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TOPIC II

CROSS-BORDER TRANSFER OF COMPANY SEAT WITHIN THE EUROPEAN UNION

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CROSS-BORDER TRANSFER OF COMPANY SEAT WITHIN THE EUROPEAN UNION

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EXECUTIVE SUMMARY

The adoption of a **Fourteenth Company Law Directive on the crossborder transfer of the company seat** has been on and off the European agenda for the past 20 years. In this context, the European Parliament has consistently stressed that such a directive should strengthen **the rights of the stakeholders concerned**, in particular employees, creditors, minority shareholders and the fiscal authorities, and must not lead to a **circumvention of the legal, social and fiscal provisions** of the European Union and of the home Member State.[1]

Companies in the European Union already have **various options to transfer their registered seat to another country**. They may either rely on the guidelines established by the Court of Justice of the European Union (***CJEU***) as substantiated by national law or have recourse to existing European Law instruments such as the Merger Directive (by forming a subsidiary in the host Member State and merging it pursuant to the rules of the Merger Directive[2]) or the SE-[3]/SCE[4]-Regulation (by forming an SE/SCE and transferring its seat).

If the European Commission nevertheless submits a proposal for a directive on the crossborder transfer of seat, the following **minimum requirements** must be respected in order to protect the rights of the stakeholders concerned and to effectively combat risks of abuse:

I. Two-pronged scrutiny by the home Member State and the host Member State

Any directive on the cross-border transfer of seat should provide for a procedure based on the well-proven model of the Merger Directive (art. 10 et seq.) and the SE-Regulation (art. 8), namely providing for a **two-pronged scrutiny** of the transfer of seat by the home Member State and the host Member State:

- First of all, the authorities of the **home Member State** should check that the national **requirements for the departure** of the company are met and issue a corresponding **certificate**. This **effectively protects** creditors' rights to the provision of security by the company, minority shareholders' exit rights and rights to financial settlement as well as employees' rights to co-determination.
- Subsequently, the authorities of the **host Member State** should check the fulfilment of the conditions of **their own legislation** for the formation and registration of the company. Without this **input control**, the **high quality and reliability** of the commercial register of the host Member State would be jeopardized.

This **two-pronged examination** allows each Member State to focus on its own legislation. The national authorities are spared from applying foreign law, which

[1] Cf. Own-initiative reports of 9 January 2012 (2011/2046 (INI)), 10 March 2009 (2008/2196(INI)) and 15 December 2016 (2016/2065(INI)).

[2] Directive no. 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[3] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[4] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).

would entail considerable loss of quality and efficiency.

II. Requirement of unity of seats or at least genuine link at European level

Moreover, a future European instrument on the cross-border transfer of a company's seat should require the **simultaneous transfer of the registered office and the real seat** or at least a **genuine link** between the company and the host Member State.

An instrument that permits an isolated transfer of the registered office and thus de facto allows the conversion of the company into a **letterbox company** involves **considerable risks of abuse**. The motive for the separation of the registered office and the real seat is often the **circumvention of legal protection standards at the real seat of the company**.

In practice, the separation of seats is used by choosing a register State with **low protection standards** in order to allow for, in particular,

- circumvention of legal requirements of the home Member State, such as provisions on the **co-determination of employees** or capital maintenance rules at the real seat of the company.
- **tax evasion** (lack of knowledge of the fiscal authorities about tax-relevant transactions due to the non-intervention of bodies of preventive administration of justice),
- **money laundering** (in certain States, it is easily possible to conceal the economic beneficiary due to the absence of an identity check of the shareholders),
- **silent liquidation** (disappearance of directors and shareholders of an insolvent company to the detriment of creditors).

That is why letterbox companies are not consistent with the objectives of a functioning internal market.

The codification of the unity of seats at European level would be in-line with the *acquis communautaire* and compatible with the freedom of establishment:

The CJEU left the organization of company law up to the Member States. In particular, every Member State has the right to require the unity of seats for its own companies.[5] If Member States are free to require the synchronism between registered office and real seat, this is even more true for the European legislator.

Moreover, the CJEU has emphasized repeatedly that the concept of establishment involves the **actual pursuit of an economic activity** through a fixed establishment in the host Member State for an indefinite period.[6]

If a political compromise cannot be found on the codification of the unity of seat, a future directive on the cross-border transfer of seat should at least require the existence of a genuine link of the company to the host Member State.

[5] CJEU, Judgement of 27 September 2008, *Daily Mail and General Trust* (C-81/87, EU:C:1988:456), para. 19-21; Judgement of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), para. 110-113, 124.

[6] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440, para. 34; AG Kokott in *Polbud* (C-106/16, EU:C:2017:351), para. 38.

A. INTRODUCTION

On 10 May 2017, the **European Commission** published a **roadmap "EU Company law upgraded: rules on digital solutions and efficient cross-border operations"**,[7] according to which it envisages the publication of a legislative instrument on the **cross-border transfer of the company seat** in the last quarter of 2017 as part of its "**Company Law Package**". In accordance with the terminology used by the European Commission, the *cross-border transfer of the company seat* means the transfer of the company seat from one Member State (the ***home Member State***) to another Member State (the ***host Member State***) to the effect that the company changes its legal form while preserving its legal identity (also called ***cross-border conversion***).[8]

Since all Member States require as a condition of incorporation and continued existence of companies under their national law that these companies have a **registered office** (also called **statutory seat**) in their national territory, any cross-border conversion of a company necessarily entails the transfer of the company's **registered office**.[9] By contrast, the situation where a company merely transfers its **real seat** (also called **real seat** or **central administration**) to the host Member State, while maintaining its registered office in the home Member State, and thus remaining a company under the national law of the home Member State,[10] will in all likelihood not be regulated by the envisaged legislative instrument.

After an overview of the current status quo, this paper endeavours to define minimum requirements to be fulfilled by a future European directive on the cross-border transfer of seat.

