and the flexibility of the Member States.

Option D.4: The requirement that the Member States decide on the means of protection

This option would ensure the protection of the interest of the minority shareholders in every Member State, but would not imply harmonisation of the rules. This would allow the Member

States to decide on the scope and the content of the minority protection measures. Given that the transfer of the registered office may have a serious impact on the minority interests (e.g. new board structure, new system for appointing directors, etc.), the appropriate protection of their rights has to be ensured. However, in order to respect the different traditions of the national rules, the differences in approach to private and public companies, etc. flexibility should be given to the Member States. As a result, the protection of the interests of the minority would be ensured, while the Member States would not need to modify their laws substantially and no unnecessary new regulation would be imposed on the companies. This solution is in line with the requirement of proportionality, it involves some uncertainty on the actual level of minority protection and the nature of the rules.

Comparing the options

The criteria of the comparison are (i) freedom of establishment and (ii) the level of minority protection and (iii) the proportionality of the rules. The assessment of the option leaving the establishment of the protection rules to the Member States (D.4) is based on the assumption that they are prevented, by a general clause contained in a measure, from introducing rules which would have the effect of hindering the freedom of establishment. In the case of 'no action' (i.e. the cross-border merger directive) the situation would be analogous to the option D.4.

Table 17. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria Minority shareholders	Freedom of establishment	Minority shareholders' protection	Proportionality Principle
Status quo	+	+/+++	++
No action	+/++	+/+++	+++
Option D.3: Sell out rights	+	+++	-
Option D.4: Member States' rules	+/++	+/+++	+++

6.3.5. Creditor protection

Option E.2: Information rights

This option would ensure that creditors are properly and timely informed about the transfer, i.e. have the possibility to examine the draft terms of the transfer and the management report on the characteristics and consequences of the transfer. This would reduce the risks involved in the transfer of the registered office to another Member State. As the shareholders of the company must receive appropriate information on the transfer, giving creditors access to the same information would not create high additional costs for the company.

Nevertheless, the possibility to obtain security for creditors' claims or any other protection measure would solely depend on the rules provided by the national legislation and/or on individual agreements between creditors and the company.

OptionE.3: Information rights and security for claims

This option would ensure a higher level of protection of creditors compared to *option E.2* as, in addition to information rights, it would introduce security for creditors' claims in relation to the transfer.

This option would result in the harmonisation of the basic protection rules at the EU level. The rules would ensure more extensive protection of creditors' rights but they would add – sometimes unnecessary – financial and time cost to the transfer (e.g. when there are no creditors in the home Member State or when the company leaves a branch in the home Member State and the creditors' claims are not at stake). Nevertheless, there may be creditors

and claims that should be protected but the costs of a general obligation on the companies would exceed the potential benefits which may be better achieved by less burdensome means.

Option E.5: Information rights and the requirement that the Member States decide on other means of protection

The possibility to examine the draft terms of the transfer and the management's report is essential for creditors in order to be able to assess the consequences of the transfer of the registered office.

This option would ensure, in addition to information rights, that the Member States introduce other measures for the protection of creditors. It would ensure respect for the traditions of the national approaches to the creditor protection and would allow the Member States to decide on the content of the particular measures. This solution would not impose unnecessary regulation, neither would result in harmonised rules but it would ensure the protection of the interests of creditors in every Member State. Therefore it is in line with the principle of proportionality.

Comparing the options

The same criteria, as defined in point D for minority shareholders' rights, will be used to compare these options with respect to creditors. In the case of 'no action' (i.e. the cross-border merger directive) the situation would be analogical to the option E.5.

Table 18. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria Creditors	Freedom of establishment	Creditors´ rights	Proportionality Principle
Status quo	+	+/++	++
No action	++	+/++	+++
Option E.2: Information rights	+++	+	+
Option E.3: Information rights and security for claims	+	++	-
Option E.5: Information rights and Member States' rules	++	+/++	+++

6.3.6. Employee participation rights

Option F.1: Information/consultation rights and application of the rules of the host Member State on participation

This option would establish a clear principle, but could have negative impact on the employees participation rights in the case where a company would move to a Member State with no or weaker employees participation rights than in the home Member State, i.e. the employees would lose these rights or their rights would be diminished following the transfer of the registered office. Besides, the application of the host rules would have a chilling effect on the companies wishing to avoid increased employees' participation rights. This could limit the mobility of the companies to the countries with similar level of employee participation rights (e.g. UK, LV, EE and BE which have no such rights or countries which have similar arrangements for employee participation).

Option F.2: Information/consultation rights and application of the rules of the host Member State with the safeguards ensuring that existing employees' participation rights are not diminished without their consent

This option would provide for a balanced solution. It would ensure that in the situation described in the point above (option F.1) employees' participation rights would not be lost or diminished as a consequence of the transfer of the registered office.

This solution would ensure that the approach remains coherent with other EU measures on cross-border restructuring (i.e. the cross-border merger directive and the Statute for a European Company). It would envisage that the scope of the participation rights must be negotiated with employee representatives according to a harmonised procedure. If the negotiations fail, the default rules on employees' participation, harmonised at the EU level, would apply. The negotiations would make the procedure of the transfer of the registered office longer and more complex.

Option F.4: Information/consultation rights and application of the home Member State rules

This option could have different results depending on the laws of the particular home and host countries. If the company would move e.g. from Member State with no employee participation rights to Member States providing for such rights, it would be able to move to such country without introducing employee participation rights. The transfer in such situation would be easier and less burdensome and, therefore, would likely result in the increased mobility of companies. However, in the reverse situation (i.e. the company moving from the Member State with employee participation rights to the one with no such rights), the company would need to keep the participation rights in the form required by the home state law.

Besides, since the employee participation issue belongs to corporate law (as it concerns the board composition), this option would imply a general exception from a principle that after the transfer the company law of the host Member State applies. In this respect, option F.2 provides for a more balanced solution.

Comparing the options

The options will be measured against the two main objectives of the proposal, the third criteria in this case is the coherence with other EU rules. It should be noted that the impact of the options on freedom of establishment and the employees' rights would differ, depending on whether a company comes from a country with employees' participation system to a country with no/weaker system or the reverse situation occurs.

In the case of 'no action' (i.e. the cross-border merger directive) the situation would be analogical to the option F.2.

Table 19. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria Employees' participation	Freedom of establishment	Employees´ participation rights	Coherence
Status quo	++	-/+	-
No action	++	++	+++
Option F.1: Application of the rules of the host Member State	++	-/+	-
Option F.2: Application of the rules of the host Member State with safeguards	++	++	+++
Option F.4: Application of the rules of the home Member State	++	=-	-

6.3.7. Summary of the identified possible package of suggested content options

The analysis and comparison of the content options of the possible measure and the 'no action' option does not give a clear answer as to which of the general options, i.e. 'no action' or 'Community action', would best meet the pre-defined assessment criteria. If there would be a Community measure, the following content options could be appropriate:

Table 20. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Content option	Suggested content options
A. The principle	***Option A.2: The extensive approach***

B. The applicable law determining the legal form of the company	***Option B.2: Law of the host Member State***
C. Shareholders' rights	***Option C.4: Qualified majority***
D. Minority shareholders´ protection	***Option D.4: Member States' rules***
E. Creditors' protection	***Option E.5: Information rights and Member States' rules***
F. Employees' participation	***Option F.2: Application of the rules of the host Member State with safeguards***

However, the 'no action' option could well meet the defined policy options i.e. improve efficiency and competitive position of existing European Companies as well as guarantee the effective protection of the interests of the main stakeholders in respect of the transfer. At the same time, it would be a more proportionate solution as there would be no new legislation.

