

Let My People Go

[SLIDE No. 1]

Now that you have seen the big picture of corporate mobility and heard thoughtful comments as pieces of the puzzle, I would like speak about more pieces of the same puzzle. Before we do this, I invite your attention to the title of my presentation – it goes like this: *Let My People Go*. [SLIDE No. 2]

Clearly, it is not the same passionate plea that Moses had delivered to the powerful and mighty Pharaoh. It is, no doubt, a more subdued and subtle message, but the bottom line is the same: *Let My People Go* - let companies transfer their registered office from one Member State to another without the need

(1) to first wind up and then form a new company, or

(2) first form a company in the land of hope in another Member State and then effect a merger between your company in your Home State and this newly formed subsidiary.

As to other pieces of the puzzle, I wish to cover four issues.

1. We are close but not quite there

We have heard that several foundations have been built to achieve the goal of cross boarder mobility [SLIDE No. 3]:

- The SE Regulation permits some kind of transfer (but we know that it is incomplete and the SE itself is less than a vehicle of full satisfaction).
- ECJ played a critical role, and many commentators believe if they did not get this tortured Hungarian *Cartesio* case, from which the Court could not come out right and of which the Commission became paralyzed for quite some time, the Court might have been able to put the dot on the “i” and cross the “t”. Others believe that no matter *what* case was presented to the bench, the Court could not and cannot finish this job. I share this view. It takes a small and smart step from the European legislature to deliver on my plea.
- There is the Cross Border Merger Directive, which already provides a structure and process for the transfer of registered office through a relatively simple merger transaction.

2. The Merger Route is No Equivalent

A number of commentators believe [SLIDE No. 4] that the transfer of registered office through the Merger Route is a good substitute for a straightforward transfer. I am afraid it is not. The Merger Route involves more time, a more complex process and substantially more “paperwork” (merger agreements, interim accounts, resolutions). For small businesses this complexity may make the difference. If they have to go for the merger solution, they may not transfer their registered office. The decision makers should not get comfort from the fact that this Merger Route exists for sophisticated businesses served by competent advisors. Small businesses need a simpler, faster and leaner solution.

3. Creditor Protection

As to creditor protection, the Reflection Group said that the protections of the CBM Directive are workable - mutatis mutandis. [SLIDE No. 5] The (CBM) Directive refers you back to the safeguards and protections prescribed by the laws of the Member States involved in the merger. The familiar standard, as formulated in the 2nd and 3rd directives, is that safeguards must be given to protect holders of un-matured obligations if (i) protection is necessary and (ii) the creditor is otherwise not protected.

In a cross border merger conceptually you have two types of risks [SLIDE No. 6]: the Transaction Risk + the Transfer of Seat Risk (which I coin as the Internal Affairs Risk). The Transaction Risk is the result of the combination of assets and liabilities of the merging entities. The surviving company will have different assets and liabilities, and in real terms will have a changed business model. [SLIDE No. 7]

In the transfer of seat situation, we have the same entity, whose Internal Affairs will be governed by the laws of another Member State. The assets and liabilities of the new entity have not been changed. [SLIDE No. 8] Accordingly, the transfer of seat involves the Internal Affairs Risks “only” – things that change when you change nationality. At the risk of simplicity, these are the following issues [SLIDE No. 9]:

- Capital and capital maintenance; distributions (risk here: exceeding solvency).
- Majority – minority relations.
- Governance: status and liability of directors – (risk here: reckless transactions). Director’s duty when in financial distress. No Member State permits contracting out of director’s liabilities like Delaware does.

- Internal reorganization rights – once you are in the new Member State, reorganization will be subject to this regime. Including reorganization outside or, maybe, in bankruptcy.
- The concept of, and limits on, limited liability: removal – piecing or other doctrines.
- Insolvency and bankruptcy. Since company laws work together with creditor-debtor laws and bankruptcy laws, this may be a real concern.

All in all, the Internal Affairs Risk entails a limited and indirect effect on creditors who do not form a homogeneous group in the first place. What we mean by *mutatis mutandis*, must be protection commensurate with the risks associated with the new nationality of the company.

4. Forum Shopping and Related Misdemeanors

It seems to me that in our discussions of forum shopping, we often times blur two (or perhaps three) distinct issues. [SLIDE No. 10] One is the applicable law or laws that come into play in different contexts when a company transfers its registered office, and the other is the venue or jurisdiction where remedies can be enforced against this company.

With the transfer of registered office you take with you your Internal Affairs. All these issues will be governed by the laws of the new Home State. What you cannot obtain by transferring the registered office are the laws that govern:

- contracts and security interests – Rome I (Regulation 593/2009).
- non contractual claims, tort claims – Rome II (Regulation 864/2007).
- insolvency – Center Of Main Interest (Regulation 1346/2000).
This is a big chunk of your company's business.
- venue or forum where you can be sued – Brussels I (Regulation 44/2001) which mandates that Member States adopt Rules of Civil Procedures that permit plaintiffs to sue in as many Member States where the company has some presence.

Accordingly, when you look at the full picture, you find that there are limited options to shop around. Forum shopping is not an overwhelming threat.

6. Conclusion

When we think of the transfer of registered office, we should not approach this enterprise with the head of mighty Google. Rather, we should recall the story of Mark

Zuckerberger and friends and partners, creating something in Cambridge, Massachusetts, forming an LLC in the State of Florida, and when it comes to obtain first round equity financing, move physically to Palo Alto, California, and to quickly convert the Florida LLC into a Delaware corporation. If Europeans want to offer their talents an opportunity to keep start-ups here on this Continent [SLIDE No. 11], students in Cambridge (England) should be able to form, on line, a company in Spain (because it is the father of one of the students who lends money and his business is in Bilbao), and when it comes to financing, the shareholders should be able to transfer the registered office either back to the UK or to Ireland, perhaps to Finland or Austria or any Member State that offers a good company law system and infrastructure. With this vision [SLIDE No. 12], let me repeat my subdued and subtle plea in a slightly revised form: *Let My People Come and Go.*