B. TRANSFER OF SEAT AND FREEDOM OF ESTABLISHMENT

Pursuant to the finely chiseled case-law of the CJEU, the cross-border transfer of a company seat **is in principle covered by the freedom of establishment** guaranteed in Art. 49, 54 TFEU.[11] The principles established by the Court on this matter in a series of well-known and much commented decisions can be summarized as follows:

The CJEU considers that companies are creatures of national law and exist only by virtue of the national legislation which determines the connecting factor required as well as their incorporation and functioning.[12] It is therefore in principle for

[7] Available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2377472_en.

[8] Cf. Roadmap, p. 3: "*Such a framework could deal also with the cross-border conversions, namely with the question of moving the seat of companies cross-border.*"

[9] As defined eg. in articles 2a) and g) and 3 of Directive 2009/101/EC.

[10] See Judgments of 9 March 1999, Centros (C-212/97, EU:C:1999:126); of 5 November 2002, Überseering (C-208/00, EU:C:2002:632); of 30 September 2003, Inspire Art (C-167/01, EU:C:2003:512); of 27 September 2008, Daily Mail and General Trust (C-81/87, EU:C:1988:456); of 16 December 2008, Cartesio (C-210/06, EU:C:2008:723); of 29 November 2011, National Grid Indus (C-371/10, EU:C:2011:785).

[11] CJEU, Judgments of 12 July 2012, VALE (C-378/10, EU:C:2012:440), para. 24 and of 13 December 2005, SEVIC Systems (C-411/03, EU:C:2005:762), para. 19.

[12] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440, para. 31, 51; Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), para. 104 seq.; Judgement of 27 September 1988*, Daily Mail and*

the Member State of incorporation to decide whether a company formed in accordance with its legislation can transfer its seat without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, also the rules relating to that transfer.[13]

Cross-border transfer of the central administration within the EU

If the Member State of incorporation allows its companies to transfer their central administration to another Member State without losing their legal personality under the law of the Member State of incorporation, the freedom of establishment obliges the Member State to which such companies transfer their central administration to recognize them.[14] The freedom of establishment however does not prevent the Member State of incorporation to provide that its companies cannot transfer their central administration to another Member State whilst retaining their status as a company governed by the law of the Member State of incorporation.[15]

Cross-Border transfer of the registered office within the EU

Pursuant to the case law of the CJEU, the freedom of establishment prevents Member States from generally prohibiting a cross-border transfer of the registered office of a company with simultaneous change into a legal form of the host Member State (**cross-border conversion**[16]) into their territory a) if they allow domestic conversions and b) provided that the company actually establishes itself in the host Member State. Indeed, the concept of establishment presupposes **actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there**.[17] Further restrictions can be justified by overriding reasons in the public interest, such as **protection of the interests of creditors, minority shareholders and employees, the preservation of effectiveness of fiscal supervision and the fairness of commercial transactions**, provided that the restrictions are non-discriminatory and proportionate.[18]

Conversely, the home Member State must recognise the **transfer of seat of one of its companies to another Member State** leading to a conversion into a company form governed by the law of the host Member State provided that a) the conversion is allowed pursuant to the legislation of the host Member State[19] and b) the company actually intends to establish itself in the host Member State, which, as explained above, presupposes

General Trust (C-81/87, ECLI:EU:C:1988:456)*, para. 19 seq.*

[13] CJEU, Judgement of 5 November 2001, *Überseering* (C-208/00, ECLI:EU:C:2002:632), para. 70.

[14] CJEU, Judgment of 30 September 2003, *Inspire Art* (C-167/01, ECLI:EU:C:2003:512); CJEU, Judgement of 5 December 2002, *Überseering* (C-208/10; EU:C:2002:632), para. 70.

[15] CJEU, Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, para. 110); Judgement of 5 November 2001, *Überseering* (C-208/00, ECLI:EU:C:2002:632), para. 70.

[16] See also definition sub p. 5 above.

[17] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440) para. 34; see also Opinion of AG Kokott, *Polbud* (C-106/16, EU:C:2017:351), para. 35 seq.

[18] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440) para. 39.

[19] Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), para. 111; see also the interpretation of the obiter dictum by AG Kokott in her opinion in Polbud (C-106/16, EU:C:2017:351), para. 40.

actual settlement in the host Member State and the pursuit of genuine economic activity.[20]

A **cross-border conversion is not protected by the freedom of establishment where it is an end in itself, but only where it is accompanied by actual establishment**,[21] which, in turn requires the participation on a **stable and continuing basis**, in the economic life in the host Member State and therefore the **actual pursuit, in the host Member State, of an economic activity through a fixed establishment for an indefinite period**. The existence of an actual establishment in the host Member State must be determined on the basis of objective factors ascertainable by third parties.[22]

In the absence of a harmonised legal framework for cross-border conversions at European level, cross-border transfers are governed by national law, namely the law of the home Member State of the company seeking to convert and the law of the host Member State by which the company resulting from that conversion will be governed.[23] Therefore, the host Member State is entitled to apply the provisions of its national law on domestic conversions governing the incorporation and functioning of companies, such as the requirements to draw-up a balance sheet and property inventories,[24] which must however be applied in conformity with the **principles of equivalence** (cross-border conversions must not be treated less favourably than national conversions) and **effectiveness** (cross-border conversions must not be made impossible or excessively difficult in practice).[25]

C. THE CROSS-BORDER TRANSFER OF SEAT IN PRACTICE

In practice, the implementation of a cross-border conversion therefore requires the consecutive application of two national laws.[26]

In the absence of a harmonised European framework, certain Member States such as Luxemburg,[27] Spain,[28] Portugal[29] or the Czech Republic[30] have enacted **specific legislation** for cross-border transfers of seat based on the guidelines laid down by the CJUE. The Netherlands are currently in the process of enacting such legislation.

