



JUSTIITSMINISTEERIUM

NOVE
ADVOKAADIBÜROO



RIIGIKANTSELEI



Euroopa Liit
Euroopa Sotsiaalfond



Eesti
tuleviku heaks

Regulation of Cross Border Movement of Companies

Summary by research questions

**Arsi Pavelts
Epp Kallaste
Janno Järve
Urmas Volens**

02/17/2017

The study has been funded from Measure 12.2, "Improving the quality of policy making", of the Cohesion Funds 2014-2010 Operational Programme Priority Axis 12, "Administrative Capacity".

Translation by Eele Prints-De Tisi.

Contents

- SUMMARY BY RESEARCH QUESTIONS 4**
- BACKGROUND AND PURPOSE 4
- OCCURRENCES OF CROSS-BORDER MOVEMENT OF COMPANIES IN PRACTICE (RESEARCH QUESTIONS 1B–6) 5
- REASONS FOR WANTING AND FOR ABANDONING CROSS-BORDER MOVEMENT (RESEARCH QUESTIONS 1A, 7 AND 8) 9
- ALTERNATIVE METHODS AND THEIR DRAWBACKS (RESEARCH QUESTIONS 9–11) 10
- THE NEED FOR REGULATION ON CROSS-BORDER MOVEMENT AND ITS BENEFITS (RESEARCH QUESTIONS 12 AND 13) 13
- REFERENCES 17**

Summary by research questions

Background and purpose

The purpose of this research is to identify the economic and legal problems arising in Estonia from insufficient regulation of cross-border movement of companies based on the views of practitioners. For the purpose of this survey, cross-border movement is any cross-border merger that is not regulated by Directive 2005/56/EC (i.e. merger between companies other than public or private limited company), cross-border division or cross-border transfer of the registered office, i.e. cross-border conversion. This research maps the situation based on the cases related to Estonia and limits the cross-border movement of companies to the countries of the European Union. The data for the research was collected from the following countries: Estonia, Latvia, Lithuania, Germany, United Kingdom, Finland, Sweden, Denmark and Poland.

The existing legal situation is insufficient in that regardless of the European Court of Justice in many of its judgements affirming the right of companies of the EU Member States to cross-border mobility pursuant to TFEU articles 49 and 54, regardless of relevant rules existing in the EU or Member State laws (see above all cases *Sevic*¹, *Cartesio*², *Vale*³), there is no regulation on cross-border movements at EU level that would obligate the Member States to adopt relevant rules or that is directly applicable, other than on mergers in the meaning of Directive 2005/56/EC (i.e. cross-border division, cross-border transfer of the registered office and cross-border merger of companies outside the scope of Directive 2005/56/EC). The majority of Member States have failed to adopt such regulations. Cross-border movement of companies is to a certain extent possible through alternative methods, but the application of alternative methods is linked to difficulties and problems described in this research.

There was a three-stage approach to the task. First, a questionnaire survey was carried out to look for cases of companies who had considered cross-border movement and collect initial background data about them. The reach of the questionnaire was wide. It was sent to business (employer) associations and confederations representing business associations, Estonian embassies in the surveyed countries and their embassies in Estonia, bilateral commerce chambers between Estonia and the surveyed countries or other similar organisations, the Estonian Development Fund and Startup Estonia. In total, 392 invitations to participate in the survey were sent out to representatives of these organisations. In addition, invitations were sent to all lawyers registered with the Estonian Bar Association and to representatives of 219 foreign law offices that, according to websites www.chambersandpartners.com and www.legal500.com, deal with mergers and acquisitions (M&A).

After that interviews were carried out to clarify and complete the information gained from the survey, and case descriptions were written. In order to identify and describe further cases, more interviews were carried out with people recommended through the survey and with Estonian law offices. In total, 20 interviews were conducted.

Case descriptions formed the basis of the legal analysis, which assessed whether the situations described in the cases could be solved within the framework of the existing regulation and which problems could only be solved by further regulation of cross-border movement. In addition to problems raised in case

¹ [Judgement](#) of the European Court of 13.12.2005, case no C-411/03.

² [Judgement](#) of the European Court of 16.12.2008, case no C-210/06.

³ [Judgement](#) of the European Court of 12.7.2012, case no C-378/10.

descriptions, the analysis included legal issues discussed in legal literature and also issues discovered during the legal analysis itself, and their possible solutions.

The following is the summary of outcomes from all the above stages and the conclusions drawn from these outcomes by research questions.

The following questions were listed as terms of reference:

1. Respondents' awareness of starting business activities in a foreign country:
 - a. How many companies have wanted or want to in the near future to commence business activities in a foreign country and more specifically move across borders.
 - b. Have any preparations been made for cross-border movement? What kind of preparations have been made?
2. What economic activities are companies involved in that want to move across borders?
3. What types of companies are interested in cross-border movement?
4. What form of cross-border movement are companies interested in using?
5. In what direction are companies interested in moving across the border (into or out of Estonia)?
6. From which countries are companies interested in moving to Estonia and to which countries Estonian companies want to move?
7. Why are companies interested in cross-border movement?
8. Why have companies abandoned or failed to complete their movement?
9. Whether and how often the desired cross-border movement has been replaced and with what methods?
10. What are the negative consequences of alternative methods compared with forms of cross-border movement?
11. What is the cost of completely giving up on cross-border movement and alternative methods?
12. Whether and how much would introduction of a regulation solve or reduce the identified problems?
13. What would be the practical benefit of the created regulation to the Estonian companies, business environment and the economy as a whole? Whether and how would the created regulation impact the number of those wishing to move across borders?

