



EURACTIV

EU LAW GOES DIGITAL

SPECIAL REPORT | 2 - 6 OCTOBER 2017
<http://eurac.tv/98SI>

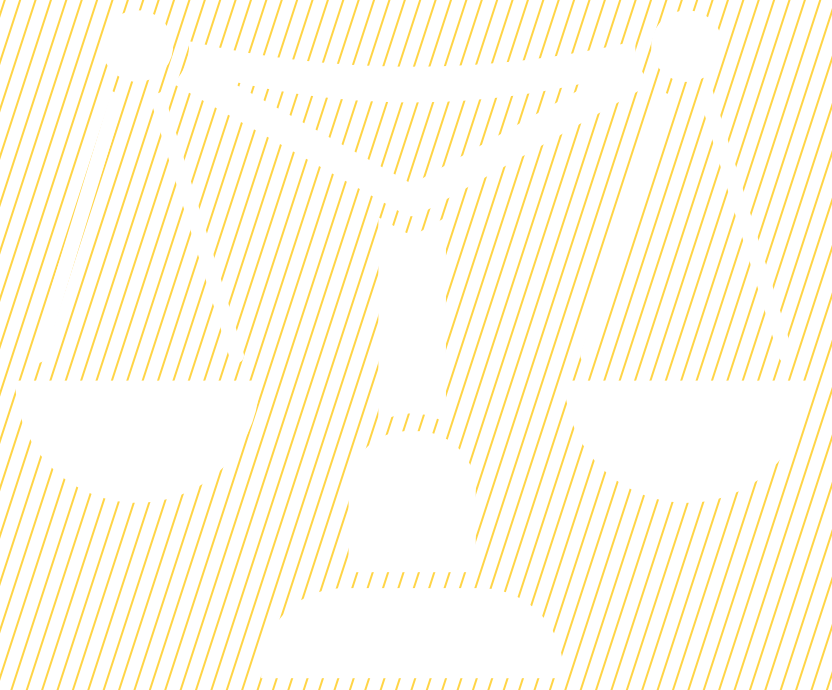
With the support of



EURACTIV

EU LAW GOES DIGITAL

SPECIAL REPORT | 2 - 6 OCTOBER 2017
<http://eurac.tv/98SI>



Contents

.....

EU eyes corporate rules shake-up with law on seat transfer	4
Jourova: EU rules on company seat transfers means savings for business	7
Notaries turn blockchain into ally for digital transactions	9
Death on Facebook: Lawyers push for EU rules on digital inheritance	11
Cross-border mobility of companies: 'Real seat' vs 'incorporation'	13

EU eyes corporate rules shake-up with law on seat transfer

.....

By *Frédéric Simon*



The European Commission is preparing a new directive on the cross-border transfer of company headquarters, a move that could have far-reaching implications for other areas of corporate governance, including tax planning and cross-border mergers, EURACTIV has learned.

With Brexit on the horizon, UK companies are busy weighing their options for keeping a foothold in the European Union. And one of those is to fiddle with the location of their legal headquarters.

Companies already have options

to transfer their seats, for example by forming a subsidiary in their host member state and merging it to create a new company elsewhere. Since 2003, they can also create a European cooperative society and transfer the headquarters to another EU country.

But the system is riddled with loopholes. Large multinational companies in particular routinely shop around Europe for the sweetest tax deals and labour conditions, using legal arrangements such as the dual location of company headquarters.

At worse, they can form “letterbox companies” that take advantage of the parent-subsidary relationship

offered in countries like Luxembourg and the Netherlands to pay no taxes on dividends or capital gains made from the sale of shares.

Social abuses are also frequent, an issue that France has flagged at EU level with attempts to crack down on letterbox companies that use addresses in low-wage EU countries to underpay workers – often truck drivers or construction workers.

The real motive behind splitting company seats “is often the circumvention of legal protection standards at the real seat of the

Continued on Page 5

Continued from Page 4

company,” explained Dr Jens Bormann, President of the German Federal Counsel of Notaries.