[20] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440), para. 35; see also Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), para. 54 with further references; Opinion of AG Kokott, *Polbud* (C‑106/16, EU:C:2017:351), para. 35; see also Judgement of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C 179/14, EU:C:2016:108), para. 148.

[21] Opinion of AG Kokott, *Polbud* (C‑106/16, EU:C:2017:351), para. 37; see also Judgement of 21 December, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C-179/14, EU:C:2016:108), para. 148.

[22] CJEU, Judgement of 21 December, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C 179/14, EU:C:2016:108), para. 148; Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440), para. 35; Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), para. 53 seq. with further references.

[23] Judgement of 12 July 2012, VALE (C-378/10, EU: C:2012:440), para. 43.

[24] See judgement of 12 July 2012, VALE (C-378/10, EU: C:2012:440), para. 52.

[25] See judgement of 12 July 2012, VALE (C-378/10, EU: C:2012:440), para. 48 ff.

[26] See judgement of 12 July 2012, VALE (C-378/10, EU: C:2012:440), para. 44.

[27] Art. 159 Loi concernant les lois commerciales.

[28] Arts. 92 y ss Ley sobre modificaciones estructurales de las sociedades de capital.

[29] Art. 3 Código de Sociedades comerciais.

[30] Art. 138 – 143 Act no.89/2012 Coll., Civil Code.

Other legislations contain **punctual provisions** for cross-border conversions. Italian law for example provides for a right of withdrawal of minority shareholders in case of transfer of the company to a foreign country. In France, art. L. 225-97 of the commercial code provides that the extraordinary shareholder meeting of a *société anonyme* can decide to change the nationality of the company if the host State has concluded a specific convention with France allowing the company to transfer its registered seat on the territory of the host State and acquire its nationality, while preserving its legal personality.

In countries which do not have a comprehensive set of rules to this effect, cross-border conversions are performed based on the (analogous) application of the legislation applicable to domestic conversions or the provisions of the SE-Regulation (art. 8) or the Merger Directive.[31]

During the preparation of the 4th European Congress of Notaries in Santiago de Compostela, notaries from various European Member States reported that, even in the absence of a harmonised set of European rules, cross-border conversions are performed with success on a regular basis within the European Union.

Alternatively, indirect mechanisms are available under European Law and used in practice for cross-border transfers of the seat without winding up the company in the home Member State.

An alternative which is available to all limited liability companies consists in the **merger of the company from the home Member State** with a pre-existing or a newly formed company in the host Member State.[32]

Another option would be to **convert the company into a European Company (SE) (or, depending on the case, a European Cooperative Company (SCE)** and transfer its seat to the host Member State following the procedure described in art. 8 SE-Regulation (respectively art. 7 SCE-Regulation). The option to convert into a SE is however limited to companies which a) comply with the minimum capital requirement of at least 120.000 Euro (art. 4 para. 2 SE-Regulation) and b) already operate in more than one Member State (Art. 2 SE-Regulation). Similarly, a cooperative can only convert into an SCE if it has an establishment or a subsidiary in another Member State (art. 2 para. 1 alt. 5 SE-Regulation) and a minimum capital of 30.000 Euro (art. 3 para. 2 SCE-Regulation).[33]

D. TOWARDS A HARMONISED EUROPEAN FRAMEWORK FOR THE CROSS-BORDER TRANSFER OF SEAT?

At European Union level, the introduction of a harmonised framework regarding the cross-border transfer of the company seat has been on and off the agenda since the late 1990s.

The first initiative dates back to a **preproposal of the European Commission**

[31] For Austria: *Eckert*, GesRZ 2009, 139; for Germany: *Hushahn*, RNotZ 2014, 137 seq.

[32] European Parliament, Cross-border transfer of seat, PE 583.143, p. 2.

[33] European Parliament, Cross-border transfer of seat, PE 583.143, p. 2.

for a "**Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office of a Company from One Member State to Another with a Change of Applicable Law**" of 20 April 1997.[34] The proposal was intended as a bridge between the legal systems of home and host Member States.[35] It therefore contained harmonized procedural rules for cross-border conversions intended to protect the interests of the relevant stakeholders. These rules were **mainly based on art. 8 of the SE-Regulation**, which was still being negotiated at the time (in the Council version).[36] In particular, articles 9 and 10 of the proposal provided for the **two-pronged scrutiny** of the transfer of seat by the competent authorities of home and host Member State which we know namely from art. 8 of the SE-Regulation. According to art. 11 para. 2 of the proposal, the host Member State could refuse the registration of a company if its real seat was not located in the host Member State. In the light of the principles of subsidiarity and proportionality, the European Commission explicitly **renounced to include any rules of conflicts of laws**, explaining that the harmonization of connecting factors (real seat or registered seat), which would constitute a major inference in the Member States' legislation, was not necessary to enable the cross-border transfer of seat without loss of legal personality.[37].

The initiative was however put on hold, namely because the European Commission wanted to wait for the adoption of the SE-Regulation, on which the preproposal was mainly based, and, later, the decision of the CJEU in the *Centros* case before going forward.[38]

The subject-matter was put on the agenda again in 2003 when the European Commission published its Communication called "**Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward**"[39] but the project was abandoned again in 2007 due to the **lack of economic need for a directive on the cross-border transfer of seat** as a consequence of the possibilities offered by the Merger Directive, the SE- Regulation as well as the expected decision of the CJEU in the *Cartesio* case.[40] The European Commission carried out further public consultations on the matter in 2012,[41] 2013[42] and 2017,[43] but not submitted any

[34] XV/D2/6002/97-EN REV. 2.

[35] Explanatory memorandum to the preproposal, IV.2., VII.1.

[36] Explanatory memorandum to the preproposal, IV.2., VII. 3.