Occurrences of cross-border movement of companies in practice (research questions 1b–6)

Cross-border movement of companies is defined fairly narrowly for the purposes of this research: cross-border merger that is not in the scope of Directive 2005/56/EC, cross-border division and cross-border transfer of the registered office (i.e. cross-border conversion). Despite the fact that this specific definition of cross-border movement was explained to respondents in the questionnaire, the topic appeared complex to many and resulted in a large number of cases submitted by respondents as cross-border movements of companies being excluded at closer examination (at interviews) as not relevant to this analysis. The respondents initially reported 62 past cases where a company had been interested in cross-border movement and 22 cases of known future interest. All these cases involved Estonia either as the country of origin or the host country⁴.

After the interviews were completed, details of the all cases clarified and some additional data gathered, **8 cases involving Estonia** were identified where a company had a real intention to move across borders but, since it was not an option, had to choose an alternative method or abandoned cross-border movement altogether. Since we cannot say about the rest of the cases reported in the survey that they were cases of

⁴ There were also cases that did not involve Estonia as the country of origin or host country.

cross-border movement of companies in the meaning of this research, we will hereby concentrate only on cross-border movement cases analysed in the interviews.

Case 1	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Investments
Size of company:	0 – 10 employees
Type of company:	Ltd
Origin and host countries of movement:	UK -> Estonia
Reason for starting business activities in a foreign country:	The owner wishes to transfer his business from the UK to Estonia and to associate himself more permanently with Estonia. The owner has Estonian e-residency
Preparations made with the intent of cross-border movement:	Consulted accountants and consultancies
Progress of cross-border movement at the time of the interview:	Cross-border transfer of the registered office was abandoned because it is not regulated and such movements are in practice executed through cross-border mergers in the meaning of Directive 2005/56/EC. The planned alternative method of merger in the meaning of Directive 2005/56/EC has been halted due to auditing and tax-related problems and obscurities
What alternative method was used?	None used

Case 2	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Timber work
Size of company:	0 – 10 employees
Type of company:	GmbH
Origin and host countries of movement:	Germany -> Estonia
Reason for starting business activities in a foreign country:	The person operating through the company wished to move to Estonia for family reasons and to “take the company along”
Preparations made with the intent of cross-border movement:	Ordered a legal analysis
Progress of cross-border movement at the time of the interview:	Abandoned
What alternative method was used?	None used as considered too costly

Case 3	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Information technology
Size of company:	0 – 10 employees
Type of company:	OÜ
Origin and host countries of movement:	Estonia -> Germany
Reason for starting business activities in a foreign country:	The company was operating both on the Estonian and German markets and wished to focus more on Germany
Preparations made with the intent of cross-border movement:	Ordered a legal analysis
Progress of cross-border movement at the time of the interview:	Used an alternative method
What alternative method was used?	A new company was established in the host country. In principle, this was a case of company being split as the owners of Estonian origin did not move together with the owners of German origin to the German company but remained instead in Estonia to run business activities only in Estonia

Case 4	
Form of cross-border movement:	Cross-border transfer of the registered office

Economic activity:	Property management and cleaning services
Size of company:	250+ employees
Type of company:	AB
Origin and host countries of movement:	Lithuania -> Estonia
Reason for starting business activities in a foreign country:	Administrative reasons, corruption in the country of origin, tax reasons
Preparations made with the intent of cross-border movement:	Ordered a legal analysis
Progress of cross-border movement at the time of the interview:	Used an alternative method
What alternative method was used?	Cross-border merger in the meaning of Directive 2005/56/EC

Case 5	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Real estate development
Size of company:	0 – 10 employees
Type of company:	OÜ
Origin and host countries of movement:	Estonia-> Latvia
Reason for starting business activities in a foreign country:	Business activities concentrated more into the host country
Preparations made with the intent of cross-border movement:	Initial legal analysis
Progress of cross-border movement at the time of the interview:	Abandoned
What alternative method was used?	None used

Case 6	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Software development
Size of company:	0 – 10 employees
Type of company:	OÜ
Origin and host countries of movement:	Estonia -> Germany
Reason for starting business activities in a foreign country:	The parent company that owns intellectual property is based in Estonia and the subsidiary that carries out business activities based on the intellectual property is based in Germany. The idea was to transfer the parent company from the Estonian register to German register as the protection of intellectual property is poor in Estonia. In addition to the above, the company's clients are big financial companies who would prefer to be in contractual relations with companies in the familiar judicial area
Preparations made with the intent of cross-border movement:	Legal solution was prepared for transferring the registered office of the company. Alternative methods were analysed first (cross-border merger in the meaning of Directive 2005/56/EC– long, complicated and costly; formation of a new company in Germany who would acquire parts of the Estonian company or the IP – unclear tax implications)
Progress of cross-border movement at the time of the interview:	Currently ongoing (awaiting the approval of all the shareholders)
What alternative method was used?	None used

Case 7	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Mediation of electronic goods
Size of company:	0 – 10 employees
Type of company:	Not known
Origin and host countries of movement:	Latvia -> Estonia

Reason for starting business activities in a foreign country:	Tax reasons
Preparations made with the intent of cross-border movement:	Initial legal analysis
Progress of cross-border movement at the time of the interview:	Abandoned (as too costly)
What alternative method was used?	None used

Case 8	
Form of cross-border movement:	Cross-border transfer of the registered office
Economic activity:	Asset management
Size of company:	0 – 10 employees
Type of company:	OÜ
Origin and host countries of movement:	Estonia-> Cyprus
Reason for starting business activities in a foreign country:	Tax reasons
Preparations made with the intent of cross-border movement:	Initial legal analysis
Progress of cross-border movement at the time of the interview:	Abandoned (as too costly)
What alternative method was used?	None used

In all eight cases, the respondents described the form of the desired cross-border movement as cross-border transfer of the registered office. Cross-border division or cross-border merger outside the scope of Directive 2005/56/EC were never considered. The bulk of the cases (seven out of eight) involved companies with less than 10 employees, only in one case there were more than 250 employees (Case 4).