6.4. Instruments

6.4.1. Recommendation

The recommendation would not be sufficient to ensure the recognition of the right of the transfer of the registered office by all Member States. As it was already explained in section 3.6.2, an action taken only by some Member State is not sufficient to ensure corporate mobility across the EU. In order to enable all European companies to move their registered seat from and to any EU country, all Member States have to provide such possibility. Otherwise the principle of freedom of establishment would remain an illusion and companies would not be able to fully use their right to freedom of establishment.

In particular, the recommendation would not secure the adequate level of legal certainty. The instrument should provide for a transfer procedure during which an appropriate co-operation between the competent national authorities must be ensured. The lack of or different implementation of certain provisions in different Member States could result in legal uncertainty. In the public consultation, several respondents emphasised that enhanced certainty is needed on the transfer of the registered office.

Similar problems would emerge in relation to the rights of the stakeholders. If the Commission aims at ensuring that every Member State provides for the protection of the rights of the creditors and the employees, it would not be sufficient to choose a regulatory instrument that allows Member States to freely select whether and which standards they apply.

6.4.2. Directive

The directive is an instrument best suited to guarantee basic common rules, applicable in all Member States, while respecting national specificities. This view was shared by the respondents to the public consultation. In particular, the need for a directive to ensure a proper protection of the interests of creditors, shareholders and employees in relation to the transfer as well as a formal procedure for the transfer was underlined.

A Directive is a less intrusive way to achieve the objectives set out in section 4 as well as more adequate as regards the content of the proposal, therefore, it fully respects the proportionality principle.

6.4.3. Regulation

This instrument is normally only used in the field of company law in exceptional cases, e.g. when a new type of supranational corporate form (such as the European Company) is created[100]. The most common basis for measures in this field, clearly provided for in the Treaty, is a directive.

The adoption of a regulation would provide for common rules directly applicable across the EU. However, the costs of such solution would be significant as it would require adoption of uniform rules in respect of the transfer of the registered office in all the Member States and would not guarantee flexibility for national specificities deeply embedded in corporate law.

In order to ensure the effective cross-border transfer of the registered office, certain procedural and substantial rules have to be put in place. Most of these rules already exist in the national legal systems, although they differ from one country to another.

To ensure the transfer of the registered office, it is sufficient to co-ordinate the national laws and introduce minimum standards on the cross-border aspects of such transfer. Therefore, a rigid approach of a regulation is not necessary and would be against the proportionality principle.

6.4.4. Choice of an instrument

The choice of an instrument may have an effect on: (i) legal certainty; (ii) proportionality (i.e. whether the instrument chosen is the least interventionist to achieve the objectives, e.g. directive should be preferred over the regulation); (iii) adequacy of the instrument with regard to the content of the proposal.

Table 21. Comparison of the options (positive effect: +; neutral effect: =; negative effect: -).

Criteria Instruments	Legal certainty	Proportionality	Adequacy
Status quo	--	-	--
No action	++	+++	++
Recommendation	-	++	-
Directive	++	++	+++
Regulation	+++	--	--

The analysis of the content options suggests that the two preferred options are: 'no action' or a directive. However, in terms of the proportionality test, it is not clear that adopting a directive would represent the least onerous way of achieving the policy objectives. Considering that the practical effect of the existing legislation on cross-border mobility (i.e. the cross-border merger directive) is not yet known and that the Community approach to the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future, it might be advisable to wait until the impacts of those developments can be fully assessed and the need and scope for the EU action better defined.

100 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1376&format=HTML&aged=1&language=en&guiLanguage=en .

7. EVALUATION AND MONITORING

Should a measure on the transfer of the registered office be adopted, the Commission, with the help of the company law expert groups (i.e. Company Law Expert Group and the Advisory Group on Corporate Governance and Company Law), will closely monitor and evaluate the results and impacts of such measure.

This process will be developed in two steps:

7.1. The monitoring

In the case 'no action' option is chosen, the Commission will monitor the implementation of other measures and assess over time the practical effect of developments identified as possible means of achieving policy objectives defined in Chapter IV. In particular, an evaluation report on the European Company Statute, together with the recommendations on possible amendments, will be issued in the course of 2009. An evaluation report on the European Cooperative Society shall be delivered in 2011.

Furthermore, the implementation of the cross-border merger directive will be monitored within the standard Commission procedures. In addition, information on the application of the directive in Member States will be gathered with the assistance of the Company Law Expert Group and the Advisory Group on Corporate Governance and Company Law. A revision of the directive is foreseen for 2012 on the basis of the experience acquired in applying it.

If there were to be a measure on the transfer of a company's registered office, the Commission, with the assistance of the Advisory Group on Corporate Governance and Company Law, will examine each year:

- The process of transposition and implementation of the measure.
- Its first results and impacts (once the implementation deadline expires).
    - Quantification of the number of companies transferring their registered office
    - Identification of the trends in the transfer of companies (the Member States receiving and losing companies, types of companies moving their registered office)

In order to prepare this review, Member States (through the Company Law Expert Group) will be required to collect the following information regarding the companies transferring their registered office to the Member State's terrirory:

- Country of origin.
- Legal form, before and after the transfer.
- Main characteristics of the company: number of employees, total turnover, total balance sheet etc.

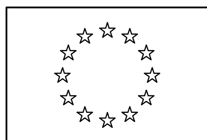
7.2. The evaluation report

If there were to be a measure on the transfer of a company's registered office, it should be subject to a complete evaluation exercise in order to analyse its effectiveness, efficiency and relevance, and to decide whether additional measures or amendments are needed. This evaluation exercise should be prepared five years after the end of the transposition period with the help of the company law expert groups. The evaluation will be based on the information and data produced by the ongoing monitoring measures, and complemented with additional information collected from companies, Member States and stakeholders.

In order to evaluate the results and the impacts of the new legislation, some evaluation questions should be addressed:

- Has the number of companies moving its registered office to a different Member State shown an increase in the years following the transposition? Which Member States are the recipients of companies and which countries do the companies leave? What are the reasons for the transfer of the registered office?
- Can existing companies in Europe freely move their registered office without losing their legal continuity? How long does it take? How costly is it? Are there still obstacles that have not been removed by the measure?
- Has legal certainty been ensured in the process of the transfer? Are there any legal ambiguities that should still be addressed? Have there been any risks identified that have not been properly treated either by the Community law or by national legislation?
- Has there been any impact on the rights of main stakeholders?
    - Shareholders/investors
    - Minority Shareholders
    - Creditors
    - Employees
- Have there been any reforms of the national company laws of the Member States aiming to attract the companies' registration as a result of the measure? Have any legal systems emerged as the favourite destinations of European companies?

Annexes (in a separate document)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.12.2007
SEC(2007) 1707

Part II

COMMISSION STAFF WORKING DOCUMENT

Impact assessment on the Directive on the cross-border transfer of registered office

ANNEX I. TABLES

ANNEX I. TABLES

Table A1. This table reports new incorporations of private limited companies in the U.K. from other EU Member States except the U.K. Incorporations from country *x* count the number of firms where *the majority* of directors resides in country *x*. Incorporations in parentheses from country *x* count the number of firms where *all* directors reside in country *x*.