[37] Explanatory memorandum to the preproposal, IV.2., V., printed in ZIP 1997, 1721, 1722; conversely, such an instrument makes it unnecessary to provide for rules on the change of applicable law consequent upon the transfer of seat in a European instrument on conflicts of laws as was suggested by the European Group for Private International Law in its draft rules on the law applicable to companies and other bodies adopted at its session in Milan, 16.-18.9.2016, available under: http://www.gedip-egpil.eu/documents/Milan%202016/GEDIPs%20Proposal%20on%20Companies.pdf.

[38] *Grundmann*, European Company Law, p. 502.

[39] COM (2003) 284 final.

[40] Cf. Impact Assessment, Sec (2007) 170, p. 38; see also *Grundmann*, European Company Law, p. 502.

[41] Public consultation on the future of European company law; see also Feedback Statement on the Future of European Company Law, dated July 2012, available at: http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf.

[42] Public consultation on the cross-border transfers of registered offices of companies; see also Feedback Statement on Cross-border Transfers of Registered Offices of Companies, dated September 2013, available

proposal as of yet even though action in this respect is announced recurrently in its policy documents.[44]

The European Parliament has repeatedly called for a directive on the cross-border transfer of seat since 2004, most recently in an own-initiative report dated 13 June 2017 (2016/2065(INI)).[45] In these reports, the European Parliament consistently stresses that a future directive on the crossborder transfer of seat should **include provisions aiming to protect the rights of the stakeholders concerned**, in particular employees, creditors, minority shareholders and the fiscal authorities,[46] and must not lead to a **circumvention of the legal, social and fiscal provisions** of the European Union and of the home Member State.[47] It further calls for a **two-pronged scrutiny** by the home and the host Member State.[48]

Depending on the results of the 2017 public consultation procedure "EU Company Law upgraded: Rules on digital solutions and efficient cross-border operations",[49] the European Commission might publish a proposal on the cross-border transfer of the company seat within the European Union as part of its "Company Law Package" announced for the last quarter of 2017. In that case, certain **minimum requirements** must be respected in order to protect the rights of the stakeholders concerned and to combat abuse of rights effectively.

E. MINIMUM REQUIREMENTS FOR A DIRECTIVE ON THE CROSSBORDER TRANSFER OF SEAT

I. Minimum requirements regarding the conversion procedure

Any harmonised European framework for cross-border conversions should be based on the well-proven model of the SE-Regulation, the SCE-Regulation and the Merger Directive:[50]

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at: http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/docs/summary-of-responses_en.pdf.

[43] Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=58190.

[44] Cf. eg. Green Paper "Building a Capital Markets Union", COM(2015), 63 final, available at: http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf, in which the European Commission announces plans for further reforms in the area of corporate law in order to eliminate existing obstacles to the cross-border mobility of companies; Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2015) 740, 4.1, available at http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120740.do; Roadmap "EU Company law upgraded : rules on digital solutions and efficient cross-border operations"of 10 May 2017 (cf. Fn 9).

[45] See namely Own-Initiative Report of 10 March 2009 (2008/2196(INI); available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0086+0+DOC+XML+V0//EN); 2011/2046(INI); Report of 2 February 2012 available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-19.

[46] Cf. eg. Recitals E, F and Recommendation 5 of the report of 10 March 2009.

[47] Cf. eg. Recital D and Recommendation No 2 para. 2 of the report of 10 March 2009: "*The transfer of the company seat must not lead to the circumvention of legal, social and fiscal conditions through the use of letter box companies and shell companies*".

[48] Cf. eg. Recommendation 4 of the report of 10 March 2009.

[49] Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=58190.

[50] See also *Schmidt*, 5.2.4., p. 35 seq.; *Verse*, ZEuP 2013, 458, 482.

These legislative instruments explicitly provide for the successive application of the legislation of the home and the host Member States regarding substantive and procedural requirements, the compliance with which the authorities of each of the involved States verify consecutively (art. 8 para. 8 and 9 SE-Regulation and art. 4 para. 1 b, art. 10 para. 2 Merger Directive).

In the same way, a **European framework for the cross-border transfer of seat** should, as the European Commission already intended in its preproposal for a Fourteenth Company Law Directive of 1997, serve as a bridge between the legal orders of the home and the host Member State and therefore **coordinate the consecutive application of the prerequisites and procedures of both States**.

A future directive on the cross-border transfer of seat should therefore provide for a **two-step scrutiny of the cross-border conversion**:[51]

In a first step, the competent authorities (court, notary or other competent authority) of the home Member State should check wether all the **acts and formalities to be accomplished before the transfer** have been lawfully completed and **issue a certificate** to this effect. The competent authority of the host Member State would namely have to check the legality of the shareholders' resolution to transfer the seat to another Member State (as to form and substance) as well as the correct implementation of the preparatory procedure (transfer plan, transfer report, independent expert report).

Subsequently, the authorities of the **host Member State** should check that the conditions of **their own legislation** for the fomation and registration of the company are fulfilled. Without this **input control**, the **high quality and reliability** of the commercial register of the host Member State would be jeopardized. As far as the **completion of the acts and formalities to be accomplished before the transfer** is concerned, the certificate issued by the authorities of the home Member State should be binding upon the host Member State.[52] They must however be entitled to verify compliance with their own national legislation as far as it is relevant for the future company (namely the legality of the articles of association –as to form and substance– and the compliance with capital maintenance requirements).[53]

This **collaborative scrutiny of the legality of the transfer of seat** enables the authorities of each Member State to focus on their own legislation, therefore enhancing the efficiency and legal certainty of the procedure.[54] It is the best way to guarantee the compliance with domestic provisions for the protection of the stakeholders that are impacted by the transfer of seat (namely minority shareholders, creditors and employees).

II. Codification of the unity of seats at European level

A future directive on the cross-border transfer of seat should however not allow

[51] See also *Schmidt*, 5.2.4., p. 35 with further references; Arbeitskreis Europäisches Unternehmensrecht, NZG 2011, 98 f.