Case descriptions did not reveal any dominating industries in terms of cross-border movement requirement, eight cases fell into six different economic activities:

- investments / assets management (2);
- timber work;
- information technology / software development (2);
- property management and cleaning services;
- real estate development;
- mediation of electronic goods.

In those cross-border movement cases where Estonia was the country of origin, the legal form of companies that wished to move across borders was always private limited company. In the cases where Estonia was the host country, the legal form of companies that wished to move across borders were *Gesellschaft mit beschränkter Haftung* (origin Germany), limited company (origin United Kingdom) or *akcinė bendrovė* (origin Lithuania) (the first two forms are similar to Estonian private limited company, the latter to Estonian public limited company). In one of the cases, the form of the company was unknown.

In terms of origin and host countries and the direction of movement, half the cases identified through the survey involved Estonia as the country of origin and Germany (2 cases), Latvia or Cyprus as host countries. In the opposite direction, i.e. from a foreign country into Estonia, there were also four cases originating from the United Kingdom, Germany, Lithuania and Latvia.

This research cannot provide a basis for a quantitative assessment of frequency of cross-border movement of companies and, thus, this collection of eight cases should not be considered as the quantitative representation of frequency of this phenomenon. There are no doubt more cases where cross-border movement would have been used if it was an option than this research has succeeded in identifying. From

a qualitative point of view, it can be said that the need for cross-border movement until now has been minor rather than major. We can also conclude that it is more often than not smaller companies that wish to move across borders.

Reasons for wanting and for abandoning cross-border movement (research questions 1a, 7 and 8)

Survey respondents described the reasons for wanting and later abandoning cross-border movement. Since the respondents might have lacked a comprehensive knowledge of regulations, it is important to analyse whether their expressed views were legally competent.

Based on the analysed cases, the reasons behind cross-border movement cannot be separated from other reasons for starting business activities abroad. The following reasons were named:

- company owner's wish to associate himself with the host country, moving to the host country and the resulting need to transfer the company's activities to the host country (Cases 1, 2);
- company's wish to shift business activities to the host country (Cases 3, 5, 6);
- tax and administrative reasons in the country of origin (Cases 4, 7, 8);
- better protection of intellectual property in the host country (Case 6).

None of the named reasons required the companies to use necessarily forms of cross-border movement and could have been solved by other methods of commencing business activities.

The problems that companies tried to solve through cross-border movement or that rose as part of that process were as follows:

- need to maintain legal continuity (cases described in the survey that were later not qualified as cross-border movement cases, and Case 4);
- alternative methods are complicated and costly to apply (Cases 2, 3, 4, 5, 7 and 8);
- audit-related problems (Case 1);
- tax consequences not easily forecastable (Cases 1 and 6);
- problems linked to the head office, business activities or registered office being in different countries (Cases 3, 4, and 6);
- matters related to intellectual property (Case 6);
- register-related legal obstacles (Case 6).

By the time of the interview, all the cases had conducted at least an initial legal analysis of the feasibility of cross-border movement (which in most cases concluded that cross-border transfer of the registered office was not possible). In one of the cases a comprehensive legal solution had been prepared for the transfer and the process is currently ongoing. It is unclear how it will conclude – one of the main obstacles to completing the process, according to the interviewee who described the case, was that entering a register abroad could not be the grounds for removing a company from the Estonian commercial register today.

The legal analysis carried out in this research concluded that the principal legal issue with cross-border movement of companies is the lack of national laws in regards to cross-border transfer of the registered office, cross-border division and merger of companies outside the scope of Directive 2005/56/EC. On the other hand, the legal analysis also concluded that most of the results that were expected to be achieved by cross-border movement (i.e. persons wanting to take their company with them when they move to another country, transferring business activities and the focus to another country, wanting to exchange the corrupt environment of the country of origin for a fairer business environment, wanting to move into a more favourable tax environment) can be achieved by alternative methods. It also transpired that alternative methods can create problems of varying degrees for companies.

Even if in the majority of the cases entrepreneurs would have been legally able to achieve their desired outcome by using alternative methods, the interviewees thought them to be too complicated and very costly. The research found that the lack of opportunity to transfer the registered office across borders is mainly a problem for smaller entrepreneurs, who are more sensitive to cost. In our opinion, this outcome matches the reality. Bigger companies, to whom the cost and effort that goes into alternative methods would be more proportional, would highly probably be able to make required changes also by using the existing regulation. Above all, bigger companies are able to invest in sufficiently qualified legal advisers, who can develop a package of alternative measures to support a specific goal as well as successfully implement it. In case of small entrepreneurs, bearing in mind their general volume of business, incurring such costs would not be justifiable and probably in majority of cases not even feasible. As a result, small companies tend to abandon the idea of cross-border movement, in many cases often too prematurely, without ever pursuing alternative methods for expanding their business activities abroad.

