



Club des juristes

Subgroup "Corporate mobility"

Preface to the proposition of a 14th Directive

The freedom of establishment is a right recognized by the Treaty on the Functioning of the European Union (TFEU) to all nationals, including physical and moral entities. However, after their constitution, companies remain "prisoners" of their State of origin, because there are national obligations which weigh on operations of cross-border transfer of the registered office: modification of the nationality and the applicable law, loss of the legal personality, fiscal effects.

Certainly, there are stopgap measures like cross-border merging or European Company, but it is insufficient to guarantee a real corporate mobility. They are only solutions "by default" which are inevitably imperfect, complex and expensive.

The Club des juristes considers that the creation of a real corporate law in Europe should include the elaboration of a directive relative to the transfers of the registered office. It would be a real turning point for the European corporate law, more than 50 years after the Treaty of Rome. Companies could take advantage of a common market offering similar conditions to those of a national market.

On the one hand, this priority is justified by current events in community case law. The European Court of Justice, in its judgment *Cartesio* of December 16th, 2008, asserted that the transfer of registered office that prompts a change in the applicable law was the corollary of the freedom of establishment, and a Member State cannot oppose to it. However, because of the lack of dedicated text, there is the biggest uncertainty on the transfer of the registered office for national form companies, transfer that States no longer have the right to forbid. Consequently, in the present state of the community law, the transfer of the registered office can only be carried out "brutally", without respecting the rights of creditors and employees.

On the other hand, the demands are multiplying: in 2009 the European Parliament asked expressly from the Commission a legislative proposition "establishing measures to coordinate national legislations of Member States to facilitate the cross-border transfer, within the Community, of the registered office of a company created according to the legislation of a Member State ". Recently, the Committee of the Regions asserted that "one of the main obstacles to create a real competition of States and regions lies above all in the quasi impossibility to transfer the registered office of companies within the European Union."



The Europe Committee of the Club des juristes, co-chaired by Didier Martin and Anne Outin-Adam, constituted a work group¹ under the scientific responsibility of Professor Menjuçq, with the aim to elaborate a "draft" of a 14th Directive. It is, naturally, by no means, to substitute itself to the European legislator, who remains the only one to decide on its priorities. Nevertheless, the Club des juristes hopes, with the help of this document, to advocate for new legislative propositions on this matter.

The spirit and the method that guided these works were the respect of the principle of subsidiarity. Therefore, are fixed by the European material rules only as much as by need so to retain the solutions the least disruptive for national rights.

The draft of the 14th Directive articulates around the following elements:

- A field of application limited to the transfers of the registered office of incorporated companies and the SARL (private limited company);
- The preservation of the legal personality;
- The detail of the decision-making and the formalities of publicity;
- A control of legality and organization of registers coordination;
- Mechanisms of guarantees and protections (employees, national authorities, minority partners...).

The Club des juristes wishes to pass on this work to all Institutions and stakeholders concerned of this matter².

¹ *With the participation of Professeur Michel Menjuçq, Daniel Barlow, Philippe Bobet, Dominique Bompont, Dany Cohen, Fabrice Fages, Michel Friocourt, Serge Rognon, Jean Tarrade, Emmanuel Susset, Anne Outin Adam, Françoise Arnaud-Faraut, Tanguy Allain.*

² *Concerted actions are led with the Chamber of Commerce and Industry of Paris, which also adopted on October 21st, 2010 a report on this subject (www.etudes.ccip.fr).*