

Publications

To have a seat or to have two seats or to have no seat - that's the question!

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Ever thought what happens if a company wants to transfer the formal seat (“registered office”) to another country in the EU and therefore change the registered office without intending to transfer the real head-office to the other state? As you may assume, there could be various reasons why a company might think that it is preferable to have its registered office in another country without changing the office which is its de facto-seat.

So, one could ask oneself if it is possible to transfer the registered office over the border with the disclosed intention not to change the “real” seat. The questions arise, what will happen to the remains of the legal entity where the company had its former seat and if and how that entity company should be wound up.

The grand chamber of the European Court gave the answers recently in the case C 106/16:

In that case the shareholders of a Polish company decided to transfer its registered office to Luxembourg by becoming a S.A.R.L under Luxembourg law but without the intention to change the place where the business is managed or carried out, even the name was changed but all these facts did not seem relevant to the European Court.

Consequently, the Polish company applied at the Polish registry court for its removal from the Polish

commercial register. The registry court considered a liquidation procedure applicable and ordered the company to install a liquidator and to follow procedures for financial accounts to be signed by the liquidator etc. The Polish company argued that it was only transferred and not liquidated and therefore appealed.

In the end, the European Court was asked to give its opinion, considering the freedom of establishment.

The main question was, could this freedom really be used to transfer a company's registered seat just by decision of the shareholders without changing the location of the "real head office"?

The answer of the court is: **YES**, under the condition that under the law of the host member state the "connecting factor" of the company being transferred to the host member state is regarded as sufficient - this means, in this case, that for the Luxembourg registry court the transfer of the registered office by shareholders' decision without transferring the real head office to Luxembourg was sufficient to register the Polish company as a S.A.R.L in Luxembourg.

In addition, the court stated that the fact that a company wanted to transfer the registered office without affecting the real head office of that company and the possible purpose of "*enjoying the benefit of more favorable legislation does not, in itself, constitute abuse*".

Consequently, the court ruled that imposing a liquidation procedure on a company that decides to transfer its registered office to another member state and wants to convert itself into a company under the laws of the new host member state - though the de facto-seat did not change! - is a legal requirement which is "*liable to impede, if not prevent, the cross-border conversion of a company.*" National legislation is not permitted to impose such a condition in these circumstances.

Understandably the Polish and other governments argued that a lack of a liquidation procedure to remove a company from the registry could affect the interests of creditors that should be protected. The court pointed out that national legislation may adopt any appropriate measure for preventing or penalising fraud, but "*the mere fact, that the company transfers its registered office from one member state to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty*".

This decision obviously offers opportunities to companies for cherry-picking more favorable legislation than that which exists in their actual home country, but also may impose reasonable difficulties for creditors to pursue their claims and we will see how national legislation will react by imposing appropriate measures before removing a company being transferred from the register which are less strict than a typical liquidation procedure.

This article is not a legal advice, for full information please contact one of our LIBRALEX members and refer to the full wording of the European Court's decision C-106/16.

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