

## Transfer of the registered office The European Commission's decision not to submit a proposal for a Directive

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*Je pense, donc je suis*  
René Descartes<sup>1</sup>

### 1. Introduction

The European Commission will not submit a proposal for a Directive on cross-border transfer of the registered office (the '14th Company Law Directive'). After its earlier announcement that adoption of a proposal would be put on hold (July 2007), the Commission has now decided not to proceed with the 14th Company Law Directive altogether (October 2007). This is remarkable in view of the fact that adoption of this Directive was a short term priority of the well-known Commission Action Plan on Modernising Company Law (2003),<sup>2</sup> three consultations by the Commission (2003-2006) showed broad support for a Directive,<sup>3</sup> and the Directive still featured in the Commission Legislative and Work Programme 2007.<sup>4</sup> The Advisory Group on Corporate

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1 R. Descartes, *Discours de la méthode pour bien conduire sa raison, et chercher la vérité dans les sciences*, part IV, Leiden 1637.

2 Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM(2003) 284 final, 21.5.2003.

3 Consultation on the Action Plan (2003), in which connection reference can be made to: Synthesis of the responses to the Communication of the Commission to the Council and the European Parliament 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward' - COM(2003) 284 final, 21.5.2003. A Working Document of DG Internal Market, 15 November 2003, [http://ec.europa.eu/internal\\_market](http://ec.europa.eu/internal_market)

Consultation on an outline for a Directive on transfer of the registered office (2004). In February 2004 the Commission launched an open consultation (that is to say, a consultation on the basis of an on-line, largely multiple choice questionnaire) on an outline of the planned proposal for a 'Directive on the right of limited companies to transfer their registered office from one Member State to another'. See IP/04/270 of 26 February 2004 (Company law: Commission consults on the cross border transfer of companies' registered offices). The outline was not laid down in a separate consultation document. The outline was only published as an integrated part of the Commission's internal market website: [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm). The consultation closed in April 2004. See IP/04/270. The results of the consultation have been published on the Commission's internal market website. More detailed qualitative analyses of the results would be available at a later date. See IP/04/270. So far, these analyses have not been made public, as far as I was able to ascertain.

Consultation on future priorities for the Action Plan (December 2005-March 2006), in which connection reference can be made to: Directorate General for Internal Market and Services, Consultation and hearing on future priorities for the Action Plan on modernising company law and enhancing corporate governance in the European Union (summary report) of July 2006, [http://ec.europa.eu/internal\\_market](http://ec.europa.eu/internal_market)

4 Commission Legislative and Work Programme 2007, COM(2006) 629 final, 24.10.2006.

Governance and Company Law, an advisory body to the Commission,<sup>5</sup> – finally – also supported the initiative of a Directive on cross-border transfer.<sup>6</sup>

In this contribution the Commission's change in policy will be examined. The structure of this article is as follows. First, the definition of cross-border transfer of the registered office and the Community's power to adopt a Directive on transfer of the registered office will be reviewed (Section 2). Then, the European Parliament's position as regards such a Directive will be discussed (Section 3). Following this, the Commission's reasons for not submitting a proposal for a Directive will be dealt with (Sections 4-6). Section 4 contains an overview of the reasons put forward by the Commission, whereas in Sections 5 and 6 an analysis of two specific reasons will be presented: Section 5 concerns the – alleged – lack of an economic case for a Directive and Section 6 deals with *Cartesio*, a case currently pending before the Court of Justice which relates to transfer of the registered office. Section 7, finally, contains some concluding remarks.

## 2. Cross-border transfer of the registered office. The Community's competence

Adoption of a Directive on cross-border transfer of the registered office of limited companies was, as mentioned in Section 1, already part of the Commission's Action Plan on Modernising Company Law (2003). In implementation of this Action Plan, the Commission published an outline of the planned proposal (hereinafter also: draft proposal).<sup>7</sup>

According to the draft proposal, a company transferring its registered office would be registered in the host Member State and would 'acquire a legal identity or legal personality' there, while at the same time being removed from the register in its home Member State and giving up its legal identity (personality) there. If necessary, companies would have to adapt their structures and assets in order to meet the substantive and formal conditions required for registration in the host Member State. However, they would not be obliged to go through liquidation proceedings in their home Member State or to create a new company in the host Member State.<sup>8</sup> The essence of the transfer of a company's registered office would be that the applicable company law changes.<sup>9</sup>

It should be noted that the Commission, in describing transfer of the registered office, regularly refers to the 'acquisition of a legal identity or legal personality' in the host Member State. In my view, this expression is not entirely accurate for the operation the Commission has in mind. In the case of transfer of the registered office – as envisaged by the Commission – the company in question ceases to be a company under the law of the home Member State and becomes a company under the law of the host Member State. During this operation, legal personality is retained;<sup>10</sup> the assets and liabilities of the legal person, therefore, are not transferred

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5 See Commission Decision 2005/380/EC of 28 April 2005 establishing a group of non governmental experts on corporate governance and company law, *OJL* 126, 19.5.2005, p. 40.

