

Cross-border transfer of company seats

European Parliament resolution of 2 February 2012 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 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 the Commission communication of 3 March 2010 entitled ‘Europe 2020 – A strategy for smart, sustainable and inclusive growth’ (COM(2010)2020),
- 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 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees²,
- having regard to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies³,
- 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*¹ and *Cartesio*²,

¹ OJ L 294, 10.11.2001, p. 1.

² OJ L 294, 10.11.2001, p. 22.

³ OJ L 310, 25.11.2005, p. 1.

⁴ Case 81/87 *Daily Mail* [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.

- having regard to its resolution of 4 July 2006 on recent developments and prospects in relation to company law³,
 - 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 seat⁴,
 - 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 Community⁵,
 - 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 company⁶,
 - 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 Programme⁷,
 - 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 Commission

¹ Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

² Case C-210/06 *Cartesio* [2008] ECR I-9641.

³ OJ C 303 E, 13.12.2006, p. 114.

⁴ OJ C 263 E, 16.10.2008, p. 671.

⁵ OJ C 76 E, 25.3.2010, p. 11.

⁶ OJ C 87 E, 1.4.2010, p. 5.

⁷ Texts Adopted, P7_TA(2010)0426.

in its 2007 impact assessment¹;

- E. whereas it is for the legislators and not for the Court of Justice 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"², 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 governments of the Member States.

¹ Commission staff working document: Impact assessment on the Directive on the cross-border transfer of registered office, SEC (2007) 1707, point 3.5.2, pp. 24-25.

² Commission staff working document: Impact assessment on the Directive on the cross-border transfer of registered office, SEC (2007) 1707, point 6.2.4, p. 39.

ANNEX

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.

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.

¹ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ L 225, 20.8.1990, p. 1).

² Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

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/EC¹.

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.

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)

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).

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' participation 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 enjoyed before the transfer.

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