Year	Majority of directors from country x	All directors from country x	Majority of directors from country x	All directors from country x	Majority of directors from country x	All directors from country x	Majority of directors from country x	All directors from country x	Majority of directors from country x	All directors from country x
	Austria		Belgium		Cyprus		Czech Republic		Denmark	
1997	31	(22)	116	(85)	144	(120)	22	(9)	59	(26)
1998	19	(13)	144	(87)	194	(154)	15	(8)	42	(31)
1999	43	(30)	169	(109)	673	(568)	32	(19)	71	(54)
2000	31	(15)	121	(56)	936	(657)	39	(17)	60	(20)
2001	77	(11)	199	(13)	864	(353)	33	(5)	201	(5)
2002	99	(21)	219	(57)	985	(422)	38	(8)	515	(259)
2003	142	(75)	282	(124)	872	(452)	54	(31)	957	(896)
2004	371	(292)	330	(204)	801	(519)	67	(33)	196	(97)
2005	609	(514)	458	(346)	959	(646)	89	(63)	248	(179)
	Estonia		Finland		France		Germany		Greece	
1997	0	(0)	9	(4)	1,061	(805)	258	(169)	72	(50)
1998	4	(0)	23	(8)	1,337	(1,042)	279	(179)	121	(94)
1999	0	(0)	11	(2)	1,431	(1,031)	277	(165)	120	(88)
2000	5	(5)	7	(3)	1,342	(764)	233	(104)	78	(37)
2001	6	(0)	23	(4)	1,175	(212)	516	(100)	74	(6)
2002	6	(0)	11	(2)	1,235	(241)	950	(354)	105	(23)
2003	9	(2)	21	(12)	1,269	(400)	2,516	(1,753)	113	(36)
2004	14	(6)	11	(7)	1,378	(682)	9,618	(8,702)	91	(35)
2005	27	(16)	21	(12)	1,666	(937)	12,019	(11,035)	120	(76)
	Hungary		Ireland		Italy		Latvia		Lithuania	
1997	2	(0)	188	(96)	427	(302)	4	(0)	7	(7)
1998	4	(2)	296	(160)	433	(279)	0	(0)	0	(0)
1999	7	(2)	410	(210)	513	(334)	7	(6)	2	(2)
2000	2	(0)	264	(106)	419	(199)	9	(5)	2	(0)
2001	18	(2)	257	(49)	319	(50)	13	(0)	13	(1)
2002	6	(2)	287	(67)	348	(46)	16	(4)	18	(2)
2003	31	(18)	330	(81)	405	(121)	13	(8)	25	(23)
2004	33	(26)	365	(105)	408	(168)	16	(6)	24	(20)
2005	63	(43)	328	(110)	538	(278)	31	(13)	13	(8)
	Luxembourg		Malta		Netherlands		Norway		Poland	
1997	59	(55)	11	(9)	381	(274)	103	(74)	31	(20)
1998	60	(29)	27	(17)	400	(292)	85	(56)	27	(19)
1999	105	(75)	21	(9)	440	(309)	111	(56)	39	(22)
2000	58	(31)	22	(12)	380	(192)	107	(34)	20	(14)
2001	55	(7)	15	(0)	477	(117)	91	(10)	24	(4)
2002	49	(9)	11	(3)	560	(213)	105	(8)	30	(7)
2003	33	(7)	19	(3)	637	(338)	315	(233)	292	(271)
2004	87	(45)	23	(9)	1,506	(1,185)	1,220	(1,080)	113	(50)
2005	111	(72)	23	(9)	2,127	(1,770)	2,328	(2,163)	136	(85)
	Portugal		Slovakia		Slovenia		Spain		Sweden	
1997	53	(28)	15	(7)	0	(0)	243	(151)	166	(114)
1998	67	(42)	6	(2)	4	(2)	237	(140)	258	(158)
1999	54	(28)	4	(4)	6	(4)	300	(169)	247	(159)
2000	44	(24)	7	(3)	2	(0)	271	(117)	233	(107)
2001	45	(5)	8	(1)	11	(4)	273	(42)	131	(10)
2002	26	(3)	11	(1)	7	(3)	370	(71)	204	(80)
2003	52	(18)	12	(8)	9	(4)	269	(79)	238	(109)
2004	53	(16)	13	(11)	18	(8)	376	(144)	241	(112)
2005	66	(35)	16	(12)	32	(16)	539	(309)	406	(288)

Source: M. Becht, C. MAYER H.F. Wagner, "Where do firms incorporate", ECGI Law Working Paper N° 70/2006, September 2006.

Table A2. Registered Companies: Private Limited Companies

Registered Companies: Private Limited Companies	
Country	**year 2005**
Austria	100709
Bulgaria(1)	106689
Denmark	119855
Estonia	66200
Finland	180332
France	1466781
Germany	995940
Great Britain(2)	2118700
Greece	25585
Hungary	218384
Iceland	23481
Ireland	140194
Italy	988557
Latvia	79711
Liechtenstein	80
Lithuania	55374
Luxembourg	25023
Malta	NA
Netherlands	660298
Norway	NA
Romania	NA
Slovenia	NA
Spain	1715888
Sweden(1)	309012
TOTAL	**9396793**

Source:European Commerce Registers Forum 2005 Survey, prepared by the Swedish Companies Registration Office, January 2007.

Table A3. Registered Companies: Public Limited Companies

Registered Companies: Public Limited Companies	
Country	**year 2005**
Austria	1720
Bulgaria1	NA
Denmark	39535
Estonia	5945
Finland	204
France	143401
Germany	20297
Great Britain2	11500
Greece	22542
Hungary	4336
Iceland	880
Ireland	1286
Italy	54852
Latvia	1280
Liechtenstein	8500
Lithuania	727
Luxembourg	47196
Malta	NA
Netherlands	6027
Romania	NA
Norway	NA
Slovenia	NA
Spain	316699
Sweden1	NA
TOTAL	**686927**

Source:European Commerce Registers Forum 2005 Survey, prepared by the Swedish Companies Registration Office, January 2007.

Table A4. Listed companies in the EU

All market segments, excluding ETFs Investments Trusts, Listed Unit Trusts and UCITS, market transfers		
Exchange	**N° of companies with listed shares**	
Athens Exchange	290	
Borsa Italiana	311	
Bratislava Stock Exchange	187	
Budapest Stock Exchange	41	
Cyprus Stock Exchange	141	
Deutsche Börse	760	
Euronext	954	
Irish Stock Exchange	68	
Ljubljana Stock Exchange	100	
London Stock Exchange	3.256	
Luxembourg Stock Exchange	260	
Malta Stock Exchange	14	
OMX	791	
Oslo Børs	229	
Prague Stock Exchange	32	
Spanish Exchanges (BME)	n/d	
Virt-X	1.446	
Warsaw Stock Exchange	265	
Wiener Börse	113	
TOTAL	**9258**	

Source: Federation of European Securities Exchanges, December 2006

Table A5. Listed companies in the EU: market capitalisation

All market segments, Domestic Equity (in million EUR)	
Exchange	**Value at month end (EUROm)**
Athens Exchange	157.941,41
Borsa Italiana	778.500,79
Bratislava Stock Exchange	4.213,84
Budapest Stock Exchange	31.687,05
Cyprus Stock Exchange	12.254,04
Deutsche Börse	1.241.963,25
Euronext	2.812.261,00
Irish Stock Exchange	123.823,58
Ljubljana Stock Exchange	11.513,08
London Stock Exchange	2.876.985,94
Luxembourg Stock Exchange	60.290,14
Malta Stock Exchange	3.415,69
OMX (Finland)	851.459,52
Oslo Børs	212.271,52
Prague Stock Exchange	34.693,42
Spanish Exchanges (BME)	1.003.298,96
Warsaw Stock Exchange	112.825,56
Wiener Börse	146.197,00
TOTAL	**10.475.595,79**

Source: Federation of European Securities Exchanges, December 2006

Table A6. Legal origin and investors rights

The table presents data on measures of investor protection according of legal origin. The "Antidirectors rights index" is a summary measure of shareholder protection, it ranges from zero to six. The creditors rights index is a summary measure of creditors protection which ranges from from zeo to four. The "efficiency of the judicial system" index ranges from zero to ten representing the average of investors' assessments of conditions of the judicial system between 1980-1983 (lower scores represent lower efficiency levels). "Corruption" is an index ranging from zero to ten representing the average of investors' assessments of corruption in government in each country between 1982-1995 (lower scores indicate higher corruption). "Accounting standards" is an index created by examining abd rating companies' 1990 annual reports on their inclusion or omission of 90 items falling in the categories of general information, income statements, balance sheets, funds flow statement, accounting standards, stock data, and special items.

