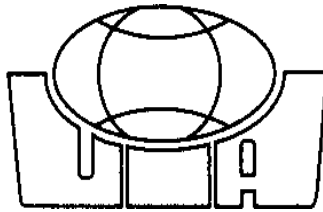


48ème Congrès de l'UIA- Genève, 1-5 septembre 2004
UIA 48th Congress - Geneva, 1-5 September, 2004
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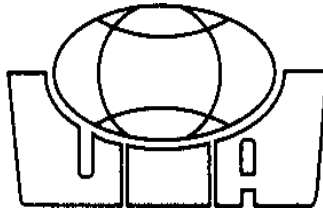


COMPANY LAW

“Migration of companies”

Saturday, September 4, 2004, 9.00 a.m.-5.30 p.m.

48ème Congrès de l'UIA- Genève, 1-5 septembre 2004
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“Migration of companies”

by Maria Antónia Cameira

With the assistance of Elisa Pereira

Henriques da Silva, Paes de Almeida, Corrêa de Sampaio & Associados,

PACSA

Lisbon, Portugal

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1. DEFINITION AND GENERAL ASPECTS

a) HOW WOULD YOU DEFINE “MIGRATION” FROM YOUR JURISDICTION’S POINT OF VIEW?

It is commonplace and accepted since ever, that a company exists only in contemplation of law, the law which gave it existence. So, this company is resident and domiciled in the jurisdiction of its legal creation.

However, with the constant internationalisation of the economy more and more companies migrate from one state to other. But, under what circumstances would it be allowed to do so? And is it still the same entity when it arrives in another jurisdiction?

Migration of companies is recognised under many states companies’ laws, although it is not well understood or consistently defined from state to state.

Migration from the Portuguese jurisdiction point of view can be defined as the international transfer of the corporate domicile of a company to and from Portugal as laid out by the provisions of article 33 number 3 of the Civil Code and article 3 number two and five of the Companies Code. Such provisions provide that the transfer of the corporate domicile of a company to and from Portugal will not affect its original identity provided that certain prerequisites are complied with.

b) What have been the most significant determinants/compelling factors for companies to migrate to and/or from your jurisdiction? What are the most popular means of achieving migration?

A further important prerequisite for companies to migrate is to find a suitable host country, namely one which is prepared to allow this kind of transfer of domicile and at the same time retain the right to exist under their proper law of incorporation.

For the choice of such host countries, not only legal considerations are relevant, but equally important are prevailing political and economic conditions. In addition, the geographical proximity of the host country assets are also of importance.

Some of the reasons for companies to migrate to Portugal are due to the fact that Portugal is presently a developed, modern nation with a particularly open economy. Its specific advantages include its geographical position, natural endowments and the economic and social environment.

The combination of Portugal's economic openness, strong ties with the EU and unique geo-strategic location, make it a natural gateway between the EU and world markets.

This advantage point is supported by a modern infrastructure in permanent upkeep and extension.

Portugal is also a market often used by multinational companies to test new products, for specific market segments. Portugal has an impressive network of modern roads and highways, linking all major cities in the country, and rapid access to Spain.

A major investment was made during the past ten years on road infra structure, resulting in one of the most advanced networks in Europe.

With a successful track record of foreign investment inflow, Portugal has also been undertaking competitiveness-enhancing reforms in a wide range of areas.

But one of the most important factors to migration of companies to Portugal was the recent reform of the Portuguese Tax System, which has obliged offshore companies holding real estate properties to transfer its domicile to Portugal.

Effectively, for more than 30 years, foreigners buying property in Portugal would have normally done so using an offshore company, usually registered in the Channel Islands, Isle of Man, Gibraltar or British Virgin Islands and it is estimated that at least 80% of foreign owned properties in Portugal have been purchased through offshore structures.

Up to a few years ago, property buyers in Portugal were generally advised to buy their villa in the name of an offshore company. The advantages were many, including the one that would allow individuals to get round Portuguese Inheritance Tax, as well as tax provisions on the transfer of the property, the so called SISA.

Recently the Portuguese Government decided that this form of tax evasion should be targeted, and implemented a reform of the real estate tax regime by adopting new measures aimed at deterring the use of offshore companies and instituting new rules on the application of double tax treaties.

In these new circumstances, most property owners have spent the summer with their lawyers and tax advisors, devising ways and means to avoid the new tax bombshell that the Portuguese authorities have fired at offshore companies owning real estate in Portugal.

New legislation passed by Parliament in Portugal on July 30, 2003 and to come into force on January 1, 2004 targeted the corporate ownership of Portuguese real estate, in those cases where the company is registered in what the Portuguese legal framework considers to be offshore tax havens. A list of 83 'undesirable' countries have been published by the Ministry of Finance of Portugal ¹, including Gibraltar, Jersey and the Isle of Man.

Offshore companies that continue to own real estate in Portugal after January 1, 2004 are subject to anti abuse measures. Wherever the owner is resident or domiciled in a country or region considered as a "highly favourable tax system", as per table laid out in the governmental order of the Ministry of Finance, the applicable tax rate will be 5% instead of the average ranging between 0.2% to 0.5%. In addition, the new law assumes automatically that such an offshore-owned property is in effect being rented out (even if it is not) resulting in a further charge of 1/15th of the taxable value.