6 See Advisory Group on Corporate Governance and Company Law, Minutes of the meeting of 27 January 2006, p. 4, [http://ec.europa.eu/internal\\_market/company/advisory/index\\_en.htm](http://ec.europa.eu/internal_market/company/advisory/index_en.htm)

7 See note 3, *supra*.

8 See also IP/04/270, *supra* note 3, pp. 1, 2.

9 See outline, under 'A need felt by the market', *sub* 1 and 3; 'Current framework', *sub* 2.

10 See, in this connection, Art. 293 EC, which refers to: '(...) the retention of legal personality in the event of transfer of their seat from one country to another'.

in any way, but remain belonging to it.<sup>11</sup> In other words, there is a change in nationality (of the legal form), not in the (identity of the) person as such.<sup>12</sup>

As to the Community's competence to adopt a Directive on cross-border transfer, let me note this: the Community can act only where the EC Treaty equips it with competence. This, in short, is the principle of conferred powers, which is laid down in Article 5(1) EC. Community competences are conferred by specific provisions of the EC Treaty, known as legal bases. The legal basis proposed for the Directive on cross-border transfer of the registered office would be Articles 44(1) and (2)(g) EC.<sup>13</sup> Article 44(1) EC confers on the Council and European Parliament the power to adopt directives to attain freedom of establishment. Connected to this, Article 44(2)(g) EC further provides that, to the necessary extent, the safeguards which, for the protection of the interests of members and others, are required by Member States of companies are to be coordinated (with a view to making such safeguards equivalent throughout the Community). The Court of Justice has already acknowledged, in *Daily Mail*, that a Directive on cross-border transfer of the registered office may be adopted on the basis of Article 44 EC.<sup>14</sup>

### 3. The position of the European Parliament

Even though the European Parliament does not have a genuine right of initiative – this is a right attributed to the Commission<sup>15</sup> – the European Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing the EC Treaty.<sup>16</sup> Furthermore, the European Parliament and its Members have a right to put (oral or written) questions to the Commission.<sup>17</sup> When the European Parliament requests his or her presence, finally, the Commission will ensure that the responsible Commissioner is present at the plenary session or in committee.<sup>18</sup>

It is clear from all this that the European Parliament can put pressure on the Commission, in the case at hand, to adopt a proposal for a Directive on transfer of the registered office. Three

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11 As the Commission itself observes in the outline, under 'Coordination Directive relating to transfers of registered offices', sub 1(7): 'Transfer of the registered office (...) should not affect the company's legal relationships, whether active or passive, with third parties.'

12 Further literature on (aspects of) cross-border transfer of the registered office includes: J. Bisacre, 'The Migration of Companies Within the European Union and the Proposed Fourteenth Company Law Directive', 2001 *International and Comparative Law Journal*, pp. 251-270; F.M. Mucciarelli, 'The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: an Important Decision from Italy – Case Note on the Decision "B & C" of the Italian Corte di Cassazione', 2005 *European Company and Financial Law Review*, pp. 512-533; E. Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law', 2005 *European Business Law Review*, pp. 1348-1365; S.M. van den Braak, 'Grensoverschrijdende omzetting van rechtspersonen', 2007 *Weekblad voor Privaatrecht, Notariaat en Registratie*, pp. 688-693; M. Ventrizzo, 'Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law', 2007 *European Company and Financial Law Review*, pp. 47-75; E. Wymeersch, 'Is a Directive on Corporate Mobility Needed?', 2007 *European Business Organization Law Review*, pp. 161-169.

13 For the proposed legal basis, see outline, under 'Current framework', sub 3; and under 'Coordination Directive relating to transfers of registered offices', sub 1.

14 See, to that effect, Case 81/87, *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, [1988] ECR 5483, paras. 21-23. The Court, to be precise, referred to Art. 54(3)(g) EEC (now Art. 44(2)(g) EC). This may be explained by the fact that at the time the Court passed its judgment in *Daily Mail*, in September 1988, all EC company law Directives had been adopted on the basis of this provision.

15 Art. 211, third indent EC.

16 Art. 192, para. 2 EC.

17 Art. 197, para. 3 EC.

18 Pt. 8 of the Interinstitutional agreement on better law-making of 16 December 2003, OJ C 321, 31.12.2003, p. 1. See also pt. 37 and 40 of the Framework agreement on relations between the European Parliament and the Commission of 26 May 2005, which is appended to the Rules of Procedure of the European Parliament (16th ed., Sept. 2007) as Annex XIII.