	Common law countries	French civil law	German civil law	Scandinavian civil law
Directors' liability index	4.00	2.33	2.33	3.00
Creditors rights index	3.11	1.58	2.33	2.00
Efficiency of the judicial system	8.15	6.56	8.54	10
Corruption	7.06	5.84	8.03	10.00
Accounting standards	69.92	51.17	62.67	74.00

Source: La Porta et al. 2000

Table A7. New private limited companies incorporated in the UK by Country of origin

This table reports new incorporations of private limited companies in the UK from the rest of the UE. A company is assigned to a given Member State according to the majority of its directors.

Country of origin	Year 2001	Year 2005	New company registrations (2005): limited private companies	Companies registered in UK (2005) as % of total number of companies in a MS
	Total nr of registrations of new plcs in the UK			
		(new company registrations in 2005 in brackets)		
Austria	77	609	Na	-
Belgium	199	458	Na	-
Czech Republic	33	89	Na	-
Denmark	201	248 (52)	18723	0,3%
Estonia	6	27 (13)	9749	0,1%
Finland	23	21 (10)	8421	0,1%
France	1175	1666 (288)	143143	0,2%
Germany	**516**	**12019 (2401)**	**69167**	**3%**
Greece	**74**	**120 (29)**	**1192**	**2%**
Hungary	18	63 (30)	21501	0,1%
Ireland	257	328 (-37)	15446	-0,2%
Italy	319	538 (130)	73644	0,2%
Latvia	13	31 (15)	8782	0,2%
Lithuania	13	13 (-11)	4502	-0,2%
Luxembourg	55	111 (24)	3922	0,6%
Malta	15	23 (0)	2360	0%
Netherlands	**477**	**2127 (621)**	**40595**	**1%**
Poland	24	136	Na	-
Portugal	45	66	Na	-
Slovakia	8	16	Na	-
Slovenia	11	32 (14)	3660	0,4%
Spain	273	539 (163)	136280	0,1%
Sweden	131	406 (165)	20532	0,8%
TOTAL	**3963**	**19686 (3903)**	**581619**	**0,6%**

Source: Becht et al. (2006); Swedish Companies Registration Office 2007.

Table A8. The Investor Protection Index indicates the quality of the national systems in protecting the investors (i.e. the strength of minority shareholder protections against misuse of corporate assets by directors for their personal gain). The Investor Protection Index is the average of the following indexes: 1) transparency of transactions (Extent of Disclosure Index) ; 2) liability for self-dealing (Extent of Director Liability Index); 3) shareholders' ability to sue officers and directors for misconduct (Ease of Shareholder Suit Index)

Region or Economy	Disclosure Index	Director Liability Index	Shareholder Suits Index	Investor Protection Index
Austria	2	5	4	3.7
Belgium	8	6	7	7.0
Bulgaria	10	1	7	6.0
Czech Republic	2	5	8	5.0
Denmark	7	5	7	6.3
Estonia	8	4	6	6.0
Finland	6	4	7	5.7
France	10	1	5	5.3
Germany	5	5	5	5.0
Greece	1	3	5	3.0
Hungary	2	4	7	4.3
Iceland	4	5	6	5.0
Italy	7	2	6	5.0
Latvia	5	4	8	5.7
Lithuania	6	4	6	5.3
Netherlands	4	4	6	4.7
Norway	7	6	7	6.7
Poland	7	2	9	6.0
Portugal	6	5	7	6.0
Romania	9	5	4	6.0
Slovakia	2	4	7	4.3
Slovenia	3	8	6	5.7
Spain	5	6	4	5.0
Sweden	6	4	7	5.7
United Kingdom	10	7	7	8.0

Source: World Bank, Doing Business 2006.

Table A9. Starting a business table illustrating the number of procedures, the time and cost of setting-up a company in the Member States.

Economy	Procedures (number)	Duration (days)	Cost (% GNI per capita)	Min. Capital (% GNI per capita)
Austria	9	29	5.6	59.6
Belgium	4	27	5.8	21.8
Bulgaria	9	32	7.9	91.3
Czech Republic	10	24	8.9	36.8
Denmark	3	5	0.0	44.6
Estonia	6	35	5.1	34.3
Finland	3	14	1.1	27.1
France	7	8	1.1	0.0
Germany	9	24	5.1	46.2
Greece	15	38	24.2	116.0
Hungary	6	38	20.9	74.2
Iceland	5	5	3.1	15.9
Ireland	4	19	0.3	0.0
Italy	9	13	15.2	10.4
Latvia	5	16	3.5	26.1
Netherlands	6	10	7.2	62.3
Norway	4	13	2.5	25.1
Poland	10	31	21.4	204.4
Portugal	8	8	4.3	38.7
Romania	5	11	4.4	0.0
Slovakia	9	25	4.8	39.1
Slovenia	9	60	9.4	16.1
Spain	10	47	16.2	14.6
Sweden	3	16	0.7	33.7
United Kingdom	6	18	0.7	0.0

Source: World Bank, Doing Business 2006.

Table A10. Ranking of the Member States on the ease of doing business.

Economy	Ease of Doing Business Rank		Starting a Business	Protecting Investors	Enforcing Contracts	The recovery rate in bankruptcy
	EU	world				
IE	1	10	6	5	24	7
DK	2	11	14	19	1	20
UK	3	12	9	9	22	10
BE	4	19	37	12	21	8
FI	5	20	18	46	13	6
SE	6	21	20	46	2	17
FR	7	30	12	60	19	32
PT	7	30	33	33	35	18
LT	8	35	48	60	4	30
LV	9	36	25	46	11	62
ET	10	38	51	33	20	47
NL	11	44	38	99	31	9
RO	12	48	7	33	45	108
DE	13	51	66	83	29	28
BG	14	58	85	33	52	64
ES	15	60	102	83	42	15
SL	16	61	98	46	84	35
AT	17	62	74	142	14	19
HU	18	66	87	118	12	48
SK	19	68	63	118	59	31
PL	20	75	114	33	112	85
CZ	21	82	74	83	57	113
IT	21	82	52	83	141	49
EL	22	109	140	156	48	34

Source : World Bank, Doing Business 2006.

Table A11. Legal cost of bankruptcy for banking creditors

	CREDITORS' POWERS	**1. Bankruptcy procedures:** **2. Average length (months)**	**Legal cost of bankruptcy for banking creditors**
SWE	DIRECTIVE	12	**LOW**
UK	DIRECTIVE	Less than one year	**LOW**
GER	DIRECTIVE	12/27	**LOW (AVERAGE-LOW**)**
FRA	CONSULTATIVE	24-36	**HIGH (AVERAGE-HIGH***)**
ITA	CONSULTATIVE	72	**HIGH**

*Sources: for Sweden, Mimeo 1999; for the UK, Germany, France and Italy, Bianco-Marcucci 2001; for the UK and Germany (length of the procedures) Franks, Nyborg and Torous 1996. ** After the 1999 reform *** After the 1994 reform, which allowed to reduce the length of the liquidation procedure.*

TABLE A12. Bankruptcy procedures: percentages of credit recovery

	Percentage of credit recovery[1]
SWE	45%(preferential)[2]; 3% (ordinary)
UK	70% (preferential)[3]
GER	3-5% (ordinary)[4]
FRA	14-66% (preferential); 5% (ordinary)
ITA	33% (preferential); 10% (ordinary)

Source: Santella (2004).