To avoid the increase in the burden tax, owners had the option to transfer the property from the offshore structure to their personal names; however this would have incurred a hefty transfer tax of 6% on the value of the house as well as capital gains tax of 25% on the "profit" made by the offshore company from the sale, although in reality no gain would have been made by the beneficial owner. This would then have been a very expensive solution.

The most sound and advantageous solution has appeared then to be the re-domiciliation of these property-owning offshore companies to Portugal and property owners have in many cases followed effectively this route.

Therefore in December of last year a huge redomiciliation trend has taken place opting for one of two possible alternatives where transferring the head office of the Offshore company to Portugal:

a) Convert the foreign company into a "LDA" Company (1, 2 or more registered shareholders). Shares are denominated quotas and transfer is subject to public deed and registration with Companies Registry.

b) Convert the foreign company into a “SA” Company where 5 shareholders are necessary to form the company. In this case shares can be bearer shares.

The company becomes then resident for tax purposes. It will have to produce annually the IRC (Corporation Tax) tax return stating the income in case of rentals. If there is no profit, there will be no IRC to pay. However, it is compulsory to make “IRC special payment on account”, a yearly 1.250 Euros; where no tax is due reimbursement is possible.

As for tax on the transfer of real estate property, anti-avoidance measures were also implemented by the end of last year, discouraging strongly thereby the use of tax heavens vehicles to hold properties. Effectively SISA Tax (Tax on the Transfer of Real Estate) changed its name and along with it the essence of its legal framework. With direct incidence on the migration of companies anti-avoidance provisions stipulate that wherever the owner is resident or domiciled in a country or region considered as a “highly favourable tax system”, as per table laid out in the governmental order of the Ministry of Finance, the applicable tax rate will be 15%. It is noteworthy that general tax rates vary from 5% to 6,5%.

Finally and to the benefit of those who took the solution to migrate their offshore companies to Portugal we will say that even onshore it is possible for now, to transfer the quotas of a Limitada Company thereby transferring the property, without being subject to the payment of Municipal Tax on the Transfer of Real Estate Properties (Imposto Municipal sobre as Transmissões Onerosas de Imóveis- IMT).

As a matter of fact the applicable provisions of IMT Code stipulate that IMT tax is due on the transfer of 25% of the share capital of a Limitada Quota Company holding a real estate property. In these circumstances if quotas representing 74% and 26% of the share capital of Limitada Quota Company holding a real state property are transferred, IMT tax will not be due.

c) If you are from an EU jurisdiction, have the European Court of justice cases Inspire Art (Case 167/01), Ubersering (Case c-208/00), Centros Ltd (Case C212/97), Segers (Case C79/85) and Daily Mail (Case 81/87) had any impact in your jurisdiction?

In Portugal the Daily Mail has had an impact in Portuguese recent jurisprudence.

Some of the most outstanding Academic recent legal works in the analysing and commenting of the Portuguese provisions regulating the international transfer of corporate domicile point out the Daily Mail Case to conclude with criticism that the Judgment of European Court of Justice on this particular

case violated dispositions 43 and 48 of the European Community Treaty and can be considered as a step behind in the consecration of the freedom of establishment. Please see for all Nuno Filipe Abrantes Leal da Cunha Rodrigues²and Gonçalo André Castilho dos Santos³.

Although the Daily Mail case represents the current case law, it is necessary that the European Court of Justice changes its view of the primary Community law and as referred by Professor Erik Werlauff⁴”once a technical solution becomes available to previously insuperable problems, the Court must reinterpret the Treaty’s right of freedom”.

With this respect the Portuguese legal framework on the International transfer of Corporate Domicile consecrates the Treaty four main freedoms to be granted to companies:

- 1- The right to establish anywhere in the EU;
- 2- The right of company owners to conduct business in any EU State through a company from any other EU State;
- 3- The right, in transnational establishments, to select the form of establishment desired, and;
- 4- The right, once established in another State, to enjoy the same rights as those enjoyed by that State’s own companies and others.

MIGRATING OUT OF AND INTO A JURISDICTION

2. Are there any law, rules and regulations in your jurisdiction dealing with the migration of a registered office by a company to another jurisdiction? What are these? Specifically, what governmental, regulatory, shareholders and other approvals are required?

The transfer of the domicile of a corporation to another jurisdiction appears to be the most effective device against adverse developments occurred in the country of incorporation, although the incorporation, existence, and legal entity of a corporation depends on the laws of the state in which a company is incorporated or domiciled.

The laws of the country of the existing domicile (state of incorporation) must allow the departure of a company, without causing its liquidation or dissolution, while the laws of the receiving country must provide for an easy arrival without an interruption of the corporation’s legal existence.

The Portuguese Companies Code stipulates that the company may move its seat or domicile wherever it wishes without losing its legal entity, or changing its status in any way, although there are a combination of rules and regulations to transfer the domicile that must be taken into account.

In this sense, article 3 of the Portuguese Companies Code provides that:

2 – A company that transfers its head office to Portugal maintains its corporate entity, if the law under which it is governed allows this amendment, but the respective articles of association will have to be redrawn in accordance with Portuguese Company Law.

3 – The above-mentioned amendments will have to be made by public deed in some cases granted before a Portuguese Notary Public and signed by the Company's representative.

