

Corporate Mobility

In the past three years with the Merger Directive and the SE Regulation, progress has been made on the mobility of European companies, but it is not enough.

To provide companies with an adequately secure legal basis, it is necessary that the mobility of companies guaranteed by the freedom of establishment be extended by an EU legal act.

1. We urgently need a Transfer of Registered Office Directive enabling a company from one member state to transfer its registered office according to its Articles of Association and administrative headquarters to another member state while simultaneously adopting a corporate legal form of that second state.

Why such a provision has not yet been presented for further discussion is incomprehensible. Existing cross-border possibilities cannot make up for the lack of a Transfer of Registered Office Directive.

- The fact that the Commission has stopped work on the Transfer of Registered Office Directive and now intends to await the judgement in the Cartesio case, which concerns the cross-border transfer of the registered office of a limited partnership from Hungary to Italy, is not acceptable. Even less so, if this means the cessation of the work. This case, which will undoubtedly develop the judgements of the ECJ to a certain extent, will not, due to its individual character, provide a secure basis in practice for how mergers are to be conducted. Important questions, e.g. how is co-determination to be dealt with, will not be clarified by this judgement. I am sure that no major German company will transfer its registered office on the basis of such an individual judgement.
- Equally, resort to the existing possibilities of transferring registered office in the case of the SE and cross-border merger are not sufficient.

The transfer of registered office possible for the SE is not helpful because transformation into a complicated and intensively regulated

legal form is involved. That cannot be demanded of small or medium sized companies, bearing in mind that re-transformation to a national legal form is possible only after two years.

- Resort to the merger possibility is also unsatisfactory. The formation of a new company (shell company) in the new state and the merger of the existing company into the new company is an expensive and roundabout process compared to a direct transfer of registered office, all the more so because a permanent establishment must usually remain in the original state so that hidden reserves are not released. A completely unsatisfactory procedure in practice.
- Finally, the company could be dissolved in the original state and a new company formed in the other state. Apart from the enormous cost of the liquidation, such a procedure would be damaging to the good name of the company and therefore unrealistic.

The Transfer of Registered Office Directive is therefore a necessity. We need a directive that enables companies to move from one EU state to another with transformation of their legal form. We need provisions so that the registered office can be transferred without the need to retain a permanent establishment. The provisions of the Merger Directive do not satisfy these needs.

The possibility of transferring the registered office will also enliven the competition between the member states to provide a legal and tax model which is as attractive as possible. This is also a must, because it will help the further expansion of the European economy.

If the European Commission not only defers but abandons the project of the transfer of registered office, it should all the more concern itself with the proposals of the Council for Private International Law (IPR). Regulation at European level would, of course, be the best solution, because a basis for successful transactions in Europe would be established. In practice, it has so far been difficult, because of the varying degree of harmonisation in private international law and the fact that many possibly contradictory and awkward provisions may be applicable. A purely private international law solution would certainly leave the problem that substantive legislation in each member

state is presupposed, unresolved. As I have said, it cannot solve all the issues, but would be an important step in the right direction.

2. In the market, we also need other provisions on mobility. For example, cross-border spin-off provisions should be considered. There is already a tax provision on this issue but so far no company law provision. This is also required in practice. A directive would be preferable although Europe-wide private international law provisions would be helpful.
3. We need mobility not only for companies but also for partnerships.

A directive for the EU area would be automatically useful in this respect although more complicated than a private international law approach, which involves further adjustments by the individual member states.

Dealing with this issue is also a necessity.

4. Against this background, the repeal of the national merger directive, the 3rd Directive, which is under consideration, is not satisfactory. It is the basis on which we have, in the member states of the EU, a uniform regime for the merger of stock corporations. It is the basis for the comparable regulation of other legal forms which exists in many states and for the rapid agreement on the Cross-border Merger Directive and the SE. It is also the basis for the Cross-border Merger Directive because it contains many references to the 3rd Directive.

By this repeal, the Commission would be de-harmonising instead of harmonising - a process which would lead in Europe to more variety, less certainty and ultimately to higher costs.

Before the repeal, therefore, the benefits of the 3rd Directive, its effect on other legal forms, and the long-term implications of every state having its own merger regime, for example, with respect to companies not covered by the Cross-border Merger Directive, must again be precisely analysed. To act on the basis of short term savings only, is not adequate.

The experience on the USA, where Model Acts are successfully employed to harmonise the laws of federal states which do not necessarily deal with cross-border situations, should also be taken into account here.

5. Finally, as to the existing legal acts. The Cross-border Merger Directive dates from 2005 and has been implemented into national law. It is an important instrument in practice and at the same time, an inexpensive one. A German/Italian transaction has shown that the merger is much less expensive in comparison to a takeover. It is said that 1.5 billion Euro was saved in comparison to a takeover (because of the avoidance of premiums). It is therefore worth keeping this form of transaction in mind and to structure it as efficiently as possible. Practice so far – at least from a German point of view – shows that there are still many obstacles to be overcome.

- Firstly, the Democles sword of challenge hangs over the merger. As the compensation claim proceedings (Spruchverfahren) often cannot be invoked, shareholders who are not satisfied with the exchange ratio or the compensation challenge the transaction and thereby hold it up. In practice, this is an unacceptable hindrance as the transactions so far have shown. A better solution is needed.

In a working group, we are at present examining whether solutions of this issue at European level are thinkable: whether in states which grant their shareholders a right of review, there should be a uniform procedure in Europe separating the review of the exchange offer or the compensation from the validity of the transaction.

In this case also, in the long-term the question of why a shareholder leaving the company in the course of a merger should not receive shares instead of cash, a solution which would assist liquidity and render the transaction form more attractive, must be examined.

- It will also have to be further observed in practice whether special rights in a company (e.g. additional voting rights, maximum or preference rights) can successfully be exchanged for shares in a company which does not have such preference rights.
- Also to be observed is whether the parties to a merger succeed in practice in agreeing on the existing variety of valuation methods in the member states. If not, uniform guidelines on this issue could be appropriate.

I would therefore request that the European Commission reviews the functioning of the Merger Directive and evaluate and amend it on the basis of experience gained in practice. A short time span is desirable for this process. I am sure that industry will be glad to pass on its experience in collated form and transmit same to the Commission in regularly up-dated form.

5. Overall, not enough has been achieved on the way to complete cross-border mobility. The present paralysis of the activities of the European Commission is not acceptable. It is therefore important that the European Parliament and the Council and the industries affected build up pressure so that ultimately the objective of complete mobility by 2010 is achieved.