Fostering corporate mobility in Europe
Towards a 14th company law directive

Report by Mr Didier KLING
21 October 2010
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with assistance from Mr Tanguy Allain, civil and business law department

Presented on behalf of the company law committee
Adopted by the Executive Committee on 21 October 2010
INTRODUCTION

Transferring a company’s registered office from one Member State to another remains a complex process, even today. The ability to do so is, however, the logical corollary of the freedom of establishment guaranteed by articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU).

The situation of companies wanting to move within the Union has undoubtedly improved on a regular basis over the course of the last 20 years as a result of numerous advances in the law.

Indeed, businesses wanting to exercise their freedom of establishment to move within the EU have been able to rely on European Court of Justice case law. The Daily Mail\(^1\), Centros\(^2\), Überseeing\(^3\), Inspire Art\(^4\) and Sevic\(^5\) judgments form the legal basis for freedom of establishment within the European Union.

There is also a comprehensive array of EU legislation in relation to company law. Some of the tools designed to promote corporate mobility are the European Company\(^6\), the European Cooperative Society\(^7\) and cross-border mergers\(^8\). Further improvements are to follow with the statute for the European Private Company (SPE)\(^9\), which is eagerly awaited.

In light of the legislative situation, the European Commission took the view in 2007, at the instigation of Commissioner McCreevy, that it was not essential to pass further EU legislation to enable cross-border transfers of corporate head offices. Following the publication of its impact assessment\(^10\), it decided not to undertake further work in this area.

At a strictly national level, it is worth noting the change to article 221 of the Code général des impôts (French General Tax Code) in 2005. It is important to remember that until this point, it was fiscally disadvantageous to transfer a head office abroad, insofar as the move was treated as a termination of business. This obstacle has now been partially\(^11\) overcome, since “transferring a head office to another European Community Member State, whether or not it entails the loss of legal personality in France, does not involve the consequences of a termination of business”. In France, therefore, transfers are fiscally neutral and unrelated to the legal treatment of the operation\(^12\).

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11 Ensuring that the transfer is fiscally neutral relies on retaining a stable base in France to which the company’s taxable assets must be allocated.
12 M. Menjucq, F. Fages, “Le transfert communautaire du siège social enfin à la portée des sociétés françaises”, Dr. & Patrimoine, no. 139, July/August 2005, p. 34.
Such solutions are not, however, necessarily satisfactory. Whilst the advances in the law, taxation and case law referred to above are beneficial, they are inadequate insofar as they only concern large businesses. Becoming a European Company (SE) or creating a company under foreign law with which to merge are complex and costly processes, particularly for SMEs.

At a more prosaic level, corporate mobility should not be restricted to mergers or becoming part of a European group. If we want to introduce a real system of company law across the European Union, we cannot put off for much longer a law on the transfer of head offices, to enable all companies established under the law of a Member State to move freely within the Union.

Indeed, the solution finally agreed by the ECJ in its judgment of 16 December 2008 confirms that the principle by which a transfer of a head office within the European Union that prompts a change in the law applicable to the company is based on freedom of establishment within the EU. Now that this has been established, the Member State of origin can neither oppose the transfer of a head office nor subject it to conditions specific to its national law.

Nevertheless - and this is fundamental - the Court notes in paragraph 108 of the judgment that “the question whether — and, if so, how — the registered office (siège statutaire) or real seat (siège réel) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions.”

In the current circumstances, the solution arrived at in the Cartesio judgment runs the risk of resulting in “unregulated” transfers, with no guarantees on the provision of information to all stakeholders - employees, creditors or minority shareholders - or cooperation between the two Members States concerned, in the absence of specific legal provisions.

Finally, to look beyond the purely legal aspects, the CCIP is conscious that introducing a directive is becoming more and more urgent from a political point of view, in accordance with the objective of completing the internal market.

Within this wider context, the European Parliament passed a resolution in March 2009. It expressly requested the European Commission to prepare a proposal for a statute “laying down measures for coordinating Member States’ national legislation in order to facilitate the cross-border transfer within the Community of the head office of a company formed in compliance with the legislation of a Member State (known as the “14th company law directive”).

