



Club des juristes

Proposition of a 14th Directive

THE EUROPEAN PARLIAMENT AND THE EUROPEAN UNION COUNCIL DIRECTIVE .../.../

of ...

THE EUROPEAN PARLIAMENT AND THE EUROPEAN UNION COUNCIL,

Having regard to the Treaty on the Functioning of the European Union (TFEU), more particularly Article 352;

Having regard to the proposition of the Commission;

Having regard to the opinion of the European Economic and Social Committee;

Whereas:

- (1) The harmonious development of economic activities and the continuous but also balanced expansion in the European Union depend on the establishment and on the good functioning of a common market offering similar conditions to those of a national market; the realization of this single market and the intensification of its unity makes it particularly desirable, for the incorporated companies, the creation of a legal framework that facilitates the adaptation of their activities to the economic conditions of the European Union. For that purpose, it is necessary that these companies have the possibility to effectively transfer their registered office.
- (2) The cross-border transfer of a company from one Member State, under the law of which it was established, towards another Member State prompts a change in the applicable law, when the company transforms into a form of company established by the national legislation of the host State. This is the corollary of the freedom of establishment guaranteed by Articles 49 and 54 of the Treaty on the Functioning of the European Union; the ability for a member state to define both the connecting factors and the conditions of its preservation, does not justify that the Member State of constitution, by imposing the dissolution and the winding-up of this company, prevents it from being transformed into a form of company established by the legislation of the host Member State even though this last one allows it.
- (3) The incorporated companies experience numerous difficulties, at legislative and administrative levels within the European Union, to realize cross-border transfer of the registered office. Legal systems of Member States do not allow preservation of legal personality of the company during the cross-border transfer of their registered office inside the European Union. It is thus necessary, to insure the completion and the good functioning of the internal market, to anticipate community provisions that would facilitate the realization of cross-border transfer of the registered office for incorporated companies.
- (4) The objective of the considered action, which is to establish a regulation containing common elements applicable on transnational level, cannot be realized in a sufficient way by Member

States and can thus, because of the dimensions and the effects of the considered action, be more efficiently executed on a community level, the European Union shall take measures according to the principle of subsidiarity as derived from Article 5 of the Treaty on European Union. According to the principle of proportionality such as stipulated by the audit article, the present directive does not exceed the mere “necessary measures” to reach this objective.

- (5) The notion of incorporated company is common to all Member States and the legal system applicable to these companies is more complete than for partnerships. Therefore it is preferable to reserve the faculty of cross-border transfer of the registered office only for the incorporated companies as they are defined by Directive 2009/101/CE.
- (6) A company created under a national legal system has only existence through the national legislation which determines its constitution and its functioning. The present Directive has no repercussion on the ability of Member States to define the connecting factor which is required from a company to be considered as established according to their national legislation. Host States are thus free to subordinate the finalization of the transfer of the registered office to that of the real seat, if their national law requires it for the constitution of companies registered on their territory.
- (7) The present Directive has no incidence on the European Union and on the national legislation relative to investment and to free movement of capital.
- (8) Transfer of the registered office is subordinated to the constitution of a transfer plan and a report explaining and justifying as well the legal and economic aspects of the proposed transfer, as the implications of the transfer for the partners, creditors and employees. Transfer plan and report must be available for consultation in reasonable time to all persons concerned.
- (9) It is appropriate to organize the effects of the change in the applicable law for shares containing particular rights;
- (10) It is necessary to guarantee a level of effective protection of the partners’ and the affected third parties’ interests from the consequences caused by the change in the applicable legislation to the company operating a transfer of its registered office. This protection involves a legality review of the transfer by a competent authority. It is also preferable to determine the legal effects of the cross-border transfer for the deregistration of the company in the Member State of origin and for its registration in the host Member State.
- (11) It is necessary to protect the rights of employees in case of a cross-border transfer of the registered office. When employees have participative rights in the company transferring its head office according to the conditions determined by the present Directive, and when the national legislation of the host Member State does not guarantee the same level of participation as the one who applied in the Member State of origin, including within the supervisory board committees having decision-making powers, or when it does not give to employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights the same as to employees situated in the Member State of origin, the participation of employees in the company transferring the registered office and their implication in the definition of these rights must be regulated. It is



preferable to leave to Member States the ability not to apply the referenced measures relative to the participation in the case of a transfer of the registered office, as a consideration to the different variety of national systems on employees participation.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

SCOPE

The present directive shall apply to operations of cross-border transfer of the registered office from a Member State to another of incorporated companies formed in accordance with the legislation of a Member State and having their registered office, their Central Administration or their main establishment inside the European Union.