The researchers concluded that the legal problems raised in the interviews and the survey are partly adequate and relevant.

The actual main problem is that if a company wanted to perform a cross-border movement within the currently existing law, it would, in principle, only be possible pursuant to Directive 2005/56/EC or through the options available in the SE regulation. Thus, in essence, alternative methods require companies to: (1) establish a new company compliant with Directive 2005/56/EC in the host country, then merge that company with the company in the country of origin (if necessary and possible transforming it previously into a company compliant with Directive 2005/56/EC) in the way that results in one host country company, or (2) transform the existing company into an SE and in cases allowed by SE regulation change the registered office of that SE according to Article 8 of the SE regulation. The use of these two measures, however, is often significantly restricted in practice.

The authors of this research do not consider the following problems discussed earlier to be actual legal problems that could only be solved by cross-border movement or that would impede the application of alternative methods: audit-related problems, tax problems or problems related to intellectual property. In case of a cross-border merger in the meaning of Directive 2005/56/EC, the law actually permits the use of auditors from either the country of origin or from the host country and does not presume that the auditing is completed by one auditor who knows the laws of both relevant countries. Taxation issues related to cross-border movement are in practice adequately solved by tax lawyers. The transfer of an intellectual property registration from one country to another does not require any company movement at all.

Alternative methods and their drawbacks (research questions 9–11)

As this research only looks at cases related to Estonia and the Estonian law does not regulate the forms of cross-border movement under investigation, the cross-border movement in the meaning of this research is not possible today. Commencement of business activities in a foreign country is only possible through alternative methods. The following measures are available in the current law as possible alternative methods:

- shareholders of the existing company establish a new company in the host country (with or without terminating the company in the country of origin);
- the company wanting to move across borders creates a subsidiary in the host country;
- company in the scope of Directive 2005/56/EC (OÜ and AS in Estonia) performs a cross-border merger with an existing company in the host country or with a company formed in the host country for that purpose by the company's shareholders or by the company itself;
- a branch or other such place of business is created in the host country;

- the company wanting to transfer the registered office is transformed into an SE and registered in the host country;
- the assets of the company in the country of origin or the company itself are transferred to an existing company or a company to be formed in the host country.

Alternative methods were used for commencing business activities abroad only in two cases (Cases 3 and 4). In the rest of the cases the cross-border movement was abandoned altogether (Cases 1, 2, 5, 7, 8) or the process of transfer of the registered office was ongoing at the time (Case 6). In one of the cases where the activities were transferred across borders, the company used cross-border merger pursuant to Directive 2005/56/EC – merger took place with a new company (AS) that was created in the host country (Estonia) (Case 4). In the other case, a new company was formed in the host country (Germany) and the company in the country of origin also continued to exist (contrary to the initial plans) (Case 3).

Based on the interviews with lawyers, legal advisers today have a good knowledge of the alternative methods to cross-border movement and they feel secure in advising the clients in these matters.

In the situations where cross-border movement was dropped for an alternative method it happened at the early stages based on their legal advisers' recommendations. These particular cases provide no grounds for assessing possible negative consequences of the alternative methods applied in practice compared with hypothetical cross-border movement. Neither is it possible to assess on the basis of these cases the cost implication of giving up cross-border movement and alternative methods altogether. The companies that made that decision based it generally on the fact that starting cross-border business activities would be more expensive than abandoning the idea.

Using the merger pursuant to Directive 2005/56/EC as an alternative method is in practice restricted by the fact that these mergers are only possible between certain types of companies, i.e. between public and private limited companies (and also between cooperative societies in some Member States). Companies outside the scope cannot use this solution. They have to use other alternative measures, primarily, formation of a new company in the host country and liquidating the existing one in the country of origin. This requires extra work in the form of terminating the company in the country of origin, which according to law takes longer than six months as a rule and involves further costs.

As to converting into an SE as an alternative method, it is clear that using the SE route, which is a less known company format, is beyond the reach of smaller companies (because of the subscribed capital requirement for the SE and also relevant legal services can cost up to tens of thousands of euro) and is somewhat alien as well as time consuming (2 – 4 months). Article 4 of the SE regulation states that the subscribed capital of an SE should not be less than 120 000 euros. Another thing to bear in mind is that Article 2 of the SE regulation sets a cross-border criteria for the establishment of an SE. The regulation regarding SEs is complex also because it is spread across the SE regulation and the specific laws that each of the EU Member States have adopted to implement this regulation, which all include the specific characteristics of each Member State and which are additionally governed by national company laws to the extent determined by each Member State. In addition, the rules for employee participation in SE management are somewhat foreign in the Estonian context⁵. An additional restriction to be aware of is from Article 66 of the SE regulation, stating that an SE cannot be transformed back into a public limited company before two years after its registration or after the first two financial statements have been approved. This means that once the SE route has been chosen the company has to remain in that form for the prescribed period and resuming the initial form before the time is up is not an option. Another restriction

⁵ Council Directive 2001/86/EC.

that applies to SEs is that their registered office and the head office have to locate in the same Member State⁶, whereas for other forms of company it depends on the national law of the relevant Member State and there are countries that do not require the registered office and the central administration to be in the same place.