Parliament Resolutions may be quoted as examples of the Parliament bearing down on the Commission.<sup>19</sup>

In its March 2006 Resolution on restructuring and employment, the European Parliament called on the Commission to submit a proposal for a '14th Company Law Directive'. In that connection, the Parliament – incidentally – pressed the Commission to submit a proposal under which the transfer of registered offices must not be used to restrict workers' rights. The Parliament emphasized that the protection of workers' acquired rights regarding their participation in company decisions (employee participation) must be both a fundamental principle and a declared objective of the directive.<sup>20</sup>

The European Parliament emphasized the need for a Directive on cross-border transfers of the registered office once more in its Resolution on recent developments and prospects in relation to company law of July 2006. The Parliament stressed that:

'(...) the transfer of a registered office is today either impossible or hindered by the requirements imposed at national level, that a directive in this area is crucial for freedom of establishment, and that the long-awaited Fourteenth Company Law Directive would fill a lacuna in the system of the internal market for companies; [t]herefore [the European Parliament] calls on the Commission to present in the near future a proposal concerning the Fourteenth Company Law Directive on the cross-border transfer of the registered office of limited companies (...).'<sup>21</sup>

Again, according to the European Parliament, safeguarding employees' acquired rights as regards participation in company decisions must be a declared aim of the Directive.<sup>22</sup>

Finally, the Resolution on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat of October 2007 must be mentioned.<sup>23</sup> In this Resolution the European Parliament states that it '[r]egrets that the Commission, after a considerable delay, has now informed Parliament that it intends to make no legislative proposal for a Fourteenth Company Law Directive on the transfer of the seat,' but '[r]eserves the right, nevertheless, to take further action with regard to the question of cross-border transfers of company seats'. With respect to this 'further action', a point worthy of attention is that the opening consideration in the preamble to the Resolution refers not just to Article 192 EC, on the basis of which the European Parliament may request the Commission to submit proposals, but also refers to Article 232 EC. Under this article an action for failure to act may be brought against, *inter alia*, the Commission. Article 232 EC confers this right on all institutions, including the European Parliament. Its object is a declaration on the part of the Court of Justice that the defendant institution acted unlawfully by failing to take a decision.<sup>24</sup> In the European Parliament's debates of 4 September 2007, on the oral question by G. Gargani on the 'Statute of the

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19 For an example of the European Parliament putting pressure on the Commission by means of questions, see Oral question (O-0042/2007) by Giuseppe Gargani of 20 June 2007, on behalf of the JURI Committee, to the Commission: State of play in the legislative proceedings on the 'Statute of the European Private Company' and of the 'Fourteenth Company Law Directive' (B6-0137/2007).

20 European Parliament resolution of 15 March 2006 on restructuring and employment, P6\_TA(2006)0088, pt. 13.

21 European Parliament resolution of 4 July 2006 on recent developments and prospects in relation to company law, P6\_TA(2006)0295 (OJ C 303 E, 13.12.2006, p. 114), pt. 32-33.

22 *Ibid.*, pt. 33.

23 See European Parliament resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat, P6\_TA-PROV(2007)0491, pt. 5 and 6.

24 Case 377/87, *European Parliament v Council* [1988] ECR 4017, para. 9.

European Private Company, Company Law,<sup>25</sup> various MEPs actually held out the prospect of an action for failure to act to the Commission.<sup>26</sup> The 'further action' the European Parliament thus considers, notably an action against the Commission for a failure to act, shows the Parliament's intention to keep pressure on the Commission to submit a proposal.<sup>27</sup>

Once the Commission has adopted a proposal for a Directive on the basis of Article 44 EC, the European Parliament – obviously – will exercise its decision making powers under the co-decision procedure of Article 251 EC.

#### **4. The Commission's reasons for not submitting a proposal for a Directive**

The European Commission will not submit a proposal for a Directive on cross-border transfer of the registered office, as was already mentioned above. In June 2007, Charlie McCreevy, who is the Commissioner for the Internal Market, made the following statement at the 5th European Corporate Governance and Company Law Conference in Berlin:

'But there are also some unresolved issues concerning the cross-border transfer of a company's seat and stakeholders seek more legal certainty in that respect. The Commission had envisaged submitting a proposal for a directive this year.

However, our preparatory work has led me to the conclusion that we should not rush forward with legislation. If we are to propose legislation, we must be sure there is a reasonable chance of a result with added value for business. The economic case is not as obvious or as clear-cut as it may seem and Member States currently follow very different approaches to which they are strongly attached.

Moreover, the Court of Justice will soon take a decision in a case that could provide us with new insights on the current legal situation in Europe. As you know, the Court has already in the past delivered fundamental judgments in the area of company mobility. I am therefore convinced that we should wait for the outcome of this case which is likely to bring more clarity into this complicated matter. We expect the judgement to be delivered in the autumn of this year.'<sup>28</sup>

After the announcement that adoption of a proposal would thus be put on hold, the Commission has now decided not to proceed with the 14th Company Law Directive altogether. In October 2007, Commissioner McCreevy made the following statement before the European Parliament's Legal Affairs Committee:

'The Commission had also suggested that a further means of improving mobility might be a directive stipulating the conditions for transfer of registered office in the EU (the so-called "14th Company Law" directive).

