Does Europe still need a 14th Company Law Directive on Cross-Border Transfer of Company Seats?

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A. Introduction

The strong desire for mobility is deeply rooted in every European national and shared by most business companies. Since the establishment of the European internal market in 1992, the number of cross-border transfers of company seats has increased significantly. Market participants quickly began to recognise the economic and legal benefits which may arise from a seat transfer. The ability to choose the most advantageous national law system enabled European companies to save taxes and costs, simplify administrative procedures or enjoy the lowest capital maintenance requirements.

The right to transfer company seats is based on diverse sources of law consisting of European primary law laid down in Articles 49 to 55 TFEU, secondary measures in the form of European regulations and directives, national statutes and European case law.

The main focus of this article will be on the key question: is this existing legal platform for company seat transfers sufficient or is further secondary legislation on supranational level in form of a company law directive on cross border transfer of company seats (Seat Transfer Directive) required?

This question has never really lost attention. Not least since the European Commission launched a draft of a fourteenth directive on the transfer of the registered office or *de facto* head office to another member state with a change in applicable law[1] on 20 April 1997 (Draft Directive), this topic is regularly subject to discussions in legal literature and statements of public organs and European industry. Despite such discussions, the Draft Directive has not been adopted yet. However, the question whether an adoption is still required or not, acquired new topicality when the European Court of Justice (CJEU) recently rendered a decision on the cross-border transfer of seats by way of conversion in the case *Vale*.[2] For the first time the CJEU held that preservation of a company's legal identity after a transfer of its registered office is compatible with EU law.

Without any doubt, the key topic of this article has gone through a lengthy process. Over time, the relevant European organs and institutions as well as the CJEU have managed to form a broad legal framework for the free transfer of company seats within the European Union. Most of these legal developments have been reflected on the national level, and through that process many issues which arose from opposing theories of establishment (which will be explained in more detail below) and other differences in the national law systems of the European member states have been clarified. With *Vale* the CJEU has continued and extended this progressive development, but the question arises, whether it has also finally provided the final piece of the puzzle or if further points have been left open which could be addressed by a Seat Transfer Directive. This acute need for clarification has also been recognised by the European Commission which initiated a consultation process immediately after becoming aware of the *Vale* judgement and after receiving a resolution[3] of the European Parliament containing a strong demand for a Seat Transfer Directive along with specific recommendations. The public consultation process is now complete and the relevant re-

1 Doc. XV/6002/97, published in ZGR 1999, p. 157.
2 CJEU, case C-378/10, *VALE Epitesi kft*, ECLI:EU:C:2012:440.
3 European Parliament resolution of 2/2/2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)).

sponses have already been summarised by the European Commission in a Feedback Statement Report[4] (Feedback Statement). Disregarding the fact that the majority of the addressees advocated the adoption of a Seat Transfer Directive, the European Commission has not yet made a decision. The Commission's conclusion is eagerly awaited.

In order to be able to assess and analyse the potential remaining need for secondary legislation measures, one must first be fully aware of the current legal framework. In order to clarify the extent to which a cross-border transfer of seats is covered by existing laws, the author will begin with a short overview of the existing laws and personal scope of the freedom of establishment. That overview will be followed by the individual presentation of the aforementioned legal framework. The author will also point out limitations and restrictions imposed on transferring companies.

Once the ambit of the right to transfer company seats across borders is clarified, this article will provide for a detailed analysis of the need for a company law directive on cross-border transfer of company seats. The author will not only consider legal aspects but will also take into account the economic and political dimensions of this question.

Finally, the Draft Directive itself will be reviewed in light of the previous analysis and recommendations for further improvements will be given.

B. Current legal basis

I. European law

1. Primary law

The right to transfer company seats within the European Union is a manifestation of the fundamental freedom of establishment. Therefore, the primary legal basis on European level can be found in Articles 49 to 55 TFEU. As usual, primary law is only able to provide a basic legal framework.

a) Material scope of application according to Article 49 TFEU

In order to properly define the scope of the right to transfer company seats under the fundamental freedom of establishment, it is essential to understand what exactly is meant by the terms "seat" and "transfer". Articles 49 TFEU et seq. do not include comprehensive definitions.

There are two different types of seats which must be clearly distinguished. The first type is the "registered seat", also called the "statutory seat". This is essentially the

4 European Commission Feedback Statement – Summary of Responses to the Public Consultation on cross-border transfers of registered offices of companies, 2013, http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/docs/summary-of-responses_en.pdf (20/3/2015).

company's registered office location. That is, the place specified in the company's articles of association and which is entered in the register of the competent national court or the commercial register, as applicable.[5] Secondly, the term "seat" can also refer to the "administrative seat" or "real seat" of a company. This is the place where the operational headquarters are based, or where, as a matter of fact, the main centre of business and administration of the company takes place.[6]

A legal definition for the term "transfer" does not exist. However, the concept of transfer is very simple. A transfer occurs when a company transfers its administrative seat or registered seat from its state of formation to another member state in the European Union (hereinafter also referred to as the "host state" or "state of destination").[7] A transfer is completed once a company has been established in the host state.

The most precise definition of the term "establishment" was given by the CJEU in the *Gebhard* case,[8] in which the term was defined as a concept allowing a Union national to participate, on a stable and continuous basis, in the economic life of a member state other than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the Union in the sphere of activities as self-employed persons.[9]

Further, Article 49 TFEU makes it clear that the freedom of establishment may take two forms, namely the right of primary establishment and secondary establishment. A primary establishment is a transfer of the registered seat or administrative seat to a host state, as already set out above. Secondary establishment covers instead the different situation in which a company retains its centre of administration in its home state, and pursues its business in another member state through agencies, branches or subsidiaries.[10]

b) Personal scope of application according to Article 54 TFEU

According to Article 54 TFEU, the right of establishment does not only apply to natural persons, but is also granted to legal persons being incorporated under the laws of a member state and having their registered office, central administration or principal place of business within the Union.

5 *Petronella*, The Cross-Border Transfer of the Seat after Cartesio and the Non-Portable Nationality of the Company, EBLR 21 (2010), p. 247.
6 Ibid.
7 *Vaccaro*, Transfer of Seat and Freedom of Establishment in European Company Law, EBLR 16 (2005), p. 1351.
8 CJEU, case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411.
9 Ibid., para. 25.
10 *Vaccaro*, (fn. 7), p. 1351.

2. Secondary law

Since 2001 the European Commission has adopted several regulations and directives directly or indirectly affecting the existing scope of the right to transfer company seats to another member state.

a) European Company Statute

The Council Regulation on the Statute for a European Company[11] (SE Regulation) is an EU Regulation which was adopted on 8 October 2001. The provisions apply to all public companies set out in Annex I to the SE Regulation which formed a "*Societas Europea*" (SE) or private companies within the meaning of Article 2(2) of the SE Regulation. It contains all provisions and requirements for the setting up and the formation of a SE.

The relevance of the directive follows from Article 8 which sets out specific requirements for a cross-border transfer of the registered office. According to paragraph 1, a SE is explicitly allowed to transfer its registered office to another member state without having to lose its legal personality.

b) Cross-Border Merger Directive

Moreover, on 25 November 2005 a cross border merger directive[12] was adopted which simplifies mergers of limited liability companies on a cross-border basis. It sets up a simple framework drawing largely on national rules applicable to domestic mergers.

The right to transfer company seats within the EU has been significantly expanded by this directive. Articles 2(2)a) and b) allow a transfer of registered office from one member state to another with a change of the company's statute (*lex societatis*) by setting up a subsidiary in the member state where it wants to move its registered office and then merging into that subsidiary. So in effect the Cross-Border Merger Directive enables a company to move its registered office while retaining its central administration in another member state. A winding up of the relevant acquired company is avoided.[13]

11 Council Regulation (EC) 2157/2001 on the Statute for a European company (SE), OJ L 294 of 10/11/2001, p. 1.

12 Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies, OJ L 310 of 25/11/2005, p. 1.

13 European Commission, Press Release on 29/11/2005, Company law: cross-border mergers Directive adopted and published, IP/05/1487.

c) Services Directive

Further, on 12 December 2006 the directive on services in the internal market[14] was adopted by the European Parliament and the Council, which made cross-border transfers by way of conversion less burdensome. It facilitated the process of cross-border conversions and business establishments enormously by removing substantial legal burdens, such as disproportionate approval procedures or unnecessary formal requirements.[15]

II. National law

As a reaction to new developments on European level, the member states implemented European secondary law sources as well as the concepts introduced by the various CJEU judgments. In this way, the harmonisation process is going forward. Nonetheless, there are significant differences between the member states, which are an expression of long and well established legal traditions as well as the challenge of maintaining national identities. However, the most significant difference which triggered the majority of legal problems in relation to the cross-border transfer of seats in the past is the dominance of two differing establishment theories in the member states. In order to illustrate those two theories, the author will present the relevant national legal foundations in the member states United Kingdom and Germany which are, respectively, the main representatives of the opposing theories in Europe. Knowledge of the establishment theories is essential to understand the European case law which will be presented later in this article.