This initiative has already won support from across the political spectrum including, for example, the CCBE and the Committee of the Regions. The French academic world - including some of the most authoritative authors on this subject - has expressed its support for the idea of introducing legislation of this kind.

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14 The Council of Bars and Law Societies of Europe (CCBE) is an organisation representing around a million European lawyers through the member bars and law societies of 31 full Member States and 11 other associate member and observer member countries.
Long driven by the need to make further progress in European company law, the CCIP has drawn up proposals for the introduction of a 14th directive, the general structure of which could be based on the following: the principle of continuity of legal personality (I), the scope of the legislation (II), the transfer procedure (III) and its implementation (IV) and finally, protection for stakeholders.

At the same time, the CCIP has been involved in the research led by Professor Michel Menjucq as part of the “corporate mobility” sub-group of the Europe Committee of the Club des juristes. Their work resulted in a “draft” of a 14th directive that articulates appropriately with this report.

In expressing its full support for the initiative by members of the European Parliament, the CCIP hopes to drive new legislative proposals in this area.

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18 Chaired by Professor Michel Menjucq, with Daniel Barlow, Philippe Bobet, Dominique Bompoint, Dany Cohen, Fabrice Fages, Michel Friocourt, Serge Rognon, Jean Tarrade, Emmanuel Susset, Anne Outin Adam, Françoise Arnaud-Faraut and Tanguy Allain.
19 Available for download from www.clubdesjuristes.com
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1. Guaranteeing continuity of legal personality

1.1. Issue

Currently, most Member States’ legal systems have no mechanism to ensure companies can maintain their legal personality when they transfer their head offices within the European Union. In other words, a company that leaves an EU Member State must first be wound up and its assets liquidated, with the consequences that ensue from such an event, and then be reincorporated as a legal entity.

1.2. CCIP position

The Cartesio judgment\(^{20}\) confirmed that the transfer of a registered office did not entail a loss of legal personality, but did involve the company being converted into one governed by the law applicable in the host Member State.

Whilst the confirmation of this principle in EU company law is to be welcomed, it would be still be useful for this solution to be enshrined in a directive.

2. Strict demarcation of the scope of application of the legislation

The question that should immediately be asked refers to the scope of application of the proposed directive. This will be determined on the basis of the legal form (2.1) and head office (2.2) of the companies concerned.

It is also important to ensure that the legislation complies with the connecting factors set by Member States (2.3).

2.1. Restricting the scope to limited liability companies

2.1.1. Issue

Freedom of establishment within the European Union, as derived from articles 49 and 54 of the TFEU and ECJ case law, is offered to all forms of company governed by civil or business law, including cooperative societies and other legal entities incorporated under public or private law\(^{21}\).

In this respect, the first draft of the 14\(^{th}\) directive on the transfer of corporate head offices applied regardless of the legal form of the company.

2.1.2. CCIP position

The solution envisaged in the first draft of the 14\(^{th}\) directive would not be viable as EU law currently stands. On the one hand, harmonisation is more advanced in relation to the forms of limited liability companies; on the other, opening up cross-border transfer rules to partnerships would mean including a number of scenarios that could be difficult to resolve, precisely because of a lack of harmonisation.

In the light of EU case law, it is also clear that in practice, the types of company that move within the European Union and that make broader use of the freedom of establishment are companies limited by shares.

This is not to say that these companies cannot transfer their head offices (like all companies, they enjoy the freedom of establishment guaranteed by the Treaty and case law). What this does mean is that, for the moment, it would be too long and complex to define the methods or procedures of such transfers in a piece of legislation.


\(^{21}\) Except for associations.
The limited liability companies to which it is proposed to refer are those defined in Directive 2009/101/EC of 16 September 2009\textsuperscript{22} and in Directive 2005/56/EC on mergers, which usefully includes the French SARL (société à responsabilité limitée), as a hybrid form of company. This would ensure that the list of legal forms of company to which the 14\textsuperscript{th} directive would apply would be clearly defined.