“An instrument that permits an isolated transfer of the registered office and thus de facto allows the conversion of the company into a letterbox company involves considerable risks of abuse,” Bormann wrote in a note to participants at the 4th Notaries of Europe Congress, taking place in Spain this week.

The risks mentioned by Bormann have unfortunately become all too familiar in recent years. They include tax evasion, money laundering and silent liquidation, when directors and shareholders wind down an insolvent company to the detriment of creditors.

But this could all change. The European Commission is currently preparing a legislative proposal, which for the first time, could establish a harmonised EU framework for the cross-border transfer of company seats.

COMMISSION KEEPING ITS CARDS CLOSE TO ITS CHEST

Věra Jourová, the EU Commissioner for Justice, Consumers and Gender Equality, is in charge of drafting the new law on behalf of the EU executive, known as the 14th company law directive.

And for the time being, she prefers to keep her cards close to her chest.

“Companies should be able to effectively exercise their right to freedom of establishment, but we also want this to happen with full respect of national social and labour prerogatives,” Jourová told EURACTIV in an interview.

She stresses that the main objective of the new company law package will be to stimulate job creation and deepen the single market. Initial Commission estimates show that

around €207 million could be saved in start-up and merger costs if only 0.5% of the companies were to move within the EU and use EU rules on the cross-border transfer of registered office, the Commissioner indicated.

“The saved money would be better invested in jobs, innovation and growth,” Jourová said.

The Czech EU Commissioner has plenty of encouragement to legislate. In a 2012 resolution, the European Parliament called on the EU executive to take action in order to prevent “the misuse of post-box offices and shell companies with a view to circumventing legal, social and fiscal conditions”.

A 2016 study for the Parliament’s Legal Affairs Committee (JURI) hammered the point home saying, “There is a real and urgent need for a special EU framework on cross-border transfers of seat” or cross-border conversions.

UNITY OF SEAT

However, Jourová also knows she is walking on eggshells.

Last time the Commission tried legislating on the matter, in 1997, EU member states killed the draft bill because they could not agree on the principle of “unity of company seats”, which grounds the location of headquarters to the actual pursuit of an economic activity in the host member state.

This proved too much to swallow for the Netherlands and Luxembourg, where companies can decide to locate their ‘registered seat’ – and pay low taxes – while keeping their ‘real seat’ where their actual business activities are taking place.

The issue is politically awkward for Jean-Claude Juncker, the President of the European Commission who was prime minister of Luxembourg at the time and spearheaded the campaign that shot down the proposal at EU level.

Should he continue opposing the unity of seat principle, he will face accusations of protecting the interests of his native Luxembourg, which makes a lucrative business from registered companies. If he does, he will face accusations of treason at home.

“The Luxembourgish will say they are in favour of the unity of seat principle because they are making a business out of it,” quipped a lawyer with knowledge of the situation. In other words, the Grand Duchy would back the principle as long as it knows companies have an interest in locating to Luxembourg.

Other countries like France and Germany are in theory favourable to the unity of seat principle as a way of fighting tax avoidance and social dumping. But they have their own reasons to be wary of a harmonised EU framework on the cross-border transfer of company seats.

In Germany, the worker code – known as Mitbestimmung – guarantees employees are represented for almost half of the supervisory board of directors. Their fear is that facilitating the transfer of seat at EU level will allow directors to circumvent such laws.

Another source of worry is that majority shareholders might impose a decision to transfer the seat of a company, to the detriment of minority shareholders or creditors in the home country.

“Germany will be reluctant if there is no solution to the unity of seat principle,” the attorney said, attributing the tension to “a clash of culture” between countries like Germany and Austria and those under common law, which have a more liberal approach to the location of company headquarters.

Positions may evolve, however. The unity of seat principle has since been enshrined in the alternative

Continued on Page 6

Continued from Page 5

investment fund managers (AIFM) directive, precisely in order to prevent forum shopping, and to ensure effective supervision by national regulators.

It is also recognised in the insolvency regulation, to avoid debtors shirking their responsibilities when winding down a bankrupt firm. What's more, guaranteeing the unity of seats is fully consistent with the freedom of establishment, one of the four core EU freedoms.