1. UK law – Incorporation Theory

The UK Companies Act 2006 does not include any provisions expressly dealing with the transfer of company seats. However, the theory of incorporation has prevailed in the United Kingdom and all other common law jurisdictions. The incorporation theory is reflected in sections 7 and 8 of the 2006 UK Companies Act and is settled case law.[16]

According to this theory, all matters concerning the constitution of a corporation are governed by the law of place of incorporation and where the company's registered office is situated.[17] UK companies do not require a linkage between the central administration and the place of incorporation and hence they are allowed to register

14 Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ L 376 of 7/12/2006, p. 36.

15 Recitals 5-6 of the Services Directive.

16 *Paschalidis*, Freedom of Establishment and Private International Law for Corporations, 2012, p. 3.

17 Ibid., p. 4.

under UK law irrespective of the location of their centre of management.[18] The law governing the company may only be changed by dissolving the company and incorporating a new corporation.

2. German law – Real Seat Doctrine

Germany, and the majority of civil law systems, has chosen the real seat theory which is laid down in §§ 4a GmbHG and 5 AktG. According to this doctrine, a corporation is governed by the law of the place where the central management and control is located, in other words where the company conducts its business.[19] The theory does not allow a company operating in the territory of a member state to be governed by the company law of another jurisdiction that may possibly disregard mandatory company law interests and provisions considered relevant in the member state where the company has its real seat.[20] The law governing the company may only be changed by moving the company's real seat, which may not be permitted by the laws of the member state concerned.[21]

3. Legal effects of the theories

Member states following the incorporation theory fully accept the transfer of an administrative seat (or real seat) to any other member state. The company's statute will not be affected by a transfer of a real seat and it will continue to be governed by the laws of the member state of incorporation. A transfer of the registered seat is, however, legally prohibited.

On the other hand, if the real seat principle is followed to its ultimate consequences, when a company moves its centre of administration abroad it ceases to be subject to the law of the member state where it was incorporated and, consequently, must be wound up there and incorporated in the new state.[22] The effect of this might be an ultimate ban on cross-border company seat transfers.

III. European case law

Due to their nature as basic rules, the aforementioned TFEU provisions left some room for interpretation. The CJEU played a huge role in forming the ambit of the right to transfer company seats abroad and gradually expanded the legal basis by interpreting the underlying provisions. Those interpretations shed some light on un-

18 *Vargova*, The Cross-Border Transfer of a Company's Registered Office within the European Union, CEU eTD collection 2010, para. 1.2.2.
19 *Paschalidis*, (fn. 16) p. 8.
20 *Frada de Sousa*, Company's Cross-Border Transfer of Seat in the EU after Cartesio, Jean Monnet Working Paper 07/09, p. 7.
21 *Flynn*, Comparative and European Company Law – The Internal Market and the Free Movement of Companies, 2014, chapter 15, p. 5.
22 *Frada de Sousa*, (fn. 20), p. 7.

certainties in a number of fundamental decisions dealing with various cross-border transfer scenarios.

1. Daily Mail

The *Daily Mail* case[23] was the starting point of the cross-border seat transfer history. A UK company planned to transfer its real seat to the Netherlands and to replace the central management in the UK with an established branch or subsidiary. English tax authorities refused to grant a required consent to the transfer under English law because the real seat constitutes the linking factor for tax purposes. Obviously, the company aimed to avoid UK tax rules.

The CJEU denied the applicability of the freedom of establishment in this case, stating that the question of the transfer of the place of incorporation to another member state was one of national law.[24] Following this statement, the CJEU ruled against the UK corporation.

2. Centros

More than a decade later, the CJEU heard another cross-border transfer case. In *Centros*[25] a Danish couple intended to establish a limited liability company under UK law, even though they had been doing business exclusively in Denmark. However, the Danish law system provided for burdensome minimum capital requirements. The couple tried to circumvent those requirements by incorporating under English law and only setting up a branch in Denmark. Due to the lack of compliance with Danish minimum capital requirements, Denmark denied registration of the branch.

The CJEU held that the right to establish a company and an affiliated branch of that company in different member states was fully guaranteed by the TFEU (ex. EC Treaty) and a legitimate exercise of the freedom of establishment.[26] Even if a national of a member state deliberately chooses to set up a company in the member state whose rules seem the least restrictive, and even though business is exclusively done through a branch formed in another member state, this would not constitute an abuse of the right of establishment.[27] Consequently, the CJEU argued that it was contrary to the TFEU for Denmark to refuse to register a branch formed in accordance with the law of another member state.

Contrary to *Daily Mail* where the relevant transferring company planned to move out of its state of incorporation (an "emigration"), *Centros* dealt with a move-in scenario (an "immigration"), where the Danish couple intended to incorporate under

23 CJEU, case C-81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, ECLI:EU:C:1988:456.
24 Ibid., para. 21.
25 CJEU, case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, ECLI:EU:C:1999: 126.
26 Ibid., paras. 26-30.
27 Ibid., para. 27.

foreign law and set up a branch in the affected member state. The member states could then draw the conclusion that immigration restrictions did not comply with European law, whereas emigration restrictions remained permissible.

Given this development, the real seat doctrine was narrowed significantly by the *Centros* ruling. If a company has its registered office in a member state A and is formed in accordance with the law of that member state A, then another member state B cannot refuse to recognize that company even when its entire business is carried on by a branch in member state B, thus evading the more restrictive rules for incorporation in member state B.[28] Further, member state B cannot deny legal capacity to that company even when it is deemed to have moved its actual centre of administration to that member state B.[29] Hence, the right to move into one member state from another cannot be restricted.

Nonetheless, scholars and industry were not fully convinced by this conclusion and believed that *Centros* would constitute a break with the rules developed in *Daily Mail*.

3. Überseering

In *Überseering*[30] the CJEU had to decide on an immigration case again. A Dutch company having a business site in Germany transferred all of its shares to two German nationals residing in Düsseldorf. Two years later, the Dutch company sued a German construction company and claimed compensation before German courts. The construction company argued that the Dutch company in fact had its real seat in Germany, but was not incorporated under German law. Therefore it would not have standing before German courts.

The CJEU found that a refusal to recognise the legal capacity of the Dutch company was incompatible with the TFEU (ex. EC Treaty) and the corresponding provisions guaranteeing a right of establishment.[31] A company validly incorporated under the law of a member state could bring proceedings to exercise its rights before a court in another member state.[32]

Überseering was therefore a confirmation of *Centros*.

4. Inspire Art

One year later, the CJEU rendered a decision on an immigration situation once again, in *Inspire Art*.[33] The Netherlands adopted an Act on Formally Foreign Companies on

28 *Dorresteijn/Monteiro/Teichmann/Werlauff*, European Corporate Law, 2nd ed. 2009, p. 34.
29 Ibid.
30 CJEU, case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, ECLI:EU:C:2002:632.
31 Ibid., paras. 78-82.
32 Ibid.
33 CJEU, case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, ECLI:EU:C:2003:512.

1 January 1998, according to which companies incorporated under foreign law and carrying on substantial business in the Netherlands without having any real connection with their home member state, should register with the competent Dutch register as a "formally foreign company". In addition, such foreign companies should meet certain disclosure and minimum capital requirements. In case of breach of any of those requirements, their managers would have to face personal liability. *Inspire Art* was validly incorporated under UK law and established a branch in Amsterdam. In order to meet local requirements, it was also registered with the competent register. However, it was not registered as "formally foreign company" and consequently the register sued it for undue registration.

The CJEU stated that the requirements set out in the Act on Formally Foreign Companies would conflict with the principle of freedom of establishment and held in favour of the company.[34]

Inspire Art affirmed and strengthened the interpretations expressed in *Centros* and *Überseering*.

5. Sevic

In 2005, the CJEU considered a cross-border merger for the first time. The cases *Centros* and *Überseering* were both based on seat transfers by way of simple secondary establishments in other member states.

The *Sevic* case[35] involved a merger between a German company and a Luxembourgian company. The Luxembourgian company was dissolved and all of its assets were transferred to the German company. German courts refused to register the merger since German law only provided for registration of mergers between resident German companies, not for cross-border mergers.

The CJEU held that cross-border mergers constitute an effective means for transformation of companies and should be viewed as a proper exercise of the freedom of establishment.[36] It further pointed out that the freedom of establishment covers all measures which permit or even merely facilitate access to another member state and the pursuit of an economic activity in that member state by allowing the persons concerned to participate in the economic life of the country effectively and under the same condition as national operators.[37] The aforementioned registration requirements made access to Germany more difficult for foreign companies. Thus, the CJEU held that the German registration requirements were contrary to the right of establishment guaranteed by the TFEU.

34 Ibid., paras. 67-72 and 142.
35 CJEU, case C-411/03, *Sevic Systems AG v. Amtsgericht Neuwied*, ECLI:EU:C:2005:762.
36 *Kimkana*, From Daily Mail to Cartesio – a case for the consistency of the ECJ?, EC Tax Students' Conference Working Paper 2009, http://ials.sas.ac.uk/postgrad/courses/docs/MA_Tax_Working_papers/Kay_Publication_FINAL.pdf (20/3/2015).
37 CJEU, case C-411/03, *Sevic Systems AG v. Amtsgericht Neuwied*, ECLI:EU:C:2005:762, para. 18.