Other alternative methods available, besides the cross-border merger pursuant to Directive 2005/56/EC and commencing business activities abroad by establishing an SE, also have their restrictions. If the shareholders of a company that wants to move into another Member State form a new company, which allows them to begin their business activities in the host country, the company in the country of origin will continue to exist. If that company then becomes surplus to requirements, a liquidation will have to be carried out. This would not be necessary in cross-border movement as the host country company would be the legal successor or even identical (incl. responsible for all its liabilities) to the country of origin company, and in those cases the liquidation of the country of origin company is not required as a rule. The requirement to initiate liquidation proceedings means that there is a period determined by national laws of each Member State (usually more than six months) during which the activities in the country of origin cannot be wound up, plus significant costs are involved related to the liquidator's fee, legal services, communication with creditors and publication of notices. Depending on the Member State, carrying out a liquidation procedure could also be tax-wise less beneficial than compared to a situation where a simpler procedure of cross-border movement was possible. If liquidation proceedings are not initiated, as a rule, sanctions will apply to the members of the company's management body. When a new company is formed in the host country and the original company in the country of origin is liquidated, the new company as a rule is not the legal successor of the original company.

Forming a subsidiary in the host country allows to commence business activities in that country, but once again, this alternative method does not provide a way for terminating the company in the country of origin without liquidation proceedings or a further cross-border merger. Establishing a branch in the host country means that the termination of the country of origin company is in principle excluded altogether since a branch is not an independent legal subject and cannot exist independently from the company in the country of origin. Even if the company in the country of origin transfers its assets or its subsidiary to the host country company, it is impossible to terminate its activities in the country of origin without liquidation proceedings.

Cross-border division is not possible under the Estonian law as there is no relevant regulation on register proceedings and even if, in theory, the rules of court proceedings applicable to register proceedings would allow to invoke the provisions of national divisions based on analogy, there is no judicial practice to allow such proceedings. No reasonable alternative method exists for cross-border division besides forming a new company in the host country and then transferring the enterprise or other assets of the company in the country of origin to the new company.

In the light of the problems raised it is understandable that in many cases when the cross-border movement is put aside because the initial legal analysis concludes the impossibility within the current law, then the whole idea of commencing business activities in another country is also abandoned. Thus, companies give up both cross-border movement and the alternative methods. Mergers in the scope of Directive 2005/56/EC involve some significant extra procedures, which would actually not be necessary if relevant national or international regulation for cross-border movement existed. Such extra procedures are formation of a new company in the host country or signing a merger agreement with the existing company, transfer of the assets of the country of origin company being acquired to the acquiring company, determining the

⁶ The SE regulation, Art. 7.

exchange ratio for shareholders' shares, compiling merger reports for all the merging companies, etc. Therefore, it can be concluded that cross-border merger in the meaning of Directive 2005/56/EC is a measure that allows to achieve the end result comparable to cross-border transfer of the registered office, but it is more time-consuming and costly compared to the procedures that would have had to be carried out if cross-border transfer of the registered office was a possibility in law.

In the described cases where cross-border transfer of the registered office was not completed after the results of the legal analysis, it would have still been possible to achieve the desired result within the current law. The desired result in all the cases was for the company to transfer the registered office across borders, i.e. to operate in the host country and be registered in its register. The alternative methods would have achieved this result in all the cases. Above all, this could have been done by forming a new company in the host country and/or by cross-border merger in the meaning of Directive 2005/56/EC. At the same time, the research team has to agree with the interviewees that the costs involved with alternative methods would have been higher (depending on the method from a few thousand to tens of thousands of euros) compared to the option of transferring the registered office.

In summary, we have to conclude that the fact that the current law lacks regulation on cross-border movement and that in principle it is only possible through the use of restricted alternative methods with the above-described problems is not a satisfactory outcome.

In addition to what the interviewees said about the high cost of alternative methods, the application of these methods is also linked to many complementary negative consequences: time-consuming; bigger administrative burden; involves in some cases procedures that would not be required if the regulation existed; in some cases have to retain the original company in the country of origin without a real need for it; loss of legal continuity, incl. losing the chance to rely on previous experience in public procurements or receiving various research and development grants; inadequate protection of employee and shareholders' rights; risk damaging company's reputation and credibility.

The need for regulation on cross-border movement and its benefits (research questions 12 and 13)

There is a need for further regulation of cross-border movement. The Estonian legislator on its own cannot solve the issue of providing cross-border movement by supplementing Estonian laws with provisions for cross-border transfers of the registered office, cross-border divisions and cross-border mergers outside Directive 2005/56/EC. Without the relevant regulation in other EU Member States the cross-border movement of companies would remain an impossibility.

The majority of the survey respondents who expressed their opinion on this⁷ and the interviewees reached the same conclusion. Most of respondents and interviewees believed that regulating cross-border movement at EU level would help to solve the problems that in their opinion obstructed the commencement of business activities across borders. Those respondents and interviewees who had a view felt that a regulation on cross-border transfer of the registered office should be created at EU level rather than at national level. They also believed that the new regulation would help to keep the costs down and promote cross-border mobility of companies.

The authors would, in principle, have to agree with these opinions. In the described legal situation, the only effective solution to the problems would indeed be creation of a relevant regulation. The potential new regulation would prescribe what procedures would have to be followed in the country of origin by the

⁷ About the same number could not comment on whether the regulations need improving.

company wanting to transfer the registered office and the registrar to enable the movement and provide adequate protection of interests for company's creditors and shareholders, and what procedures would be necessary in the host country to register the company. Maintaining *status quo* or using alternative measures to changing the regulation – training for entrepreneurs, creation of consultancy systems, etc. – would not solve the described problems.