Article 2

DEFINITIONS

For the purpose of this directive:

a) “registered office” means place mentioned in the memorandum or in the articles of association of the company and conform to the place indicated in the public register in which the company is registered;

b) “real seat” means the place where the company has his Central Administration;

c) “Member State of origin” means Member State in which the company had his registered office before its transfer to another Member State;

d) “host Member State” means Member State to which the company transfers his registered office.

e) “cross-border transfer of the registered office” means operation which consists in modifying the location of the registered office by moving it from the Member State of origin towards the host Member State, this transaction operates a changes in the national law applicable to the company.

f) “incorporated company”, further referred to as “company”:

- means a company as defined by Article 1 of Directive 2009/101/CE,

or

- a company with a shared capital, enjoying the legal personality, possessing a separate patrimony that covers alone the debts of the company and subject by its national legislation to conditions of guarantees such as provisioned by Directive 2009/101/CE, to protect the interests of partners and third parties;



g) “employee participation” means, under Article 2, k of Directive 2011/86/CE, the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company exercised by:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ,

or

- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

Article 3

CONDITIONS OF TRANSFER

The transfer of the registered office can be subordinated by the host Member State to the transfer of the real seat if the national legislation requires it from companies registered on its territory.

Article 4

EFFECTS OF THE CROSS-BORDER TRANSFER ON THE LEGAL PERSONALITY

The transfer of the registered office of a company prompts a change in the applicable law and social form on the day of its registration in the host Member State. This change gives rise neither to its winding –up nor to the creation of a new legal entity, the company maintains its legal entity.

Article 5

TRANSFER PLAN

1. Production of a transfer plan and its content

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

- (a) the legal form, name and registered office of the company in the Member State of origin;
- (b) the envisaged legal form, name and registered office for the company in the host Member State;
- (c) the memorandum and the articles of association envisaged for the company in the host Member State;
- (d) the timetable proposed for the transfer;
- (e) the date from which the transactions of the company intending to transfer its registered office will be considered for accounting purposes as being located in the host Member State;
- (f) where appropriate, the new location of the central administration or the principal place of establishment;



(g) the consequences of the transfer for the employees and the relevant measures proposed affecting them;

(h) a description of the modalities by which the creditors and the partners opposed to the transfer can exercise their rights and the address where all the information concerning these modalities can be obtained, free of charge.

2. Publicity of the transfer plan

The transfer plan is published according to the applicable legislation of the Member State of origin, in accordance with Directive 2009/101/CE, at least a month before the general meeting of the partners deciding on the manner.

3. Report of the management or board of the company

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

4. Right to examine of partners, creditors and employees

The partners, creditors and employees of the company have the right to obtain, free of charge, at least a month before the general meeting called to approve the transfer, the communication of the transfer plan and the report established according to Paragraph 3 and the modalities established by the Member State of origin.

Article 6

APPROVAL OF THE TRANSFER BY THE GENERAL MEETING

1. The decision of the transfer should not intervene sooner than two months after the publication of the project of transfer.

2. The transfer is voted by the partners following the conditions required to modify the memorandum by a minimum two-third majority of the expressed votes.

3. The expressed votes shall not include those attached to the actions for which the shareholder did not take part in the decision like abstention, casting a blank ballot or invalid vote.

4. However, a Member State can make provisions for that, when at least half of the capital is represented, a simple majority of the expressed votes indicated in Paragraph 2 is considered as sufficient.

5. The decision of transfer of the registered office and, if necessary, the modification of the memorandum resulting from it are both objects to publicity under current legislation of the Member State of origin, according to the Directive 2009/101/CE.

Article 7

VOTE OF THE SHAREHOLDERS HAVING SPECIFIC RIGHTS OVER THE COMPANY



1. When there are several categories of shares, any decision of the general meeting or, according to the social form of the company, all of the partners consulted individually, is subordinated to the approval of a separate vote for each category of shares having specific rights, rights to which infringe the decision.

2. When the decision of the general meeting or, according to the social form of the company, all of the partners consulted individually, requires the majority of votes planned in Article 6, Paragraphs 2 and 3, this majority shall also be required for the separate votes of each category of shareholders having specific rights over the company, rights to which infringe the decision.

Article 8

PROTECTION OF PARTNERS OPPOSED TO THE CROSS-BORDER TRANSFER

A Member State have the ability to adopt, for the companies registered on its territory, measures intended to guarantee an effective protection for the partners opposed to the transfer.