1 Where not otherwise specified, the source is Bianco, Marcucci [2001].
2 This figure refers only to floating charge creditors. Franks and Sussman [2000b. 37] report for fixed-charge creditors recovery percentages between 83% and 91%.
3 In this cathegory are to be included also floating charge creditors.
4 Kamlah [1996].

Table A13. Closing business table illustrating the time and cost of the bankruptcy proceedings in the Member States may serve as an indicator on the efficiency of the national judiciary systems.

Region or Economy	Time (years)	Cost (% of estate)	Recovery rate (cents on the dollar)
Austria	1.1	18.0	73.7
Belgium	0.9	3.5	86.4
Bulgaria	3.3	9.0	34.4
Czech Republic	9.2	14.5	18.5
Denmark	3.0	4.0	70.5
Estonia	3.0	9.0	39.9
Finland	0.9	3.5	89.1
France	1.9	9.0	48.0
Germany	1.2	8.0	53.1
Greece	2.0	9.0	46.3
Hungary	2.0	14.5	39.7
Iceland	1.0	3.5	79.7
Ireland	0.4	9.0	87.9
Italy	1.2	22.0	39.7
Latvia	3.0	13.0	34.8
Lithuania	1.7	7.0	50.5
Netherlands	1.7	1.0	86.3
Norway	0.9	1.0	91.1
Poland	3.0	22.0	27.9
Portugal	2.0	9.0	75.0
Romania	4.6	9.0	19.9
Slovakia	4.0	18.0	48.1
Slovenia	2.0	8.0	44.9
Spain	1.0	14.5	77.6
Sweden	2.0	9.0	75.7
United Kingdom	1.0	6.0	85.2

Source: World Bank, Doing Business 2006

Table A14. The list of the main mandatory procedures for setting up a company in the EU Member States (the exact number and types of procedures vary across the EU)

1. Formal approval of proposed name
2. Confirm skills/qualifications with authorities (if applicable to all new enterprises)
3. Obtain certificate of no outstanding taxes
4. Obtain certificate of "good character" (no criminal record, etc.)
5. Obtain overall permit to conduct economic activity (if applicable to all new enterprises)
6. Complete management training course (if applicable to all new enterprises)
7. Registration of domicile of business
8. Formal validation of signatures of representatives of the business
9. Notary draws up (or confirms) formal deed of incorporation/partnership agreement/registration deed
10. Founders (or advisers) draw up formal deed of incorporation/partnership agreement/registration deed
11. Appoint Board Members/Manager
12. Open bank account and deposit capital
13. Obtain certificate from bank of capital deposited
14. Audit report on deed of incorporation/foundation report or equivalent
15. Create financial plan to show viability
16. Hold statutory meetings (shareholders/ subscribers, approval of foundation report by board, etc.)
17. Shares offered for subscription
18. Lawyer or notary certifies documents for submission to registration authorities
19. Prepare dossier for registration authorities
20. Certificate of all social security charges paid
21. Certificate of all compulsory healthcare paid
22. Obtain certificate of management skills

Source: the Commission study "Benchmarking the administration of start-ups" (January 2002, available at:http://ec.europa.eu/enterprise/entrepreneurship/support_measures/start-ups/bench_admin_business_start-up_final_2002.pdf)

Table A15. This table reports minimum capital requirements for private and public limited liability companies in the 25 E.U. Member States and Norway. Typical setup costs are the upper bounds of figures reported in EVCA (2004) and checked against estimates of law firms based in various Member States. A contact list is available from the authors. All reported figures are in Euro.

Country	Private limited company					Public limited company			
	Local name	Abbreviation	Minimum capital	Paid-up capital	Typical setup costs	Local name	Abbreviation	Minimum capital	Typical setup costs
Austria	Gesellschaft mit beschränkter Haftung	GesmbH	35,000	17,500	3,500	Aktiengesellschaft	AG	70,000	7,000
Belgium	Besloten vennootschap met beperkte aansprakelijkheid or Société responsabilité limitée	BVBA or SPRL	18,550	6,000	980	Naamloze vennootschap or Société anonyme	NV or SA	61,500	1,798
Cyprus	Private company limited by shares	Ltd	2	2	n.a.	Public company limited by shares	Plc	8,850	n.a.
Czech Republic	Společnost s ručením omezeným	s.r.o.	6,700	3,350	1,234	Akciová společnost	a.s.	67,000	1,234
Denmark	Anpaartsselskap	ApS	16,800	16,800	6,715	Aktieselkab	A/S	67,200	6,715
Estonia	Osaühing	OÜ	2,560	2,560	n.a.	Aktsiaselts	AS	25,560	n.a.
Finland	Osakeyhtiö	Oy	8,000	8,000	285	Julkinen osakeyhtiö	OYJ	80,000	285
France	Société à responsabilité limitée	SARL	1	1	450	Société anonyme	SA	37,000	550
Germany	Gesellschaft mit beschränkter Haftung	GmbH	25,000	12,500	1,000	Aktiengesellschaft	AG	50,000	1,500
Greece	Eteria periorismenis efthynis	E.P.E.	18,000	18,000	1,500	Anonymos eteria	A.E.	60,000	3,000
Hungary	Korlátolt felelősségű társaság	Kft	12,170	12,170	430	Részvénytársaság	Rt	81,150	2,443
Ireland	Private limited liability company	Ltd	1	1	1,500	Public limited liability company	Plc	38,092	5,000
Italy	Società a responsabilità limitata	S.r.l.	10,000	2,500	2,750	Società per azioni	S.p.A.	120,000	2,750
Latvia	Sabiedriba ar ierobežotu atbildibu	SIA	2,880	2,440	n.a.	Akciju sabiedriba	AS	35,950	n.a.
Lithuania	Uždaroji akcine bendrove	UAB	2,900	2,900	n.a.	Akcine bendrove	AB	43,440	n.a.
Luxembourg	Société à responsabilité limitée	SARL	12,500	12,500	2,300	Société anonyme	SA	31,000	2,500
Malta	Private limited liability company	Ltd	1,160	232	n.a.	Public limited liability company	Plc	46,400	
Netherlands	Besloten vennootschap	B.V.	18,000	18,000	1,750	Naamloze vennootschap	N.V.	45,000	1,750
Norway	Aksjeselskap	AS	11,913	5,957	1,787	Allmennaksjeselskap	ASA	119,130	1,787
Poland	Spólka z ograniczona odpowiedzialnoscia	SP.Z.O.O	12,460	12,460	650	Spólka akcyjna	S.A.	124,580	3,500
Portugal	Limitada	Lda.	5,000	5,000	650	Sociedade anónima	S.A.	50,000	830
Slovakia	společnost s ručením omezeným	s.r.o.	5,230	4,230	4,000	Akciová společnost	a.s.	26,140	5,000
Slovenia	Druzba z omejeno odgovornostjo	d.o.o.	8,780	4,180	n.a.	Delniska druzba	d.d.	25,090	n.a.
Spain	Sociedad de responsabilidad limitada	S.L.	3,010	3,010	600	Sociedad anónima	S.A.	60,100	1,200
Sweden	Privat aktiebolag	privat AB	10,650	10,650	2,210	Publikt aktiebolag	publikt AB	53,240	2,210
United Kingdom	Private limited company	Ltd	2	2	425	Public limited company	Plc	75,450	779

Source: M. Becht, C. MAYER H.F. Wagner, "Where do firms incorporate", ECGI Law Working Paper N° 70/2006, September 2006.