6. Cartesio

Twenty years after *Daily Mail*, finally an emigration case where a European company desired to move out of its home state was brought before the CJEU again. The *Cartesio* decision[38] was long-awaited. The public wanted to know whether the CJEU would reaffirm its *Daily Mail* ruling or if it would distance itself from its former decision in order to create a consistent approach without having to distinguish between immigration and emigration cases.

A limited partnership incorporated under Hungarian law sought to transfer its administrative seat to Italy but wished to remain registered in Hungary. The competent court refused to register the new business address because Hungarian law required the company to dissolve and incorporate under Italian law.

Although not widely expected, the CJEU reverted to its decision in *Daily Mail* by stating that member states have the power to define the connecting factor required by a company for incorporation and that each member state is free not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another member state by moving its seat to the territory of the latter.[39] The court confirmed that a member state adopting the real seat doctrine can refuse to allow a company to move its seat while retaining status as a company incorporated in that member state. Consequently, the state of incorporation can require the company to be wound up or liquidated if it decides to move its real seat to another member state. It cannot, however, prevent that company from moving to another member state and then being governed by the law of the new member state.[40]

Cartesio also contained an *obiter dictum* in which the CJEU addressed whether national rules governing the company conversions fall within the scope of Article 49 TFEU.

7. Vale

Vale is the most recent decision on cross-border seat transfers. It was much anticipated since it had a strong practical relevance for companies that seek to carry out cross-border operations. Further, it brought momentum to the legislative struggle around the Seat Transfer Directive.[41]

An Italian company planned to transfer its seat and business to Hungary and therefore applied for deregistration in the competent Italian register making reference to a consecutive incorporation in Hungary. At the same time, the managing directors

38 CJEU, case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723.

39 Ibid., para. 110; *Kubat Erk*, The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine, EBLR 21 (2010), p. 424.

40 *Krarup*, VALE: Determining the Need for Amended Regulation Regarding Free Movement of Companies within the EU, EBLR 24 (2013), p. 695.

41 *Biermeyer*, Shaping the space of cross-border conversions in the EU – Between right and autonomy: Vale, CMLR 50 (2013), p. 571.

applied for registration of a newly formed company under Hungarian law as legal successor of the Italian company. The request had the objective of accomplishing a cross-border conversion from an Italian Srl into a Hungarian Kft. However, Hungarian law only provided for valid conversions between domestic companies. Consequently, the Hungarian court rejected the registration.

The CJEU held that a member state may not provide companies incorporated in it with benefits that companies from other member states do not have, if this discrimination is not justified by overriding reasons in the public interest.[42] It stated that the transfer of a company's registered office and real seat from its state of incorporation to another member state by way of cross-border conversion cannot be denied or refused by the new member state. If the new member state allows for national conversion but does not permit a cross-border conversion, then the scope of the right of establishment is affected and a denial of a cross-border conversion amounts to a restriction within the meaning of Articles 49 TFEU et seq.[43] That means the *Vale* decision permitted a transfer of the registered office by way of conversion without losing legal personality.[44]

The *Vale* decision followed on from *Sevic* where the CJEU confirmed the applicability of the Articles 49 and 54 TFEU in a cross-border merger scenario. Moreover, the CJEU successfully transferred its legal statements developed in the tax law driven case *Cadbury Schweppes*[45] into European company law. But the most important part of the *Vale* case was arguably the clarification of the *obiter dictum* in *Cartesio* and the conclusions regarding the question whether cross-border conversions fall into the scope of the right of establishment, which led to serious widespread discussions among scholars.

For the time being *Vale* is the final link in the chain of clarifications and interpretations provided by the CJEU.

8. Summary

Since *Daily Mail* in 1988, the CJEU has constantly extended the scope of the fundamental freedom of establishment. Particularly, the question whether alternative transfer forms as cross-border mergers and conversions are covered by the right of establishment, has been answered clearly in *Sevic* and *Vale*.

For a long time it seemed as if the CJEU was slowly preparing the ground for a Europe wide expansion of the incorporation theory. However, *Cartesio* made it clear that when it comes to the emigration of companies wishing to exit their member state

42 *Krarup*, (fn. 40), p. 695.

43 CJEU, case C-378/10, *VALE Epitesi kft*, ECLI:EU:C:2012:440.

44 *Hushahn*, Grenzüberschreitender Formwechsel im EU/EWR-Raum – die identitätswahrende statutenwechselnde Verlegung des Satzungssitzes in der notariellen Praxis, RNotZ 2014, p. 138.

45 CJEU, case C-196/04, *Cadbury Schweppes plc v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:544.

of incorporation, the real seat doctrine still has its place in the legal framework of cross-border seat transfers.

C. Historical background

Before analysing the general need for a Seat Transfer Directive it is essential to understand why it has not yet been adopted and what the main drivers of this lack of endorsement are. The following paragraphs give a chronological overview over the different stages and the development among the European organs involved.

The search for an appropriate directive on cross-border transfer of company seats began soon after *Daily Mail* in 1993 when the European Commission published a study on the transfer of company seats.[46] This study finally led to the preparation of the Draft Directive in 1997.

Following the preparation of the Draft Directive the European Commission launched two public consultations in 1997 and 2002. Their results highlighted the importance of an adoption. Further, the European Commission set up a "Group of High Level Company Law Experts" in September 2011 in order to initiate a legal analysis of the need to modernise European company law, including the right to transfer company seats abroad. The experts' report[47] resulted in a recommendation to the Commission to consider adopting a proposal for a Seat Transfer Directive.[48]

In response to such positive feedback, the European Commission issued an Action Plan on Modernising Company Law[49] in 2003, in which it expressly undertook to adopt a proposal for a directive on the cross-border transfer in the short term, citing it as one of its top priorities.[50] In addition, the European Commission described the possibility of corporate mobility as a helpful element in achieving the overall aim of company law, which is to foster efficiency and competitiveness of business.[51] Between 2003 and 2006 three further consultations on whether the addressees considered there to be a need for a Seat Transfer Directive were launched by the European Commission. All of them showed broad support for a Seat Transfer Directive. One of the consultations was even accompanied by an outline of the anticipated proposal.[52] During that

46 European Commission, Study on the transfer of the head office of a company from one member state to another, 1993.

47 Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, 2002, http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf (20/3/2015), p. 20.

48 *Johnson-Stampe*, The Need for a 14th Company Law Directive on the Transfer of Registered Office, 2010, https://lup.lub.lu.se/student-papers/search/publication/1715030 (20/3/2015), p. 31.

49 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 of 21/5/2003.

50 *Johnson*, Does Europe still need a Fourteenth Company Law Directive?, Hertfordshire Law Journal 3 (2005), p. 19.

51 *Johnson-Stampe*, (fn. 48), p. 32.

52 European Commission, Press Release on 26/2/2004, Company Law: Commission consults on the cross border transfer of companies registered offices, IP/04/270.

time the European Parliament expressed its view on this matter on several occasions and stressed the importance of the adoption of a Seat Transfer Directive.[53]

In light of the consultation results the European Commission published a Legislative and Work Programme[54] in 2007 which contained the clear statement of the Commission that a Seat Transfer Directive was one of its priority initiatives. However, it also stated that a final decision on the adoption is still subject to an impact assessment.

Disregarding all public support and past statements, the European Commission published an Impact Assessment[55] in December 2007 according to which it decided to suspend the work on a Seat Transfer Directive and not to submit a proposal. The Commission decided that, after having weighed up all arguments, it was not clear whether the Seat Transfer Directive was the best way of achieving the objectives and concluded that further safeguards are needed in some areas. Different positions on cross-border seat transfers would make such a directive difficult to adopt.[56] Member states would be unwilling to give up their national approaches for the sake of harmonisation. Moreover, it would be very hard to quantify the economic benefit of a Seat Transfer Directive due to lack of reliable quantity criteria. Currently only a few companies would actually make use of their right to transfer company seats to another member state. Further, there would be lack of an economic case since the Cross-Border Merger Directive would already give all limited liability companies the option to transfer their registered office by way of a cross-border merger. It would be necessary to gain experience concerning practical influence of the merger regulations.[57] Finally, the Commission made reference to the pending CJEU case *Cartesio*, which it expected to result in more clarity on the issue.

Shortly after *Cartesio*, the European Parliament published a report[58] with recommendations to the European Commission on the cross-border transfer of the registered office of a company. The European Parliament emphasized the need for a Seat Transfer Directive once again. The Parliament expressed its disappointment with the Commission's decision not to make a legislative proposal. However, none of the steps taken by the Parliament succeeded in convincing the Commission to continue with the initiative.[59]

53 European Parliament Resolution on the Commission Legislative and Work Programme for 2007, B6-0640/2006; European Parliament Resolution on recent developments and prospects in relation to company law 2006/2051(INI).

54 Commission Legislative and Work Programme 2007, COM (2006) 629 final of 24/10/2006.

55 Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007) 1707 of 12/12/2007.

56 *Wisniewski/Opalski*, Companies' Freedom of Establishment after the ECJ Cartesio Judgement, EBOR 10 (2009), p. 621.

57 Ibid.

58 European Parliament Report with recommendations to the Commission on the cross-border transfer of the registered office of a company, 2008/2196(INI).

59 *Lehne/Regner*, European Added Value Assessment 3/2012 – Directive on the cross-border transfer of a company's registered office (14th Company Law Directive), 2012, p. 11.