Article 9

PROVIDING NATIONAL AUTHORITIES WITH THE RIGHT TO OBJECT

1. Legislation of the Member State of origin may prescribe, for the companies registered in this one, that the transfer of the registered office shall not become effect if, during a time limit of two months mentioned in Article 6, Paragraph 1, the competent authority of this State opposes to it. This opposition shall only be justified by public interest reasons.

2. When a company is subjected to control by a national authority of financial monitoring according to community directives, the right to object to the transfer of the registered office also applies to this authority.

3. The opposition aimed at Paragraphs 1 and 2 is subject to appeal in front of a judicial authority.

Article 10

LEGALITY REVIEW OF THE TRANSFER

In the Member State of origin, the competent authority shall issue a certificate conclusively declaring that all the acts and formalities required have been completed before the transfer.

Article 11

REGISTRATION IN THE HOST MEMBER STATE

1. Registration can only intervene after presentation of the certificate mentioned in Article 10 and the proof of accomplishment of all the formalities required for the registration in the host Member State.



2. The host Member State may refuse, according to Article 3 of the present Directive, to register a company in conformity with Paragraph 1, if the real seat of this company is not located in the same Member State.

3. The transfer of the registered office, as well as the modification of the memorandum which results from the transfer, come into force on the day of which the company is registered in the register of the new seat.

Article 12

DEREGISTRATION IN THE MEMBER STATE OF ORIGIN

1. When the new registration of the company is complete, the authority holding the register in the host Member State shall notify immediately the respective authority in the Member State of origin. Deregistration from the former register shall intervene right after reception of the notification.

2. The new registration and the deregistration are published in the host Member state and in the Member State of origin according to the modalities required by each legislation, according to Directive 2009/101/CE.

3. Publication of the new registration of the company makes the new registered office opposable to third parties. However, as long as the publication of the deregistration from the register of the previous seat did not take place, third parties shall continue to regard the company as having its registered office in the home Member State, unless the company proves that third parties had knowledge of the new seat.

Article 13

PROTECTIVE MEASURES

1. The creditors or shareholders of particular rights, including public entities, like claims or the rights appeared prior to the publication of the transfer plan, shall benefit during the transfer of an adequate protection under the legislation of the Member State of origin.

2. A Member State have the ability to extend the application of the first paragraph to the claims prior to the transfer.

3. Any company against which proceedings for winding-up, liquidation, insolvency, 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.

4. Without prejudice to the right of the plaintiff of a legal action to take advantage of the new registered office, a company that transferred its registered office to another Member State is considered, for one year, for the purposes of any dispute arising before the transfer such as determined by Article 11 Paragraph 3 shall be regarded as having its registered office in the Member State where the company was registered before the transfer, even if an action is brought against the company after this transfer.



Article 14

EMPLOYEE PARTICIPATION

1. When a company realizes a transfer of the registered office from a Member State to another, the company is eventually subject to rules concerning employee participation applicable in the Member State where its registered office is established.

2. The first Paragraph shall not apply to the companies that employ, during the period of six months prior to the publication of the transfer plan, in average more than 500 employees and among which at least two-third of those who worked in the Member State of origin usually carry out their functions in this one, or if the national legislation of the host Member State:

a) does not make provisions for at least the same level of participation of the employees, measured upon the proportion of employee representatives among the members of the board, the supervisory board, their committees or the group of direction that manages the units entrusted to reach the profit objectives in these companies, that the one who applied in the Member State of origin, in condition that there is a representation of the workers;

or

b) does not make provisions for the employees working in an establishments of the company situated in another Member State, the possibility to enjoy the same rights of participation as to the employees working in the Member State where the registered office is established.

3. In the cases aimed at the second Paragraph, the employee participation in the company that transfers its registered office and their implication in the definition of the rights relative to it are regulated by the Member States, *mutatis mutandis* and under the condition of a conclusion of an agreement on the conditions of employee participation between employee representatives and the managing board of the company according to the terms and principles determined by Article 16 Paragraphs 3 and 4, Directive 2005/56/CE.

4. In particular, when they regulate the principles and the procedures aimed at the Paragraph 3, Member States grant to the competent organs of the company which transfers its registered office, the possibility to choose without preliminary negotiation to be directly subjected to measures relative to employee participation aimed in Article 16, Paragraph 3, h), Directive 2005/56/CE, such as fixed by the legislation of the Member State in which the registered office of the company is transferred, and to respect these measures from the date of registration.

5. Member States shall take appropriate measures, in the respect for the European Union laws, to avoid excessive use of transfer of the head office to deprive employees the rights of participation or to refuse them these.