4 – The amendments of the company's articles of association will be governed by the Portuguese legal framework of companies and by the provisions regulating registrations and publications.

The company that transfers its head office to Portugal should adapt its form to the Portuguese existing types of companies, in accordance with article 1 number 2 of the Companies Code.

If the company transfers its head office from Portugal to another jurisdiction it will have to conform with the types of companies and formalities governing the companies host jurisdiction.

The definition of the type of company to adopt when migrating to a new jurisdiction must be included in the project of deliberation to be passed at a General Meeting to decide on the effective migration of the company.

The company that transfers its head office to Portugal without complying with the legal requirements foreseen in article 3 will continue to be regulated by the law of the place where it was incorporated and to have, according to article 3 number 1 of the Companies Company Code, a personal foreign statute.

When a company of personal foreign statute creates the appearance of being a national company but does not comply legal requirements to transfer the head office to Portugal, it may be compelled to terminate its activity in the country following the provisions of article 4 number 3 of the Companies Code.

In case of a company that has its head office in Portugal and pretends to transfer it to another jurisdiction, provisions of article 3 number 5 and 6 establish that:

5 - The company that has its head office in Portugal, can transfer it to another country, and maintain its corporate entity, if the law of the host country so allows.

6 – A corporate resolution passed by a majority of no less 75% of the voting rights corresponding to the company's share capital must approve the international transfer of head office.

Shareholders who voted against the resolution may exonerate themselves from the company within 60 days of the publication of the referred deliberation.

After the passing of the corporate resolution a notary deed must be executed formalising the contents of the deliberation to change the company's head office.

This deed is subject to registration and publication in the Portuguese Companies Registry.

Portuguese regime for international transfer of head office as foreseen by article 3 number 6 of the Companies Code intends to provide for the protection of minority shareholders' rights as well as of other stakeholders.

Effectively, the right to withdraw from the company granted to shareholders who voted against the resolution intends to foster their rights.

On the other hand the publicity of the public deed awarded through compulsory registration and publication, intends to grant stakeholders the information necessary to protect and enforce the rights they may have in relation to the Company.

3. What requirements and standards, if any, are prescribed by the laws of your country for a company seeking migration of its business into your country? Is there any provision for waiver of these requirements and if yes then under what circumstances?

The requirements stipulated by Portuguese Companies Code for migration of companies into Portugal are the following:

1- To define company's main activity & corporate name;

- 2- To execute a public deed with the new articles of association according to the type of company chosen;
- 3- Registration with tax authorities;
- 4 – Registration with companies’ registry;
- 5- Registration for social security purposes;

1. Define company’s main activity and corporate name:

Shareholders wishing to change the head office to Portugal must apply for a corporate name certificate at the National Registry of Companies Names (Registo Nacional de Pessoas Colectivas).

In the case of Migration of Companies the company is allowed to keep the same basic name and for purposes of National Registry of Companies Names it should mention that the reason for applying for a name is the migration of the company in question.

2. Public Deed

The deed may be contained in a private document only, if the company is a sole quota holder company (Sociedade unipessoal por quotas) and the share capital is fully paid up either in cash or assets for which transfer a notarial deed is not required, or will need to be signed before a public notary if the company has more than one shareholder.

3. Registration with the Tax Authorities:

The shareholders must apply for the registration of the commencement of activities of the company in Portugal with the local Tax Authorities, and this application must be signed by the auditor that will henceforth be responsible for the accounts of the company.

4. Registration with the Commercial Companies’ Registry:

The deed of incorporation must be registered at the Companies’ Registry and this entity will also proceed with the publication of the deed in the Portuguese Official Gazette.

5. Social Security

The new company must also register with the local Social Security office.

It is noteworthy that there are no provisions allowing the waiver of these requirements. On the contrary non-compliance with these requirements may give rise to sanctions.

CORPORATE AND OTHER EFFECTS OF MIGRATION

4. Under the laws of your country, would the migration of a company into/ out of your jurisdiction result in any of the following:

- a) Creation of a new legal entity
- b) Prejudicing or affecting the identity of that body corporate constituted by the foreign company or its continuity as a legal person
- c) Which law has to govern the company after migration
- d) Prejudicing the rights of any person or affecting the property, rights, liabilities or obligations of that body corporate
- e) Rendering defective any legal proceeding by or against that body corporate

a) Creation of a new legal entity

Under article 3(2) of the Portuguese Companies Code, a company that migrates into Portugal will keep, if its national law allows, its legal entity. Nevertheless, the company must shape its articles of association in accordance with Portuguese Company Law in order to fulfill the requirements stipulated by the Portuguese Companies Code.

Portuguese companies that wish to migrate to other countries will also keep the same legal entity but must conform with prerequisites stipulated by the national legal framework of the country where it migrates.

b) Prejudicing or affecting the identity of that body corporate

As aforementioned, the legal entity remains, in principle unaffected, therefore the body corporate constituted by the foreign company is not prejudiced or affected by the migration.

c) Which law has to govern the company after migration?

Provisions of the Portuguese Companies Code will govern the company, after its migration into Portugal. In fact, in order to conclude the migration some requirements must be fulfilled, namely, the

company must adopt one of the Portuguese existing types of companies and the respective articles of association must be redrafted in accordance with the Portuguese Companies Code. These amendments to the articles of association must be made in many cases through a public deed before a public notary and signed by the company's representative.

d) Prejudicing the rights of any person or affecting the property, rights, liabilities or obligations of that body corporate.

