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CCBE response to the European Commission consultation on the cross-border transfer of the registered office of companies

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The Company Law Committee of the CCBE has discussed your public consultation document on the Outline of the Planned Proposal for a European Parliament and Council Directive on Cross Boarder Transfer of the Registered Office of a Company. The CCBE represents over 700,000 lawyers through their national Bars and Law Societies. Its comments which follow the sequence of the questions of the on-line consultation are set out below.

The CCBE has responded to the Commission on-line consultation on 15 April 2004, however has thought it useful to submit some further detailed comments to the Commission.

The CCBE welcomes any proposal which enables companies to transfer their registered office to another Member State and to acquire legal personality in that other Member State in place of its original legal personality in the home Member State without having to be wound up provided that shareholders, creditors and other third parties are adequately protected.

The CCBE would make the following comments:

1. The CCBE agrees that the Directive should cover all forms of limited company namely legal entities that have legal personality in their own right and separate assets which alone serve to cover their debts. However, it may be appropriate to consider whether other similar legal entities, for example, co-operative organisations, limited partnerships and foundations should also be in a position to take advantage of any proposed Directive. Therefore it may be appropriate that, in addition to any definition of limited company, that a list of the different types of entities which may take advantage of the Directive be set out and annexed to the Directive with each Member State proposing the entities to be included for that Member State.
2. The decision to transfer the registered office to another Member State should be taken by the company in general meeting in accordance with the necessary rules and procedures in the home country for amending the company's Memorandum and Articles of Association.
3. The general meeting should take this decision on the basis of a transfer proposal which would cover the form, name, registered office and Memorandum and Articles of Association planned for the company in the host Member State together with the planned timetable.
4. The transfer proposal should be publicised appropriately, for example, in newspapers circulating in the home Member State. In this context we refer to the First Council Directive on Publicity.
5. Members, creditors and, where they exist, employee representatives should be given sufficient time to examine the transfer proposal and in any event the proposal should be advertised in a newspaper.

6. The decision to transfer the registered office to another Member State should be accompanied by an alteration of the company's structures and assets in order to comply with the substantive and formal requirements for registration and the granting of legal personality in the host Member State. It should also be specified which company form in the host Member State is chosen by the transferring company.
7. Member States could be permitted but not obliged to take specific measures to protect creditors and minority shareholders opposed to the transfer. Therefore the requirements of the Directive should be general but with Member States being allowed to include more stringent requirements if they so wish.
8. The onus should be on the home Member State to verify the legality of the decision to transfer the registered office to another Member State and thought will have to be given as to the form such verification should take.
9. The obligation should be on the host Member State to verify that the company transferring its registered office meets the substantive and formal requirements for registration and the granting of legal personality under its national law. If appropriate, it should check that amendments to the Memorandum and Articles of Association are sufficient.
10. The company should remain registered in its home Member State until such time as it is registered in the host Member State and Member States should be required to co-operate in arranging for the company to be registered in the host Member State and removed from registration in the home Member State. However, consideration will need to be given to, for example, dealing with legal proceedings which are in existence at the time of the transfer of a seat or legal causes of action that have arisen at that time and in what jurisdiction such future proceedings should be brought. It should be made clear that the courts before which litigation is pending remain competent and retain jurisdiction and that such proceedings are not affected by the transfer of seat and that proceedings may still be brought on the basis of the laws that applied to the company at the time a cause of action arose.
11. It is also appropriate that there should continue to be an entry in the home Member State (rather than the company being removed completely) from the Register there but the information available can be quite basic, for example, only giving details of the Member State to which the company has been moved and its number there. Consideration will also have to be given to providing for a period after registration in the host Member State during which all the registration details available in the home Member State should be available together with brief details of the re-registration (relevant Member State name and identification number) (or even perhaps copies of every document filed in the home state within e.g. 3 years prior to re-registration).
12. The transfer of the registered office should be entered in the register of both Member States.
13. It is important that the transfer of the registered office should not entail the company being wound up in the home Member State.

14. The act of the transfer of the registered office should be tax neutral as laid down in Directive 90/434/EEC applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States.
15. As regards the question of employee participation, the CCBE would suggest that a similar approach to this issue should be taken as was adopted in the SE Regulation and related Directive in connection with a merged SE, and as in the proposed Cross-Border Merger Directive.