[52] Habersack/Drinhausen/*Diekmann*, SE-Verordnung, art. 8 para. 92; NK-SE/*Schröder*, art. 8 para. 95.

[53] Habersack/Drinhausen/*Diekmann*, SE-Verordnung, art. 8 para. 91 seq.

[54] Habersack/Drinhausen/*Diekmann*, SE-Verordnung, art. 8 para. 92; NK-SE/*Schröder*, art. 8 para. 95.

the isolated transfer of the registered seat (i.e. without corresponding transfer of the central administration) due to the notorious risks of abuse connected to the separation of seats.

1. Risks of abuse connected to the separation of seats

The advocates of the isolated transfer of seat generally argue that it allows for a free competition between company laws within the European Union, therefore enabling companies to "switch to a company law regime which they view as better suited for their specific structure and needs (…), to reduce costs and improve efficiency, (…) attract investors and lenders" but also to benefit from the "higher efficiency of the judicial system of the host Member State" "a more favourable economic environment", "to be closer to important clients, or to facilitate market entry by using a legal form of the Host Member State".[55]

One must however keep in mind that it is the sole or majority shareholder(s) who take the decision to transfer the seat. Generally, an isolated transfer will therefore aim at strengthening their rights not by choosing a "better" company law, as is often argued, [56] but rather by selecting a company law with lower requirements, especially as far as the protection of minority shareholders, creditors and employees is concerned. A company that only transfers its registered office or its central administration in another country and thus separates the seats does not do it to choose a better business location, but rather to escape creditors or commit abuse of law – or as it is often euphemistically called "legal arbitrage", "insolvency migration", "regulatory arbitrage", "fiscal optimisation", "prevention of employee participation", "accounting policy" etc.[57]

Indeed, any instrument that permits an isolated transfer of the registered office of a company and thus de facto allows the conversion of the company into a **letterbox company** entails serious risks of abuse and endangers the interests of creditors, employees and tax authorities. In particular:

- The separation of seats negatively impacts **compliance with accounting publications.** Indeed, even if offshore companies actually comply with their legal obligations and register a branch office in the State where their real seat is located, only very little information is published in the Member State of the branch office.[58] In particular, the annual financial statements of the company are generally only available in the language of the registered office. Therefore, creditors in the Member State in which the real seat is situated are not informed comprehensively about the legal and economic situation. Moreover, experience shows that shareholders and management bodies of limited liability companies often renounce to register a branch office in the State of the real seat altogether. Indeed, as the

[55] *Schmidt*, 5.1., p. 32 with further references.

[56] In that sense however *Schmidt*, p. 32.

[57] *Kindler*, The Single-Member Limited Liability Company (SUP), 2016, p. 39 seq.

[58] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

registration in the State of incorporation is sufficient to achieve the limitation of liability, there is no real incentive to register a branch office where the real seat is located. The non-registration of the branch office is however generally not sanctioned. Indeed, the local registration authorities often lack knowledge of its existence and the registration authorities in the State of incorporation are generally not overly interested in an effective control of the compliance with publication requirements abroad, as business transactions in their own country are normally not concerned.

- The separation of seats is frequently used to **circumvent legal rules of the Member State where the real seat is located, such as the provisions on employee participation in the country of the real seat.** The protection mechanisms currently foreseen by European law[59] are insufficient to prevent abuse as they only freeze the level of employee participation reached before the merger/transfer of seat, therefore permitting companies to escape their obligation to guarantee higher levels of employee participation by setting up a letterbox company.
- The separation of seats **facilitates money laundering and other illegal activities**, as it allows the shareholders to transfer the seat of the company to states with lower transparency requirements and less strict checks of the identity of the beneficial owners.
- The separation of seats fosters **tax evasion through non-compliance with fiscal reporting requirements**. Indeed, in the case of a separation of seats, the fiscal authorities of the country where the real seat is located are generally informed about tax-relevant company law operations such as the transfer of shares, capital measures or the winding up of the company. This lack of information allows for the evasion of e.g. income and corporate tax as well as inheritance or real estate transfer tax. The report on the inquiry on money laundering, tax avoidance and tax evasion by the PANA committee therefore unsurprisingly points to letterbox or shell companies as a major vector for tax evasion[60] (comp. namely para. 14-16: "*14. Observes that offshore entities are often set up as shell companies, without underlying economic rationale or substance within the country of establishment; 15. Underlines that motivations for the establishment of offshore entities most often include obscuring the origins of money and assets and concealing the identity of the ultimate beneficial owner (UBO), the avoidance or evasion of inheritance or savings tax in the countries where the UBOs are residents, shielding assets from creditors or heirs, the evasion of sanctions, masking criminal activity and money laundering, or transferring*

[59] Art. 16 para. 2 Merger Directive (cross-border merger) and Art. 7 SE Directive (cross-border transfer of seat of a SE).

[60] PANA-committee, Report on the inquiry on money laundering, tax avoidance and tax evasion (2017/2013 (INI)).

assets from an individual or company to a new company without incurring the liabilities of the former; 16. Adds that in the case of multinational corporations, shell and letterbox companies are also used as part of corporate tax optimising strategies, to facilitate transfer pricing" as well as the finding in para. 137: "*Finds that through the use of trusts, shell companies, tax havens and complex international financial structures, some multinational companies and high net worth individuals have successfully shielded their fortunes from, for example, the tax authorities and others with legitimate financial claims against them, thereby rendering themselves immune by positioning their wealth in a legislative vacuum*).

- The separation of seats facilitates **silent liquidation** through the transfer of the registered office of companies encountering financial difficulties to States with low requirements as to company liquidation and transparency.