Moreover, in order to ensure that any form of limited liability company established in a Member State after the adoption of the directive was included in its scope, it would be advisable to use the definition provided in article 2b) of the mergers directive. This states, more generally, that a limited liability company is a company with share capital and having legal personality, possessing separate assets that alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees, as provided for by Directive 2009/101/EC on the protection of the interests of associates and third parties.

Finally, it should be noted that only limited liability companies incorporated in accordance with the legislation of a Member State would benefit from the ability to transfer their head offices. This is systematically stipulated in the directives relating to company law.

\section{2. Limiting the scope of application to the transfer of registered offices}

\subsection{2.2.2.1. Issue}

In the Cartesio judgment, the European Court of Justice made a clear distinction between two types of transfer of head offices, according to whether they entailed a change in the national law applicable to the company or not.

In practice, a company has two solutions open to it when it wants to transfer its head office:

- Either it can arrange to transfer its real seat\textsuperscript{23}, i.e. the place where its central administrative offices are located. In this case, the operation has no effect in terms of company law: the company remains registered in its Member State of origin and retains its “nationality”. This is generally done for operational reasons, notably in order to be closer to a market, customers or suppliers.

- Otherwise, it can transfer its registered office, i.e. the place referred to in the company’s memorandum or articles of association, which is also referred to in the public register where the company is recorded. In this case, the operation does have legal consequences, since the applicable lex societatis is determined by the registered office. In transferring its registered office, the company must comply with the new lex societatis, which involves its being converted into a form of company governed in the host Member State.

In other words, when a company transfers its registered office, it is seeking a legal effect (being governed by a different form of company law); whereas when it transfers its real seat, it is motivated by operational concerns that have no legal effect.

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\textsuperscript{23} If the Member State where it is incorporated allows its registered office to be dissociated from its real seat.
2.2.2. CCIP position

The scope of application of a 14th directive should be restricted to transfers of registered head offices only, which entail a change in the applicable law.\(^{24}\)

As far as the transfer of a real seat is concerned, the solution is quite different, as it is not acceptable for the directive to provide that the Member State of origin should require it to be transferred concomitantly with the registered office. By requiring a simultaneous transfer of the registered office and real seat, the change would inevitably be made more difficult. Moreover, given the applicable case law in relation to freedom of establishment and the possibility for a company operating as a going concern to dissociate its registered office and real seat, it could simply return its real seat to the Member State of origin a few days after the transfer.\(^{25}\)

Giving the host State the ability to require the transfer of a company’s real seat concomitantly with the transfer of its registered office would therefore have no effect. As a result, the solutions laid down in the case law must continue to apply, in accordance with the connecting factors of the Member States.

2.3. Complying with the connecting factors for Member States’ national law

2.3.1. Issue

There are two contrasting theories in EU law in play in determining the law applicable to a company (the *lex societatis*).

On the one hand, there is the theory of incorporation – based on a formal criterion – according to which the company exists in respect of the national law of the State in which it was incorporated provided it was incorporated and registered in accordance with the law of said State. On the other, there is the theory of real seat – based on a material criterion – according to which the State requires that the company’s real seat is located in the Member State in which it was incorporated.

As EU law currently stands, these connecting factors have not been harmonised; so each Member State can choose either one theory or the other. This explains why the Cartesio judgment\(^{26}\) stated that although a Member State could not oppose the departure of a company created in accordance with its national law, it was nonetheless also necessary that the law of the host Member State should “allow” the transfer to be lawfully completed. More specifically, host States that have chosen to apply the “real seat” theory could therefore legitimately refuse to register a company that was transferring its registered office to its territory unless it transferred its real seat at the same time.

2.3.2. CCIP position

The adoption of a 14\(^{th}\) directive should not cast doubt on the ability of Member States to determine the connecting factors for their national law, depending on which theory they have chosen to apply. The ECJ stated that “every Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status”.

It therefore seems necessary to include a provision stating that the host Member State may require specific conditions to ensure that the transfer complies with its national law, notably by requiring the transfer of the company’s real seat.

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\(^{25}\) Indeed, the Member State of origin would be obliged, under EU case law, to recognise the legal capacity of a company that had established its real seat in its territory, provided it had been legally constituted under the law of another Member State, and by the effect of a transfer.