The case for applying the unity of seat principle – reflecting actual business activity rather than tax preferences – also finds an echo in the debate over the taxation of digital giants like Google, Apple and Amazon.

Estonia, the current holder of the rotating EU Presidency, recently proposed taxing digital firms along the principle of “virtual permanent establishment”, whereby companies pay taxes in countries where they have a “significant digital presence”.

But Jourová, for the time being, seems hesitant to impose the unity of seat principle at European level.

“I'm well aware that cross-border

conversions are a complex issue that's why we are carefully assessing how to address it. We want to take into careful consideration all the different interests at stake,” she told EURACTIV.

And Juncker, for the moment, prefers dismissing the issue as a mere “detail” of the upcoming proposal. Pressed by EURACTIV to clarify the President's position on the unity of seat principle, a spokesperson said, “The aim of the upcoming company law proposal is to enable companies to make the best of digital solutions and provide efficient rules for cross-border operations. However, the exact details and content of this proposal are currently under preparation.”

TWO-STEP SCRUTINY

The Notaries of Europe, for their part, say the current system for company conversions based on the merger directive works reasonably well. But in case a European framework is put in place, they argue it should provide a two-step scrutiny with the home and destination countries, similar to what is done with cross-border EU mergers.

• In a first step, the competent

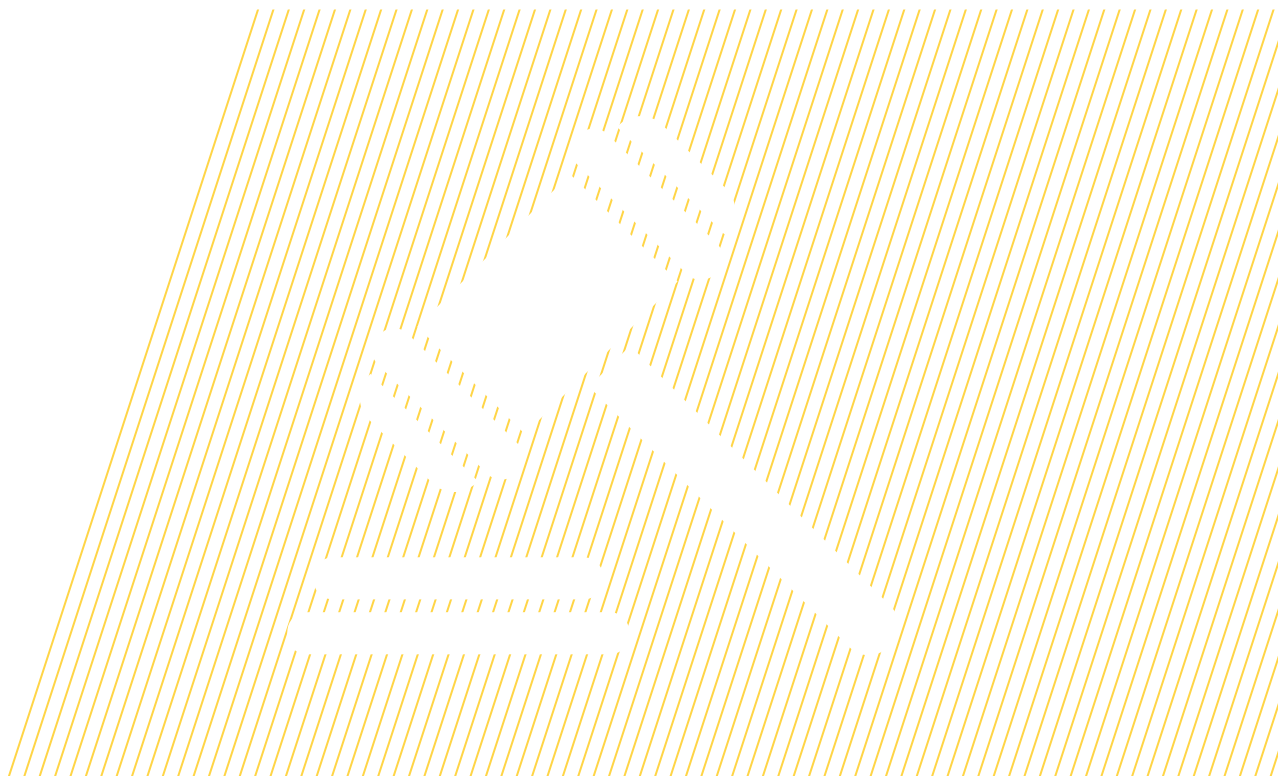
authority in the home country delivers a certificate ensuring that all formalities have been lawfully completed on their side.

