REPORT

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

Committee on Legal Affairs

Rapporteur: Evelyn Regner

(Initiative – Rule 42 of the Rules of Procedure)
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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

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

The European Parliament,

– having regard to Article 225 of the Treaty on the Functioning of the European Union,

– having regard to Articles 50 and 54 of the Treaty on the Functioning of the European Union,


– having regard to the Commission communication of 27 October 2010 entitled ‘Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another’ (COM(2010)0608),

– having regard to the Commission communication of 13 April 2011 entitled ‘Single Market Act – Twelve levers to boost growth and strengthen confidence – Working together to create new growth’ (COM(2011)0206),

– having regard to Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)\(^1\),


– having regard to the rulings of the Court of Justice in Daily Mail\(^4\), Centros\(^5\), Überseering\(^6\), Inspire Art\(^7\), SEVIC Systems\(^8\), Cadbury Schweppes\(^9\) and Cartesio\(^1\),

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\(^1\) OJ L 294, 10.11.2001, p. 1.
\(^2\) OJ L 294, 10.11.2001, p. 22.
\(^5\) Case C-212/97 Centros [1999] ECR I-1459.
\(^6\) Case C-208/00 Überseering [2002] ECR I-9919.
\(^7\) Case C-167/01 Inspire Art [2003] ECR I-10155.
\(^8\) Case C-411/03 SEVIC Systems [2005] ECR I-10805.
– having regard to its resolution of 4 July 2006 on recent developments and prospects in relation to company law,

– having regard to its resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat,

– having regard to its resolution of 19 February 2009 on the implementation of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community,

– having regard to its resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company,

– having regard to its resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme,

– having regard to Rules 42 and 48 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Employment and Social Affairs (A7-0008/2012),

A. whereas Articles 49 and 54 of the Treaty on the Functioning of the European Union guarantee freedom of establishment for all companies and firms; whereas cross-border company migration is one of the crucial elements in the completion of the internal market; whereas the lack of consistency in legislation on transfers and on procedures for transferring the registered office or real head office of an existing company or firm incorporated under national law from one Member State to another, within the single market, and the associated risks in terms of employment, as well as the administrative difficulties, the costs generated, the social implications and the lack of legal certainty should be noted;

B. whereas the majority of the participants in the public consultation closed on 15 April 2004 were in favour of the adoption of a company law directive on the cross-border transfer of company seats;

C. whereas given the disparities between the requirements imposed by Member States for companies' migration, the Court of Justice ruling in Cartesio confirms the need for a harmonised regime governing the cross-border transfer of company seats;

D. whereas the Court of Justice, in its judgment in Cartesio, has not provided the necessary clarification with regard to the transfer of a company's seat as expected by the

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1 Case C-210/06 Cartesio [2008] ECR I-9641.
4 OJ C 76 E, 25.3.2010, p. 11.
5 OJ C 87 E, 1.4.2010, p. 5.
Commission in its 2007 impact assessment;

E. whereas it is for the legislators and not for the Court to establish on the basis of the Treaty the relevant measures to accomplish the freedom of a company to transfer its seat;

F. whereas, as a result of the Commission's statement in its 2007 impact assessment that the "no action' option seems more proportional as no further EU action is required", company mobility still encounters high administrative burdens as well as social and tax costs;

G. whereas the Commission’s 2007 impact assessment does not cover the implications for social and employment policies, apart from the involvement of employees;

H. whereas the misuse of post-box offices and shell companies with a view to circumventing legal, social and fiscal conditions should be prevented;

I. whereas the cross-border transfer of a company seat should be tax-neutral;

J. whereas transfers of seat should maintain the continuity of the legal personality of the company or firm concerned, in order to ensure its proper functioning;

K. whereas the transfer should not affect the rights of stakeholders (minority shareholders, employees and creditors) originating before the transfer;

L. whereas the transfer procedure should be governed by strict rules as regards transparency and information to stakeholders prior to the transfer being carried out;

M. whereas employees' involvement rights are of high importance when the seat of a company is being transferred;

N. whereas coherence of the employee involvement procedures between the different legislative provisions contained in the company law directives should be ensured;