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25 Oral question (O-0042/2007) of 20 June 2007 by Giuseppe Gargani, on behalf of the JURI Committee, to the Commission: State of play in the legislative proceedings on the 'Statute of the European Private Company' and of the 'Fourteenth Company Law Directive' (B6-0137/2007).

26 See: European Parliament Debates of 4 September 2007 (Statute of the European Private Company, Company Law), in particular the remarks made by G. Gargani and K.-H. Lehne.

27 The issue of whether such an action has a chance of success will not be dealt with here.

28 SPEECH/07/441 of 28 June 2007 (Company law and corporate governance today. 5th European Corporate Governance and Company Law Conference, Berlin).

As I informed the European Parliament, in reply to the oral question tabled by Mr Gargani, the results of the economic analysis of the possible added value of a directive were inconclusive. Companies already have legal means to effectuate cross-border transfer. Several companies have already transferred their registered office, using the possibilities offered by the European Company Statute. Soon the Cross-Border Merger Directive, which will enter into force in December, will give all limited liability companies, including SMEs, the option to transfer registered office. 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. To my mind it is only if this framework is found wanting, that further legislative action in the shape of a 14th Company Law Directive would be justified. Therefore, I have decided not to proceed with the 14th Company Law Directive.<sup>29</sup>

The main reasons for, first, postponement and, now, abandonment of a proposal for a Directive are therefore, in short, political feasibility,<sup>30</sup> (alleged) lack of an economic case, and a forthcoming judgment of the Court of Justice. I will concentrate on the second and third reasons. The (alleged) lack of an economic case will be dealt with first. After that the Court's future ruling will be examined.

## 5. The economic case for a Directive

### 5.1. Introduction

Where the economic case for (future) Community legislation is concerned, the so-called impact assessment process deserves specific attention. It will be dealt with first (Section 5.2). After that, the Commission's argument that there is no economic case for a Directive in view of the fact that companies would already have legal means to effectuate a cross-border transfer, will be examined (Section 5.3). Next, the economic benefits from a Directive will be entered into (Section 5.4). Finally, some concluding remarks will be made (Section 5.5).

### 5.2. Impact assessment

The Commission Legislative and Work Programme 2007,<sup>31</sup> briefly mentioned in Section 1, *supra*, contains a list of 'priority initiatives'.<sup>32</sup> The Directive on cross-border transfer of the registered office is one of these priorities. The Commission states – in its Work Programme – that all priorities, and thus the Directive, will be subject to impact assessment.<sup>33</sup>

There are two stages in the impact assessment process.<sup>34</sup> First, a short Preliminary Assessment, which results in a 'preliminary assessment statement'. Such a statement, on the Directive at issue, has been annexed immediately to the Work Programme 2007.<sup>35</sup> The statement does not

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29 SPEECH/07/592 of 3 October 2007 (Speech by Commissioner McCreevy at the European Parliament's Legal Affairs Committee, Brussels).

30 The Commission, see main text, refers to the circumstance that: 'Member States currently follow very different approaches to which they are strongly attached'. In this connection, I briefly refer to J. McCahery & E. Vermeulen, 'Does the European Company prevent the 'Delaware effect'?', 2005 *European Law Journal*, pp. 785-801. These authors argue, *inter alia*, that Member States are unwilling, given their long tradition of independence, to relinquish their lawmaking autonomy in the area of company law. They speak of a 'non-competitive equilibrium' in this respect. The Member States' position, referred to by the Commission, can then be argued to reflect the Member States' commitment to respect the 'equilibrium'.

31 Commission Legislative and Work Programme 2007, COM(2006) 629 final, 24.10.2006.

32 *Ibid.*, p. 4.

33 *Ibid.*

34 See Communication from the Commission on Impact Assessment, COM(2002) 276 final, 5.6.2002, pp. 6-9.

35 See the Priority Initiatives Index, annexed to the Work Programme 2007, *supra* note 31, sub 7. It consists of two parts 'Initial impact assessment screening' and 'Planning of further impact assessment work'.

indicate any expected (negative) impacts of the future Directive in terms of economic consequences.<sup>36</sup>