Only after the *Vale* case was pending in 2012, the Commission launched another public consultation on the future of company law and again the consultation resulted in a significant interest of the majority of respondents in legislative measures to facilitate cross-border transfers.[60] Driven by the revival of the discussions, the European Parliament prepared a new report[61] with further recommendations on a Seat Transfer Directive and invited the Commission to continue its work on a proposal. In order to support the work on two legislative own-initiative reports on a Seat Transfer Directive the Committee on Legal Affairs further requested an European Added Value Assessment[62] including all expected benefits arising from and issues related to a Seat Transfer Directive.

In the course of the consultation process initiated by the European Commission a new group of company law experts took the opportunity to present its updated opinion on this matter. The legal results were very similar to the first report published in 2002 and contained a strong support for the adoption of a Seat Transfer Directive.[63]

On 12 December 2012 the European Commission issued another communication to, among others, the European Parliament and the Council which shall be finalised in due course.[64] Further, a final public consultation was launched by the Commission in 2013 and all responses were summarised in the Feedback Statement. The vast majority of submissions were in favour of a Seat Transfer Directive. As at today the Commission is, however, still considering the necessity of a legislative initiative.

D. Is a 14th Company Law Directive on cross-border transfer of company seats still required?

Taking into account the existing very broad legal framework and the significant number of material European cases set out above, one questions whether there is still a legal or economic need for a Seat Transfer Directive. Such doubts are supported by the fact that the European Commission has, as described in detail above, not yet adopted such a directive, disregarding the existence of a Draft Directive for many years and the pressing demands of the public, legal experts and the European Parliament. However, the fundamental freedom of establishment and the related rules for transfer of company seats is a rather complex topic which consists of legal, political and economic dimensions. A valid analysis of any remaining necessity requires a detailed view in consideration of all affected parties and factors.

60 Ibid., p. 9.

61 European Parliament Report with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats, 2011/2046(INI).

62 *Lehne/Regner*, (fn. 59).

63 Response to the European Commission's Consultation on the Future of European Company Law by European Company Law Experts, 2012, http://europeancompanylawexperts.wordpress.com/papers-published-by-ecle/ (20/3/2015).

64 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740.

I. Lack of procedural rules

Vale clarified one of the last remaining open questions concerning the transfer of company seats, namely the legal possibility of a cross-border transfer of the company's registered office without having to dissolve and newly incorporate the company. In *Vale*, the CJEU held that a cross-border conversion which preserves the relevant company's legal identity is covered by the fundamental right of establishment.

However, even though the CJEU determined the legal ambit and existing rights, it failed to point out under which procedural framework such rights may be implemented.[65] This question is of particular practical importance. National law systems differ in many ways and a uniform approach for an identity preserving cross-border conversion does not yet exist. The same applies to national registration procedures. National registrars are potentially not familiar with identity preserving cross-border transfers. In fact, some member states do not even provide for any conversion law at all. The creation of a common and coherent solution falls into the responsibility of the European legislator. An adoption of a Seat Transfer Directive which reflects those missing procedural gaps, would lead to fulfilment of this responsibility.

II. Legal contradiction – Natural persons versus legal persons

According to Article 54 TFEU all companies or firms must, for the purposes of the Articles 49 TFEU et seq., be treated in the same way as natural persons. Nonetheless, there is a strong contradiction inherent in the comparison between the movement of natural persons and the seat transfer of companies.

A natural person moving from one member state to another will never face the risk of losing his or her citizenship because the national law of the citizen will still prevail even after relocation.[66] In contrary, according to *Überseering* and *Cartesio* the home member state may require a company, moving its real seat to another member state, to be liquidated, so that the original national law regulating the company ceases to apply.[67] Obviously, there is a certain degree of unequal treatment.

Naturally, from a legal perspective, the aforementioned circumstances are not identical. Companies cannot be granted with a citizenship and may only acquire legal personality by way of incorporation. However, the interests of both individuals and companies are similar. In order to be a beneficiary of the rights set out in Articles 49 and 54 TFEU, the relevant person (either natural or legal) must become a national of

65 *Neubauer*, Das Vale-Urteil des EuGH und die Konsequenzen für die Sitzverlegungsrichtlinie, GRIN 2012, p. 20; *Messenzehl/Schwarzfischer*, Anmerkung zur Entscheidung des EuGH vom 12.7.2012 (C-378/10; BB 2012, 2069) – Zur grenzüberschreitenden Umwandlung einer Gesellschaft innerhalb der EU, BB 2012, p. 2072.

66 *Frenzel*, Immer noch keine Wegzugsfreiheit für Gesellschaften im Europäischen Binnenmarkt – Die Cartesio Entscheidung des EuGH, EWS 2009, p. 160; *Leible*, Niederlassungsfreiheit und Sitzverlegungsrichtlinie, ZGR 2004, p. 536; LawTeacher, Free Movement of Companies, 2013, http://www.lawteacher.net/european-law/essays/free-movement-of-companies-law-essays.php (20/3/2015).

67 Ibid.

an EU member state by means of acquisition of the relevant citizenship or incorporation, as applicable. It appears to be absurd that the relevant legal person should lose its legal personality just because it exercised the rights attached to its status as national of a member state.[68] Such a result does not comply with the intention of the legislator laid down in Article 54 TFEU.

The adoption of a Seat Transfer Directive could help rectify the described inconsistencies and create a universal approach.

III. Lack of legal alternatives

Several scholars consider that the rules for seat transfers within the European Union have already been sufficiently codified.[69] They usually make reference to the existing SE Regulation and the Cross-Border Merger Directive. Others are of the opinion that open issues might be solved by harmonising and adjusting International Private Law and the relevant conflict of law rules.[70] However, these arguments and ideas are neither legally satisfactory nor do they provide sufficient clarity.

1. SE Regulation

A detailed look at the provisions shows that the real seat doctrine is predominant in the SE Regulation, since it is in fact not possible for an SE to transfer its registered office to another member state while keeping its real head office of administration elsewhere.[71] That follows from Article 7 which requires that both registered office and real head office are located in the same member state. This constitutes a deep restriction of corporate mobility and a serious competitive disadvantage for companies. As the CJEU made very clear in *Centros* and *Überseering*, the separate transfer of the real seat to another member state does per se comply with Article 49 TFEU. Further, the predominance of the real seat theory does not comply with the rules developed by the CJEU in *Vale*, which allow an independent and separate transfer of registered office with retention of legal personality by way of cross-border conversion. Such legal form of transfer is, however, not even subject of the SE Regulation. The latest developments could, however, be reflected in a Seat Transfer Directive.

As already set out above, it is worth to mention that the SE Regulation only applies to certain company forms. Other forms are completely disregarded. This is the main

68 *Schall/Barth*, Stirbt Daily Mail langsam?, Zu den Folgen von EuGH C-371/10 (National Grid Indus) für Kollisionsrecht und Wegzugsbesteuerung, NZG 2012, p. 418; *Neubauer*, (fn. 65), p. 22.

69 *Kallmeyer*, Die Mobilität der Gesellschaften in der Europäischen Union, AG 1998, p. 89; *Frobenius*, Cartesio: Partielle Wegzugsfreiheit für Gesellschaften in Europa, DStR 2009, p. 491.

70 Ibid.; *Bergmann*, Niederlassungsfreiheit: Wegzug und Zuzug von Gesellschaften in der EU, ZEuS 2012, p. 255; *Lutter/Bayer/Schmidt*, Europäisches Unternehmens- und Kapitalmarktrecht, 5th ed. 2012, p. 113, para. 83.

71 *Frada de Sousa*, (fn. 20), p. 59.

disadvantage and weakness of the regulation compared to a potential Seat Transfer Directive. Moreover, any company covered by Article 2 of the SE Regulation which intends to transfer its seat abroad would need to convert itself into an SE in its home member state before transferring its registered office. Once the transfer is complete, the transferring company must eventually convert itself back into its original form. The conversion process is a heavy administrative burden and is very time consuming and costly.[72] A Seat Transfer Directive could be a comprehensive legal framework, taking into account all possible forms of companies and save the relevant market participants time, work and costs.

2. Cross-Border Merger Directive

The legal instruments set out in the Cross-Border Merger Directive only constitute an indirect form of cross-border transfer of registered office. It will always be necessary for the relevant company to set up a subsidiary in the member state of destination before the transfer. That requires the company to devote time and effort, and creates burdensome costs. A Seat Transfer Directive could provide for a one-step approach by allowing a direct transfer without having to spend time and costs for the formation of a subsidiary.

Another effect resulting from a transfer in accordance with the Cross-Border Merger Directive is material in light of the key question. The company transferring its seat will be subsequently absorbed by the subsidiary. That means, strictly speaking, the relevant corporation is not able to retain its original legal personality and continues to exist and operate as a new legal person, which is the subsidiary as acquiring company. The legal consequences might be extensive. All assets originally owned by the transferring company will be transferred to the acquiring subsidiary automatically by operation of law. The same applies to all of the company's rights, obligations and titles. Such universal succession may trigger material tax issues, particularly in the case of transfers of real estate. As a result, the subsidiary might incur land transfer taxes.[73] These issues could only be avoided by legally permitting a transfer of registered office without forcing the relevant company to give up its legal personality. The implementation of the latter mechanism could be achieved by a Seat Transfer Directive.