As regards the migration prejudicing the rights of any person or affecting the property, rights, liabilities or obligations of that body corporate, there is a debate encompassing two different opinions in the Portuguese jurisprudence. One that defends that stakeholders' rights are ensured by registration and publication proceedings which give proper publicity to the migration and continuity to the legal entity. The other contends that, although the Portuguese Companies Code has ensured the protection of stakeholders' rights in mergers and demergers, it has not, however, ensured properly stakeholders' rights, namely employees and creditors, in the case of migration of companies.

Part of the Portuguese jurisprudence feels, as the Spanish Fernández del Pozo that "in companies migration, the creditors were forgotten".

e) Rendering defective any legal proceeding by or against that body corporate

In migration of companies, opposite to mergers and demergers, the Portuguese Companies Code does not entail specific proceedings ensuring the rights of other stakeholders, namely granting them the right to oppose to the migration.

In mergers and demergers, the Portuguese Companies Code sets out mandatory provisions giving creditors the option to oppose judicially to the operation if they feel that their rights are being put at risk (Articles 107º and 120º).

The Portuguese Companies Code does not foresee any specific mechanisms aimed at protecting and ensuring third party rights. These rights will therefore be only protected through the publicity given by registrar, by the continuity of the company's legal entity and by third party right to opposition in general terms as foreseen by Civil Procedure Code which may include the triggering of injunction proceedings.

5. Does your country treat a migrant company as an ‘equal’ with home grown companies. In other words, does a migrant company in your country suffer from any restrictions? If so, then what are these?

Portugal treats migration of companies in accordance with the provisions of Article 43 of the EEC Treaty (general freedom of establishment) and Article 48 (requiring the same rights to be provided for commercial legal persons as for natural persons). Therefore a company planning to establish itself in Portugal will be granted the same rights as companies domiciled in another State.

The EU has also signed the OECD’s so-called Third Decision to extend the same rights and obligations to foreign companies as to domestic companies. The decision concerns the treatment of companies established in an OECD country that are dominated by foreign interests, and is part of a revised agreement on equal treatment of domestic and non-domestic companies. Portugal as a EU member state is bound by these agreements.

The EEC Treaty grants certain rights to companies that can be summarized in the quadripartite companies freedoms and which were also implemented by the Portuguese national legal framework: The right to establish anywhere in the EU; the right of company’s owners to conduct business in an EU state through a company from any other EU state; the right, in trans national establishments, to select the form of establishment desired, including the right to choose between a subsidiary and a branch and finally the right, after establishment in another state, to enjoy the same rights as those enjoyed by that state’s own companies and others.

The idea of unification, economic and political integration includes the free circulation of people, goods, services and capital. The Community aims at fostering a regime orientated to grant that competition is not negatively affected in the internal market and the “narrowing of national legislation in the necessary measure to the running of the common market”.

The basic principles of the internal market are:

- 1 – Non-discrimination: In the internal market any discrimination based on nationality is forbidden. As for discrimination, it means different treatment, according to the nationality, of similar situations.
- 2 – The mutual recognition means that the legislation of another Member State is equivalent in its effects to the national legislation.

As aforementioned the single market is based on the free movement of goods, services, capital and persons, and any barrier to trade is prohibited. Member States may only introduce restrictions when these are in the public interest notably on grounds of public policy, public security or public health.

In Portugal, there are no restrictions to migrant companies and their treatment is equal to home grown companies, observing the EU principles of freedom of establishment, non-discrimination and mutual recognition.

MIGRATION BY WAY OF CROSS BORDER MERGERS AND ANTITRUST ISSUES

6. Are there any national legal barriers which prevent cross border mergers in your country? What have companies done to get round this situation? What rights are available in your country to the shareholders of companies proposing to enter into a cross border merger? Would the adoption of the Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital facilitate cross border mergers involving companies in your jurisdiction.

In many European countries companies can “merge” their assets and liabilities, and these “mergers” can be legally convenient and fiscally efficient for domestic companies wishing to combine.

Cross-border Mergers are one of the strategies that companies follow for market penetration in foreign countries.

With the completion of the Single European Market (SEM) at the end of 1992 and the consequent removal of all barriers to trade, EU domestic companies faced increased competition in their product markets. In the run-up to the establishment of the SEM, companies across Europe as well as in the rest of the world prepared themselves to the challenges posed by operating in a more competitive environment.

Unfortunately, despite nearly two decades of deliberations, until now the Commission’s proposals did not materialize in a European Legal framework capable of facilitating cross-border mergers aimed at reducing the impact of the shortcomings created by national laws.

The European Court of Justice (ECJ) has ruled in several judgments that restrictions by some European governments on foreign ownership of privatized companies are illegal, and these decisions are intended to pave the way for cross-border mergers without barriers.

Portugal as a full member of the European Union has removed any legal barriers to foreign investment, mainly that from other European Union countries.

However the Portuguese government has adopted in the recent past highly questionable measures designed to ensure the national control of privatized state firms, thereby implementing discriminatory restrictions to foreign ownerships of those firms.

Therefore although there are no legal barriers in cross-border mergers in Portugal, the Portuguese government remains protection prone in some of the domestic market fields and hampers the free access of foreign investment to certain areas of economic activity.