Since cross-border transfer of the registered office can only work if the regulation enabling relevant procedures exists both in the country of origin and the host country, it is clear that this regulation can be effective only if it ensures that these provisions exist in the laws of all the EU Member States or internationally even more widely. Thus, the best solution is regulation at EU level. Although putting in place an EU regulation is extremely time- and resource-consuming, the research team believes that only this kind of regulation can guarantee that the necessary national regulations are introduced by the legislators of all EU Member States, and only if underlying principles for the regulation are agreed in advance would these regulations by national legislators be compatible with each other.

This conclusion coincides with the results of the survey and the interviews where people believed that a relevant new regulation would solve these problems at EU level. The following reasons were given in the survey as free text answers to why common EU regulation would be required:

- increased attractiveness of the European Union as a whole as an area for company seats;
- creating an easier and more cost effective way for companies to move across borders and simplifying cross-border business;
- the fact that the regulations of some countries (e.g. Luxembourg) offer better options for cross-border movement damage the single market and provide a competitive advantage;
- putting in place a framework for regulating divisions would allow for clearer rules to be established in this area, which would increase legal certainty.

Among the reasons against further regulations, the most common was the fear that easier cross-border movement would result in exploitative abuse and that simpler regulation would make leaving Estonia easier for companies and the Estonian economy would suffer as a result. The latter concern is realistically unjustified as with the help of alternative methods companies can already start up in foreign countries, although it is rare in practice. Bigger companies that start business activities abroad are probably less concerned about the number and complexity of company law procedures and more about the practical matters that need solving (i.e. complexity of the legal environment as a whole, finding employees in the host country, guaranteed access to resources, etc.)

Exploitative abuse of the possibility to transfer the registered office across borders as a way of evading the claims of creditors and tax administrators or hindering the assertion of claims is certainly an important issue. However, the above risks and counter arguments to the regulation do not outweigh the problems caused by the lack of regulation on cross-border movement. Although the existing need for the movement is not great and does not concern a large number of entrepreneurs daily, the described problems cannot be solved without supplementing the laws.

At the same time, it is somewhat questionable whether the potential supplemented regulation would provide a complete solution to the problems that are currently linked to the complexity and cost of starting business activities across borders. For this purpose, the potential future regulation must also contain adequate measures for the protection of creditors (incl. tax administrator of the country of origin) and minority shareholders of the company interested in cross-border transfer, similarly to the existing regulation on cross-border merger (cf. the Estonian Commercial Code, Section 433¹ et seq.). The regulation on cross-border transfer or division must also ensure that the company that is registered in the host country

would substantively meet the same company law requirements that apply to the host country companies. This would, in essence, mean reorganising the country of origin company according to the company rules of the host country. Thus, there are no grounds to believe that the regulation on movement would become very much easier or cheaper.

As to **economic benefits resulting from the regulation** of cross-border movement, other than generally improving the Estonian business climate, it is doubtful the potential new regulation would have a significant impact on the Estonian economy. Although the European Commission⁸ concluded in its Country Report Estonia 2016 that the lack of options for cross-border movement of certain companies weakens the Estonian business environment, the Report does not contain a clear mechanism of how putting such a regulation in place would support the development of the Estonian economy. It would therefore be beneficial to look at it in more detail here.

Enabling cross-border movement of companies would have a positive effect on the Estonian economy primarily if this resulted in more companies moving to Estonia and creating added value and providing jobs for people. Thus, the positive effects of cross-border movement of companies appear in a multi-layered process – first, there must be a wish to start or expand business activities in Estonia, then, if there is a wish, the option of cross-border movement makes it possible to fulfil the wish and that would allow for all the positive effects relating to starting business activities or expansion to reveal.

A competitive economic environment consists of many different well-fitting components and the aspects of the company law regulating cross-border movement of companies is a part of it. Sensible regulation of these matters is a positive in itself.

A more specific reason why cross-border movement of companies could benefit the Estonian economy is the outcome of the recent referendum in the United Kingdom, where the majority supported leaving the EU. There are companies in the UK for whom access to the single market is critical and who may therefore wish to transfer their activities from the island to the continent. Since Estonia actively develops e-residency, which provides foreign citizens with a secure access to Estonian public e-services and allows to manage a company registered in Estonia from outside Estonia, it would potentially make Estonia even more attractive to companies whose owners would be interested in an EU company but would prefer not to leave the UK permanently themselves.

At the same time, there is no reason to believe that regulating cross-border movement of companies on its own would have a strong impact on the Estonian economy. First, because the need for cross-border movement is minor and, based on the experience of this research, concerns mostly smaller companies. Second, companies would probably start to move to Estonia in larger numbers if the Estonian business environment as a whole was significantly better than in other (nearby) countries, i.e. presence of a very clear advantage to prefer Estonia to other countries. The Estonian business environment today, however, is not significantly better (or significantly worse) than in the neighbouring countries. In terms of ease of doing business, Estonia's neighbours are in a very similar position, but we also have an acute work force shortage, a small population (and, thus, a small internal market) and the current security policy situation (cf. countries of North- and Central-Europe) does not help either. For these reasons, we cannot expect the improved cross-border movement options to have a great impact on the Estonian economy.

⁸ See the European Commission (2016) Commission Staff Working Document, Country Report Estonia 2016, Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, Brussels, 26.2.2016 SWD(2016) 76 final, p 58.