That said, respect for the legal traditions of Member States should not result in the creation of more restrictive rules than those already applicable to companies incorporated ex nihilo in their territory. So this is the CCIP’s position: the directive should forbid Member States that authorise companies incorporated in their territory to dissociate their registered offices and real seats from refusing to allow companies that have transferred only their real seat to their territory to avail themselves of this possibility.

3. Creating a rigorous transfer procedure

3.1. Issue

The decision to transfer a company’s registered office requires an amendment to its articles of association to bring them into line with the foreign law. This entails a change to the applicable law and ipso facto the conversion of the company that has been transferred into a form of company available in the host Member State.

Given their importance, these effects should be notified to the various stakeholders prior to the transfer being carried out. An appropriate procedure needs to be created.

3.2. CCIP position

The transfer procedure could usefully be based on that already laid down for transferring the head offices of existing EU groupings (SEs, EEIGs, SECs), which is a three-stage process:

- a transfer plan produced by the management or administration bodies;
- a report from the management or administration bodies;
- and finally, approval of the transfer by the general meeting.

The transfer plan

The transfer plan must include the following information:

- the legal form, name and registered office of the company in the Member State of origin;
- the proposed legal form, name and registered office of the company in the host Member State;
- the proposed articles of association in the host Member State;
- the proposed timetable for the transfer;
- the date from which the company’s transactions will be considered from an accounting point of view as having taken place in the host Member State;
- if applicable, the new location of the central administration or main office;
- the consequences of the transfer for employees and the proposed measures concerning them;
- a description of the terms under which creditors and members opposed to the transfer can exercise their rights and the address from which full information about these terms can be obtained free of charge.

It will also be important to arrange for publishing the transfer plan before the decision to transfer is taken at the annual general meeting. There needs to be an adequate period between the two events. The month provided for in the existing legislation would be a sensible option. Member States should set the terms for disclosure of the plan in accordance with the conditions laid down in directive 2009/101/EC.

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27 This last point has been amended slightly compared with the legislation referred to above, to adapt the obligation to take account of digital technologies. Previously, the legislation provided for “the right to examine the transfer proposal at the head office of the company instigating the transfer and to obtain free copies on request,” which is not only expensive for the company involved in the transfer, but also fails to take account of the computerisation of information.
The report from the management or administration bodies

Based on the model used for the formalities currently required when transferring the head offices of EU groupings, the management or administration body should be tasked with drawing up a report designed to explain and justify the legal and economic aspects of the proposed transfer and setting out the implications of the transfer for members, creditors and employees.

This report must be published in accordance with the terms set by Member States, so that the company’s members, creditors and employees can examine it.

It is also important to think about how it can be communicated to stakeholders a reasonable period before the general meeting called to decide on the transfer.

Approval of the transfer

As the decision to transfer the registered office involves amending the articles of association, it must be taken by the members in a general meeting, in accordance with the conditions required by each Member State for such amendments. Nonetheless, and in order to make decision-making easier, an exception could be made provided half the subscribed capital were represented. In these conditions, a simple majority could be sufficient.

It would also be appropriate, so that interested parties could be made fully aware of the effects of the transfer, to lay down a period between the publication of the transfer plan and the decision of the general meeting. The CCIP recommends that this should be set at two months.

In any case, and to avoid any kind of “empty chair” policy where a shareholder has not voted, has abstained or has returned an unmarked or invalidated ballot paper, their shares would not be taken into account in calculating the votes cast.

In addition, and in accordance with the principle of shareholder equality, the decision of the general meeting would be subject to the approval, by a separate ballot, of each category of stock where the specific rights associated with it would be affected by the transfer decision.

Finally, once the members have approved the decision, it must be disclosed. Again, the directive should allow Member States to set the terms of disclosure in accordance with the conditions laid down in directive 2009/101/EC.

4. Guaranteeing reliable implementation of the transfer

For the transfer to be fully effective (4.4), provision needs to be made for reviewing its legality (4.1). Provisions on registration in the host Member State (4.2) and deregistration in the Member State of origin (4.3) will also need to be drafted.