• Authorities in the host member state then check that the conditions of their own legislation for the formation and registration of the company are fulfilled.

This should enable authorities in each country to focus on their own legislation, guaranteeing the legal certainty of the procedure, the Notaries argue.

In any event, notaries warn that a future EU directive should not allow the isolated transfer of registered seat, due to the notorious risk of abuse this represents.

“If no political consensus can be found on the codification of the unity of seats, a European directive on the cross-border transfer of seat should at least require the existence of a genuine link between the company and the host member state in order to prevent the most extreme cases of abuse through the conversion of the company into a mere letterbox company,” says Dr Jens Bormann, President of the German Federal Council of Notaries.



INTERVIEW

Jourova: EU rules on company seat transfers means savings for business

By Frédéric Simon



European firms could save millions in start-up and merger costs if they could use EU rules on cross-border transfer of registered office, says Věra Jourová, adding the saved money would be better invested in jobs, innovation and growth.

Věra Jourová is EU Commissioner for Justice, Consumers and Gender Equality. She answered in writing to questions from EURACTIV.

There is currently no European framework on how to deal with the cross-border transfer of company seats. So what will be the main objectives of this proposal, the key principles behind it?

The main objective of our company law package is to improve the Internal Market and make it fairer and more predictable – to stimulate sustainable jobs, growth and investments, with a

positive impact on SMEs in particular.

There are 24 million companies in the EU, and 99% are small and medium sized enterprises. We want to help them flourish and expand, in particular the smaller ones that feel the effects of costs and barriers the most. In a dynamic internal market companies should be able to move across borders more easily; this stems from their need to adapt to market conditions and realise new business opportunities.

Companies should be able to effectively exercise their right to freedom of establishment, but we also want this to happen within full respect of national social and labour prerogatives. In a nutshell, the specific objectives are twofold:

- to cut costs and administrative hurdles for companies when undertaking cross-border operations;
- to provide for a clear legal framework with safeguards built in to guarantee the effective

Continued on Page 8

Continued from Page 7

protection of the rights conferred particularly on employees and other stakeholders.

Last time the Commission tried to pass legislation on the topic, it failed because of resistance from the member states. What were the lessons learned in view of the forthcoming proposal? Can Brexit be a driver to get the legislation accepted this time?

I'm well aware that cross-border conversions are a complex issue that's why we are carefully assessing how to address it.

We want to take into careful consideration all the different interests at stake. We've recently done an online public consultation and several other consultation activities. These consultations also collect the member states' views and they provide essential input for assessing the best way forward.

Our initial estimates show that around €207 million could be saved in start-up and merger costs if half a percent of the companies would move within the EU and could use EU rules on cross-border transfer of registered office. The saved money would be better invested in jobs, innovation and growth.

But currently the prospect of these costs deters companies from

moving, in particular small ones. At the same time we are also committed to safeguard the rights of other stakeholders, such as employees and shareholders.

We hope that these aspects will be acknowledged by member states and stakeholders and trigger their support for the eventual proposals.

How does the Commission plan to approach the question of the "unity of company seats", which proved to be a sticking point in the previous negotiation?

In light of the results of our different consultations, we're looking at different options for striking a balance. By this, I mean providing an efficient and attractive legal framework for companies to facilitate growth, whilst taking into account the legitimate interests of the member states and other stakeholders.

Do you think a transfer of company seat should be treated like a merger – with a certain number of procedural steps to be observed in the country of origin and the country of destination? What is the Commission's view on this, notably regarding the protection of shareholders and creditors?