However, the above should not be interpreted as saying that there is no benefit in regulating cross-border movement of companies. As mentioned before, simple, clear and transparent rules and a considered company law are all part of a competitive economic environment. It is therefore that the authors of this research believe that pursuing the regulation of cross-border movement is worthwhile.

In the conclusive view of the research team, simply supplementing and simplifying the regulation on cross-border movement is not a measure that would significantly impact the number of companies moving across borders, since currently only a few small companies fail to expand their business activities through alternative methods. At the same time, it would certainly make commencing business activities in another country somewhat easier for those companies that plan to do it for some other reasons.

References

- Bech-Bruun, Lexidale (2013) [Study on the Application of the Cross-Border Mergers Directive](http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf), Bech-Bruun ja Lexidale International Consulting, uuring Euroopa Liidu Siseturu ja Teenuste Peadirektoraadile. http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf (13.01.2017).
- Belgia Code on Private International Law 16.06.2004. <http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf> (13.01.2017).
- Eesti Konjunktuuriinstituut (2016) Konjunktuur 1 (196), http://www.ki.ee/publikatsioonid/Konjunktuur_nr1_2016_196.pdf (13.01.2017).
- Euroopa Kohtu 12.7.2012 otsus kohtuasjas nr C-378/10, äriregistrise kandmise taotlus, mille esitas VALE Építési kft, ELT C 287, 22.09.2012, lk 3. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:62010CA0378> (13.01.2017).
- Euroopa Kohtu 13.12.2005 otsus kohtuasjas nr C-411/03, Sevic Systems AG, ECLI:EU:C:2005:762. <http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1413731175114&uri=CELEX:62003CJ0411> (13.01.2017).
- Euroopa Kohtu 16.12.2008 otsus kohtuasjas nr C-210/06, Cartesio Oktató és Szolgáltató bt, ECLI:EU:C:2008:723. <http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1413730965071&uri=CELEX:62006CJ0210> (13.01.2017).
- Euroopa Kohtu eelotsusetaotlus kohtuasjas nr C-106/16, mille on esitanud Sąd Najwyższy (Poola) 22.02.2016 – Polbud – Wykonawstwo sp. z o.o. (likvideerimisel), ELT C 211, 13.06.2016, lk 23–24. <http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1479991662722&uri=CELEX:62016CN0106> (13.01.2017).
- Euroopa Komisjon (2007) Impact assessment on the Directive on cross-border transfer of registered office. SEC (2007) 1707, Brüssel, 12.12.2007. http://ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf (17.01.2017).
- Euroopa Komisjon (2011) Report of the Reflection Group on the Future of EU Company Law, Siseturu ja teenuste peadirektoraat, Brussels 5.04.2011. http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf (13.01.2017).
- Euroopa Komisjon (2013) Konsultatsioon äriühingute registrijärgse tegevuskoha piiriülese üleviimise kohta, Siseturu ja teenuste peadirektoraat. http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm (17.01.2017).
- Euroopa Komisjon (2014) Konsultatsioon piiriüleste ühinemiste ja jagunemiste kohta, Siseturu ja teenuste peadirektoraat. http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm (17.01.2017).
- Euroopa Komisjon (2015) Roheline raamat. Kapitaliturgude liidu loomine. COM(2015) 63 final, Brüssel, 18.2.2015. <http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=COM:2015:63:FIN&from=ET> (17.01.2017).
- Euroopa Komisjon (2015) 201. aasta teatis Euroopa Parlamendile, Nõukogule, Euroopa Majandus- ja Sotsiaalkomiteele ning Regionide komiteele „Ühtse turu täiustamine: rohkem võimalusi inimestele ja ettevõtetele“, COM(2015) 550 final, Brüssel 28.10.2015. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:52015DC0550> (17.01.2017).

Euroopa Komisjon (2016), Komisjoni 2017. aasta tööprogramm. Luues Euroopat, mis hoiab, kaitseb ja avardab võimalusi. COM(2016) 710 final, Strasbourg 25.10.2016. http://ec.europa.eu/atwork/pdf/cwp_2017_et.pdf (17.01.2016).

Euroopa Komisjon (2016) Eestit käsitlev 2016. aasta aruanne, mis sisaldab põhjalikku analüüsi makromajandusliku tasakaalustamatuse ennetamise ja korrigeerimise kohta, Euroopa Komisjoni talituste töödokument, SWD(2016) 76 final, Brüssel, 26.02.2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_estonia_et.pdf (13.01.2017).

Euroopa Parlamendi 10.3.2009 resolutsioon soovitud komisjonile äriühingu registrijärgse asukoha piiriülese muutmise kohta, ELT C 87E, 01.04.2010, lk 5–9. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0086+0+DOC+XML+V0//ET> (13.01.2017).

Euroopa Parlamendi 14.06.2012. aasta resolutsioon Euroopa äriühinguõiguse tuleviku kohta (2012/2669(RSP)), ELT C 332E, 15.11.2013, lk 78–81. <http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1408967505027&uri=CELEX:52012IP0259> (13.01.2017).

Euroopa Parlamendi ja Nõukogu direktiiv 2005/56/EÜ, 26. oktoober 2005, piiratud vastutusega äriühingute piiriülese ühinemise kohta, ELT L 310, 25.11.2005, lk 1–9. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:32005L0056> (13.01.2017).

Euroopa Parlamendi ja Nõukogu direktiiv 2006/123/EÜ, 12. detsember 2006, teenuste kohta siseturul, ELT L 376, 27.12.2006, lk 36–68. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=celex%3A32006L0123> (13.01.2017).