3. Conflict of law rules

The idea of simply harmonising international private law and creating common conflict of law rules appears insufficient.[74] European national law systems differ signifi-

72 *Johnson-Stampe*, (fn. 48), p. 40.
73 *Neubauer*, (fn. 65), p. 21; *Wicke*, Zulässigkeit des grenzüberschreitenden Formwechsels, Rechtssache "Vale" des europäischen Gerichtshofs zur Niederlassungsfreiheit, DStR 2012, p. 1758.
74 *Kersting*, Rechtswahlfreiheit im Europäischen Gesellschaftsrecht nach Überseering, NZG 2003, p. 11.

cantly between the member states. As long as the member states do not reach a certain degree of similarity there is a huge risk that any collision of laws will lead to a "race to the bottom". The level of protection for creditors, shareholders, employees and other stakeholders as well as the scope of the freedom of establishment would be reduced to a minimum. When it comes to fundamental freedoms and the protection of market participants minimum standards cannot be the solution. Otherwise, it will become extraordinarily difficult for creditors to pursue companies and for shareholders and employees to participate and exercise influence. In the long run, stakeholders might refuse to enter into agreements with companies or to be involved in companies' business environment due to the high risk they would need to bear and the associated low level of protection. This behaviour would have a strong negative impact on the entire economic system. Thus, a Seat Transfer Directive creating harmonised standards and giving affected stakeholders an appropriate level of protection is the preferable option.

IV. Employee participation and shareholder/creditor protection

1. Employee participation

The problem of employee rights in the event of a corporate transfer from one member state to another has been one of the major sticking points of the Draft Directive debate.[75] So far, the rights of employees in a seat transfer scenario are only covered to a very limited extent. Articles 8(2)b) and 8(3) of the SE Regulation contain the obligations of the company's management or administration to draw up a report and a transfer proposal including all implications of an intended transfer for employees. These obligations provide little protection for employees since they constitute only information obligations on the management (or administrative organs) and no direct participation right for employees.

Article 8(4) of the SE Regulation on the other hand forms a direct right to review the aforementioned report and proposal and to obtain copies of those documents free of charge. Unfortunately, this provision does not mention the employees as addressees of the rights but only entitles shareholders and creditors. Given that not every employee is also a shareholder of the company, the scope of this article is highly unsatisfactory. The review right should be extended to employees. The Draft Directive already deals with this matter, although in a limited manner. It proposed to entitle employees where they formed part of the management board prior to the proposed transfer. An adoption of the Draft Directive would therefore create more protection than employees currently experience. It would also be conceivable to provide employees with a veto right.

However, in recognition of the importance of employee rights, which have been stressed by the member states regularly, the Council of the European Union has also adopted a directive supplementing the statute for a European company with regard

75 *Johnson*, (fn. 50), p. 30.

to the involvement of employees (Employee Directive).[76] The idea behind the Employee Directive was the creation of a common basis of employee protection and the harmonisation of an existing wide divergence of systems of employee involvement throughout the EU. In accordance with Article 3(1) the Employee Directive requires a relevant company to make appropriate arrangements for employee involvement. For this purpose a special employee representative body must be created pursuant to Article 3(2) of the Employee Directive.

Unfortunately, the Employee Directive basically adopts a "hands off" approach by relying initially on the concept of freedom of negotiation between the parties for the corporate form permissible under the SE Regulation.[77] Article 5 of the Employee Directive provides for a hard negotiation deadline. If the parties fail to meet the deadline by not finding an agreement within a specified time period, certain standard rules set out in Annex I to the Employee Directive apply. Those standard rules reveal a strong conflict between the challenge of keeping national law systems untouched to the extent possible and the aim of retaining rights acquired by the employees prior to the establishment of the SE.[78] Due to that conflict, the standard rules are very limited. Furthermore, the "before and after" principle set out in Recitals 18 of the Employee Directive applies. Consequently, the standard rules do not cover any employee rights acquired after the initial establishment of the SE. That means, should the SE, once established, decide to transfer its registered office, the employees will face a lower level of protection.

A higher level of protection taking into consideration employees' rights acquired after the first establishment is desirable. An appropriate framework for these adjustments could be the planned Seat Transfer Directive.

2. Creditor protection

According to Article 8(2)e) of the SE Regulation a transfer proposal must contain all rights provided for the protection of the creditors in connection with the anticipated transfer. In addition, the reporting obligation under Article 8(3) also applies to creditors. As mentioned above, those provisions are only soft information obligations and the right to review the transfer proposal and report pursuant to Article 8(4) benefits the creditors.

Further protection can be found in Article 8(7) according to which the interests of creditors must be adequately protected in accordance with requirements laid down by the member state where the SE has its registered office prior to the transfer. Accordingly, creditor rights may vary significantly from one jurisdiction to another since all member states are given discretion in forming their own creditor protection mechanism.[79] Inadequacies arising from the diversity of national law systems may be elim-

76 Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294 of 10/11/2001, p. 22.

77 *Johnson*, (fn. 50), p. 30.

78 Ibid.

79 LawTeacher, Free Movement of Companies, (fn. 66).

inated by a Seat Transfer Directive either by harmonising creditor protection mechanisms or by inserting an applicable jurisdiction clause.

Moreover, the SE Regulation is silent on the rights and priority of new creditors coming into existence after the transfer. The clarification of this uncertainty might also be a task for the proposed Seat Transfer Directive, which could either include certain priority rules or restrict the company from entering into new obligations. Naturally, the Seat Transfer Directive would also have to provide legal protection for creditors of all other company types not already covered by the SE Regulation.

3. Shareholder protection

Beside Articles 8(2)e), 8(3) and 8(4) of the SE Regulation, which all apply to shareholders, Article 8(5) entitles member states to adopt provisions to protect the rights of minority shareholders who oppose a transfer of an SE located in their territory. As it is the case with national creditor protection mechanisms, national minority shareholder rights may vary significantly. In theory, member states are free to determine applicable minority shareholder rights. However, in practice, it appears unlikely that shareholders would be given the power to block a seat transfer. A Seat Transfer Directive could define the scope of potential minority shareholder rights and provide a set of standard rules as well as extending the scope of the protection to all company forms.

V. "Legal captivity"/tax implications

The fact that the CJEU decided in *Überseering* and *Cartesio* to allow the member states to restrict an emigrating company's ability to transfer its registered seat to another host member state might in fact result in the legal captivity of the relevant companies. Should the home member state of the transferring company follow the real seat theory it will most likely make use of this opportunity and will require the company to dissolve and liquidate before establishing in the member state of destination. Should the disadvantages outweigh the benefits arising from a transfer, such legal restrictions can ultimately prevent the company from transferring its seat.

Apart from additional costs and substantial administrative work, which a dissolution and subsequent reconstitution would involve, a transferring company must also consider burdensome tax consequences.[80] Fear of tax revenue losses caused by the formation of post-box companies is in fact one of the main reasons why member states remain hostile to companies' emigration.[81] When the company departs its home state, it is in the interest of the home state to receive the tax that it considers to have fallen due, or at least to obtain security from the company in question.[82]

80 *Andenas/Wooldridge*, European Comparative Company Law, 2010.
81 *Vargova*, (fn. 18), para. 3.2.1.
82 *Johnson*, (fn. 50), p. 37.

A Seat Transfer Directive could safeguard the tax neutrality of transfer procedures. With regard to taxes still incurred before the transfer, tax-neutrality could be achieved by requiring a company transferring its registered office cross-border to leave sufficient assets in the source country or establish an explicit reserve to pay outstanding taxes to the source member state once they become due.[83] In terms of future tax liabilities coming into existence after the seat transfer, tax neutrality cannot be expected. Depending on the host member state, a seat transfer may lead to lower total tax revenues of the company. However, the choice of a member state which has less burdensome tax requirements is legitimate and covered by the freedom of establishment laid down in the TFEU. This was also confirmed by the CJEU in *Centros*.

In light of *Vale* in particular, this risk of being locked in a member state is quite paradoxical. Once established, the company must bear the risk of being locked in its state of incorporation due to a lack of agreement between the member states on allowing cross-border transfers and the scope of the real seat doctrine.[84] The CJEU made it clear in *Vale*, that it is possible for a company to transfer its registered office and retain its legal personality, and that ability in general meets the legislator's intentions and is compatible with the guaranteed right of establishment. However, such right is of no real value, if the home member state is governed by the real seat doctrine. There is no arrival without departure and no immigration without previous emigration. In other words, the effective execution of such fundamental right of establishment requires a legal symmetry in both the home and the host member state. The legal rules applying to a "move-in" scenario should also apply to a "move-out" scenario.

