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Intra-EU cross-border seat transfers: Risks for stakeholders

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Introduction

As a result of Europe's credit crunch, the need for re-pricing the risk and availability of funding coupled with a trend of consensual restructurings of companies has led to an increased number of cross borders seat transfers. The present contribution provides a brief overview of the key concerns relating to the risks that cross-border seat transfers within the EU may entail for the main stakeholders i.e. shareholders, creditors, employees, managers and the society as a whole. These risks reside in the changes that a cross-border transfer of seat implicates with regard to a. international jurisdiction and b. applicable law, and are aggravated by the lack of uniformity in the EU Member States ("MS") national law, mainly company law and procedural law of compulsory execution.

The article at hand is organized as follows: I. Applicable legal framework and international jurisdiction; II. Risks potentially entailed for the company's administration (directors/managers) and shareholders; III. Risks potentially entailed for the company's creditors; IV. Risks potentially entailed for the company's employees; and V. Social impact of cross-border seat transfers.

I. Applicable legal framework and international jurisdiction

a. Applicable law

Companies are creatures of national law; the conflicts-of-laws rules of the lex fori, thus, determine whether a company fulfills the critical connecting factors to be subjected to the lex fori. If such connecting factors are met, the lex fori regulates a company's incorporation in the forum's jurisdiction, its corporate form, administration and shareholders' rights. As, however, MS consider different connecting factors to be relevant in this respect, cross-border transfer of seat may result in significant changes and considerable legal uncertainty as regards the company's legal status and stakeholders' respective rights and obligations. The law applicable to insolvency proceedings is likewise potentially linked to the company's registered seat by virtue of art. 4 par. 1 Regulation No. 1346/2000, which designates as applicable the law of the MS within the territory of which such proceedings are opened, applied in conjunction with art. 3 of the same Regulation that establishes international jurisdiction to open main insolvency proceedings for the courts of the MS where the company's COMI is situated. The latter is presumed to be the place of the company's

registered office absence proof to the contrary (art.3 par. 1 in fine).

b. International jurisdiction

Along the same lines, international jurisdiction with regard to the company's affairs is equally affected by a cross-border transfer of seat. Pursuant to art. 2 in conjunction with art. 60 of Regulation No. 44/2001 legal persons may be sued in the courts of the MS where they domicile in i.e. where they maintain their statutory seat, or their central administration, or their principal place of business. In practical terms this means that transfer of seat, whether statutory or real, from one MS ("home MS") to another MS ("host MS") will most likely establish general jurisdiction of the host MS's courts. This is particularly important with regard to the applicable rules of civil procedure, especially in respect of the ranking of creditors and allocation of the proceeds in case of compulsory sale of the company's property, which are provided by the *lex fori*. Furthermore, as mentioned above, host MS's courts assume jurisdiction for the opening of main insolvency proceedings, if the seat transferred constitutes the debtor company's COMI.

Risks potentially entailed for the company's directors/managers and shareholders

a. Directors/Managers

Depending on the conflict-of-laws rules of the involved MS and the circumstances of the cross-border transfer, company administration may be determined by the company law of the host MS, which may provide for enhanced liability for managers. Greek company law adopts the more lenient "business judgment rule" as a standard of liability (art. 22A CL 2190/1920). Transferring of seat to a MS that applies the more stringent "entire fairness test" in this regard would expose company directors/managers to increased liability. Additionally, burden of proof provisions provided by the *lex fori* are equally significant in this respect and may constitute an additional onus to be borne by a manager involved in a relating dispute.

b. Shareholders

As described under II.a. with regard to directors/managers, shareholders' rights may similarly be determined by the company law of the host MS. Controlling shareholders may, thus, be subject to different rules on controlling shareholders' liability due to the new regime permitting or facilitating piercing of the corporate veil. Contrary to controlling shareholders that have presumably made an informed decision, the position of minority shareholders having objected to the transfer may be compromised under a new legal regime of reduced rights or increased obligations. Minority shareholders of a Greek SA transferring its statutory seat to another MS may, for example, lose their right to information on the status of the company affairs and the latter's fiscal status (art. 39 CL 2190/1920).

II. Risks potentially entailed for the company's creditors

To be sure, cross-border seat transfers may affect legal relationships of the company with third parties, namely creditors. Creditors' status could be compromised in view of less advantageous ranking rules in the context of compulsory execution or due to different rules regulating insolvency proceedings in the host State. Even if creditors obtain a court judgment at the host MS and attempt to enforce it at the home MS, provided that the company maintains property in that jurisdiction, they will face considerable delay with regard to final satisfaction of their claims.

III. Risks potentially entailed for the company's employees

Assuming that the place where employees carry out their work remains the same, social security rights and employment law protection should not be altered. Employees' right of involvement in corporate administration, if applicable, however, may be restricted or eliminated under the new regime. Employees may, moreover, lose their ranking as preferential creditors of the company with regard to claims stemming from the employment agreement, such as unpaid wages (e.g. as stipulated in art. 975 Greek Civil Procedure Code), if compulsory execution against the company takes place in the host MS.

IV. Social impact of cross-border seat transfer

The preponderant social concern relates to a possible financial and business drainage of MSs failing to offer a competitive company law environment in favor of MSs that facilitate cross-border transfer of seat to their jurisdiction and offer business and tax incentives for company migration. Additionally, administration carried out from a foreign jurisdiction might result in ignoring the local concerns and disregarding local society and working environment particularities. Abuse of a foreign legal system to circumvent duties imposed by the law of the home MS is also to be considered as a risk. Last but not least, a risk inherent to the described scenario is potential distortion of competition in the common market contrary to EU's fundamental objectives.

Concluding remarks

In conclusion, cross-border transfer of seat – assuming it could be effectuated while maintaining continuity of the same legal entity – involves risks that primarily emanate from establishing international jurisdiction of the courts of the host MS, as well as rendering applicable a new legal framework that may encompass provisions that are less advantageous or more onerous for the stakeholders.