Euroopa Parlamendi ja Nõukogu direktiiv 2009/101/EÜ, 16.09.2009, tagatiste kooskõlastamise kohta, mida liikmesriigid äriühingu liikmete ja kolmandate isikute huvide kaitseks asutamislepingu artikli 48 teises lõigus osutatud äriühingutelt nõuavad, et muuta sellised tagatised võrdväärseteks, ELT L 258, 1.10.2009, lk 11–19. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX%3A32009L0101> (13.01.2017).

Euroopa Parlamendi ja Nõukogu määrus (EÜ) nr 1896/2006, 12.12.2006, millega luuakse Euroopa maksekäsmenetlus, ELT L 399, 30.12.2006, lk 1–32. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX%3A32006R1896> (13.01.2017).

Fleischer, H., Goette, W. (toim) (2015) Münchener Kommentar GmbHG, 2. trükk.

Henssler, M., Strohn, L. (2016) Gesellschaftsrecht, 3. trükk, Verlag C. H. Beck oHG.

Hispaania Sobre modificaciones estructurales de las sociedades mercantiles, 3/2009, 3.04.2009.

Justiitsministeerium (2016) Ühinguõiguse revisjoni lähteülesanne, seisuga 10.05.2016. http://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_lahteulesanne_loplik_10.5.2016.pdf (17.01.2017).

Küprose Cyprus Companies Law. [http://www.olc.gov.cy/olc/olc.nsf/all/E1EAEB38A6DB4505C2257A70002A0BB9/\\$file/The%20Companies%20Law,%20Cap%20113.pdf?openelement](http://www.olc.gov.cy/olc/olc.nsf/all/E1EAEB38A6DB4505C2257A70002A0BB9/$file/The%20Companies%20Law,%20Cap%20113.pdf?openelement) (13.01.2017).

Luksemburg Act of 10 August 1915 on commercial companies. <https://www.nautadutilh.com/siteassets/documents/luxembourg-act-of-10-august-1915.pdf> (13.01.2017).

Malta Continuation of Companies Regulations, S.L. 386.05, 26.11.2002. <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10494> (13.01.2017).

Nõukogu direktiiv 2001/86/EÜ, 8.10.2001, millega täiendatakse Euroopa äriühingu põhikirja töötajate kaasamise suhtes, ELT L 294, 10.11.2001, lk 22–32. <http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:32001L0086> (13.01.2017).

Nõukogu määrus (EÜ) nr 1435/2003 Euroopa ühistu (SCE) põhikirja kohta, ELT L 207, 18.08.2003, lk 1–24.

Nõukogu määrus (EÜ) nr 2157/2001, 8.10.2001, Euroopa äriühingu (SE) põhikirja kohta, ELT L 294, 10.11.2001, lk 1–21. <http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=celex:32001R2157> (13.01.2017).

OLG Nürnberg, 19.06.2013 otsus nr 12 W 520/13 – NZG 2014.

Portugal Código das Sociedades Comerciais, 262/86, 02.09.1986.

Prop, F., Felleisen, F. (2014) Grenzüberschreitende Sitzverlegung nach Deutschland bei gleichzeitiger Umwandlung in eine GmbH – der Durchbruch? [AnwaltZertifikatOnline 9/2014, Handels- und Gesellschaftsrecht. http://www.grooterhorst.de/de/AnwZert-HaGesR_09_2014.pdf](http://www.grooterhorst.de/de/AnwZert-HaGesR_09_2014.pdf) (13.01.2017).

Riigikantselei. Ühingute piiriülese liikumise reguleerimine Euroopa Liidus, uuringu hankedokumendid. <https://riigihanked.riik.ee/register/fsdownload?fileId=ECEFCA3B-9CF2-C410-4D00-D102E5BCA938> (13.01.2017).

Riigikohtu halduskollegiumi otsus 28.11.2012 nr 3-3-1-45-12. <http://www.riigikohus.ee/?id=11&indeks=0.3.16776.16792.16808.19696&tekst=RK/3-3-1-45-12> (13.01.2017).

K. Saare, U. Volens, A. Vutt, M. Vutt (2015) Ühinguõigus I. Kapitaliühingud. Juura.

Schmidt, J. (2016) Cross-border mergers and divisions, transfers of seat: Is there a need to legislate? European Parliament Policy Department C Policy Department C: Citizens' Rights and Constitutional Affairs. [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU\(2016\)556960_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf) (13.01.2017).

Soome [Limited Liability Companies Act](http://www.finlex.fi/en/laki/kaannokset/2006/en20060624.pdf), 624/2006. <http://www.finlex.fi/en/laki/kaannokset/2006/en20060624.pdf> (13.01.2017).

Statistikaamet (2016) Tööturul aktiivsete arvu kasv jätkus, 14.11.2016 – pressiteade nr 125. <https://www.stat.ee/pressiteade-2016-125> (13.01.2017).

Taani [Danish Act on Public and Private Limited Companies](https://danishbusinessauthority.dk/sites/default/files/danish_companies_act.pdf), 468 17.06.2008. https://danishbusinessauthority.dk/sites/default/files/danish_companies_act.pdf (13.01.2017).

Tšehhi Act on Transformation of Companies and Cooperatives, 125/2008 Coll.

UK Companies Act 2006 <http://www.legislation.gov.uk/ukpga/2006/46/contents> (13.01.2017).

World Bank Group (2017) Doing Business 2017. Equal Opportunity For All. International Bank for Reconstruction and Development, World Bank. <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> (13.01.2017).