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German Tax and Legal News

Court ruling on regulations applicable to cross-border relocations - Regulations of the German Reorganization Act decisive

The SE Regulation does not apply to a cross-border relocation with conversion of a French S.à r.l. into a German GmbH.

Pursuant to a recent court ruling of the Kammergericht (Higher Regional Court of Berlin), the relocation of the statutory seat of a French S.à r.l. to Germany upon simultaneous conversion into a German GmbH shall be subject to the respective regulations of the German Reorganization Act; the rules related to the relocation of the statutory seat of an SE shall not apply.

The following article is based on our comments of the court ruling of the Kammergericht in the well-known law journal Der Betrieb dated July 15, 2016, pages 1625 – 1626.

Factual circumstances
The register court denied the registration of the relocation of the statutory seat of a French S.à r.l. upon simultaneous conversion of that entity into a German GmbH (inbound conversion relocation). In its reasoning, the register court inter alia argued that the prerequisites for the relocation of the statutory seat of a Societas Europaea (SE) as set in the SE Regulation have not been met.

The Kammergericht Ruling
The Kammergericht (Higher Regional Court of Berlin) came to the conclusion that the prerequisites set in the SE Regulation do not apply to an inbound conversion relocation into a German GmbH. It argued that the SE Regulation was designed for multinational undertakings/groups of companies. Its application to smaller undertakings such as the company in question would not make sense and lead to unjustified disadvantages for non-domestic companies if compared to German companies, to which the respective regulations do not apply.

The Kammergericht applies only the regulations contained in the German Reorganization Act related to a conversion of the legal form. In that context, in particular the regulations related to the formation of a GmbH must be taken into consideration.

Own judgment
Since the VALE-ruling of the ECJ, it is clear that a cross-border relocation of limited liability companies upon simultaneous conversion of their legal form must be possible within the EU. Insofar, the ruling of the Kammergericht only confirms the prevailing opinion in German legal literature. Nevertheless, the ECJ has never defined the exact prerequisites for or laws applicable to such measure. Against this background, the ruling of the Kammergericht provides useful guidance. The Kammergericht solely refers to the regulations contained in the German Reorganization Act and explicitly refrained from applying provisions contained in the SE Regulation. This means that practitioners now have additional comfort in dealing with this type of measures and treat them equal to domestic conversions of the legal form.

No uniform concept in German case law
The ruling of the Kammergericht is in line with the ruling issued by the Higher Regional Court of Nuremberg in June 2013 which also came to the conclusion that an inbound conversion relocation shall solely be subject to the German Reorganization Act. That ruling was related to the inbound conversion relocation of a Luxembourg S.à r.l. into a German GmbH. Nevertheless, other German courts had taken a slightly deviating position and a checklist published by judges at the local court of Berlin-Charlottenburg dealing with the commercial register matters had explicitly demanded the applicability of the respective rules of the SE Regulation. In spite of the fact that there is still no final uniform concept followed by German courts and no ruling of the Federal Supreme Court with respect to such constellations, yet, it appears as if there is an increasing tendency to follow the principles set by rulings of the Higher Regional Courts of Berlin and Nuremberg. Future developments

remain to be seen.

Practical advice
The Kammergericht ruling does not represent a final and binding decision on how to treat each and every form of cross-border relocation of companies. In its ruling, the Kammergericht explicitly makes reference to the factual circumstances of the case at hand and, in particular, the size of the company forming the subject matter of the decision. It remains to be seen how the court will decide in relocation cases involving larger or large companies, which may even be subject to employee participation (in the German sense and meaning, i.e. involving employee representation in the supervisory board). In such cases, courts could at least not refuse the applicability of the SE Regulation on the basis of that regulation being designed for large enterprises. Also the treatment of outbound conversion relocations remains unclear.

In spite of this conclusion and the fact that more and more register courts are inclined to only apply the regulations of the German Reorganization Act to inbound conversion relocations, we would still recommend to discuss any envisaged cross-border conversion relocation with the commercial register(s) in charge prior to implementation.

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