It is not a secret that the European Union is striving hard to maintain the national legal identity of each member state, which is per se praiseworthy. However, the CJEU revealed a serious conflict between the execution of a European fundamental freedom and the protection of national legal traditions. The preservation of national identity might have reached its limit at this point. Calls for harmonisation by adoption of a Seat Transfer Directive increase. Indeed, a Seat Transfer Directive could circumvent the above difficulties by including agreed transfer rules.[85]

VI. Efficient execution of European law

Experience shows that the efficiency of cross-border operations generally depends on the existence of a uniform legal standard coordinating the domestic laws of the member states.[86] Neither legal certainty nor efficiency can be achieved solely by the direct effect of primary law, which does not fill the gaps resulting of the inapplicability of national law.[87] In fact, this is not even the goal of primary legislation, which mainly aims to

83 Annex II to Added Value Assessment 3/2012, Economic and Social Effects of the Requested Legislative Instrument, Research Paper by London Economics, 2012, p. 45.
84 *Krarup*, (fn. 40), p. 697.
85 *Vargova*, (fn. 18), para. 3.2.1.
86 *Mörsdorf*, The Legal Mobility of Companies within the European Union through Cross-Border Conversion, CMLR 49 (2012), p. 659.
87 Ibid.

create a basic framework within which more detailed rules may develop. Only secondary legislation can provide for precise procedural measures and can define the conditions under which cross-border operations are open to companies. Therefore a Seat Transfer Directive would be the right platform to deal with these issues.

It is true that decisions made by the CJEU must be fully reflected and considered by the member states when acting across borders. However, case law is potentially subject to changes and not necessarily permanent. Further, the CJEU only deals with individual and specific facts and cases. It does not comment generally on legal questions. CJEU judgements cannot go beyond formulating certain restrictions for the operation of national laws. No fragmentary solution for a particular problem will ever produce generally satisfactory results.[88]

The courts must administer justice but not create law. The latter is the task of the legislator. Therefore, even though the CJEU has, over years, established a remarkable and extensive set of rules, those decisions will, strictly speaking, always remain a product of particular cases which will only achieve generality if they are laid down in a directive.

Moreover, the adoption of a Seat Transfer Directive would require the member states to implement the contained provisions in their national law systems. Such implementation would naturally result in more efficiency. First, national laws are better known and enjoy greater acceptance by market participants. Hence, less breaches of European law could be expected. Secondly, national courts would not only be authorised but also capable of making decisions on any seat transfer scenario without having to consult the European Court of Justice.

VII. Competitive disadvantages

It has already been discussed above that the legal possibility of the member states to impose national restrictions on companies wishing to exit their state of original incorporation and transfer their seat to another member state, is burdensome in many ways. In economic terms, such legal effect constitutes a material competitive disadvantage. The relevant company might be locked in its member state and would therefore not be able to make use of beneficial tax rules, preferable administrative procedures, more efficient protection mechanisms or cheaper cost structures dominant in other member states of the European Union. In contrast, companies incorporated under the law of a member state which follows the incorporation theory, may transfer their real seat quite easily back and forth and enjoy the benefits arising from it. It is to be expected that some companies may be dissatisfied with their business location, when compared to the location of their competitors.

88 *Wisniewski/Opalski*, (fn. 56), p. 618.

VIII. Legal certainty and clarity

The specific legal need for further harmonisation in certain fields of European company law has already been pointed out above in great detail. Large steps forward have been made. However, a Seat Transfer Directive would without any doubt take on a strong symbolic character and strengthen the trust of the member states and the individual legal persons in the European fundamental freedom of establishment.

Legal certainty may also be associated with lower administrative and legal expenses and agency costs.[89] Lack of transparency and an associated lack of knowledge about the formal execution and procedural implementation of cross-border mergers and conversions require companies to involve legal experts and to undertake a significant amount of preparation work.

Additionally, as set out above, there are several remaining problematic areas arising from the co-existence of the real seat doctrine and the incorporation theory as well as from the different aims of national law and European law which meet in these areas.[90] The case law of the CJEU does not cover all scenarios and leaves too many questions unanswered, in particular with regard to tax issues, creditor and minority shareholder protection rules and employee participation rights. The ambit of existing protection remains unclear. The SE Regulation is fragmentary and insufficient.

Furthermore, the judgments do not draw a clear line between exit and entry cases. It appears as if the CJEU in general accepts and supports the incorporation theory in entry cases but nonetheless on the other hand still respects the real seat doctrine in exit cases.[91] Such inconsistent rulings create barriers to the right of establishment and trigger a feeling of uncertainty. A Seat Transfer Directive could provide certainty and clarity.

Even more important, a Seat Transfer Directive could prepare the ground for the disappearance of conflicts and disparities between national legal systems related to the cross-border transfer of seats. Its adoption is a fundamental requirement for linking up national arrangements and making them compatible with one another.[92]

IX. Reduced minimum capital requirements vs. creditor protection

Pursuant to relevant member state legislation, companies are often required to maintain a minimum level of share capital. In Germany, for instance, the minimum share capital for private limited companies is laid down in § 5(1) GmbHG and requires them to hold 25.000 Euro of share capital. The UK Companies Act 2006 also provides for minimum share capital rules and requires private limited companies to hold £ 1 of

89 Annex II to Added Value Assessment, (fn. 83), p. 44.
90 *Johnson*, (fn. 50), p. 43.
91 *Ribeiro*, Free Movement of Companies within the EU – The Never-Ending Saga, King's Student Law Review of 17/2/2014.
92 *Vossestein*, Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment, European Company Law 6 (2009), p. 123.

share capital and public limited companies to hold £ 50,000 (section 763 para. 1(a)) of share capital.

Reduced capital requirements may strongly motivate companies to transfer their seat to another member state since such reduction would give them greater access to internal financial resources.[93] Monies that would otherwise be used to meet minimum capital requirements could then be used for productive investments. This productive use of money may bring about an increase in the level of economic activity.[94]

On the other hand, minimum capital requirements constitute one of the core elements of creditor protection. Relevant companies must procure that the share capital does not fall below a specific amount to make sure that at least a minimum amount always exists for the satisfaction of creditors' claims. That means a reduction of capital requirements also has some disadvantages. Interests of all relevant parties must be weighed and balanced.

Due to a lack of company law harmonisation in relation to capital requirements and insufficient creditor protection rules on a European level (see above), a balance between promotion of economic activity and creditors' interests does not yet exist. In fact, various national systems coexist. As long as the European Commission is reluctant to agree on common standards, this situation will not change. A Seat Transfer Directive could play a key role and provide for a link between those two opposing interests at the interfaces.

X. Group of company law experts

As stated above, on 4 November 2002 a high level group of company law experts dealt with the necessity for adoption of a Seat Transfer Directive and published the results in the report on a modern regulatory framework for company law in Europe. They pointed out expressly that there is a perceived need for action in the legislative field with regard to corporate mobility in a cross-border context.[95] The experts therefore invited the European Commission to urgently bring forward the existing proposal for a Seat Transfer Directive. Further, the experts emphasized that the areas of employee participation and board structures would be the most important open matters in the Seat Transfer Directive. They also stressed the importance of creating a legal framework under which the fundamental freedom of establishment can be guaranteed for companies by balancing all the consequences of the existing opposing establishment theories and finding a harmonised solution. The experts' demands for secondary legislative measures were very clear and strong. However, those demands originate from a time when several key decisions such as *Inspire Art*, *Sevic*, *Cartesio* or *Vale* did not yet exist. Hence, in light of such development, the experts' statements made in 2002 must be assessed very carefully and do not assist the current debate much.

93 Annex II to Added Value Assessment, (fn. 83), p. 43.
94 Ibid.
95 Report of the High Level Group of Company Law Experts, (fn. 47), p. 20.

In the course of a recent consultation process initiated by the European Commission a new group of company law experts published a written response to the European Commission's consultation on the future of European company law in May 2012 where it criticised that the court rulings have only stated certain principles without elaborating on specific steps to be undertaken in order to move to another jurisdiction.[96] The experts also emphasized the lack of clarity regarding the legal consequences of the relevant court rulings. They pointed out potential risks resulting from those uncertainties and existing ambiguity, such as administrative burdens as well as social and tax disadvantages. Further, they also draw attention to aspects which are of a rather practical nature but actually in fact restrict corporate mobility or even make it impossible. Differences in registration procedures between exit state and state of destination should be adapted precisely. Moreover, company registrars would not be well acquainted with the process of cross-border transfers and therefore might refuse to accept them. Clear instructions would be required.[97]

Making reference to the existing Draft Directive, the experts suggest compliance with basic seat transfer principles, which are mainly the non-affection of legal personality and contractual relationships of the relevant company, the protection of minority shareholders and avoidance of burdensome tax consequences.

Finally, the experts made their standpoint very clear and endorsed the arguments set out in this article. Their conviction of the need for a Seat Transfer Directive becomes even more obvious when taking into account that the adoption of a Seat Transfer Directive has been declared as a high priority project. In particular the aforementioned harmonisation of registration procedures and required instructions for registrars could be implemented by secondary legislation.

XI. Public consultation – View of the industry

As set out above, the European Commission initiated several public consultations between 2003 and 2007. After a long break, a further need to consult stakeholders became apparent after the resolution of the European Parliament on 1 September 2012 and the CJEU cases *Cartesio* and *Vale*.[98] The results of the latest consultation in 2013 were summarised by the European Commission in the Feedback Statement and reflect *inter alia* the current view of the industry. The analysis of the practitioners' view helps to understand the legal needs of the market. Given that in the end the companies themselves, their representatives, contractual partners, shareholders and employees are the ones who must face the everyday problems of business life in connection with cross-border transfers of company seats, one should assume that those parties know best whether further legislative measures are required or not.

