14th company law directive on the cross-border transfer of company seats

2011/2046(INL) - 02/02/2012 - Text adopted by Parliament, single reading

The European Parliament adopted a resolution with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats.

The resolution stresses that **cross-border company migration is one of the crucial elements in the completion of the internal market**. It notes 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.

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**.

Members recall that **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**. However, 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‘, company mobility still encounters high administrative burdens as well as social and tax costs.

In this context, the Commission is requested 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 below:

Recommendation 1 (on the scope of the directive to be adopted): the directive should apply to limited liability companies within the meaning of Directive 2005/56/EC. It 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 be tax-neutral.

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. The report should be submitted to the shareholders and to the representatives of the employees.

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. The transfer plan should be published in accordance with the provisions of Directive 2009/101/EC.

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.

Recommendation 5 (on the verification of the legality of the transfer): 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. 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.

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.

Recommendation 7 (on employees´ rights): the employees' participations 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 it does not provide for at least the same level of participation as that applicable in the home Member State. In addition, the legislative provisions on employees' rights should be in line with the acquis.

Parliament confirms that the recommendations respect fundamental rights and the principle of subsidiarity. It considers that the requested proposal does not have financial implications.