Table A16. The procedural steps required to wind-up a company in FR.

Preparatory measures	• Drafting the different resolutions to be adopted by the shareholders during the shareholders' meeting.
During the shareholders' meeting	• Adoption of the dissolution of the company resolution. The dissolution leads to the liquidation of the company but the company "survives" as long as the liquidation operations need it. • Nomination of the liquidator. • Publication of the liquidation and appointment of the liquidator decisions in a journal of legal notice (from the company's seat competence). Listed companies (to be precise: companies "faisant appel public à l'épargne") also need to publish the notice in the BALO (Bulletin d'annonces légales obligatoires – This is an official gazette that contains the mandatory legal notices companies are due to publish). • Registration of the juridical acts (decision of dissolution and appointment of the liquidator) at the office of the court clerk. • Notice of discontinuance of the business to the Commercial Register (within one month after the day the dissolution has been decided by the shareholders' meeting). • The clerk of court must publish the notice of discontinuance in the BODACC (Bulletin officiel des annonces civiles et commerciales – Official Bulletin for civil and commercial notices).
Measures during liquidation (Liquidator's obligations)	within 6 months after his nomination: • Convocation of the shareholders' meeting. • Draft and present to the shareholders a report on the financial situation of the company, on the liquidation operations and on the schedule of these operations. • Request all the necessary authorizations from the shareholders. within three months after the end of the exercise: • Preparation of the financial statements and of a report presenting the ongoing liquidation operations. within six months after the end of the exercise: • Convocation of a shareholders' meeting: presentation and approval of the financial statements and renewal of the necessary authorizations.
Termination of liquidation	• Termination is possible only after distribution of the share capital and discharge of all liabilities of the company. • The termination of the liquidation is confirmed by the shareholders' meeting or by decision of a court and must be confirmed maximum three years after the dissolution of the company. • Registration of the final financial statements drawn up by the liquidator and approved by the shareholders' meeting at the office of the court clerk. The discharge of the liquidator also has to be registered at the office of the court clerk. • Publication of the termination of the liquidation in the same gazette than the one used to publish the decision of opening the liquidation. Listed companies (to be precise: companies "faisant appel public à l'épargne") also need to publish the notice in the BALO (Bulletin d'annonces légales obligatoires – This is an official gazette that contains the mandatory notices companies are due to publish). • Within one month after the publication of the termination of the liquidation, application for registration of the termination of the liquidation to the Commercial Register (held by the court clerk) by the liquidator. • Maximum eight days after the registration of the termination of the liquidation, the clerk of court must publish the termination of the liquidation in the BODACC (Bulletin officiel des annonces civiles et commerciales – Official Bulletin for civil and commercial notices). • Within one year after the termination of the liquidation, the liquidator has to deposit on a special bank account (Caisse des dépôts et consignations) the amount assigned to some creditors or shareholders and not called for by them. • Once the liquidation is terminated, distribution of the remaining assets.

Source: information obtained from the Advisory Group on Company Law and Corporate Governance in 2006/2007.

Table A17. The procedural steps required to wind-up a company in DE.

Preparatory measures	Drafting of: • shareholders' resolution on dissolution of the company, letters of information to clients and business partners, • letter of information to employees
Start of liquidation	• Shareholders' resolution on dissolution of the company (3/4 majority requested); • Appointment of the liquidator; Application of liquidation to the commercial register by liquidator; • Triple publication of the notice to the creditors in the electronic Federal Gazette (*elektronischer Bundesanzeiger*); Preparation of the closing financial statements of the active company; • Preparation of an opening liquidation balance sheet
Measures during liquidation	• Letters to clients and business partners; • Discharge of liabilities, collection of claims and conversion of assets of the company into money (alternatively asset deal with the new company incorporated under the law of the foreign Member State); • Preparation of a balance sheet for each year of liquidation; • After termination of all business activities: Notice of discontinuance of the business to the responsible Trade Supervisory Office
Distribution of remaining assets	• Distribution only possible after one year from the third publication of the notice to creditors in the electronic Federal Gazette and after discharge of or provision of security for the obligations of the company; • Preparation of a closing balance sheet of the liquidated company; • Distribution of the remaining assets
Termination of liquidation	• Termination is possible only after distribution of the share capital and discharge of all liabilities of the company; Pending law suits have to be resolved before termination; • Preparation of final account by the liquidator; Confirmation of termination of liquidation; • Approval of closing balance sheet; • Approval of final account; • Formal approval of the liquidator's activities; • Application for registration of the termination of the liquidation to the Commercial Register by the liquidator
Measures after termination of liquidation	• Notification of the Chamber of Industry and Commerce about the termination of the liquidation; • Notification of the relevant Tax Office about the termination of the liquidation; • Storage for the next ten years of the books and records of the company by the person determined in the Articles of Association of the company, by a shareholders' resolution or by the responsible court

Source: information obtained from the Advisory Group on Company Law and Corporate Governance in 2006/2007.

Table A18. Court efficiency – contract enforcement. The table shows the three main indicators for enforcing contracts:

- number of procedures from the moment the plaintiff files a lawsuit in court until the moment of payment,
- time in calendar days to resolve the dispute, and
- cost in court fees and attorney fees, where the use of attorneys is mandatory or common, expressed as a percentage of the debt value.

Region or Economy	Procedures (number)	Time (days)	Cost (% of debt)
Belgium	27	328	9.5
Bulgaria	34	440	14.0
Denmark	15	190	6.5
Estonia	25	275	11.5
Finland	27	228	5.9
France	21	331	11.8
Germany	30	394	10.5
Greece	22	730	12.7
Hungary	21	335	9.6
Iceland	14	352	5.9
Ireland	18	217	21.1
Italy	40	1,21	17.6
Latvia	21	240	11.8
Lithuania	24	166	8.6
Netherlands	22	408	15.9
Norway	14	277	9.0
Poland	41	980	10.0
Slovakia	27	565	15.7
Slovenia	25	1,35	15.2
Spain	23	515	15.7
Sweden	19	208	5.9
United Kingdom	19	229	16.8

Source: World Bank, Doing Business 2006

Table A19. Case studies

Since the option of the cross-border transfer of the registered office is not yet available, no accurate data exists on benefits of such an option. Therefore, the presented cases should not be considered as precise cost calculations, but simply preliminary estimates, based on certain assumptions.

Case studies

1. Estimated cost savings for EU companies in terms of lower interest rates – example of Italy

In order to provide a quantification of the potential benefits of the option to transfer the registered office recourse is made to the analysis provided by the Italian Banking Association on the consequences of the higher legal costs of credit recovery in Italy. According to the Chairman of the Italian Banking Association, higher cost of legal procedures relied to banking credit recovery entails 1 percentage point more in interest rate required by Italian banks in their loans to non-financial companies.[5] It could be assumed that if the company would move its registered office to a jurisdiction with a more efficient credit recovery system, the cost of credit in Italy is likely to be lower.