As a consequence of this stance, the Commission took legal action against the Portuguese restrictions on foreign ownership of privatized state firms, despite the fact that the Portuguese government said that the restrictions were designed to ensure that essential industries remained under national control in an eventual case of crisis.

See for all the case of the takeover bid of Banco Santander for the Champalimaud financial group which was blocked by the Portuguese Government.

The commission argued that Portugal had the right to block the deal under the EU's merger regulation only if it could prove that the bid endangered "legitimate national interests," including defense, public safety or the prudential management of financial markets, which officials said clearly was not the case with Spain's biggest bank bid.

These elements discounted, it seemed clear that Portugal was vetoing the agreement simply because of Banco Santander nationality, which the commission said was a clear violation of the EU founding treaty.

Asserting that EU merger law normally takes precedence over national interests and the commission said that Portugal lacked any legal basis "to oppose an operation which the commission has authorized."

The Portuguese legal framework for mergers is set out in articles 97 to 117 of the Portuguese Companies Code, as approved by Decree-Law 262/86, of 2 September 1986, last amended by Decree-Law 237/2001.

The central corporate document in a merger procedure is the merger project, which must be jointly prepared by the board of directors of the companies involved, addressing the matters and including the references required by law and outlining the objectives of the merger.

Measures to ensure protection of shareholders' and creditors' interests and the economic and financial advantages arising out of the proposed merger should also be mentioned therein

Further to the registration of the merger project with the competent Companies Registry, the merger is subject to corporate approval, by the General Meeting of shareholders of the companies concerned, followed by execution of the respective deed before a notary public and registration thereof at the Companies Registration Office.

To assure shareholders rights, the managing bodies of each of the companies involved in the merger must publish a separate notice on such registration, indicating that the merger project and all related documentation are available for shareholders for consultation at the company's head offices.

The General Meeting to discuss and approve the merger project must take place within a 30 day period counting from the date of publication of the notice on the merger or the notice convening the General Meeting, if published later.

Thus, disclosure to shareholders of information with regard to M&A procedures is related to the preparation of the General Meeting convened to approve a merger or acquisition rather than the negotiations thereof and so are the Portuguese Companies Code provisions regarding the exercise of the shareholders' right to information applicable to M&A:

- (i) Companies are generally required to make all preparatory information for General Meetings available to shareholders 15 days before the General Meeting takes place;
- (ii) Shareholders are also entitled to request the disclosure of detailed information on the items discussed at the general meeting, during the course thereof;
- (iii) Shareholders having a participation equal to, or greater than, 10% of the share capital may request, in writing, the company management body to disclose, also in writing, information on corporate issues. The company's management body cannot deny the request if it states expressly that the information is intended for assessing management performance.

Finally, article 105 of Companies Code allows that any shareholder that has voted against the merger project can release and demand, 30 days after the publication of the merger, the company to acquire or prepare the acquisition of his shareholding.

The European Commission proposed the date of 20 October 2003 to amend the merger directive. The Directive, adopted in 1990, provides for deferred taxation of capital gains in the case of cross-border mergers, demergers of companies, transfers of assets and exchanges of shares, and this changes would clarify and broaden the scope of the directive.

Cross-border mergers in the EU are currently only possible if the companies wishing to merge are established in certain EU member states. In some member states, cross-border mergers may not be legally possible or may entail costly and complex legal arrangements because of differences in national laws.

The main proposals are as follows:

- The Directive will apply to all companies with share capital, but it is aimed primarily at small and medium-sized businesses that want to operate in more than one member state, but not throughout the EU.
- Each company taking part in a cross-border merger will do so in accordance with the laws of its own member state (subject to specified exceptions) and that national law will also protect the interests of creditors, debenture holders, the holders of securities other than shares, minority shareholders and employees in respect of each of the merging entities. The place where the registered office is situated will determine the law applicable to the new company.
- The national law of the company created by the merger will also apply to employee rights. However, if one of the merging companies is governed by rules on employee participation in its home member state and the merged company is created under the rules of a member state where such rules do not apply, then a negotiation procedure, as provided for under the Regulation, will apply.

The proposed directive, designed to overcome obstacles caused by differing national laws, is stated as being a way of help small and medium-sized businesses (SME's) looking to operate in more than one Member State but not throughout Europe, without the need to create a European company, under the European Company Statute, which is aimed at companies which want to reorganize their business on a Europe- wide scale.

This proposal of Directive actualizes the list of companies included in its framework, in order to integrate new legal forms of entities and still include the European Society and the European Co-

operative Society that may be created from 2004 to 2006, in order to allow companies that exercise their activities in more than one state to establish themselves as one entity ruled by the European Law.

In the same way, ensures that the transfer of the head office of a European company from a Member-State to another does not directly lead to the increase in burden of taxation. The main goal is to make the transfer possible in accordance with the applicable provisions of the different States without raising discriminatory tax burdens which will hamper the enforcement of the European Community Treaty.

The proposal would set up a cross-border merger procedure whereby mergers would be governed in each Member State by the principles and rules applicable to "domestic" mergers.

Each company taking part in a cross-border merger would do so in accordance with the laws of its own Member State, except in specific cases provided by the Directive.