1. Requests the Commission swiftly to submit, on the basis of Article 50(1) and (2)(g) of the Treaty on the Functioning of the European Union, a proposal for a directive on the cross-border transfer of company seats, following the detailed recommendations set out in the Annex hereto;

2. Confirms that the recommendations respect fundamental rights and the principle of subsidiarity;

3. Considers that the requested proposal does not have financial implications;

4. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council, and to the parliaments and

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governments of the Member States.
ANNEX TO THE MOTION FOR A RESOLUTION DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED

**Recommendation 1 (on the scope of the directive to be adopted)**

The directive should apply to limited liability companies within the meaning of Article 2, point 1, of Directive 2005/56/EC.

Its scope should provide for an appropriate solution to the question of separation between the registered office and the administrative seat of a company.

**Recommendation 2 (on the effects of a cross-border transfer)**

The directive should allow companies to exercise their right of establishment by migrating to a host Member State without losing their legal personality but by being converted into a company governed by the law of the host Member State without having to be wound up.

The transfer should not circumvent legal, social and fiscal conditions.

The transfer should take effect on the date of registration in the host Member State. From the date of registration in the host Member State, the company should be governed by the legislation of that State.

The transfer should not affect the company's legal relationships with third parties.

The transfer should be tax-neutral in accordance with the provisions of Directive 90/434/EEC1.

**Recommendation 3 (on transparency and information rules prior to the transfer decision)**

The management or board of a company planning a transfer should be required to draw up a report and a transfer plan. Before the management decides on the report and the transfer plan, the representatives of the employees or, if there are no representatives, the employees themselves, should be informed and consulted on the proposed transfer within the meaning of Article 4 of Directive 2002/14/EC2.

The report should be submitted to the shareholders and to the representatives of the employees or, if there are no representatives, to the employees themselves.

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The report should describe and justify the economic, legal and social aspects of the transfer and explain its consequences for the shareholders, creditors and employees who may examine the report during a specified period which may be not less than one month or more than three months prior to the date of the meeting of shareholders approving the transfer.

The transfer plan should include:

(a) the legal form, name and registered office of the company in the home Member State;
(b) the legal form, name and registered office of the company in the host Member State;
(c) the memorandum and articles of association envisaged for the company in the host Member State;
(d) the timetable envisaged for the transfer;
(e) the date from which the transactions of the company intending to transfer its seat will be treated for accounting purposes as being located in the host Member State;
(f) detailed information on the transfer of the central administration or principal place of business;
(g) the rights guaranteed to the company’s shareholders, employees and creditors or the relevant measures proposed and the address where all the information thereon can be obtained, free of charge;
(h) if the company is managed on the basis of employee participation and if the national legislation of the host Member States does not impose such a scheme, information on the procedures whereby the arrangements for employee participation are determined.

The report and the transfer plan should be submitted to the shareholders and the employee representatives of the company for examination within an appropriate period prior to the date of the company's general meeting of shareholders.

The transfer plan should be published in accordance with the provisions of Directive 2009/101/EC.

**Recommendation 4 (on the decision by the meeting of shareholders)**

The general meeting of shareholders should approve the transfer proposal in accordance with the formalities and by the majority required to amend the memorandum and articles of association under the legislation applicable to the company in its home Member State.

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1 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ L 258, 1.10.2009, p. 11).
If the company is managed on the basis of employee participation, the shareholders' meeting may make completion of the transfer conditional on its expressly approving the arrangements for employee participation.

Member States should be able to adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer, for example, the right to retire from the company, in accordance with the legislation applicable in its home Member State.

**Recommendation 5 (on the verification of the legality of the transfer)**

The home Member State should verify the legality of the transfer procedure in accordance with its legislation.

The competent authority designated by the home Member State should issue a certificate conclusively declaring that all the acts and formalities required have been completed before the transfer.

