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Cross-border transfers of companies' registered offices

European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI))

The European Parliament,

- having regard to Article 192, second paragraph, of the EC Treaty,
 - having regard to Articles 43 and 48 of the EC Treaty,
 - having regard to the Commission communication of 21 May 2003 entitled “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” (COM(2003)0284),
 - having regard to its resolution of 21 April 2004 on the communication from the Commission to the Council and the European Parliament: Modernising company law and enhancing corporate governance in the European Union – A plan to move forward¹,
 - having regard to its resolution of 4 July 2006 on recent developments and prospects in relation to company law²,
 - 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 seat³,
 - having regard to the judgments of the Court of Justice in *Daily Mail and General Trust*⁴, *Centros*⁵, *Überseering*⁶, *Inspire Art*⁷, *SEVIC Systems*⁸ and *Cadbury Schweppes*⁹,
 - having regard to Rules 39 and 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Economic and Monetary Affairs (A6-0040/2009),
- A. whereas companies should enjoy freedom of establishment within the internal market as enshrined in the EC Treaty and interpreted by the Court of Justice,
- B. whereas cross-border company migration is one of the crucial elements in the completion of

¹ OJ C 104 E, 30.4.2004, p. 714.

² OJ C 303 E, 13.12.2006, p. 114.

³ OJ C 263 E, 16.10.2008, p. 671.

⁴ Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483.

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.

⁹ Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

the internal market,

- C. whereas a cross-border transfer of the registered office of a company should not give rise to its winding-up or any other interruption or loss of legal personality,
 - D. whereas a cross-border transfer of the registered office should not circumvent legal, social and fiscal conditions,
 - E. whereas the rights of other stakeholders concerned by the transfer, such as minority shareholders, employees and creditors, etc, should be safeguarded,
 - F. whereas the relevant *acquis communautaire* providing for cross-border information, consultation and participation rights of employees as well as safeguarding pre-existing employee participation rights (Directives 94/45/EC¹ and 2005/56/EC²) should be fully preserved, and whereas, consequently, the transfer of a registered office should not result in the loss of those existing rights,
 - G. whereas a rule requiring a company to maintain its head office and its registered office in the same Member State would run counter to the case-law of the Court of Justice on freedom of establishment and would therefore infringe EC law,
1. Requests the Commission to submit to Parliament by 31 March 2009, on the basis of Article 44 of the EC Treaty, a legislative proposal for a directive laying down measures for coordinating Member States' national legislation in order to facilitate the cross-border transfer within the Community of the registered office of a company formed in accordance with the legislation of a Member State ("14th Company Law Directive"), and requests that the proposal in question be drawn up within the framework of inter-institutional deliberations and following the detailed recommendations set out below;
 2. Notes that undertakings can currently transfer their seat only either by dissolution and the establishment of a new legal entity in the Member State of destination, or by establishing a new legal entity in the Member State of destination and then merging both undertakings; further notes that this procedure involves administrative obstacles, costs and social consequences and offers no legal certainty;
 3. Draws attention to the freedom of establishment that is guaranteed for undertakings under Article 48 of the EC Treaty, as interpreted by the Court of Justice³;
 4. Notes that a transfer of a company seat implies a transfer of supervision; points out that, in the context of the drafting of the 14th Company Law Directive on the cross-border transfer of registered offices, the maintenance of the existing rights of shareholders, creditors and workers must be guaranteed and the existing equilibrium in the management of the company ("corporate governance") must be preserved;
 5. Proposes that reference be made in the new directive to Directive 94/45/EC and Directive

¹ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254, 30.9.1994, p. 64).

² Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1).

³ Judgment in *Centros*, cited above.