2. Solutions

Two approaches are conceivable to counteract the risks of abuse associated with the separation of seat described above.

a) Unity of seats

The most clear-cut and therefore legally certain way to avoid the risks of abuse associated with the separation of seats would be to codify the unity of seats, namely to permit cross-border conversions only in the form of a simultaneous transfer of the registered office and the real seat. This would permit cross-border conversions induced by the desire to pursue a **genuine economic activity** in the host Member State (for example due to a shift in the geographical location of the clients), while filtering out the cases of mere choice of the law applicable to the company without any underlying economic rationale. As explained above, the latter is not protected by the freedom of establishment.[61]

a.1) The principle of the unity of seats in the *acquis communautaire*

The requirement of the unity of seats has already been used in the *acquis communautaire* as a means to prevent forum shopping and abusive practices: it is codified in 8 para. 1e) AIFM Directive[62] pursuant to which alternative investment funds within the meaning of the Directive can be managed only by companies whose head office[63] and registered office are located in the same Member State in order to prevent *forum shopping* and ensure an effective state supervision. Similarly, the SE-Regulation prescribes the

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[61] CJEU, Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440), para. 35; see also Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), para. 54 with further references; Opinion of AG Kokott, *Polbud* (C-106/16, EU:C:2017:351), para. 35; see also Judgement of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C 179/14, EU:C:2016:108), para. 148.

[62] Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (2011/61/UE).

[63] Also referred to as administrative seat.

unity of seat for European Companies in its art. 7 sentence 1.[64]

The possible use of the cross-border conversions in order to circumvent legal, fiscal and social requirements of the law of the home Member State by means of letterbox companies is one of the main subjects of concern of the European Parliament as regards a future EU directive on the transfer of seat.[65] Moreover, a consultation launched by the European Commission in 2013, more than 50% of the respondents declared that the transfer of a registered office should only be possible along with a simultaneous transfer of the headquarters.[66]

Finally, the codification of the unity of seats at European level would be compatible with the freedom of establishment:

The CJEU left the organization of company law up to the Member States. In particular, every Member State has the right to require the unity of seats for its own companies.[67] If Member States are free to require the synchronism between registered office and real seat, this is even more true for the European legislator.

[64] MünchKomm/*Oechsler/Mihaylova*, art. 7 SE-VO para. 1; *Kindler*, ZHR 179 (2015), p. 330, 370 et seq.

[65] Own-initiative report of 2 February 2012 (2011/2046(INI)), Recital D and Recommendation 2, para. 2 ("*The transfer should not circumvent legal, social and fiscal conditions*"); and already the EP Resolution of 10 March 2009 (2008/2196 (INI)), Recital D as well as Recommendation 1, first sentence).

[66] Feedback Statement, Summary of Responses to the Public Consultation on Cross-Border Transfers of Registered Offices of Companies, p. 13, available at http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/docs/sum-mary-of-responses_en.pdf.

of 27 September 2008, Daily Mail and General Trust (C-81/87, EU:C:1988:456), para. 19-21; Judgement of 16 December 2008, Cartesio (C-210/06, EU:C:2008:723); para. 110-113, 124.

a.2) European Conflict-of-laws rules

The requirement of the unity of seat would also fit perfectly into the current system of European conflicts of laws rules.

In terms of conflicts of laws, the choice of the registered seat can be considered as an implied choice of law, as the choice of the registered office determines the law applicable to the company under the current *acquis*. Allowing the isolated transfer of the registered seat would therefore mean granting companies a complete freedom of choice of their legal form. Such a complete freedom would run counter to the current tendencies at European level in terms of conflict-of-laws rules:

- In the area of **insolvency law**, art. 3 para. 1 first sentence of the Regulation on insolvency proceedings[68] stipulates that insolvency proceedings have to be opened in the State within the territory of which the centre of the debtor's main interests ("COMI") is situated. This provision is intended to prevent abusive *forum shopping* through the choice of a foreign insolvency law to which the debtor has no link at all or only a minor economic link.[69]
- Pursuant to Art. 23 para. 1 Rome II-Regulation, the habitual residence of companies and other bodies, corporate or unincorporated corresponds to the place of their

[68] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[69] Cf. Own-Initiative Report of the European Parliament with recommendations in the context of EU company law (2011/2006(INI)) of 17 October 2011, Recommendation 2.2.

central administration. Therefore, the applicable tort law is determined based on the real and not the registered seat.

- Pursuant to the **principle of fiscal territoriality** recognised by the CJEU in the National Grid Indus case,[70] capital gains are taxed by the State where the company is effectively managed. The applicable tax law is therefore determined based on the **real seat** of the company.

b) Requirement of genuine link

If no political consensus can be found on the codification of the unity of seats, a European directive on the cross-border transfer of seat should at least require the existence of a **genuine link** between the company and the host Member State in order to prevent the most extreme cases of abuse through the conversion of the company into a mere letterbox company.

The requirement of a genuine link is fully compatible with the case law of the CJEU, pursuant to which the freedom of establishment gives companies the **right to choose the location of their economic activity, but not the law applicable to them**. As a consequence, a cross-border conversion is not protected by the freedom of establishment where it is an end in itself, but only where it is accompanied by **actual establishment**[71] **or at least the intention to establish such establishment.**[72] Actual establishment presupposes the actual pursuit, in the host Member State, of an economic activity through a fixed establishment for an indefinite period. It must be established on the basis of objective factors ascertainable by third parties.[73]

F. CONCLUSIONS

The adoption of a **Fourteenth Company Law Directive on the crossborder transfer of the company seat** has been pursued by the European institutions for the past 20 years and the publication of a new proposal by the European Commission is imminent.

Any future directive on the crossborder transfer of seat should be based on the well-proven models of the Merger Directive and the SE-Regulation and most importantly provide for a **two-pronged scrutiny of the transfer of seat** by the home Member State and the host Member State.