Protection is afforded under national laws, and would thus be maintained by the proposed Directive, for creditors, debenture holders, the holders of securities other than shares, minority shareholders and employees.

This proposal applies to mergers between two or more EU companies (public and private limited companies) provided that at least two of them are governed by the laws of Member States, as referred in article 1 of the Proposal.

Each company taking part in a merger will do so in accordance with the laws of its own Member State which apply to mergers between companies governed by that law.

These include provisions regarding the approval process, the protection of creditors, debenture holders and the holders of securities other than shares to which special rights are attached.

The merging companies have to draw up draft terms of cross-border merger, approved at a general meeting, which may reserve the right to make implementation of the merger conditional on ratification of any arrangements regarding employees.

The merging companies must publish, at least one month before the date of the general meeting, the following information: the form, name and registered office of each merging company and those proposed for the company created by the merger; the public register in which the documents of each merging company are filed and their identification number; the identification of the arrangements made for the exercise of creditor's rights and of any rights of minority shareholders and the address where information on these arrangements can be obtained free of charges.

The merging companies are also required to draw up an expert report and make this available at least one month before the general meeting, or in alternative one expert can be appointed to draw up a single report for both companies.

Member States must designate the competent authority which will consider the legality of any merger under its national law and which will issue a certificate confirming proper completion of the pre-merger acts and formalities and that the terms of cross-border merger were approved.

The date on which a merger will take effect depends on whether the merger is being effected by way of acquisition or by way of formation of a new company. If it is by acquisition, the relevant date will be the one provided for by the law of the Member State which governs the acquiring company. In the case of a new company, it will be the date provided for by the law of the Member State in which the new company is incorporated.

Each Member State will determine what arrangements must be made for publishing completion of any cross-border merger in the public register in which each of the companies is required to file its documents. Once a cross-border merger has taken effect it cannot thereafter be declared null and void.

The proposal for a Directive will be submitted for adoption under the so-called co-decision procedure to the EU Council of Ministers (subject to qualified majority voting) and the EU Parliament.

Summarizing, the scope of the Directive covers all companies with share capital and will benefit above all small and medium-size enterprises (SMEs). The removal of legal barriers to cross-border mergers will help to internationalize such enterprise activities, which will facilitate cross border mergers involving Portuguese companies.

The provisions of the proposal should allow companies wishing to carry out a cross-border merger to benefit from substantially reduced legal and economic requirements, normally highly complex and expensive.

This proposal will benefit all companies with share capital in the EU, and this will include Portuguese companies, and at the same time create a favourable impact on employment and competitiveness.

The adoption of the Directive 90/434/CEE would certainly alleviate the costs and complexity of actual cross-border mergers, simplifying the process for companies wishing to expand in Portugal.

However compulsory employee participation requirements may undermine some of the benefits that the proposed new legislation stands for.

Companies created by the cross-border merger operations covered by the present Directive will be companies governed by the law of a Member State. Such companies will accordingly remain subject to the compulsory participation rules applicable in that Member State.

This means that the general principle of the national law of the company created by the merger applies. If there were no employee participation, this would continue to be the case and if the merged company was created in a Member State with rules on employee participation, it would be governed by those rules.

However, if at least one of the companies taking part in the cross-border were governed by rules on employee participation in its home Member State and if the merged company were to be created under the rules of a Member State where such rules do not apply, then a negotiation procedure, as provided for under the European Company Statute would apply, allowing for interested parties to define an agreed participation regime on employee participation.

In Portugal, worker's representation at board level is expressly provided by the Constitution and by the Law on Worker's Committees, according to which workers have a say in corporate governance matters.

Board level employee representation involves employee representative who sits in the different boards that compose each management structure. For companies that have adopted the unitary system, employee's representative will sit in the Board of Directors and in the Audit Committee. For companies who adopted the two-tier system, employee's representatives will sit in the board of managers and Advisory Board.

These representatives are elected by the workers and chosen among them. However, this type of representation is only mandatory in the case of state owned companies. In the case of private sector this appointment is optional and will fundamentally depend on previous stipulation of the parties involved.

7. What anti-trust issues would arise in a cross border merger involving a company in your jurisdiction?

The Portuguese legal provisions on Competition and Anti-trust issues concerning prohibited practices and concentrations of companies as laid out by Law 18/2003, are applicable to cross border mergers as follows:

As to prohibited practices: Agreements between companies, decisions by associations of companies and concerted practices between them, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited.

As to concentration of market share: certain merger and acquisition activities may be deemed anticompetitive as they lead to greater concentration of market share, which may offset market balance to the detriment of smaller companies. This is apparent for any transaction, which creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it. The same applies when the companies involved have obtained in Portugal a turnover exceeding EUR 150 million, net of taxes, provided that the individual turnover in Portugal of at least two of these companies exceeds two million euros.

Infringements to competition law are punished through administrative fines imposed by the Competition Authority, notwithstanding the criminal liability eventually incurred by the offender.

Since 1 May 2004, a new Merger Regulation (Regulation 139/2004) has been in force, replacing Regulation 4064/89. If the transaction is a concentration with a community dimension, it must be notified by the acquiring party to the Commission's Merger Task Force within one week of the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling shareholding.

By virtue of the new Merger Regulation, the European Commission has the power to veto major cross-border mergers, acquisitions and certain joint ventures and to prohibit them when they are incompatible with the common market.