The second stage in the whole process, is that of an Extended Impact Assessment. The purpose of the extended impact assessment is two-fold: to consult with interested parties and relevant experts; and to carry out a more in-depth analysis of the potential impact on the economy (and on society and the environment).<sup>37</sup> As far as the *first goal* (consultation) is concerned, it may be noted that stakeholders had already been consulted on a proposal for a 14th Company Law Directive, in particular within the general consultation on future priorities for the Action Plan conducted in December 2005 – March 2006, which showed broad support for a Directive.<sup>38</sup> Within the context of this first goal it must further be mentioned, that the Commission has requested the Advisory Group on Corporate Governance to provide assistance. A working group within the Advisory Group has been established in this regard. The Advisory Group published its findings in April 2007.<sup>39</sup> The Group has identified certain specific economic benefits from a Directive, which will be dealt with in Section 5.4, *infra*. In 2006, the Group had already made it clear that it supported the initiative of a Directive on cross-border transfer.<sup>40</sup> As far as the *second goal* of the Extended Impact Assessment (in-depth analysis of the potential impacts on the economy) is concerned, reference can be made to the ‘economic analysis of the possible added value of a directive’ mentioned in the press release discussed in Section 4, *supra*, the results of which, apparently, were inconclusive. This outcome is rather unexpected, in view of the positive results of the consultation with stakeholders and experts (and the Commission’s own position as regards a Directive on transfer of the registered office in the past).

The results of the Assessment must be presented in an impact assessment report.<sup>41</sup> As far as I was able to ascertain, the report at issue has not been made public.<sup>42</sup> In the absence of this report (or the – inconclusive – economic analysis), it is difficult, if not impossible, to gain insight into the Commission’s conclusion, that there would be no obvious economic case for a Directive (and its subsequent decision not to proceed with a proposal). The Commission, therefore, should publish the impact assessment report without delay (on its internal market web site or its impact assessment site).

### ***5.3. The Commission’s economic argument against a Directive***

Notwithstanding that the economic analysis at issue has not been made public, the press releases of Section 4, *supra*, do shed some light on the Commission’s observations as regards ‘the economic case’ for a Directive or actually the (claimed) lack of it. Companies would already have legal means to effectuate a cross-border transfer, according to the Commission. In this connection the Commission refers to the possibilities offered by the European Company (SE) Statute and to, in short, a cross-border down stream merger.

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36 It does indicate, in rather general terms, that a Directive on the transfer of registered office 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; and that a Directive would offer flexibility for companies, notably SMEs, to choose the company law environment in which they want to operate, independently of the actual localisation of their economic activity.

37 See Communication from the Commission on Impact Assessment, COM(2002) 276 final, 5.6.2002, p. 7.

38 See Sect. 1, *supra*.

39 See Advisory Group on Corporate Governance and Company Law, Minutes of the 6th meeting of 8 March 2007, *d.d.* 4 April 2007, pp. 4-5, [http://ec.europa.eu/internal\\_market/company/advisory/index\\_en.htm](http://ec.europa.eu/internal_market/company/advisory/index_en.htm)

40 See Sect. 1, *supra*.

41 See Communication from the Commission on Impact Assessment, COM(2002) 276 final, 5.6.2002, pp. 9, 10.

42 At least not on the official impact assessment website: [http://ec.europa.eu/governance/impact/index\\_en.htm](http://ec.europa.eu/governance/impact/index_en.htm) (consulted last on 1 November 2007).

First, a company may indeed transfer its registered office by means of an SE. This is, in brief, how such a transfer may be realized. First, a Member State (public limited) company converts or transforms itself into an SE (this is only possible, however, if the company for at least two years has had a subsidiary company governed by the law of another Member State).<sup>43</sup> Subsequently, the – then – SE transfers its registered office to another Member State.<sup>44</sup> Finally, then, the SE converts back into a public limited company governed by the law of the Member State in which its registered office is situated. However, no decision on conversion may be taken before, in short, two years have elapsed since its registration.<sup>45</sup>

Second, transfer of the registered office is, admittedly, also possible by means of a cross-border, down stream merger (as described in the second press release, dealt with in Section 4, *supra*). This method also entails, that quite specific requirements have to be met. There is the need to incorporate a new company in another Member State (which may be quite burdensome). It may furthermore, not be forgotten that the merger is typically an operation which involves two companies; this entails, for instance, that each of the companies taking part in the merger must comply with the provisions of its own national law, in particular those concerning the decision making process.<sup>46</sup>

Even though it must be admitted that transfer of a company's registered office may already be realized, the methods currently available for transfer have important disadvantages that a transfer of the registered office under a specific Directive would not have. Instead of three separate operations (the SE) or two (down stream merger), each of which characterized by the various specific requirements just indicated briefly, a single operation (geared towards transfer of the registered office) would suffice. A Directive on transfer of the registered office would thus be cost-saving.<sup>47</sup>

The Commission's argument, in conclusion, that there would not be an economic case for a Directive in view of the fact that transfer of a company's registered office may already be realized, must therefore be dismissed.

#### **5.4. Economic benefits of a Directive**

It was just explained that under a specific Directive on transfer of the registered office, such transfer may be realized at lower costs than at present, when, in brief, an SE or a cross-border down stream merger are used. There are, however, other economic arguments in favour of a Directive. These will be dealt with now.

