

Presentation by Professor Antonio Perdices Huetos

My intervention will focus on the main features of cross-border transfers of registered office of companies in Spain. The interest of this regulation lay, from a substantive point of view, in its broad and liberal approach to this matter, an approach that overcomes the 14th Directive draft in which it is clearly based, and that fits perfectly with the European Parliament Recommendations of 2009. Besides, from a technical point of view, its virtues are brevity, simplicity and clarity. In this sense, it might be an example for other EU Member States to follow and even –who knows- for a future directive itself.

Since 2009, cross-border transfers of companies in Spain are regulated by the Structural Modifications of Commercial Companies Act. Although this act was originally intended to implement the Directive on cross-border mergers, it also provides for a new regulation of conversions, mergers, divisions, and, of course, cross-border transfers of registered office of companies –it is more or less our “*Umwandlungsgesetz*”-.

Company mobility is regulated in the last twelve articles of this act, including both the transfer of (the registered office of) Spanish companies abroad, and the transfer of (the registered office of) foreign companies to Spain. Logically, the act focuses mainly on the former devoting only one article to the latter.

Foreword: The head office Issue

The general starting point in this matter is the **absence of any hint or reference to the head office or real seat of the company**, overcoming in this way the 14th Directive draft (arts. 2 and 11). This is logical since the head office location is, as a matter of Spanish Law, an issue of fact that cannot be controlled by the Register, and that is mainly irrelevant. The head office is independent and can be set and moved freely without regard to the statutory office (I use the term statutory office to refer to the office included in the company’s articles of association). The one and only relevant point –for Company law at least- is the registered office, since it is the only factor that determines the national applicable law.

Therefore, a company with its registered office in Spain –and therefore subject to Spanish law- may have its head office abroad, from the very beginning or by way of transfer. Conversely, a foreign company may have its head office in Spain, from the beginning or subsequently, keeping its statutory office abroad and consequently being subject to a foreign law. In this way, a Spanish public company can have its registered office in Madrid but its head office in Lisbon, remaining –at least for Spanish purposes- a Spanish company. Conversely, a German private company with statutory office in Berlin can have its head office in Mallorca, remaining German and free from any claim from Spain to regulate it. As a logical consequence, as we will see immediately, the transfer of the registered office from and to Spain is in no way conditioned to the simultaneous transfer of the head office (as it was admitted in the article 11.2 of the 14th Directive draft).

Let's consider now the two possibilities: Spanish companies departing abroad (I) and foreign companies arriving into Spain (II).

I. Departing companies: Transfer of -registered office of- Spanish companies abroad

It is always possible for **Spanish companies to transfer their registered office abroad**, provided that the state of arrival allows the maintenance of the company's legal entity. This will lead as a general rule to a cross border conversion, in the sense that the Spanish legal form will be converted, without dissolution or winding up, into a similar legal form of the new home state. So, for instance, a Spanish public company may convert into a Spanish private company (inland conversion) or into a Portuguese private company, provided that Portugal allows for it (cross border conversion). Besides, the maintaining of the legal personality makes this operation tax exempt just like an inland conversion.

Besides the admission of the cross border conversion by the state of arrival, and following article thirteen of the 14th Directive draft, in order to protect creditors and shareholders it is required that the Spanish company to be transferred is not subject to insolvency proceedings or being liquidated.

Assuming that the above stated conversion is possible, the law provides for a procedure which follows the path set down in articles 4 to 12 of the 14th Directive Draft and the procedures laid down in Regulation on the European Economic Interest Grouping and European Company. However—and this is important- this procedure does not foresee *any* safeguard clause based on public interest or similar issues that allows “shooting at the border”:

a) This procedure starts with a **transfer proposal** and an **explanatory report** by the directors that should be **filed with the Commercial Registry** and published in the Official Journal of the Commercial Registry. Among other things, this should mention the right of shareholders and creditors to request information free of charge about their rights regarding the operation.

b) In second place, the transfer of the registered office must be **approved by the General Shareholders' Meeting** according to the general rules of each type of company. The **call of General Shareholders' Meeting** cannot be published until the transfer proposal has been filed with the Commercial Registry, it must contain all the relevant information, especially regarding the new office and shareholders' and creditors' rights, and it must precede at least in two months the meeting itself. (i) **Shareholders** who have voted against the resolution to transfer are allowed to withdraw from the company and (ii) **Creditors** whose claims originated before the date of publication of the transfer proposal may oppose to the transfer in the same terms provided for a merger.

c) The **resolution of the General Shareholders' Meeting** approving the transfer will be submitted to the Commercial Registry and if all conditions have been met, the Register will be **closed** to further entries till the final deletion of the registration of the

company. This will happen once the company has been registered with the Registry of its new statutory office and that such registration has been publicized.

Finally, as foreseen in article 12 of the 14th Directive draft and in the Regulation on the European Economic Interest Grouping and on the European Company, the act provides that the transfer shall **take effect** on the date of registration of the company with the Registry of the new registered office.

II. Arriving foreign companies. Transfer of -registered office of- foreign companies to Spain

The possibility for **foreign companies to transfer to Spain** is broadly admitted, with a slightly different regulation between companies of one Member State of the European Economic Area and companies incorporated under other laws.

a) In case of **companies arriving from one Member State of the European Economic Area**, the law declares that the transfer shall not affect the legal entity of the company. As you can see, Spanish law presumes and takes for granted that the legislation of all these countries of the EEA allows the maintenance of the legal entity. This presumption duly justified by the doctrine of the European Court of Justice. However, the arriving company will have to comply with the requirements of Spanish law for the incorporation of a company of the same class. This means that the foreign company will convert to a Spanish company form governed by Spanish law (cross border conversion)

b) Regarding **companies incorporated under other laws**, the act states that the transfer shall not affect the company's legal personality, provided that the applicable law permits maintaining it. In particular, the foreign company will have to produce a report issued by an independent expert that its net worth covers the amount of capital required by Spanish law.

In this way, the law shows a tendency to be very favorable to the transfer of the registered office of foreign companies to Spain, and it must be highlighted that it does not consider any safeguard requiring a genuine economic activity or a head office in Spain (as it was admitted in the article 11.2 of the 14th Directive draft, which stated that *"the state of arrival may refuse to register an arriving corporation if its central administration is not situated in the state of arrival"*). Spain will host any company provided that the home state allows the transfer; which is taken for granted in the case of the EEA Members.

Anyway, the contrast between this generous approach of open doors, which was present in the first draft of the European Private Company, and the more restrictive one of the European Company and the last draft of the SPE, is paradoxical.

Conclusion: Competition between legislations and race to the bottom?

What if all the EEA States would adopt this set of rules? In my view the result would be, at least regarding small and medium enterprises, a very limited competition between

States, since the barriers of legal tradition, language and administrative cost would be excessive in most cases. Just think of the cost of local legal advice, translations and registering of documents in a foreign land. Besides, we must also bear in mind the concerns that may be raised, for instance, by the possibility of an Estonian company composed by Spaniards acting in Spain: in which commercial registry could potential Spanish contracting partners consult the board of directors or the financial statements of that company? In Tallin? In Estonian language?