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International Relocation of Companies: Focus on French Practice

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International relocation of companies is becoming more frequent. Most companies choosing to relocate to another country are looking for a better and more attractive environment in terms of regulatory framework, taxation and labor regulation. As the advantages of relocation are often overestimated, it is important to carry out a precise analysis of the pros and cons of relocation. This article, based on the example of relocation of a French company, explains why and how a French company would relocate to another country and the consequences that may arise.

Key Objectives of Company Relocation

Relocating a French company abroad may be driven by interest in seeking more flexible regulatory framework and less restrictive governance standards; seeking more favorable tax rates and system and/or attempting to avoid certain taxes (like the financial transaction tax imposed on listed companies in France); and avoiding the application of strict labor laws and a heavy burden of social contributions.

Ways in Which a Company Can Initiate Relocation

One way in which a French company can initiate relocation is by transferring its registered office. In this scenario, the French company cancels the registration of its registered office in France and registers it in another country. This may be accompanied by the physical relocation of employees and/or assets.

Another option is a cross-border merger. In this scenario, the French company is merged into a foreign company, as a result of which all the assets and liabilities of the French company are transferred to the foreign company. The structure resulting from this operation is comparable to the structure resulting from a transfer of the registered office.

A third option is for shareholders of the French company contribute their shares to a foreign company, in consideration of which they receive shares of the foreign company. The registered address of the French company remains in France but the foreign company may become the new registered address by means of transferring over some employees and/or assets from the French company.

Legal Consequences of Transferring a Registered Office

The transfer of a French company’s registered office has to be decided by a unanimous resolution of all shareholders. In principle, the cancellation of the company’s registration in France can be carried out without having to wind up the company, provided that the receiving country agrees to register the company. In practice, it means that the French company may have to adapt to the corporate forms existing in the receiving country (e.g., conversion into a new corporate form, appointment of additional directors/offices).

The transfer of the registered office of a “European Company” (known as societas europaea, a form of company governed by **European Union (EU)** law and introduced in 2001) to the territory of another EU country is made easier by EU law. In this situation, a resolution to transfer the registered office must be approved by a qualified majority vote of two-thirds of the shareholders. Minority shareholders are granted a right to be bought out and creditors of the company can challenge the transfer (which may lead to their receivables being paid back).

In general, the relocation of the registered office involves the continuation of contracts entered into by the French company. Therefore, the French company should pay careful attention to the content of such contracts, which may continue subject to the prior approval of the counterparties.

Legal Consequences of a Cross-border Merger

The main obstacle to a cross-border merger is the necessary compatibility between the laws of the original and receiving countries. In practice, the concept, the conditions and the effects of the merger must be recognized by the law of the receiving country and be compatible with French law. Because they are complicated and legally uncertain, cross-border mergers are therefore rarely implemented.

On the contrary, the rules governing the merger between two companies incorporated in two different EU countries are provided under EU law. These rules, which are enforceable in each and every EU country, harmonize the regime of cross-border mergers. The merger decision has to be approved by a qualified majority vote of two-thirds of the shareholders of the merged company. Unlike in the case of transfer of registered office, minority shareholders are not granted a right to be bought out.

As a result of the merger, all of the French company's assets and liabilities would be transferred to the foreign beneficiary company. One should keep in mind that the contracts entered into by the French company with third-parties would also be transferred to the beneficiary unless they contain a provision prohibiting their assignment or unless they are intuitu personae agreements, i.e., they were entered into in consideration of the identity of the other party, in which case the approval of the counterparties may be necessary.

Legal Consequences of a Contribution of Shares

In general, the contribution of the French company's shares should not raise any significant difficulties. The law of the receiving country may nevertheless impose specific requirements, such as the intervention of a third party expert to provide a valuation of the contributed shares.

In addition, the contracts entered into by the French company must be examined as they may contain a change of control provision giving counterparties the right to terminate the contracts.