If we do include a legislative proposal on cross-border conversions in the company law package, the aim

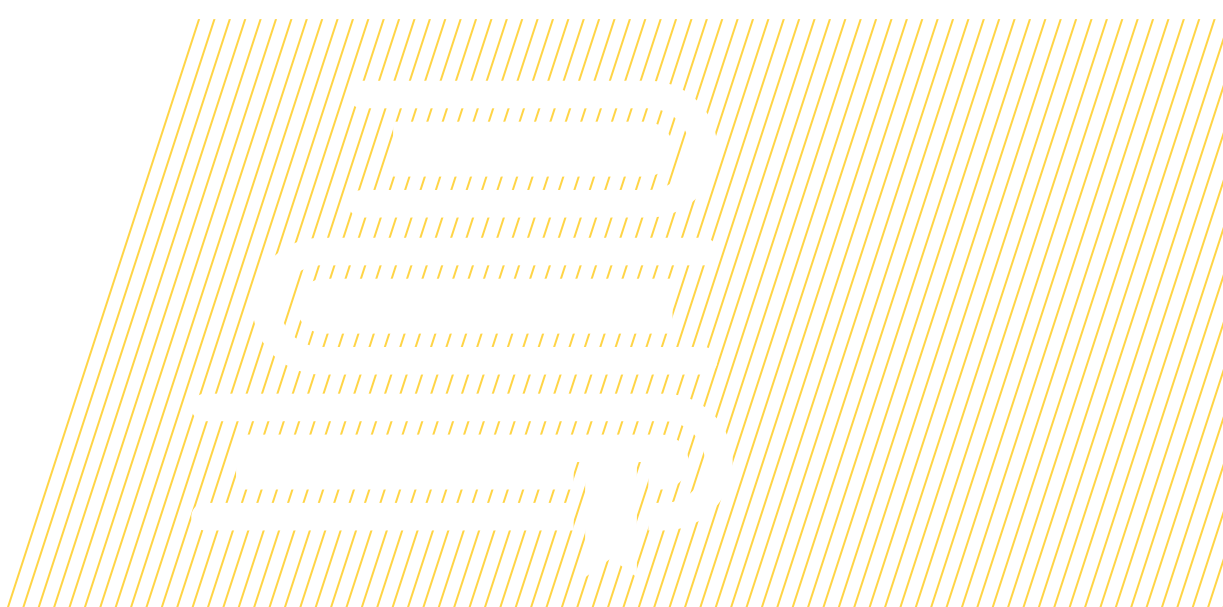
is to have a harmonised procedural framework to provide legal certainty for companies and other stakeholders.

In 2012, the European parliament made detailed recommendations on how to deal with the cross-border transfer of company seats. Which ones do you think are worth taking on board and which ones do you think should be rejected?

The Parliament has addressed the issue of cross-border conversions in several different resolutions – in 2009, in 2012 and in 2017. We're going to take all of these resolutions – together with other input – into account when assessing the way forward.

