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DRAFT REPORT

with recommendations to the Commission on cross-borders transfers of
company seats
(2008/2196(INI))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

(Initiative – Rule 39 of the Rules of Procedure)

Rapporteur for opinion(*):
Harald Ettl, Committee on Economic and Monetary Affairs

(*) Associated committee – Rule 47 of the Rules of Procedure

CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL REQUESTED.....	5

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**with recommendations to the Commission on cross-borders transfers of company seats
(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 communication from the Commission 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 modernising company law and enhancing corporate governance¹,
 - 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 company law³,
 - 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 (A6-0000/2008),
- 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 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,
- C. whereas the rights of third parties concerned by the transfer, such as minority shareholders, creditors, etc, should be taken into account,

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.

- D. 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,
- E. whereas the transfer of a registered office should be tax-neutral,
1. Requests the Commission to submit to Parliament during 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, and requests that this proposal be drawn up within the framework of inter-institutional deliberations and following the detailed recommendations below;
 2. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
 3. Considers that the requested proposal does not have any financial implications;
 4. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Council and the Commission and to the parliaments and governments of the Member States.

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).

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

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. 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 for the company in the host Member State;
- (c) the memorandum and articles of association envisaged for the company in the host Member State;
- (e) the timetable envisaged for the transfer;
- (d) the date from which the transaction 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 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 general meeting.

A company planning a transfer shall be required to publish at least the following particulars

according 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 on 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.

Recommendation 3 (transfer decision by general meeting)

The general 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 general meeting may make the completion of the transfer conditional on its expressly approving the arrangements for employee participation decided on in the host Member State.

Recommendation 4 (administrative transfer procedure and verification)

The home Member State shall verify, in accordance with its legislation, the legality of the transfer procedure. 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. These documents shall be sufficient to enable the company to be registered in the host Member State. The competent authority 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 notify immediately the respective authority in the home Member State about the registration. Thereupon, the home Member State authority shall remove the company from the register.

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).

Registration in the host Member State and removal from the register in the home Member State shall be published. 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 is not 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 such employees enjoy before the transfer.

In these cases, 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.