2005/56/EC, in order to guarantee the coherence and substantive nature of employee participation procedures in the application of EU company law directives;

6. Takes the view that a transfer of a company's seat must be preceded by the issuing of a transfer plan and a report explaining and justifying the legal and economic aspects and any consequences of the transfer for shareholders and employees; points out that the transfer plan and the report must be made available in good time to all those involved;
7. Emphasises the positive effects of tax competition on economic growth in the context of the Lisbon Strategy;
8. Notes that a transfer of a company seat should be tax-neutral;
9. Suggests that the exchange of information and mutual assistance between tax authorities be improved;
10. Calls for transparency in the application of the new directive in the Member States and therefore proposes a reporting requirement for Member States vis-à-vis the Commission whereby undertakings transferring their registered office under the directive must be entered in a European companies register; points out that, in the interests of better law-making, excessive information (“overkill”) must be avoided when the reporting requirement is transposed into national law, provided that sufficient information is guaranteed;
11. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
12. Considers that the requested proposal does not have any financial implications;
13. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council and to the parliaments and governments of the Member States.

**ANNEX TO THE RESOLUTION:
DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL
REQUESTED**

The European Parliament requests the Commission to put forward a proposal for a directive that should contain the following elements:

Recommendation 1 (effects of a cross-border transfer of the registered office)

Cross-border transfers of registered offices shall not give rise to the winding-up of the company concerned or to any interruption or loss of its legal personality; consequently, the company shall retain its legal identity and all its assets, liabilities and contractual relations shall remain unaffected. Furthermore, the transfer shall not circumvent legal, social and fiscal conditions. The transfer shall take effect on the date of registration in the host Member State. From the date of registration in the host Member State, the company shall be governed by the legislation of that State.

Recommendation 2 (transfer procedure within the company)

The management or board of a company planning a transfer shall be required to draw up a transfer proposal. The proposal shall cover at least:

- (a) the legal form, name and registered office of the company in the home Member State;
- (b) the envisaged 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 registered office will be treated for accounting purposes as being located in the host Member State;
- (f) where appropriate, detailed information on the transfer of the central administration or principal place of business;
- (g) the rights guaranteed to the company's members, employees and creditors or the relevant measures proposed;
- (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 transfer proposal shall be submitted to the members and employee representatives of the company for examination within an appropriate period prior to the date of the company's meeting of shareholders.

A company planning a transfer shall be required to publish at least the following particulars pursuant to the applicable national legislation, in accordance with Directive 68/151/EEC¹:

- (a) the legal form, name and registered office of the company in the home Member State as well as those envisaged for the company in the host Member State;
- (b) the register in which the documents and particulars referred to in Article 3(2) of Directive 68/151/EEC have been entered in respect of the company and the entry number in that register;
- (c) an indication of the arrangements whereby creditors and minority shareholders of the company may exercise their rights and the address at which full information concerning those arrangements can be obtained free of charge.

The management or board of the company planning a transfer shall also draw up a report explaining and justifying the proposal's legal and economic aspects and indicating the consequences for the company's members, creditors and employees, unless agreed otherwise.

¹ First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8).

Recommendation 3 (transfer decision by meeting of the shareholders)

The shareholders' meeting shall approve the transfer proposal in accordance with the arrangements laid down 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.

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.

Recommendation 4 (administrative transfer procedure and verification)

The home Member State shall verify the legality of the transfer procedure in accordance with its legislation. The competent authority designated by the home Member State shall issue a certificate conclusively declaring that all the acts and formalities required have been completed.

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 shall be presented within an appropriate period of time to the body responsible for registration in the host Member State. Those documents shall be sufficient to enable the company to be registered in the host Member State. The competent authority responsible for registration in the host Member State shall verify that the substantive and formal conditions for the transfer are met.

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

Registration in the host Member State and removal from the register in the home Member State shall be published. At least the following particulars must be covered:

- (a) the date of registration;
- (b) the new and former entry number in the respective registers of the home and host Member States.

Recommendation 5 (employee participation)

Employee participation shall be governed by the legislation of the host Member State.

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

- (a) where the host Member State does not provide for at least the same level of participation as operated in the company in the home Member State, or
- (b) where the legislation of the host Member State does not give employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as enjoyed by such employees before the transfer.

In these cases, the provisions of Article 16 of Directive 2005/56/EC should apply accordingly.

Recommendation 6 (third parties concerned by the transfer)

Any company against which proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought shall not be allowed to undertake a cross-border transfer of its registered office within the Community.

For the purposes of ongoing judicial or administrative proceedings which commenced before the transfer of the registered office, the company shall be regarded as having its registered office in the home Member State.