The certificate, a copy of the memorandum and articles of association envisaged for the company in the host Member State and a copy of the transfer proposal should be presented within an appropriate period of time to the body responsible for registration in the host Member State. Those documents should be sufficient to enable the company to be registered in the host Member State. The competent authority for registration in the host Member State should verify that the substantive and formal conditions for the transfer, including the requirements laid down in the host Member State for the formation of such company, are met.

The competent authority in the host Member State should give immediate notification of the registration to the corresponding authority in the home Member State. Thereupon, the home Member State authority should remove the company from the register.

In order to protect third parties, the registration in the host Member State and the removal from the register in the home Member State should be adequately published.

**Recommendation 6 (on protective measures)**

Any company against which proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought should not be allowed to undertake a cross-border transfer of seat.

For the purposes of ongoing judicial or administrative proceedings which commenced before the transfer of seat, the company should be regarded as having its registered office in the home Member State. Existing creditors should have the right to a security deposit.

**Recommendation 7 (on employees’ rights)**
The employees' participations rights should be preserved through the transfer. In principle, they should be governed by the legislation of the host Member State.

However, the legislation of the host Member State should not be applicable if:

(a) it does not provide for at least the same level of participation as that applicable in the home Member State, or

(b) it does not give employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as they enjoy before the transfer.

In addition, the legislative provisions on employees' rights should be in line with the *acquis.*
27.9.2011

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on Legal Affairs

on a 14th company law directive on the cross-border transfer of company seats
(2011/2046(INI))

Rapporteur: Philippe Boulland

(Initiative – Rule 42 of the Rules of Procedure)

SUGGESTIONS

The Committee on Employment and Social Affairs calls on the Committee on Legal Affairs, as the committee responsible:

– to incorporate the following suggestions in its motion for a resolution:

A. whereas the Commission’s 2007 impact assessment does not cover the implications for social and employment policies, apart from the involvement of employees;

B. whereas the Statute for a European Company and the Statute for a European Cooperative Society provide for the transfer of company seats in accordance with specific, binding rules on the involvement of employees, in line with Directive 2001/86/EC, and whereas the employee participation procedures laid down in European company law directives must be as coherent and effective as possible;

C. whereas the Court of Justice has adopted certain approaches towards freedom of establishment of undertakings, in the Daily Mail\(^1\), Centros\(^2\), Überseering\(^3\) and Cartesio\(^4\) cases,

1. Emphasises that Articles 49 and 54 of the Treaty on the Functioning of the European

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Union guarantee freedom of establishment for all companies and firms; observes that cross-border company migration is one of the crucial elements in the completion of the internal market; notes the lack of consistency in legislation on transfers and on procedures for transferring the registered office or real head office of an existing company or firm incorporated under national law from one Member State to another, within the single market, and the associated risks in terms of employment, as well as the administrative difficulties, the costs generated, the social implications and the lack of legal certainty;

2. Is in favour of EU legislation on the transfer of company seats, provided that this does not jeopardise the achievement of the objectives set out in Article 9 of the Treaty on the Functioning of the European Union or restrict the right of involvement of employees;

3. Calls for transfers of seat to maintain the continuity of the legal personality of the company or firm concerned, in order to ensure its proper functioning;

4. Calls for transfers of seat to be guided by the principle of flexicurity in the interests of a more flexible market which accords better with the interests of workers and is free of obstacles but in which the rights of workers are respected and they are protected against dismissal;

5. Expects the proposed directive to prevent abuses as referred to in Directive 2001/86/EC and fraud, caused in particular by the setting-up of "mailbox companies", and to protect the interests, and guarantee the existing rights, of creditors (particularly in the event of insolvency of a company or firm), minority shareholders and employees, while preserving at least the existing balance in the governance of undertakings; observes that a cross-border transfer of the seat of a company or firm should not result in its dismantlement or any other interruption or loss of its legal personality;

6. Encourages Member States to arrange for the legality of transfers to be monitored by a competent authority which, in particular, adjudicates on compliance with the obligations of all stakeholders;

7. Sets out below a series of recommendations concerning binding conditions that must be satisfied if a 14th company law directive is to ensure the involvement of employees during and after the transfer of company seats;