According to the Feedback Statement, contributions were made by public authorities, trade unions, individual citizens, companies, business organisations, individuals

96 Response to the European Commission's Consultation, (fn. 63), para. 3(a).
97 Ibid.
98 European Commission Feedback Statement, (fn. 4), p. 2.

and universities. Submissions were received from 20 different member states of the European Union. Such extensive and diverse participation means the submissions provided a broad representation of society.[99]

A majority of the respondents answered that the recent CJEU case law does not provide for an adequate solution for cross-border transfer of registered offices. Most of the submissions complained about the lack of necessary clarity, certainty and uniformity, which has already been set out in detail above. Further, they stressed the insufficient protection of third parties, which the author also explained earlier. The lack of a regulatory and procedural framework was also mentioned by the respondents.

In addition, the respondents pointed out the danger of tax shopping which would not be prevented but rather supported by CJEU case law. Some submissions observed that there is an increasing number of post-box companies. In the respondents' view, the post-box companies would exploit a "legal vacuum" created by CJEU judgements by separating their registered office from their administrative seat. These structures would have an adverse impact on labour and fiscal standards and other national provisions.[100]

Other submissions made reference to the enormous expenditure of costs, time and preparation which a cross-border transfer by way of merger or conversion would cause.[101] Such expenditures would prevent smaller companies from making use of their transfer right.

Overall, the Feedback Statement and the individual responses to the consultation reveal the very clear and well-considered views of the respondents. It would be negligent to ignore their demands.

XII. Validity of European Commission's arguments

The European Commission has justified its decision in 2007 to suspend work on the Draft Directive mainly by claiming a lack of political feasibility, a lack of an economic case and on account of the pending *Cartesio* case. Now that time has passed, the legal situation developed after *Cartesio* and *Vale* and the practical influence of existing secondary law has been observed, the validity and applicability of the European Commission's former arguments should be critically reviewed again.

99 Ibid.

100 Ibid., pp. 11-12.

101 Response by the German Chamber of Industry- and Commerce (DIHK) to the public consultation on cross-border transfer of company seats of 16/4/2013, http://www.dihk.de/themenfelder/recht-steuern/privates-wirtschaftsrecht/gesellschaftsrecht-rechnungslegung/positionen/dihk-positionen/firmensitze (20/3/2015); Response by the Federal Association of the German Industry (BDI) to the public consultation on corporations with only one shareholder of 20/9/2013, http://ec.europa.eu/internal_market/consultations/2013/single-member-private-companies/docs/contributions/registered-organisations/bundesverband-der-deutschen-industrie-bdi-_de.pdf (20/3/2015).

1. Lack of political feasibility

The European Commission has argued that the various member states would be quite reluctant to step away from their own national systems. Due to this strong attachment to their traditional transfer rules, the creation of a common Seat Transfer Directive would be somewhat difficult.

It is understandable, that member states are trying to protect their national legal identity. National law systems have developed over centuries and enjoy a huge trust among nationals. Nonetheless, this is a matter of political expediency and the situation could change if the European legislator makes a sufficiently strong case.[102]

The freedom of establishment is guaranteed by the TFEU and constitutes one of the four freedoms which all aim to foster competitiveness and the welfare of all member states.[103] Considering the importance of these paramount objectives, simple political sensitivities of the member states cannot be a valid justification for rejecting reform.

Apart from political aspects, the Commission should take into account the overwhelming support for a European Seat Transfer Directive shown by the public consultation results. Practitioners and stakeholders made a very clear statement: they call for the adoption of a Seat Transfer Directive.

2. Lack of economic case

The general remark of the Commission that currently not many companies are transferring their seats abroad has no strong significance.[104] Given the current complexity and costs of transfer procedures it is neither surprising nor unexpected that only a small number of companies are willing to transfer company seats at present. A simplification and improvement of the existing legal framework could change companies' behaviour significantly.

Further, the Commission referred to existing alternative legislation. Without any doubt, the Cross-Border Merger Directive and the SE Regulation both already provide for the possibility of cross-border seat transfers. However, as set out above, it is very costly and in administrative terms very burdensome to affect a transfer using those methods. Furthermore, not all types of corporations are covered by the scope of the Cross-Border Merger Directive and the SE Regulation. Besides, a merger causes a change of legal personality which may result in disadvantageous tax requirements. The Commission's argument, in conclusion, that there would be no economic case for a Seat Transfer Directive, must therefore be dismissed.[105] A Seat Transfer Directive could in fact provide for a cost-saving and tax-neutral alternative and facilitate the transfer process by removing administrative and procedural burdens. Even more

102 *Lehne/Regner*, (fn. 59), p. 22.
103 Ibid.
104 Ibid., p. 30.
105 *Vossestein*, (fn. 92), p. 60.

important, it could create a legal basis for a "one-size fits all forms of companies" approach.

Even the possibility of a transfer by way of conversion as permitted by the CJEU in *Vale*, cannot lead to a lack of economic case. As stated before, a procedural framework for the execution of cross-border conversions does not yet exist. Some member states' national laws do not even permit such forms of transfer.

3. Cartesio

Before *Cartesio*, the European Commission and the European public hoped for final clarification. Unfortunately, neither *Cartesio* nor *Vale* brought the expected clarity and transparency. The CJEU confirmed its ruling in *Daily Mail* and did not abandon the real seat doctrine in its entirety. The two opposing theories still coexist and cause significant problems when it comes to an emigration of companies. The member states were therefore not forced to adjust and harmonise national transfer rules but rather continue to stick to their legal traditions. Other areas such as stakeholder protection and tax implications have also been left open completely. Hence, pending case law can no longer serve as a justification for a refusal to adopt a Seat Transfer Directive.

XIII. Position of the European Parliament

The right of initiative is exclusively reserved for the European Commission according to Article 294 TFEU. Therefore, the ability of the European Parliament to influence the adoption of a Seat Transfer Directive and to put some pressure on the Commission is limited. The Parliament is, however, entitled to make recommendations (Article 288 AEUV), ask questions (Article 230 AEUV) and request the Commission to submit proposals (Article 225 AEUV). Since 2006 the European Parliament has adopted several resolutions dealing with the Seat Transfer Directive. It has often emphasized the obvious need for a Seat Transfer Directive and clearly expressed its regret[106] that the Commission has not yet made an updated proposal for a Seat Transfer Directive. Furthermore, it has made use of its rights and provided the Commission with various recommendations on a potential Seat Transfer Directive.

In the Added Value Assessment and its latest Resolution[107] the European Parliament summarised its position in light of recent developments and the current legal framework. In its Resolution it stresses the fact that cross-border migration is one of the crucial elements in the completion of the internal market and draws attention to the lack of consistency in legislation on transfers and on transfer procedures.[108] The Parliament then lists the open issues, uncertainties and inconsistencies mentioned and

106 European Parliament Resolution on the European Private Company and the Fourteenth Company Law Directive on the transfer of company seat of 25/10/2007, P6_TA-PROV(2007)0491, pt. 5 and 6.

107 European Parliament Report, (fn. 61).

108 Para. A of the Resolution.

analysed above. It refers to existing disparities between the member states, insufficient clarity provided by *Cartesio*, the tax related dangers of misuse of post-box offices and the lack of protection and participation of stakeholders. Further, the Parliament supports its view by citing administrative difficulties, inappropriate cost structures and the clear demands of the public expressed via various consultations.

Moreover, the Parliament expressly calls the Commission to account by recalling that "it is for the legislators and not for the Court to establish on the basis of the Treaty the relevant measures to accomplish the freedom of a company to transfer its seat".[109]

The European Parliament as representative of the people and relevant controlling body has expressed a view which does not leave any room for interpretations. According to its resolutions, reports and statements, a Seat Transfer Directive is required.

XIV. View of the European Court of Justice

Finally, it is worth mentioning, that the European Court of Justice itself, as supreme legal authority in Europe, recently disclosed its view on the key question of this article in *Vale*. Even though it made clear that the existence of rules laid down in secondary European Union law cannot be made a precondition for the implementation of the freedom of establishment, their presence would be indeed useful to facilitate cross-border conversions.[110]

E. Draft Directive – Content and required adjustments

Now that the main question of this article has been answered positively, one should take a brief look at the practical implementation of a Seat Transfer Directive. For this purpose the author will give a general overview of the content of the existing Draft Directive and will summarise the required adjustments of the individual provisions which have already been indicated above. The author will, however, limit his analysis to the key provisions of the draft. In conclusion, the author will also present a few missing aspects which have not yet found their way into the Draft Directive.

I. Article 3 – Transfer procedure

Article 3 allows a transfer of registered office and real seat of a company in another member state with retention of legal personality. It does not require the company to be wound up or to form a new legal person in the member state of destination.

Unfortunately, the provision does not include any procedural rules. It would be desirable to specify the different forms of seat transfer such as merger, conversion or simple relocation and the practical implementation related thereto. The article, however, leaves the implementation expressly to the member states. Given the great dis-

109 Para. E of the Resolution.
110 CJEU, case C-378/10, *VALE Epitesi kft*, ECLI:EU:C:2012:440, para. 38.

parity in transfer procedures between the member states and the fact that some national law systems do not provide for the legal possibility of conversions at all, this provision needs to be adjusted. Further, as set out in detail above, the Cross-Border Merger Directive and the SE Regulation only allow very complex forms of transfer which are costly, time-consuming and burdensome. The European legislator should create a simple and cost-saving immediate transfer structure covering all forms of companies and types of transfer.