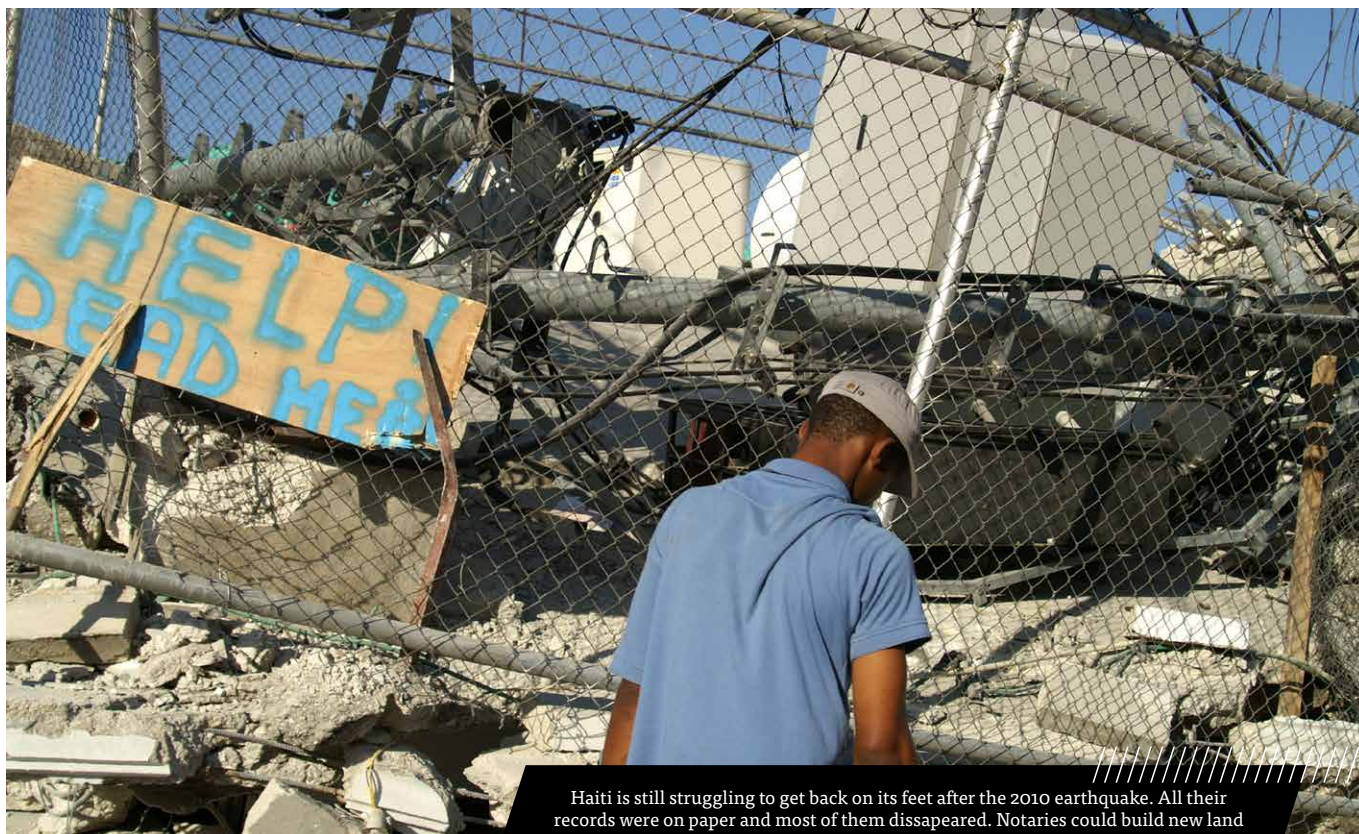
The recent spate of corporate tax evasion scandals (Luxleaks, Panama papers) has shone the spotlight on aggressive tax planning practices by companies operating in Europe. How can the upcoming proposal on cross-border of company seat help tackle this issue? Will so-called "letter box companies" be addressed in the proposal?"

There's no doubt that I'm committed to fighting against the abusive use of letterbox companies. However, in general, this initiative won't focus on the substantive requirements for setting up a company. It will only deal with specific cross-border operations.



Notaries turn blockchain into ally for digital transactions

By Jorge Valero



Haiti is still struggling to get back on its feet after the 2010 earthquake. All their records were on paper and most of them disappeared. Notaries could build new land registries based on blockchain technology to increase efficiency. [DG ECHO/Flickr]

Once feared as a technology that would make legal practitioners redundant, blockchain has now actually strengthened the role of notaries as interpreters of complex transactions, best illustrated by the convoluted issue of land registries.

Blockchain has been hailed as the most promising disruption in the digital world since the arrival of the Internet. While the web enabled exchanges of information, blockchain allows people to exchange value

with increased confidence like never before.

In these distributed ledgers, the existence of a network of computers to sustain and control operations makes a third party unnecessary to ensure that the transaction happens.

For that reason, middlemen responsible for building and maintaining trust among the parties could look redundant once blockchain networks spread across the planet.

But these third parties, from central banks to credit card companies, are not

just waiting to be forced out without a fight.