In addition, as was consistently stressed by the European Parliament,[74] such a directive must ensure that the crossborder transfer of seat does not lead to a **circumvention of the legal, social and fiscal provisions** of the European Union

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[70] CJUE, Judgement of 29 November 2011, National Grid Indus (C-371/10, EU:C:2011:785), para. 43

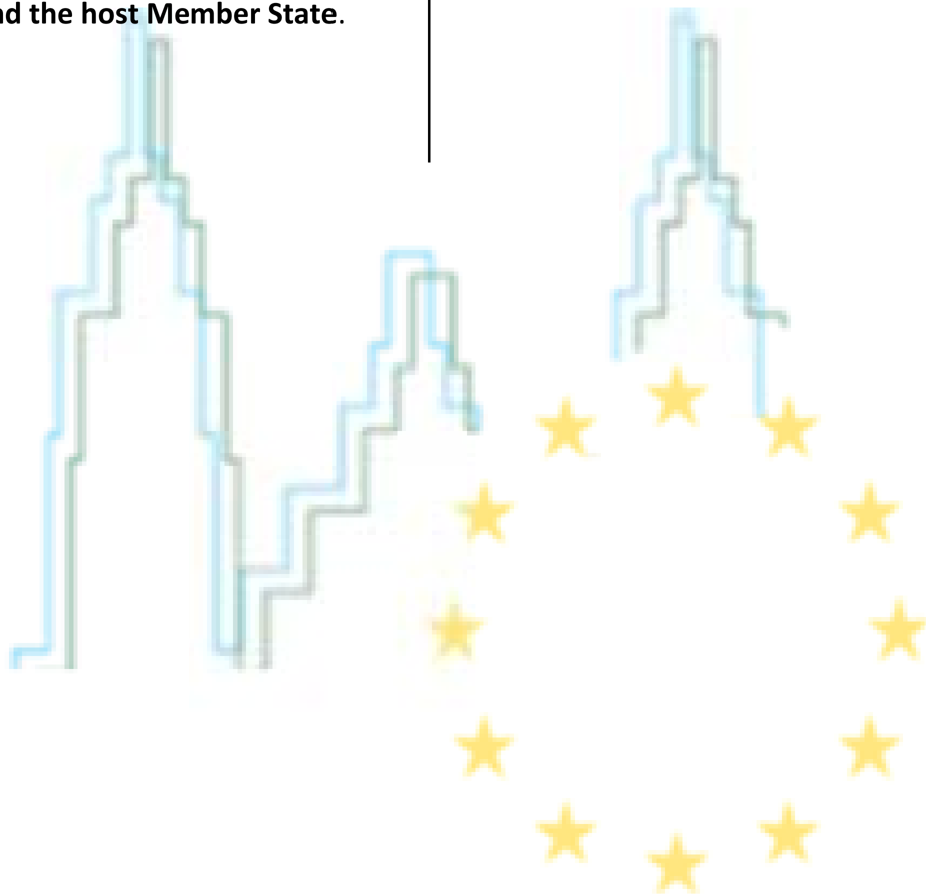
[71] Opinion of AG Kokott, *Polbud* (C‑106/16, EU:C:2017:351), para. 37; see also Judgement of 21 December, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C 179/14, EU:C:2016:108), para. 148.

[72] Opinion of AG Kokott, *Polbud* (C‑106/16, EU:C:2017:351), para. 37.

[73] CJEU, Judgement of 21 December, *AGET Iraklis* (C-201/15, EU:C:2016:972), para. 50 f.; Judgment of 23 February 2016, *Commission v Hungary* (C 179/14, EU:C:2016:108), para. 148; Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440), para. 35; Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), para. 53 seq. with further references.

[74] Cf. Own-initiative reports of 9 January 2012 (2011/2046 (INI)), 10 March 2009 (2008/2196(INI)) and 15 December 2016 (2016/2065(INI)).

and of the Member State where the central administration of the company is located and therefore prevent the cross-border conversion into letterbox companies. To that purpose, it should codify the **principle of the unity of seat** at European level or, at least, require the existence of a **genuine link between the company and the host Member State**.



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Jens Bormann is the President of the Bundesnotarkammer (Federal Chamber of Civil Law Notaries) and notary in Ratingen (North Rhine-Westphalia). He studied law at the Universities of Constance, Geneva and Harvard. After his studies, he was a research assistant at the Institute of German and Foreign Civil Procedure at the University of Freiburg where he received his doctorate in law. In 2002, he was appointed notarial candidate in Düsseldorf. From 2006 to 2011 he was Director General of the Bundesnotarkammer in Berlin. He has also been active as a member of the Advisory Board of the German Notarial Institute in Würzburg and member of the Board of Directors of the German Association of Notarial Professional Law. Mr Bormann lectures at the Faculties of Law in Freiburg and Hanover and teaches at the German Lawyers' Institute in Bochum.

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Frédéric Simon is the publisher and editor of EurActiv, the leading specialised EU media. He joined EurActiv in 2003 as a reporter to cover some of the EU's most heated policy debates such as the REACH regulation on chemicals, energy liberalisation, and the emissions trading scheme. In his current position, he oversees the editorial and IT departments of EurActiv in Brussels, Paris and Berlin while continuing to write about EU affairs with a particular focus on economic and environmental issues. Frédéric is also Brussels correspondent for France 24, the 24/7 international TV channel. He graduated in journalism from Brussels University (ULB) in 1998 and holds a Master's degree in EU politics from the Institut d'Etudes Européennes (IEE) in Brussels.

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Evelyn Regner, born in Vienna in 1966, first became a Member of the European Parliament in 2009. She is a member of the Legal Affairs Committee and the Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion, as well as substitute Member of the Employment and Social Affairs Committee and the Committee on Women's Rights and Gender Equality. Moreover, she is a member of the Delegation for relations with the countries of the Andean Community and the Euro-Latin American Parliamentary Assembly. After her law studies and her first working experience at Amnesty International, she

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Peter Scherrer was elected as ETUC Deputy Secretary General at the Paris Congress in 2015 having, previously worked for the German Metalworkers' Trade Union (IG Metall) in Frankfurt, where he held the post of European Industrial Policy officer. Before that, he spent three years (2011-2014) as Labour Director with ArcelorMittal Bremen, and was General Secretary of the European Metalworkers' Federation (EMF) from 2005-2011. Peter was born in Clarholz, Westphalia in Germany. He started his working life at the age of 14 as an apprentice metalworker, and was later employed as a welder, truck driver and postman. During the 1980s, he studied history, social sciences and journalism in Germany and the UK, obtaining a Master's degree in history from the University of Bielefeld in 1989. From 1990 onwards, Peter held a number of trade union and NGO positions in Germany and the Balkans. From 1998-2002 he was Editor-in-Chief of the South-East Europe Review for Labour and Social Affairs (SEER).