As we have learned from *Daily Mail* and *Cartesio*, member states are still able to restrict the transfer of emigrating companies. Therefore, in order to procure the effective execution of the freedom of establishment, a clear commitment to the incorporation theory and corresponding equality of emigration and immigration cases is recommendable.

II. Articles 4(1)c) and 5 – Employee participation

The employee participation rights contained in the Draft Directive essentially comply with the level of protection provided for in the SE Regulation. A company's management or administration is obliged to draw up a report and a transfer proposal including all implications of an intended transfer for all employees who formed part of the management board prior to the transfer. Beyond the rights laid down in the SE Regulation, employees may also review the relevant report and transfer proposal.

Nonetheless, the scope of employee participation rights is very limited. Taking into account the stressed importance of employee protection, one should at least expect the same level of protection as set out in the Employee Directive. In addition, those rights must be extended to employees becoming part of the company after completion of the transfer.

III. Articles 5(2) and 8 – Creditor protection

The right to review the transfer proposal and the report mentioned above does also apply to creditors. Furthermore, all creditors, whose claims came into existence before the transfer proposal is disclosed, are entitled to be granted security in their favour.

It is difficult to find a reason why the legislator did not extend the reporting obligations of the management and the administrative body to creditors. The right to review report and transfer proposal is not worth the paper it is written on, if those documents do not contain any implications for the creditors.

In addition, the Draft Directive is, unfortunately, completely silent on any rights of new creditors coming into existence after the transfer. Considering the variety of creditor protection mechanisms present throughout the member states, a harmonised approach would be helpful.[111]

111 This matter may be subject to another directive.

Finally, the legislator might consider the creation of consistent minimum capital requirements which are essential for creditor protection.

IV. Articles 5 and 7 – Shareholder protection

In the same way as creditors, shareholders are not protected by reporting obligations of the management and the administrative body. The existing review right of the shareholders in relation to transfer proposal and report is therefore only of limited use.

Article 7 leaves it to the member states to determine appropriate and reasonable minority shareholder protection rights. Due to material differences in national shareholder protection structure, a common approach would be welcome.[112] Further, a Seat Transfer Directive could provide for a set of standard rules.

V. Article 11(2) – Identity of real seat and registered office

Similar to Article 7 of the SE Regulation, Article 11(2) allows the competent registrar of companies to deny registration of a transferring company in the relevant register of the member state of destination if the real seat and the registered office are not located in the same member state. Consequently, this provision requires the real seat and the registered office to be identical and forces companies to transfer both seats simultaneously.

Article 11(2) is unlikely to be implemented.[113] Even though the TFEU is silent on this matter, the need of congruency between a real seat and a registered office would constitute an enormous restriction of the right of establishment and would therefore contradict the express aim of creating a European internal market and the idea of corporate mobility guaranteed in the TFEU. Further, this would be an immigration restriction, which appears to be even more unlikely to be acceptable in light of *Centros* and *Überseering*. The CJEU clearly stated that any requirement restricting a seat transfer or making it more difficult does not comply with the right of establishment.

VI. Missing aspects

The Draft Directive does include any rules dealing with tax requirements. Taking into account the legitimate interest of member states to receive taxes owed to them before the transfer of a company seat and the risks associated with an increasing number of post-box companies, a tax provision would be appropriate. The legislator should provide a legal concept which allows seat transfers in a tax neutral way. A suggested method is set out above.

112 This matter may be subject to another directive.
113 *Rajak*, Proposal for a Fourteenth European and Council Directive on the Transfer of the Registered Office or de facto Head Office of a Company from One Member State to Another With a Change in Applicable Law, EBLR 11 (2000), p. 43.

Moreover, it might be recommendable to include specific registration procedures along with certain instructions for the relevant national registrars in order to facilitate the administrative process of transferring seats.

F. Conclusion

The European harmonisation process has made significant progress in the field of corporate mobility since *Daily Mail* in 1988. *Vale* has already been adopted in decisions made by the courts of the member states.[114] However, with a view to the goals of achieving completion of the European internal market and fulfilling the guarantee laid down in Article 49 TFEU, further steps forward are necessary.

The adoptions of the Cross-Border Merger Directive and the SE Regulation as well as the high number of public consultations provide evidence that the European legislator has recognised the need for certain adjustments and clarifications. Unfortunately, the legislative measures did not go far enough and left many areas affected by a cross-border transfer of seats untouched. The legal framework remained fragmentary. Further, the legislator did not consider specific economic implications such as costs and administrative burdens. The Cross-Border Merger Directive and the SE Regulation provide for methods of transfer which are not suitable for all companies and are, in comparison to an immediate transfer under a Seat Transfer Directive, cumbersome and require a large amount of capital to be achieved.[115]

This article has shown that the CJEU has already set down several cornerstones for corporate mobility within the European Union. Particularly with the latest *Vale* judgment, the CJEU opened the door to a long awaited cross-border transfer of the registered office without loss of legal personality. However, none of the judgements brought the required clarity and certainty. Issues such as employee participation, creditor protection and minority shareholder protection are not fully covered by European case law. The same applies to tax implications. Further, a satisfactory approach for an equal treatment of emigrating and immigrating companies cannot be found. Given that the CJEU is only a judiciary body it cannot be expected to take over the function of the legislator and offer the same certainty. Cases will never be able to provide for as detailed rules as in a directive.[116]

Unfortunately, the European Commission expressed certain doubts about whether a Seat Transfer Directive is still necessary. In its latest action plan the European Commission considered that any future initiative in this matter needs to be underpinned by robust economic data and a thorough assessment of a practical and genuine need

114 Oberlandesgericht (Higher Regional Court) Nuremberg, ZIP 2014, p. 128; Oberster Gerichtshof (Supreme Court) Austria, AnwBl 2014, p. 504.

115 *Johnson-Stampe*, (fn. 48), p. 44.

116 Ibid.; *Böttcher*, Grenzüberschreitender Formwechsel und tatsächliche Sitzverlegung – Die Entscheidung VALE des EuGH, NJW 2012, p. 2704.

for and use of European rules on seat transfer.[117] Further, the European Parliament sent a clear warning to the European Commission by stating that a Seat Transfer Directive must not be used as an instrument for misuse of post-box offices and shell companies with a view to circumventing legal, social and fiscal conditions.[118] These warnings should not be ignored. The European market and its participants require a solid legal platform balancing economic needs and political sovereignty of the member states.

Irrespective of the risks associated with this ambitious goal, Europe needs a clearly defined and workable solution in the shape of a Seat Transfer Directive.[119] Existing political barriers have been reduced over the last few years and must be entirely removed in the near future.[120] A Seat Transfer Directive is the only way to ultimate transparency and legal certainty. It is strongly desired and enjoys wide support of the European public. Alternative models or sources cannot constitute a sufficient legal basis to cover the field of corporate mobility in its entirety. Latest initiatives of the European Commission and recent results published in the Feedback Statement offer hope that work on the existing Draft Directive will be continued shortly, disregarding the doubts expressed by the European Commission in its action plan. The history of corporate mobility taught us that legal and practical issues related to cross-border transfer of seats can only be solved and controlled if all member states pull together under a common legal framework. Far reaching and strict rules, not only concerning company law matters but also in relation to affected tax law aspects and stakeholder protection models, are unavoidable. European companies and competent authorities need clear guidance on procedural matters related to cross-border transfers.

Such guidance can only be brought by a Seat Transfer Directive which sets out the detailed procedural steps to be taken and specifies which public interests justify restrictions on the freedom of establishment. Moreover, only a Seat Transfer Directive can fill the gaps left by the CJEU, such as the legal treatment of other forms of cross-border conversions (e.g. division of companies).

At each state of progression of the internal market member states have had to accept that cherished national concepts were open to challenge and possible overruling by the European Union.[121] The abandonment of the real seat doctrine should therefore not be prevented by national traditions. In the same way, the ability to affect a separate and immediate transfer of the real seat and of the registered office of a company must be procured by a Seat Transfer Directive in order to strengthen the competition within the European Union.

117 Communication from the Commission, (fn. 64), p. 17; *Behrens*, Die grenzüberschreitende Mobilität der Gesellschaften im neuen Aktionsplan der Kommission, EuZW 2013, p. 122.
118 European Parliament, (fn. 3), p. 2; *Drygala*, Europäische Niederlassungsfreiheit vor der Rolle rückwärts?, EuZW 2013, p. 574; *Kindler*, Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH, EuZW 2012, p. 892.
119 *Johnson*, (fn. 49), p. 44.
120 *Behrens*, in: Dauses (Hrsg.), Handbuch des EU-Wirtschaftsrechts, 2014, E.III., para. 129.
121 Ibid.

The required Seat Transfer Directive must finally stop the never ending saga of the 14th company law directive. In view of the inactivity of the European Commission, the European Parliament should consider exercising its right to bring an action against the European Commission for its failure to act.[122]

122 *Leible*, in: Michalski (Hrsg.), GmbH-Gesetz, 2nd ed. 2010, Systematische Darstellung 2 – Internationales Gesellschaftsrecht, para. 57.