Tax Consequences of Transferring a Registered Office

From a tax point of view, the transfer of a French registered office is treated as a liquidation, which triggers the immediate taxation of the French company's profits and latent capital gains on assets. Shareholders would also be deemed to have received the liquidation proceeds, which is a taxable event.As an exception, such transfer occurring within the EU benefits from a tax neutrality regime regarding profits. The French tax authorities consider the tax neutrality regime to be applicable only if the assets of the French company are registered on the balance sheet of a permanent establishment located in France. As a consequence, the tax neutrality regime would be ineffective because the capital gains on said assets would be taxable in France despite the head office having been relocated. However, the Court of Justice of the European Union has ruled that a similar requirement applicable in Portugal was unlawful. Consequently, the tax neutrality regime should apply to the relocation of a French company's registered office within the EU when such relocation is followed by a partial or complete relocation of employees and assets in the receiving country.

In addition, such relocation may trigger the payment, under certain circumstances, of a transfer tax on the value of the business and the real estate transferred at the rates of 5 percent and 5.19 percent.

Tax Consequences of a Cross-border Merger

A French company merged into another company established in a EU country may benefit from the tax neutrality regime (avoiding the immediate taxation of the French company's profits and latent capital gains on assets), subject to an approval of the French tax authorities, which is granted provided that (i) the operation is economically justified, (ii) it is not fraudulent or motivated by tax evasion and (iii) capital gains on a future sale of the assets remain taxable in France notwithstanding the merger, which in practice means that the French company's assets should be registered by the beneficiary company on the balance sheet of a permanent establishment located in France.

Tax Consequences of a Contribution of Shares

Relatively favorable taxation conditions may be applicable to the realization of such transfer. Under certain conditions, only 10 percent of the amount of the capital gain realized by the shareholders of the French company who are subject to French corporate income tax is taxable. As far as individuals and non-resident shareholders are concerned, the contribution may be subject to a tax deferral under certain conditions.

Therefore, the subsequent transfer of assets to the beneficiary company may lead to the taxation on latent capital gains and to the application of transfer tax.

Other Tax Effects

The relocation may have adverse tax consequences, which must be anticipated. First, the relocation of a company that is the head of a tax group may trigger the breaking up of such tax group (and the taxation of certain operations neutralized for the determination of the tax group's global income).

Secondly, the relocation of a French company's headquarters may affect the deductibility of interest incurred for the acquisition of investment shares, if this acquisition occurred shortly after the relocation.

Finally, the profits of a company relocated out of France will be taxable in the receiving country if the company's center of main interest, including part of its employees and assets are actually relocated to the receiving country

Labor and Employment Consequences of Transferring a Registered Office

The transfer of the registered office does not constitute a change of employer, and consequently employment contracts are not affected by such transfer and remain governed by French law.

If the employees are relocated abroad, it will be necessary to obtain their consent and have them sign a new employment contract subject to the law of the receiving country. Those employees who refuse to be relocated would have to be dismissed by the company, which under French law must be justified by economic grounds, namely evidence of financial losses or the necessity to reorganize the company so as to safeguard its competitiveness. If more than 10 employees are dismissed, a social plan must be implemented.

Labor and Employment Consequences of a Cross-border Merger

The merger does not put an end to the employment contracts, which are transferred to the beneficiary company, provided the merger triggers the transfer of the economic activity from the French company to the beneficiary company in an effective and permanent way. The foreign company becomes the new employer.

Although the cross-border merger involves a change of employer, its consequences on the employees are quite similar to those in the case of transfer of the registered office. In practice, the relocation of the employees requires the consent of each employee, those refusing the relocation having to be dismissed.

Labor and Employment Consequences of a Contribution of Shares

The contribution of a French company's shares to a foreign company does not lead to a change of employer nor does it affect the working conditions of employees. Unless the contribution is followed by their relocation in the receiving country, the contribution does not affect the situation of the French employees.

Conclusion

The decision to relocate a French company abroad requires a precise assessment of the company's situation.

First, it appears that the tax and labor consequences of relocating abroad can greatly outweigh the benefits of such relocation. This is particularly true when the company needs to relocate a significant number of employees and/or assets.

If the cost-benefit analysis appears to favor relocation, the benefits of relocation will in any event only materialize if it is part of a global strategy of international operational development.

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