The CCIP is mindful of the benefits of creating a European Companies Register (4.5) to address these issues.

4.1. Legality review

4.1.1. Issue

As with transfers of EU groupings and cross-border mergers, it would be sensible to establish a procedure for reviewing the legality of transfers. A competent authority in the Member State of origin would carry out such a procedure.

4.1.2. CCIP position

Designating a competent authority to carry out legality reviews would be left to Member States to determine.
Such checks could be formalised by creating a certificate confirming that the documentation and formalities completed prior to the transfer were correct. This certificate would need to be handed over when registering in the host Member State.

4.2. Organising registration in the host Member State

4.2.1. Issue

Special formalities should be developed in the host Member States to ensure that a company that has transferred its office there is subject to the national law and to connect it materially to its new State.

4.2.2. CCIP position

Registration in the host Member State should not be more difficult than for a company incorporated ex nihilo. Given that the conditions of the transfer were checked in the Member State of origin in terms of both form and substance, it does not seem necessary to carry out further legality review in the host Member State.

However, the new registration would be subject to presenting the certificate issued by the competent authority in the Member State of origin and would have to comply with the host Member State’s company formation formalities.

4.3. Organising deregistration in the Member State of origin

4.3.1. Issue

Once the company has transferred its office and been registered in the host Member State, it will be important to inform the authority responsible for the register in the Member State of origin so that the company can be deregistered there. The information provided to both stakeholders and third parties must be as reliable as possible, particularly as regards the law applicable to the company.

4.3.2. CCIP position

It would be advisable to develop a mechanism that would enable the Member State of origin to be informed in a timely manner of the company’s registration in the host Member State.

For obvious reasons of legal security, deregistration should not be completed before receiving notification of registration in the host Member State.

4.4. Arrangements for disclosure of the transfer and its effects

4.4.1. Issue

The fact of the company’s deregistration and re-registration following the transfer should be made available for all.

It would be sensible to specify the point at which the company is considered to have effectively transferred its head office.

4.4.2. CCIP position

Firstly, each Member State should define the conditions for disclosure in accordance with directive 2009/101/EC.

The effective date of the transfer should be determined according to the date of disclosure of the transfer.

If disclosure is to enable the implementation of the transfer to be relied upon against third parties on the day of the new registration in the host Member State, it must be concomitant with disclosure in the Member State of origin. Without such disclosure in the Member State of origin, information may be distorted for third parties aware of the information in the host Member State, thus jeopardising the legal security of third parties.
To allow for the possibility of a delay in disclosure in the Member State of origin, the legislation should stipulate that until disclosure has been completed, third parties may continue to rely on the former registered office, unless the company can prove that they were aware of the new office.

4.5. **Introducing a European register**

4.5.1. **Issue**

Cross-border transfers of registered offices should, by definition, involve highly efficient cooperation and coordination between the various authorities responsible for business registers in the Member States.

4.5.2. **CCIP position**

In this respect, the necessity of creating a European register or, at the very least, organising the interconnection between the various existing business registers is becoming increasingly urgent. Work that has already begun\textsuperscript{28}, at the instigation of the European Commission\textsuperscript{29} and the European Parliament\textsuperscript{30}, must be confirmed and produce concrete proposals to ensure effective communications channels between registers, particularly in relation to the transfer of offices.

5. **Taking account of the rights of stakeholders**

Transferring an office and particularly the resulting change of law can have negative effects on the rights of stakeholders. This applies whether they are creditors (5.1), minority shareholders (5.2), employees (5.3), national authorities (5.4) or finally, third parties that may want to take legal action against the company (5.5). The transfer should not affect any of the rights acquired prior to it for any of these groups.

5.1 **Protecting creditors and holders of other rights over the company**

5.1.1. **Issue**

A company’s creditors are a particularly vulnerable group when a head office is transferred, particularly in terms of the resulting change of law. This implies creating the right conditions to provide protection guaranteeing the exercise of rights acquired prior to the transfer.

In order to ensure that the transfer is not doubtful from the creditors’ point of view, it is important to remove any possibility of its being used as a delaying tactic to make it more difficult to continue to operate or recover a debt, given not only the risk of geographical distance but also potentially a change of competent court.