In order to build a case study, we apply such estimation to the total loans provided by Italian credit institutions to non-financial companies (**Table A20**). Taking into account that in 2005 the average interest rate applied to banking loans to non-financial companies was 4.24%,[6] a benefit to Italian companies from moving to a jurisdiction with a more efficient credit recovery system in terms of savings on interest rates could be as much as **6 billion EUR**, that is **22% of the total cost of credit in 2005** (**Table A21**). In 2005 **total loans provided by credit institutions to EU companies** amounted to **more than 4000 billion EUR (Table A20).**

2. Estimated cost savings for EU listed companies in terms of lower cost of capital

With regard more specifically to listed companies, **Table A4** illustrates the number of companies listed on the EU stock exchanges. As of December 2006, **the total number of listed companies was of more than 9000**, with the London Stock Exchange, Euronext and Deutsche Börse leading the way and representing about 54% of the total. As **Table A5** shows, the total market capitalisation represented by companies listed on the EU stock exchanges is about 10 trillion EUR, with the London Stock Exchange, Euronext, and Deutsche Börse representing about 66% of the total.

For listed companies the cost of capital is very important. In this respect, the studies measuring the extent of private benefits of control provide data to estimate the potential for savings in terms of cost of capital that could be ushered if an option to transfer the registered offices provided[7].

Table A22 illustrates the potential savings in terms of cost of capital that could be possible if the option to transfer the registered office is made available. Potential savings are calculated by considering the re-registration of EU listed companies in another Member State characterized by a lower level of private benefits of control. Potential savings range from 2% for Spanish companies to 35% for Italian companies and 56% for Czech companies.

5 See ABI (2002), p. 21: " As credit recovery depends on judicial procedures, the efficiency of the latter affects even more active rates. Empirical evidence shows that credit recovery delays are much longer in Italy than in the rest of Europe: 6 years as compared to one. Such a substantial delay also determines a penalisation in terms of effectively recovered amount. Once the new Basilea's Ratios will enter into force, medium-high risk rates could be even lower than one percentage point, if only the average length of credit recovery in Italy would align to that of the rest of Europe. This is to say that the inefficiency of Italian judicial system of credit protection burdens businesses with billions of Euros."

6 Source: Italian Banking Association and European Central Bank (ECB).

7 See Annex 3 for more information on studies.

Table A20. Loans of Credit Institutions to non financial companies

- bln euro -					
	2005	2004	2003	2002	2001
BE	90,6	84,5	86,9	90,8	94,2
CZ	18,8	15,5	13,8	13,8	
DK	102,4	89,5	83,5		
DE	774,1	786,8	813,7	840,7	844,2
EE	3,2	2,0	1,5	1,2	1,1
EL	69,1	63,0	58,3	52,3	48,6
ES	579,7	454,7	387,8	341,0	306,0
FR	610,9	566,9	534,7	548,9	540,1
IE	107,1	85,6	65,0	54,9	52,8
IT	647,5	615,2	588,7	546,6	520,9
CY	N.A.	N.A.	N.A.	N.A.	N.A.
LV	5,1	3,5	2,6	2,2	2,0
LT	4,6	3,6	2,8	1,9	1,6
LU	37,3	33,7	36,6	40,2	45,4
HU	23,1	20,8	16,1	14,5	13,6
MT	3,3	3,2	3,0	6,3	5,6
NL	242,0	224,0	214,0	206,0	213,3
AT	121,6	114,0	131,3	132,2	134,1
PL	32,2	30,9	25,8	29,4	40,7
PT	88,0	84,1	82,7	78,7	72,6
SI	11,0	8,1	6,8	5,9	5,6
SK	7,2	5,9	6,0	5,5	5,6
FI	41,2	37,7	34,7	33,0	30,9
SE	138,5	128,3	125,0	127,4	124,8
UK	540,0	426,9	408,6	439,5	439,7
MU	3409,1	3152,2	3034,3	2965,1	2903,1
EU	**4298,5**	**3890,4**	**3729,7**	**3612,9**	**3543,6**

Source: ECB

Table A21. The Italian case (lower interest rates on loans)

	Bln EUR
Loans to non-financial companies (bln EUR)	647
Average interest rate	4.24
Interests paid in 2005 (bln EUR)	27
Possible lower interest rate	3.24
Possible interests paid	21
Possible savings	6 (22%)

Data refer to 2005. Source: Italian Banking Association.

Table A22. Potential savings in terms of cost of capital

	Control block premia (mean values)	Market capitalization (Bln EUR)	Possible market capitalization by moving registered office to FI, FR, NL or the UK (Bln EUR)
Austria	0.38	146	198 (+34%)
Czech Republic	0.58	35	55 (+56%)
Denmark	0.08		
Finland	0.02	851	Na
France	0.02	2812*	Na
Germany	0.10	1242	1342 (+8%)
Italy	0.37	778	1050 (+35%)
Netherlands	0.02	2812*	Na
Poland	0.11		
Portugal	0.20		
Spain	0.04	1003	1023 (+2%)
Sweden	0.06		
UK	0.02	2877	Na

Source: Dyck and Zingales 2004; FESE.
** Total capitalization for Euronext, which includes France, Belgium and the Netherlands.*

Table A23. Different scenarios: public limited companies

Registered Companies: Public Limited Companies				
Country	**year 2005**	0,6% moving	1% moving	3% moving
Austria	1720	10	17	52
Bulgaria1	NA	Na	Na	Na
Denmark	39535	237	395	1.186
Estonia	5945	36	59	178
Finland	204	1	2	6
France	143401	860	1.434	4.302
Germany	20297	122	203	609
Great Britain2	11500	69	115	345
Greece	22542	135	225	676
Hungary	4336	26	43	130
Iceland	880	5	9	26
Ireland	1286	8	13	39
Italy	54852	329	549	1.646
Latvia	1280	8	13	38
Liechtenstein	8500	51	85	255
Lithuania	727	4	7	22
Luxembourg	47196	283	472	1.416
Malta	NA	Na	Na	Na
Netherlands	6027	36	60	181
Romania	NA	Na	Na	Na
Norway	NA	Na	Na	Na
Slovenia	NA	Na	Na	Na
Spain	316699	1.900	3.167	9.501
Sweden1	NA	Na	Na	Na
TOTAL	**686927**	**4.122**	**6.869**	**20.608**

Source:European Commerce Registers Forum 2005 Survey, prepared by the Swedish Companies Registration Office, January 2007.

Table A24. Different scenarios: private limited companies

Registered Companies: Private Limited Companies		0,6% moving	1% moving	3% moving
Country	**year 2005**			
Austria	100709	604	1.007	3.021
Bulgaria(1)	106689	640	1.067	3.201
Denmark	119855	719	1.199	3.596
Estonia	66200	397	662	1.986
Finland	180332	1.082	1.803	5.410
France	1466781	8.801	14.668	44.003
Germany	995940	5.976	9.959	29.878
Great Britain(2)	2118700	12.712	21.187	63.561
Greece	25585	154	256	768
Hungary	218384	1.310	2.184	6.552
Iceland	23481	141	235	704
Ireland	140194	841	1.402	4.206
Italy	988557	5.931	9.886	29.657
Latvia	79711	478	797	2.391
Liechtenstein	80	0	1	2
Lithuania	55374	332	554	1.661
Luxembourg	25023	150	250	751
Malta	NA	Na	Na	Na
Netherlands	660298	3.962	6.603	19.809
Norway	NA	Na	Na	Na
Romania	NA	Na	Na	Na
Slovenia	NA	Na	Na	Na
Spain	1715888	10.295	17.159	51.477
Sweden(1)	309012	1.854	3.090	9.270
TOTAL	**9396793**	**56.381**	**93.968**	**281.904**

(1) The figures include both public and private limited companies.
(2) The figures are taken from the DTI Companies In Reports for a year ending March 2006.
Source:European Commerce Registers Forum 2005 Survey, prepared by the Swedish Companies Registration Office, January 2007.