In advance of Section 6, *infra*, where the currently pending *Cartesio* case will be discussed, let me observe this: if the Court of Justice would decide in *Cartesio*, that a company from a Member State may request transfer of its registered office to another Member State relying directly on Articles 43 EC and 48 EC, the economic case for a Directive, in my opinion, would be even stronger. Let me elaborate on this. Although restrictions on freedom of establishment are prohibited by Article 43 EC and individuals may invoke this provision both against Community and national authorities (the so-called 'direct effect') and the Commission may start an infringe-

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43 Art. 2(4) and Art. 37 SE Statute.

44 Art. 8 SE Statute. See further: W.-G. Ringe, *Die Sitzverlegung der Europäischen Aktiengesellschaft*, 2006.

45 Art. 66 SE Statute.

46 See Art. 4 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, *OJL* 310, 25.11.2005, p. 1.

47 The Advisory Group on Corporate Governance and Company Law, Minutes of the 6th meeting of 8 March 2007, *d.d.* 4 April 2007 p. 5, [http://ec.europa.eu/internal\\_market/company/advisory/index\\_en.htm](http://ec.europa.eu/internal_market/company/advisory/index_en.htm), compares cross-border mergers with cross-border transfer. It states: '(...) the first saving is the absence of a need to set up a new corporate vehicle in the destination country. The other possible savings would relate to a simplified procedure.'

ment procedure against a Member State which has failed to fulfil its obligations under Article 43 EC,<sup>48</sup> a directive under Article 44 EC may be a more effective means of eliminating the restrictions concerned. While, in short, 'direct effect' and the infringement procedure concern individual cases resulting from specific circumstances and measures in a particular Member State, a directive under Article 44 EC may on the other hand, by the introduction into the law of Member States of a set of similar provisions, be aimed at ensuring, in a general and systematic fashion, that all national legal systems correspond to the requirements of a genuine internal market in which the freedom of establishment is guaranteed.<sup>49</sup>

Reference can further be made to the Advisory Group, which identifies 'two main categories of benefits from the 14th Directive':

'At EU level, it would reinforce basic EU principles such as freedom of establishment and it would do so quicker than through case law. It is a *de facto de-regulatory* measure. It is also attractive for EU subsidiaries of overseas companies, which can change their mind over their business life as to their Member State of establishment.

Concerning existing companies, moving to another company law regime is not *per se* attractive. What motivates companies is easier access to finance and cost savings. This financial aspect is important: if the company is going to be listed or wishes to raise finance for growth, changing the company law regime may help to attract investors and lenders. There are other potential elements for costs savings when comparing the impact of different national company law regimes on companies, including for example the cost of finance.'<sup>50</sup>

There is, finally, so it seems to me, also an actual economic need for a Directive on cross-border transfer of the registered office, in particular where the main part of a company's business has moved to another Member State. The advantage of a transfer would be that companies or natural persons from the 'host' Member State, who consider doing business with the company, may then rely on similar guarantees that apply when dealing with other companies from their own Member State. This may lower important information costs. Another situation that I would like to point out in this respect concerns companies which are required to have their head office within the Member State of incorporation, but which have moved the main part of their business. The advantage of a transfer of the registered office would be that it would also allow for a transfer of the head office (because the host Member State is a 'real seat' country, as a consequence of which the head office of its companies *must* be transferred to the host Member State; or the host Member State is not a 'real seat' country, as a consequence of which the head office *may* – not *must* – be transferred to the host Member State).<sup>51</sup> There may be a real economic need for such a combined transfer of the registered office and head office, for example, in the event that the company is taken over by local management.

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48 See Art. 226 EC *et seq.*

49 Cf. Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final/3, 5.3.2004, pp. 22-23.

50 The Advisory Group on Corporate Governance and Company Law, Minutes of the 6th meeting of 8 March 2007, *d.d.* 4 April 2007, p. 4, [http://ec.europa.eu/internal\\_market/company/advisory/index\\_en.htm](http://ec.europa.eu/internal_market/company/advisory/index_en.htm)

51 It is assumed here that a Directive on cross-border transfers of the registered office will not require that after the transfer, the registered office and the head office must be located within the same Member State.

### 5.5. Conclusion

In view of the above, it must firstly be concluded that the Commission's argument that there would not be an economic case for a Directive, in view of the fact that transfer of a company's registered office may already be realized, must be dismissed. In addition, further economic benefits may be identified: depending on the outcome of *Cartesio*, a Directive under Article 44 EC may be a more effective means of eliminating restrictions on freedom of establishment within the meaning of Article 43 EC than 'direct effect' or the 'infringement procedure'; a transfer of the registered office (and thus a change in the company law regime) may help to attract investors and lenders; and, finally, that where the main part of a company's business has moved to another Member State, a transfer of the registered office may lower important information costs.