8. Calls for Directive 2001/86/EC to become the main legal basis for transfers of seat, bearing in mind the provisions of labour law;

   to include the following recommendations in the annex to its motion for a resolution:

9. **Recommendation 1:** the Commission should submit an impact assessment covering the implications of a directive on the transfer of company seats as regards the achievement of the objectives set out in Article 9 of the Treaty on the Functioning of the European Union; that impact assessment should be published, at the latest, at the same time as the proposal for a 14th company law directive;

10. **Recommendation 2:** EU legislation on the transfer of the registered office of a company or firm must include the following elements in order to guarantee the right of participation
and the cohesion of employees, and must retain the protection and guarantees afforded to their representatives, during and after the transfer, for reasons of efficiency and legal certainty:

- legislative provisions on the right of involvement of employees should be in line with those set out in Directive 2001/86/EC regarding the involvement of employees, particularly where a company or firm is established by means of transformation, in order to ensure the coherence of employee participation procedures in connection with the application of European company law directives;

- in addition, the management body should consult shareholders and employees about the legal and economic implications of the transfer by means of a report fully setting out and justifying the consequences for shareholders and employees, presented in good time and at least one month before the general meeting definitively decides whether or not to approve the proposed transfer; particulars of the consultation on the report, including the transfer plan, must be accessible free of charge for all workers and their representatives;

- the company’s rights and obligations – deriving from legislation, accepted practice and individual employment contracts or employment relationships – in respect of working conditions in the home Member State, as well as the activities of the bodies representing workers, should continue to apply during the transfer of the seat and following its registration in the host Member State;

- if the transfer entails a change in the structure of the company or firm, central management should – on its own initiative or in response to a written request by a number of workers decided by the social partners – take a decision to alter the composition of the bodies representing workers;

- where collective redundancies are inevitable as a result of the transfer of a company’s seat, the provisions of Directive 98/59/EC should apply;

- the transfer of a company’s seat should be subject to its ability to demonstrate compliance with the provisions on employees’ rights;

- the Member States should provide for effective legal remedies, with suspensive effect in relation to the transfer of the seat, for employees and their representatives so that employers can be forced to discharge their obligations at national and European level towards employees should they fail to do so;

- the legislation of the host Member State should apply, except where it specifically provides for a lower level of employee involvement and joint decision-making.
RESULT OF FINAL VOTE IN COMMITTEE

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<th>Date adopted</th>
<th>26.9.2011</th>
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| Result of final vote | ±: 40  
|                     | −: 1     
|                     | 0: 5     |
| Members present for the final vote | Regina Bastos, Edit Bauer, Pervenche Berès, Mara Bizzotto, Philippe Boulland, Milan Cabrnoch, David Casa, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Sergio Gaetano Cofferati, Tadeusz Cymański, Frédéric Daerden, Proinsias De Rossa, Frank Engel, Sari Essayah, Richard Falbr, Ilda Figueiredo, Marian Harkin, Roger Helmer, Nadja Hirsch, Liisa Jaakonsaari, Danuta Jazłowiecka, Martin Kastler, Ádám Kósa, Patrick Le Hyaric, Veronica Lope Fontagné, Thomas Mann, Elisabeth Morin-Chartier, Csaba Őry, Siiri Oviir, Rovana Plumb, Sylvana Rapti, Licia Ronzulli, Elisabeth Schroedter, Joanna Katarzyna Skrzydlew ska, Jutta Steinruck, Traian Ungureanu |
| Substitute(s) present for the final vote | Raffaele Baldassarre, Jelko Kacin, Ria Oomen-Ruijten, Antigoni Papadopoulou, Evelyn Regner, Emilie Turunen, Cecilia Wikström, Tatjana Ždanoka |
RESULT OF FINAL VOTE IN COMMITTEE

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<td><strong>Substitute(s) present for the final vote</strong></td>
<td>Jan Philipp Albrecht, Jean-Marie Cavada, Luis de Grandes Pascual, Vytautas Landsbergis, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy</td>
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