5.1.2. **CCIP position**

Firstly, it is important to prohibit any company from transferring its registered office when facing winding-up, liquidation, insolvency, suspension of payments or similar proceedings.

Secondly, creditors or holders of other rights over the company must be entitled to adequate protection, the terms and conditions of which will be left to the discretion of Member States, so that they are in line with existing measures on mergers or transfers of EU groupings in their national law.

Finally, the point at which the guarantee will be due will have to be determined. This point could usefully be determined on the day the transfer plan is disclosed. Member States could, however, be given some leeway, as is already provided for in the SE scheme, by allowing them to extend protection to debts or rights arising prior to the transfer.\textsuperscript{31}.

\textsuperscript{28} Such as the introduction of the European e-justice portal.
\textsuperscript{31} In other words, arising during the period between publication of the plan and publication of the completed transfer.
5.2 Protecting minority shareholders

5.2.1 Issue

As the decision to transfer the registered office must be taken on the basis of a qualified majority, it leaves open the possibility of opposition from some members. If the total number of votes held by shareholders who have stated their opposition to the transfer is not enough to obtain a blocking minority, the transfer could go ahead regardless.

The reasons for not supporting a transfer decision, however, may be quite legitimate from the point of view of company law: minority shareholders may feel that the law in the host Member State would provide less effective protection for their interests; they may not want to have to travel to monitor the company’s activities or to attend general meetings, etc.

5.2.2 CCIP position

Prior to defining the form it would take, it is important to determine whether such protection would be offered to all minority shareholders or only those opposed to the transfer. The CCIP’s view is that protection could only be granted to the latter. It may seem paradoxical to offer protection to members, even if they are minority shareholders, when their vote has contributed to the transfer being implemented.

A liberal solution should be adopted, however, taking account of the fact that not all Member States will have the same approach: some will want to offer a right of withdrawal whilst other will prefer to offer a right to object, insofar as a right of withdrawal could expose the business to prohibitive costs.32

The directive should simply indicate that Member States may introduce measures designed to ensure appropriate protection for minority shareholders who have stated their opposition to the transfer, each State remaining free to determine what is meant by “appropriate measures”.

5.3 Protecting employees’ rights

5.3.1 Issue

The question of employee participation is a difficult area to deal with in EU matters. This has been demonstrated in the European Company experience and the SPE project: some Member States are particularly attached to their system of co-management and fearful of any system that would help to improve corporate mobility in Europe. They see these as legal avenues that would allow businesses initially registered in their territory to sidestep their national rules.

Whilst the concerns of these Member States may be understandable, it should also be noted that co-decision mechanisms of this kind are lengthy, expensive and particularly complex for businesses to implement. Recent research by the firm Ernst & Young33, commissioned by the European Commission, also showed that these rules are some of the reasons for the relative failure of the SE: stakeholders34 who responded to the European Commission’s consultation were largely in agreement on this point.

5.3.2 CCIP position

The CCIP accepts the necessity of including provisions protecting employees’ rights where a head office is transferred across borders. It believes, however, that such rules should be controlled and kept to an absolute minimum; otherwise, the legislation on transferring offices would lose all its relevance and usefulness for businesses.

32 The business could be obliged to buy back a third of the shares making up its capital.
33 Ernst & Young, Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192462, Final report 29 October 2009.
34 Such as MEDEF, BUSINESSEUROPE, ACFCI and the CCIP. The responses are available in full on the Commission’s website: http://circa.europa.eu/Public/irc/markt/markt_consultations/library/?l=/company_law/statute_european&vm=detailed&sb=Title
To achieve this, the directive must fulfill the following core requirements:

- reflect the principle whereby employee involvement must be determined by the national law of the host Member State;
- provide for exceptions in order to prevent companies from being tempted to transfer their head office for the sole purpose of avoiding the application of employee participation rules in effect in the Member State of origin – the difficulty for Member States being to reach a consensus on the thresholds that would mean a particular case was treated as an exception and the terms for its implementation;
- authorise the company to dispense with prior negotiation (which is sometimes much too long) if it has opted to be directly subject to the participation system laid down in the legislation of the host Member State: this solution is already accepted in the case of cross-border mergers and must also be offered to companies transferring their head offices;
- avoid any form of words suggesting that all Member States should offer mechanisms setting out the rules on employee participation;
- define the concept of “employee participation” with reference to article 2 k of Directive 2001/86 supplementing the statute for a European Company;
- introduce an “anti-abuse” clause, with the aim of avoiding a company transferring its office only in anticipation of changes in the national law of the host Member State, which would be less favourable for employees. A form of words similar to that used in article 11 of the directive supplementing the statute for a European Company could be usefully adopted.

5.4 Providing national authorities with a right to object

5.4.1. Issue

The fact of providing for the possibility of transferring a head office freely anywhere within the European Union could, in certain circumstances, be detrimental to the public interest.

In the case of the transfer of an SE or a cross-border merger, Member States may introduce a right to object (also referred to as a right of veto) for the national authorities where reasons of public interest so require. Such a provision may be controversial, particularly where it might reflect excessive caution or would not align well with the principles of the single market.

5.4.2. CCIP position

Creating a right to object for the national authorities is a necessary development. Legally, such a right will be effective in protecting State interests; politically, it aims to build trust amongst the most reluctant Member States to accept tools to promote mobility within the EU.

36 In other words, as “the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of:
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.”
37 The directive states that “Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights”.
40 In the case of an SE in France, the right to object can be exercised by the State Prosecutor and three regulators: the French Financial Markets Authority (AMF) when the operation concerns portfolio management companies registered in France, the Committee for Credit Institutions and Investment Businesses (CECEI) for banks and the Committee for Insurance Businesses (CEA) for insurance companies.
Any right to object should nonetheless be limited in time. It is essential that it should not create a sword of Damocles over the head of a company that wishes to transfer its office. It would therefore be advisable to restrict its exercise to the period between the disclosure of the transfer plan and the decision of the general meeting.

In any event, and in order to avoid abusive use of the right of veto by national authorities, it would be advisable to create a system of appeal to a judicial authority for the benefit of companies wishing to transfer their offices.

5.5 **Safeguarding the conditions for legal action**

5.5.1. **Issue**

Organising the transfer of registered offices within the EU will inevitably make so-called “forum shopping”\(^{41}\) and “law shopping” easier.\(^{42}\).

This certainly appears to align well with the political determination to complete the internal market, but on condition that companies not use it to escape their obligations at the expense of the rights of consumers, their partners and, more generally, all third parties who may want to rely on legal action under a particular law or before a particular court.

5.5.2. **CCIP position**

The 14\(^{th}\) directive could usefully provide, as with the existing system for transferring an SE, that any party involved in legal action relying on a dispute that arose before the transfer could bring it before the court that originally had jurisdiction and according to the law applicable at the time. Such a provision should not result in the transfer itself being challenged.

In other words, for any dispute arising prior to the transfer (i.e. until the company has been registered in the host Member State), and even if proceedings are begun after the transfer, the company should be treated as having its registered office in the Member State where it was registered prior to the transfer.

Once this rule has been laid down, two further stipulations will be required:

Firstly, the principle of legal security must require a time limit by introducing a “purge” period, after which all disputes would be subject to the law of the host State, even if they arose before the transfer. A period of one year would seem appropriate insofar as it would leave sufficient time for possible claimants to begin proceedings under the previously applicable law.

Consumers, however, would still be able to rely on the law applicable in their country of residence. Similarly, the provision would have no impact on employment law, which is determined by the place where the service is performed. Finally, this would apply only to those disputes that were directly dependent on the *lex societatis*, namely those relating to the formation, operation or winding-up of the company.

Secondly, as the newly applicable law could be more favourable to claimants, the directive should provide that, as an exception to the principle set out above, they could rely on the law of the host Member State before a competent court in said State, even if the dispute arose prior to the transfer.

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\(^{41}\) *In other words, the possibility of selecting the legal system whose case law is most beneficial.*

\(^{42}\) *The possibility of selecting the law applicable in a given situation.*