### 6. The Court of Justice: *Cartesio*

One of the reasons the Commission advances for not submitting a proposal for a 14th Company Law Directive is that 'the Court of Justice will soon take a decision in a case that could provide us [the Commission] with *new insights on the current legal situation in Europe* [emphasis added].<sup>52</sup> The case the Commission has in mind, apparently, is *Cartesio*.<sup>53</sup> *Cartesio* concerns a company, constituted in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishing to transfer its registered office to another Member State. The Szeged Court of Appeal (Hungary) made a reference for a preliminary ruling in 2006. One of the questions referred was whether a Hungarian company may request transfer of its registered office to another Member State of the European Union, relying directly on Community law (Articles 43 and 48 EC).<sup>54</sup> Advocate General Poiares Maduro is expected to deliver his opinion now in March 2008. I make the assumption, for convenience, that *Cartesio* concerns a transfer of the registered office as it is defined in the preparatory work by the Commission (see Section 2, *supra*).

In many of its preliminary rulings on the interpretation of the prohibition of Article 43 EC the Court has adopted the approach that before it examines the question whether a national measure constitutes a 'restriction'<sup>55</sup> on this freedom and whether such a restriction is 'justified', it determines first 'whether the Treaty provisions on freedom of establishment apply'.<sup>56</sup> An in-depth discussion of all three questions would obviously be outside this contribution's scope. I would like to make a remark on the first question (the applicability of the Treaty provisions on freedom of establishment) nevertheless; the personal scope of freedom of establishment – which companies are beneficiaries of this freedom under Article 48 EC – deserves particular attention in view of the Court's case law.

In *Daily Mail*, the Court pointed out that:

'[20] (...) the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the

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52 See Sect. 4, *supra*.

53 Case C-210/06, Reference for a preliminary ruling from the Court of Appeal Szeged lodged on 5 May 2006, *Cartesio*.

54 *OJ* C 165, 15.7.2006, pp. 17-18.

55 This means, restriction within the meaning of Art. 43(1) EC.

56 See e.g. Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] ECR I-9919.

company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another.

[21] The Treaty has taken account of that variety in national legislation. In defining, in Article 58 [now Article 48 EC], the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company (...).<sup>57</sup>

Obviously, this means that Article 48 EC leaves it to the Member States to choose the connecting factor they deem fit. It further means, and this is something the Court explained in *Überseering*, that:

‘(...) the question whether a company formed in accordance with the legislation of one Member State (...) [may] transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation and, in certain circumstances, the rules relating to that transfer (...) [are] determined by the national law in accordance with which the company (...) [has] been incorporated. (...) [A] Member State (...) [is] able, in the case of a company incorporated under its law, to make the company's right 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.’<sup>58</sup>

Timmermans has summarized this interpretation by the Court of Article 48 EC as follows:

‘(...) since Article 48 EC leaves it to the Member States to choose the connecting factors they deem fit, Community law has to respect the choice made by the law of incorporation. If that law requires the real seat to be established and remain established within the country of incorporation, Community law accepts such a requirement and its possible consequences: the loss of legal personality were the real seat to be transferred. Such a defect in the company's statute could not be cured by the freedom of establishment (...).’<sup>59</sup>

The question of relevance here is whether the Court's observation in *Überseering*, quoted in the main text, also includes transfer of the registered office as it is defined in the preparatory work by the Commission. To put it differently, does the law of the State of origin (also) determine whether its companies may transfer their registered offices (as defined by the Commission) to another Member State?

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57 See Case 81/87, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, [1988] ECR 5483, paras. 20-21.

58 *Überseering*, *supra* note 56, para. 70.

59 See C.W.A. Timmermans, *Neue Rechtsprechung des Gerichtshofs der EG zum Europäischen Gesellschaftsrecht* (Zentrum für Europäisches Wirtschaftsrecht. Vorträge und Berichte, no. 132), 2003, p. 17.

It seems to me, that this question must be answered in the negative. The Court, in *Überseering*, refers (twice) to retention of legal personality *under the law of the Member State of incorporation*. In the case of transfer of the registered office (within the meaning of the future 14th Directive), however, there is no retention of legal personality *under the law of the Member State of incorporation*; legal personality is retained in full. The addition ‘under the law of the Member State of incorporation’, therefore, does not make sense where transfer of the registered office (still within the meaning of the future 14th Directive) is concerned.