As far as the Portuguese cases are concerned, it is important to refer the acquisition of two banks, Banco Totta & Açores and Crédito Predial Português, which belonged to António Champalimaud, by the Spanish bank Banco Santander Central Hispano (BSCH).

This has been definitely a test case for controls on concentrations and changes in financial services in the European Union. The authorization to acquire the two banks was given by the European Commission on 12 January, after the results of its inquiry had shown that their acquisition neither created nor strengthened a dominant position in the retail banking sector in Portugal.

Indeed, the market share of the new entity will be around 11 % only. The initial operation between BSCH and Champalimaud was authorized by the Commission on 3 August 1999, but the Portuguese Finance Minister had already decided in June to block it. The Commission held that the blocking was incompatible with European competition rules.

The Portuguese Government lifted its ban on the merger, after the announcement of a new agreement between BSCH and Champalimaud. It should be pointed out that the Commission has exclusive powers to assess concentration operations which have a European dimension.

8. To what extent are the laws of your country in compliance with WTO rules impacting migration of companies for eg. TRIMs.

Freedom of international trade has been a goal pursued since 1948, when 23 countries set up the General Agreement on Tariffs and Trade (GATT). Since then there have been nine trade talks ("rounds") amongst which the one that set up the World Trade Organization (WTO), which now has over 132 members, and which strengthened regulation by outlawing the veto on penalties for restricting trade.

Since its inception in 1995, the World Trade Organization has established a body of international trading principles aimed at liberalizing trade and increasing market access across the globe via a series of sector-specific agreements.

Portugal is member of the World Trade Organization (WTO) since 1 January 1995 and in this capacity it must adapt to the fast moving field of international economic relations. The participation of Portugal within the EU framework in the WTO negotiations, will be essential to improve its access to foreign markets therefore its economic growth and development.

The reinforcement of multilateral trade rules in sectors such as competition, investment and social development, in order to increase legal security and predictability of international economic relations among countries, represents a vital contribution to foster economic growth, to promote sustainable development and to increase the inter-relation between the WTO and the global economic evolution.

Within this context, Portugal particularly supports the integration of a multilateral framework of disciplines and rules for international investment in the WTO negotiations with the objectives of increasing legal security for investors and favoring international flows of investment, which, under appropriate conditions, can have a positive impact on development.

The WTO embodies the establishment of a new world economic order, based on the principle of multilateral agreed rules for international trade.

Since its creation, the WTO has increased the scope of trading agreements. Such agreements no longer involve only the trade of manufactured products. Today agreements involve services, the protection of intellectual property rights and investments, and consequently the migration of companies from one country to another.

In contrast to the Treaty of European Union (article 3 c)), the WTO does not aspire to the abolition, as between Member States, of obstacles to the free movement of goods, persons, services, or capital. The WTO asserts a much less ambitious goal in its Preamble, namely, “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”.

In accordance with WTO rules, each member government retains a great deal of latitude to determine how substantially its trade barriers should be reduced and how much market freedom to permit. Nevertheless, it can be said that the removal of barriers to the free movement of goods, persons, services, and capital all come, within the current competence of the WTO.

There are three main areas of work in the WTO on trade and investment, one of them is the TRIM's Agreement.

This Agreement, negotiated during the Uruguay Round, applies only to measures that affect trade in goods. Recognizing that certain investment measures can have trade-restrictive and distorting effects, it states that no Member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions).

The Agreement contains transitional arrangements allowing Members to maintain notified TRIMs for a limited period of time following the coming into force of the WTO (two years in the case of developed country Members, five years for developing country Members, and seven years for least-developed country Members). The Agreement also establishes a Committee on TRIMs to monitor the operation and implementation of these commitments.

The agreement recognizes that certain investment measures restrict and distort trade. It provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

The agreement requires mandatory notification of all non-conforming TRIMs and their elimination within two years for developed countries, within five years for developing countries and within seven years for least-developed countries. It establishes a Committee on TRIMs which will, among other things, monitor the implementation of these commitments. The agreement also provides for consideration, at a later date, of whether it should be complemented with provisions on investment and competition policy more broadly.

The Portuguese legal framework is in compliance with the WTO Agreements, namely the Agreement on Trade-related Investment Measures (TRIM's), in order to reduce substantially tariffs and other barriers to trade and eliminating discriminatory investment measures with respect to the trade in manufactured goods, as well as on foreign investment as set out below in reply to question 9.

9. Are there any discriminatory forms of regulatory measures (such as pre-admission and post-admission regulations, performance requirements) on foreign investment in your country?

The Portuguese system is based on non-discrimination with regards to the national origin of investment. There are no specific obligations for foreign investors in Portugal.

Portugal has opened most of its industries to foreign investment and has liberalized the bureaucratic process for foreign investors.

In keeping with European Union directives, Portuguese foreign investment law, which came into effect in December 1996, mandates equal treatment for foreign and domestic companies. However, non-EU foreigners may own only limited percentages of businesses in the television operations and telecommunications sectors.

Although there are no restrictions to foreign investment, foreign investment projects have to comply with specific legal requirements if in any way they affect public order, security or public health and if they involve the exercise of public authority.