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Marius Kohler is the Vice-President of the Council of the Notariats of the European Union (CNUE) and since 2011 notary in Hamburg. He studied law at the Universities of Freiburg and Harvard. After his studies, he worked as research assistant at the Max Planck Institute for Foreign and International Criminal Law in Freiburg and the Institute for German and Foreign Civil Procedure Law at the University of Freiburg. After passing the Bar Exam at the Supreme Court of New York and working as a lawyer for the law firm GLEISS LUTZ in Stuttgart and Frankfurt, he was appointed notarial candidate in 2006. In 2007, he headed the department "notarial professional law" of the Federal Chamber of Civil Law Notaries (Bundesnotarkammer) and became its press spokesman afterwards. Between October 2007 and December 2010, he was the Head of Office of the Permanent Representation of the Bundesnotarkammer in Brussels before being appointed Director of the Bundesnotarkammer in March 2008. Ever since, Mr.

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Mónica Fuentes Naharro is a Counsel and Associate (tenured) Professor at the Complutense University of Madrid. She is a member of the European Commission's Informal Corporate Law Expert Group (ICLEG). She also represented Spain in the Company Law Working Group on the Societas Unius Personae Directive Proposal and is now the Spanish representative member in the European Model Company Act (EMCA) Group. Mónica Fuentes has a PhD in Law (magna cum laude) with a thesis on "Creditors protection in groups of companies from a company law perspective (scope, deficiencies and reform proposals)". She has also published many articles and books in the field of company law.

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Corrado Malberti has been Professor of Commercial Law at the University of Trento since 2015. From 2010 to 2015 he was tenured Associate Professor of Commercial Law at the University of Luxembourg, where, between 2014 and 2015, he was also director of the Master 1 in European Law. He graduated from the University of Milan in 2000. He completed an LL.M. at the University of Chicago in 2005 and a Ph.D. in Commercial Law at Bocconi University (Milan) in 2006. Since 2008 he has been a notary in Turin, Milan and Como. Since 2011 he has been Chair of the Company Law working group of the Council of the Notariats of the European Union. His principal research interests are national, comparative and European company law, financial market regulation and competition law. He has widely published in the fields of company law, financial market regulation and competition law in English, Italian and French.

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Peter Kindler, born in 1960, started his career as a Member of the German Bar in Munich, practising International Business Law as a lawyer (1988-1991). In 1991 he took a position as academic assistant at the Konstanz Faculty of Law, where he was appointed Lecturer in 1995 (Dr. iur. habil.). He held chairs for Corporate and Private Int'l Law in several universities (Heidelberg, Bochum, Augsburg) and since October 2011 he has held the Chair for Private and Corporate Law, Private International Law and Comparative Law at the Munich Law Faculty. Since 1994 he has been involved in research and lecturing in the field of private international law and commercial law at, inter alia, various Italian universities. In 1999, Prof. Kindler was elected secretary general of the German-Italian Lawyers' association and in 2017 the Università degli Studi del Molise/Italy conferred the degree of doctor honoris causa in Business Law upon him. Kindler is a board member of several German and Italian legal journals (Recht der Internationalen Wirtschaft; Banca, borsa, titoli di credito; Rivista di diritto civile et al.). He is also a

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Mr **Jacques DELVAUX** was appointed notary on 1 February 1980 in the Grand Duchy of Luxembourg and fulfilled this role until 31 December 2011, from which date he became an honorary notary. Having reached the age limit for performing the function of notary in the Grand Duchy of Luxembourg, he now practises as a lawyer at the Luxembourg Bar. He was President of the Chamber of Notaries of the Grand Duchy of Luxembourg for eighteen years and was elected twice (1997 and 2006) as President of the CNUE. He is a member of the Company Law Legislative Review Board and of the Legal Commission of Luxembourg's Companies Register. He gives training courses in company law for notary students in the Grand Duchy of Luxembourg. He is the author of various publications on company law.

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Erwin Roelofs (1983), a candidate civil law notary, is a member of the Corporate/M&A practice group. He specialises in and advises in particular on restructuring (cross-border mergers, conversions and divisions). In June 2014, he defended his PhD thesis entitled: 'Cross-border division of companies with limited liability' at the University of Utrecht. Erwin is a member of the Royal Netherlands Society of International Law, the International Law Association and the Vereeniging 'Handelsrecht'. He regularly publishes on cross-border restructurings in national and international literature.

ALEXANDER REBS

Alexander Rebs is an entrepreneur and CEO of REBS Zentralschmiertechnik GmbH. He is also Head of the Board of Directors of the subsidiaries REBS Lubrication Technology Ltd., Shanghai, and REBS Lubrication India Pvt. Ltd., Mumbai. Mr Rebs studied general engineering at the University of Duisburg-Essen and graduated as an engineer in 1990. After his studies, he was assistant manager and project engineer for clients in the steel and aluminium industry. REBS Zentralschmiertechnik GmbH, whose headquarters are in Ratingen, is a leading supplier of centralized lubrication systems for business clients worldwide. The family business which is a member of the sustainable development initiative "Blue Competence" of the German Mechanical Engineering Federation (VDMA) has about 80 employees on the Ratingen site and 150 in total. It generates a turnover of about 17 million euros, while the export share is about 30%.