What the Court apparently intends to refer to, I would argue, is the modification of a connecting factor *with retention of the quality of being a company under the law of the Member State of incorporation*.<sup>60</sup> This is precisely the *Daily Mail* case of a UK company wishing to transfer its central administration to another Member State (the Netherlands), whilst remaining a UK company,<sup>61</sup> and, in essence, also the *Überseering* situation, where a company under Netherlands law had moved its centre of administration (according to the host state law of Germany) to another Member State (Germany), but did not cease to be a company under Netherlands law.<sup>62</sup> This latter type of modification (to leave no doubt: not the transfer of the registered office within the meaning of the 14th Directive) is a matter Article 48 EC, in short, leaves to the Member States (of origin).<sup>63</sup>

In conclusion, the question whether the Court’s observation in *Überseering*, as entered into in this section, also includes, in short, transfer of the registered office, must – so it seems to me – be answered in the negative. *Überseering*, consequently, does not seem to constitute an obstacle for a ruling that a company, such as the Hungarian company in *Cartesio*, may request transfer of its registered office to another Member State relying directly on Community law (Articles 43 and 48 EC). Now, if the Court would indeed arrive at the judgment that, in short, a transfer of the registered office may be requested on the basis of Articles 43 and 48 EC, there would be an acute need for a 14th Company Law Directive – for the reasons explained in Section 5.4, *supra*. This acuteness, of course, may contribute to the (political) feasibility of a Directive. However, also if the Court would, in short, dismiss a transfer of the registered office on the basis of Article 43 EC, a Directive would still be needed. In fact, the Directive would make cross-border transfer of the registered office actually possible (that is, Member States would then be required to provide for such transfer).

It may be assumed therefore, that irrespective of the outcome of *Cartesio*, there remains a need for a Directive on transfer of the registered office. Viewed from this perspective, the possible ‘new insights on the current legal situation in Europe’ *Cartesio* may provide – which the Commission refers to – do not seem to justify the Commission’s decision not to submit a proposal for a 14th Company Law Directive altogether. One may argue that these ‘new insights’

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60 See also in this connection *Daily Mail*, *supra* note 57, para. 18, where it is referred to the ‘transfer (...) [of a company’s] central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company [emphasis mine].’ For such transfers of the registered office (*i.e.* not within the meaning of the 14th Directive), see: Mucciarelli, *supra* note 12, p. 520; *cf.* M. Lamandini, ‘Report from Italy’, 2006 *European Company Law*, pp. 31-32.

For a different interpretation of the Court’s case-law (and an answer in the positive to the question at issue), see J.N. Schutte-Veenstra, ‘Case note Sevic’, 2006 *Ondernemingsrecht*, pp. 115-119.

61 See also *Daily Mail*, *supra* note 57, paras. 3 and 18 and the previous footnote.

62 See, to that effect, *Überseering*, *supra* note 56, paras. 80-81.

63 It may also be noted, that the observation at issue here, is made by the Court within the context of ‘the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor’. It seems to me that a mere ‘modification of the connection with the Member State of origin’, is to be distinguished from a (complete) replacement of the connection with the Member State of origin by a connection with another Member State.

It must, finally, be emphasized that the Court’s case law, just dealt with, on free choice of connecting factors (and the issue of modification of the connecting factor) concerns Art. 48 EC, which is about the scope *ratione personae* (as opposed to the scope *ratione materiae*) of freedom of establishment. It is against this background, so it seems to me, that *Daily Mail* and *Überseering* are to be understood.

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could also be taken into account – *if necessary* – during the legislative process, by means of amendments, or even be anticipated in the proposal itself.

## **7. Conclusion**

The Commission's argument that there is no economic case for a Directive on cross-border transfer of the registered office in view of the fact that such transfer may already be realized by means of an SE or a cross-border down stream merger, must be dismissed. Under a specific Directive, such a transfer may be realized at lower costs. Further economic benefits from a Directive were identified in Section 5.4. The possible 'new insights on the current legal situation in Europe' a case pending before the Court of Justice (*Cartesio*) may provide, neither seem to justify the Commission's decision not to submit a proposal for a Directive on transfer of the registered office. It was explained that irrespective of the outcome of *Cartesio*, there remains a need for such a Directive. The 'new insights' the Commission refers to, could be taken into account – *if necessary* – during the legislative process, by means of amendments, or even be anticipated in the proposal itself. All in all, the justification the Commission provides for not submitting a proposal for a Directive on cross-border transfer of the registered office is not convincing. It is to be doubted, incidentally, whether the Commission can provide a thorough argument. In the absence of such justification (the impact assessment report on a Directive on cross-border transfer should anyhow be published), the Commission should answer the European Parliament's repeated call to submit a proposal for a '14th Company Law Directive'.

Over 350 years ago, the famous French philosopher, mathematician, scientist and writer René Descartes (Cartesius in Latin; *Cartesio* in Italian – what's in a name?) stayed in Leiden and Utrecht. He studied and taught at the Universities of both cities – 'Leiden', my University; 'Utrecht' the University which so kindly invited me to be a speaker here and thus granted me the privilege to follow in the footsteps of the great thinker for one day. Let me conclude in his – *Cartesio's* – spirit: *Je transfère, donc je suis!*