Projects of this nature should be submitted to the Portuguese Investment Agency (API – Agência Portuguesa para o Investimento) for an assessment of compliance with Portuguese applicable provisions.

There are no limits as to the sectors in which a foreign company may invest in. However, there are specific restrictions for both national and foreign investments made in sectors under public administration. These include the treatment and distribution of water for public consumption, postal services, rail transport as a public service and the running of maritime ports. Private-sector companies can operate in these areas only through public procurement.

Law 88-A/97 of 25 July, regulates the right of access of the private-sector business to certain areas of economic activity and the Decree-law 203/2003 of 10 September establishes a single contractual regime for large-scale investment projects, whether domestic or foreign in origin.

Provisions of Decree-law 203/2003 of 10 September are aimed at introducing in the national legal framework recent orientations from the EU and from the OCDE, referring non discrimination of foreign investment abolishing any hints of differentiated treatment of the foreign investment in opposition to the national investment.

The Portuguese legal framework provides a number of incentives, of a financial or fiscal nature, to attract national and foreign investment.

There is a specific contractual regime for large-scale investment projects that benefit the Portuguese economy. Projects that benefit the economy are defined as those that: produce goods or services that can be traded internationally; contribute to a sustained improvement in the productivity and competitiveness of the Portuguese economy; contribute, directly or indirectly, to strengthening Portugal's capacity for innovation, research and national development and to improving the quality of goods and services produced in Portugal; help Portuguese production move up the value chain and generate a high level of added value; help increase or improve the use of national resources and contribute to the development and internationalization of the Portuguese economy.

The regime covers investments made up to 31 December, 2010 in the following areas: mining and manufacturing; tourism; information technology and related activities; agricultural, fishing, livestock and forestry activities; research and development activities with a high technological contents; and the production of audiovisual and multimedia contents. Investment projects of €5 million or more may be eligible for fiscal benefits under a contractual regime. Under this regime, exemptions from Corporation Tax (IRC) are provided in article 14 number 1 of the IRC Code, as amended.

There are no limitations on the repatriation of profits or dividends earned in Portugal and the Parent Subsidiary Directive is fully applicable.

Also, Portugal restricts non-EU investment in regular air transport to 49 percent, and restricts non-EU investment in television operations to 15 percent (by a single non-EU investor). It subjects complementary telecommunications services to licensing and restricts non-EU investors' participation in the capital of complementary telecommunications operators to 25 percent. Portugal further restricts foreign investors' participation in the capital of public service telecommunications operators to 25 percent.

The incorporation of new credit institutions or finance companies, acquisition of controlling shareholdings in such financial firms, and establishment of subsidiaries, require authorization by the Bank of Portugal (for EU firms) or the Ministry of Finance (for non-EU firms). In both cases, the authorities take prudential considerations into account, but in the case of non-EU firms, the Ministry of Finance also considers the impact on the efficiency of the financial system and the internationalization of the economy. Foreign insurers from non-EU countries seeking to establish an

agency in Portugal must post a special deposit and financial guarantee and must have been authorized for such activity for at least five years.

Portugal offers a number of incentives to foreign investors. For the period 2000-2006, the country has adopted an "Economic Operation Plan" (POE) with the objective of reinforcing the productivity and competitiveness of existing businesses and promoting new areas for development. The POE will cost an estimated 10.6 billion Euros over the period. Of that sum, an estimated 4.9 billion Euros will be used for direct financial incentives for companies.

The financial incentives are designed to stimulate investment in industry, trade, construction, tourism, and services such as transportation, business services, information technology and audiovisual. The incentives also target investments in the poorer regions of the country, such as the Alentejo and Trás-os-Montes, and investments in small and medium-sized enterprises, and finally entrepreneurs under 35 years of age.

The principle incentive scheme, which goes under the acronym "Sistema de Incentivos a Modernização Empresarial" (SIME), covers investments larger than 150,000 euros. The incentives consist essentially of tax-free loans and grants for a series of qualifying investments.

In what concerns Fiscal Policy, a strong current public expenditure control, further selectiveness of investment expenditure, the more rigorous investment selection and fight of tax fraud and evasion are the main guidelines of this budgetary adjustment process.

The reduction of the tax burden on business is to be reached until 2006, where Portugal aims to have one of the lowest corporation tax rates of the EU. Meanwhile, there will be temporary and non-discriminatory tax incentives to investment.

Portugal already shows one of the highest rates of productivity growth of the E.U. at the same time that offers low production costs in several areas to investors.

The geographical location of Portugal is also an important asset to investors. Portugal is the ideal gateway to Europe with infrastructures that are in permanent development.

Other important aspect is the reduction of the presence of the Public Sector, the process of simplifying regulations and administrative procedures is already underway, with several measures being already implemented.

Finally, investors will have the support of a new attitude and organization of the Public Administrative services.

¹ Governmental order 1272/2001 of 9th November, with an adjoining list of the 83 regions qualified as offshore.

² Nuno Filipe Abrantes Leal da Cunha Rodrigues, “A Transferência da sede em direito internacional privado”, 1999/2000.

³ Gonçalo André Castilho dos Santos, “Transferência Internacional de Sede Social”, 1999/2000.

⁴ Professor Erik Werlauff, Common European Company Law: Status 1998, “Equal treatment of companies, domicile under company law and related concepts”, European Business Law Review, May/June 1998.