Table A25. Different scenarios: listed companies

Exchange	N° of companies with listed shares	0,6% moving	1% moving	3% moving
Athens Exchange	290	2	3	9
Borsa Italiana	311	2	3	9
Bratislava Stock Exchange	187	1	2	6
Budapest Stock Exchange	41	0	0	1
Cyprus Stock Exchange	141	1	1	4
Deutsche Börse	760	5	8	23
Euronext	954	6	10	29
Irish Stock Exchange	68	0	1	2
Ljubljana Stock Exchange	100	1	1	3
London Stock Exchange	3.256	20	33	98
Luxembourg Stock Exchange	260	2	3	8
Malta Stock Exchange	14	0	0	0
OMX (Finland)	791	5	8	24
Oslo Børs	229	1	2	7
Prague Stock Exchange	32	0	0	1
Spanish Exchanges (BME)	n/d	n/d	n/d	n/d
Warsaw Stock Exchange	1.446	9	14	43
Wiener Börse	265	2	3	8
TOTAL	113	1	1	3
	9258	**56**	**93**	**278**

Source: Federation of European Securities Exchanges, December 2006 (All market segments, excluding ETFs Investments Trusts, Listed Unit Trusts and UCITS, market transfers).

ANNEX II. The recent case law of the Court of Justice on the freedom of establishment

(1) **Case C-81/87, Daily Mail** (The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc (reference for a preliminary ruling: High Court of Justice, Queen's Bench Division, United Kingdom).

Content: Articles 52 and 58 (new Articles 43 and 48) of the EC-Treaty - the right of free establishment - the right to leave the Member State of origin

Basic Principles of the Judgement: With regard to the present stand of harmonisation of company law, Articles 52 and 58 of the EC Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

(2) **Case C-212/97, Centros Ltd** v Erhvervs- og Selskabsstyrelsen (reference for a preliminary ruling: Højesteret, Denmark)

Source: [1999] ECR I-1459

Content: Articles 52 and 58 (new Articles 43 and 48) of the EC-Treaty -right of free movements of persons - right of free establishment

Basic Principles of the Judgement: It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business, where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there. The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. However, the authorities of the Member State concerned are not precluded from adopting appropriate measure for preventing or penalising fraud.

(3) **Case C-208/00**, **Überseering BV** v Nordic Construction Company Baumanagement GmbH (NCC), (reference for a preliminary ruling, Bundesgerichtshof, Germany

Content: Articles 43 EC and 48 EC - Company formed in accordance with the law of a Member State and having its registered office there - Company exercising its freedom of establishment in another Member State - Company deemed to have transferred its actual centre of administration to the host Member State under the law of that State - Non-recognition by the host Member State of the company's legal capacity and its capacity to be a party to legal proceedings - Restriction on freedom of establishment

Basic Principles of the Judgement: 1. Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

2. Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').

(4) **Case C-167/01**, **Inspire Art Ltd** (Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd)**,** reference for a preliminary ruling, Kantongerecht te Amsterdam, Netherlands

Content: Articles 43 EC, 46 EC and 48 EC + Twelfth Company Law Directive - Company formed in one Member State and carrying on its activities in another Member State - Application of the company law of the Member State of establishment intended to protect the interests of others

***Basic Principles of the Judgement*:** It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 for national legislation to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

It is contrary to Articles 43 EC and 48 EC for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.

(5) Case C-411/03, *SEVIC Systems AG*

***Basic Principles of the Judgement*:** The Court of Justice observes that freedom of establishment for companies includes in particular the establishment and management of those companies under conditions laid down by the legislation of the State of establishment for its own companies. The Court went on to emphasise that cross-border merger operations, like other company transformation operations, meet needs for cooperation and consolidation between companies established in the various Member States. They constitute particular forms of exercise of the freedom of establishment, which are important for the proper functioning of the internal market, and therefore fall within those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.

The Court notes that a difference in treatment between companies according to the internal or cross-border nature of the merger constitutes a restriction on the right of establishment and can be allowed only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions. Such a restrictive measure must also be appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them.

To refuse generally in a MS to register a merger between a company established in that MS and one established in another MS when such registration is possible where both companies are established in the same MS is contrary to Articles 43 and 48 of the Treaty. Limitations to fundamental freedoms must meet the proportionality test.

ANNEX III. Studies on private benefits of control.

Empirical studies of private benefits of control try to measure whether the controlling votes are valued more than non-controlling ones.[8] These studies take recourse to two different methodologies. A first group of studies measures the value of control-block votes, while a second group measures the value of a single vote.

Controlling block trades. One methodology is to focus on privately negotiated transfers of controlling blocks in publicly traded companies: "The assumption made is that the price per share an acquirer pays for the controlling block reflects the cash flow benefits from his fractional ownership and the private benefits stemming from his controlling position in the firm. By contrast, the market price of a share after the change in control is announced reflects only the cash flow benefits non-controlling shareholders expect to receive under the new management. Hence, the difference between the price per share paid by the acquiring party and the price per share prevailing on the market reflects the differential payoff accruing to the controlling shareholder."[9] As a result of such a methodology, countries are ranked according to a ratio of value of control to value of equity. The most recent estimates in this respect are those provided by Dyck and Zingales 2004.

Vote premium studies. An alternative methodology consists of linking the extraction of private benefits by controlling shareholders to their willingness to pay a premium price for voting shares at the moment of their acquiring control of the company. Some of the relevant studies in this field are Zingales (1994 and 1995a), Rydqvist (1996), Modigliani and Perotti (1998), and Nenova 2003.[10] To sum up the findings of this literature, we may say that, although methodologies differ and the number of companies included in the various samples is limited, in some EU states there might be a significant level of private benefits of control. With particular reference to Italy, such benefits are the highest in relative terms in all the more recent and complete studies. In the Nenova study, the value of control-block votes in Brazil, Chile, France, Italy, and Mexico is one-quarter or more of firm market capitalization. Such figures are confirmed by Dyck and Zingales 2004 as regards Italy in particular, while France in this study shows a low level of private benefits. It should also be noted that while in general such studies are based on a small number of observations for each country, in one of these studies[11] Italy is covered with a rather large set of cases.[12]

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[8] Overviews of this subject are provided by Shleifer and Vishny 1997, Nenova 2003, and Dyck and Zingales 2004.

[9] Dyck and Zingales 2004, p. 1.

[10] According to the definition of such a method provided by Dyck and Zingales 2004, p. 9: "The second method of estimating the value of private benefits of control uses the price difference between two classes of stock, with similar or identical dividend rights, but different voting rights. If control is valuable, then corporate votes, which allocate control, should be valuable as well. How valuable? It depends on how decisive some votes are in allocating control and how valuable control is. If one can find a reasonable proxy for the strategic value of votes in winning control - for example in forming a winning coalition block - then one can infer the value of control from the relationship between the market price of the votes and their strategic role." As underlined by Marcello Bianchi in a private interview, the main problem of this methodology is that prices of non-voting classes of shares often are highly variable due to the limited quantities traded.

[11] Nenova 2003.

[12] The latest available data are provided by the annual report of the Consob (the Italian stock market regulator) for 2003, p. 9: out of 21 cases identified, the average premium for the purchase of controlling blocks is 12.3%. Such findings are also confirmed from non-systematic findings reported in the press. For instance, Penati 2004a refers to recent cases in which controlling voting blocks in Italian listed companies have been paid a premium between 30% and almost 100% vis-à-vis their stock market price. For a general treatment on the importance of shareholder expropriation in Italian corporate governance, see Rajan and Zingales 2004 and Pinza and Zoppini 2004.