For notaries, blockchain may even become an “ally”, José Manuel García Collantes, President of the Notaries of Europe, told EURACTIV.com’s partner EFE.

The Notaries of Europe, an association bringing together more than 40,000 notaries in 22 member states, will look at how best to exploit the opportunities of blockchain

Continued on Page 10

Continued from Page 9

during a two-day conference to be held in Santiago de Compostela on 5-6 October.

EU WAKES UP

The European Commission has also stepped up its efforts on two fronts. In January, it will publish an action plan for FinTech, including a set of proposals to regulate digital firms operating in the financial sector, including those using blockchain and its most famous application, Bitcoin.

At the same time, the Commission is putting money into research projects to explore potential uses of distributed ledger technologies (the 'Blockchain for Social Good' prize), and to address some of its shortcomings.

The EU executive is also currently developing a European Blockchain Observatory Forum, and a European Financial Transparency Gateway, which will make available the information that listed companies must report to national authorities.

Blockchain brings a new generation of smart contracts, in which codes are introduced in the ledger. They are safeguarded by tens or thousands of computers, making it almost impossible to alter the information because the operation must be done simultaneously in all the computers.

Still, these new contracts can apply only where there is no room for interpretation, notes Cristina Carrascosa, a legal advisor at Demium Startups.

And even in cases where automated contracts are possible, José Carmelo Llopis, a notary at Ayora, believes that a human element will always be needed to oversee the whole process and build trust among the parties.

Carrascosa and Llopis took part in a session with notaries to explain how blockchain could become a tool for them to support their daily work, according to ValenciaPlaza, a news

website.

The technology is so promising that García Collantes believes it is worth exploring the idea of setting up a "private blockchain network" for European notaries.

Blockchain gained prominence with the emergence of cryptocurrency Bitcoin but has since attracted widespread interest due to its multiple potential applications.

Its use for land registries triggered enthusiasm because of its capacity to offer secured lists in a more efficient way than traditional methods.

Given the lack of public registries of land assets in developing nations, some have argued that a blockchain-based approach could increase efficiency and even prevent fraud.

Honduras already introduced a system based on a distributed ledger because of this very reason and Sweden is also discussing the possibility of using such a system.

HANDS-ON LAND REGISTRIES

But the use of blockchain for land registries also illustrates the need for notaries in the digital ecosystem, according to a paper drafted by Maurice Barbier, a member of the Council of European Geodetic Surveyors, and Dominik Gassen of the German Federal Chamber of Civil Law Notaries.

Despite all the euphoria, the authors draw up a long list of "reservations" when it comes to blockchain applied to land registries. This includes network integrity, the anonymity in the system which favours fraudsters, and the need for additional document storage which blockchain currently doesn't allow.

Finally, the decentralised network of computers supporting the distributed ledger requires an immense amount of energy.

For instance, a single bitcoin transaction requires as much energy

as 1.6 US households per day and requires more than 5,000 times the energy needed by the VISA credit card system. Maintaining a blockchain network at this stage would therefore require an investment that would likely not be cost-effective compared to other solutions.

Against this backdrop, and given that the complexity of real estate transactions cannot be reflected simply in a code embedded in the distributed ledger, Barbier and Gassen argue that blockchain may not be the best solution in the end.

In addition, the more participants and transaction types exist, the more complex the adoption of new standards becomes, they warned.

Instead, the two authors contend that blockchain could be more useful in the context of the 'internet of things', where there is a high affinity for common standards in the communication between machines, for example between home devices.

Others meanwhile remain upbeat about the potential of blockchain to register land transactions, particularly in special cases. Elliot Hedman, CEO of Bitland Global, a technology firm for real estate registration in Ghana, referred to Haiti.

"When the earthquake struck, all of their records were on paper, if they were written down at all," Hedman warned, adding: "There are still people fighting over whose land is whose."

Death on Facebook: Lawyers push for EU rules on digital inheritance

.....



A group of lawyers are pressuring EU legislators to propose rules that could force internet platforms to hand over data that belongs to another person who had died or is being cared for.

Lawyers pushing for new legislation argue that there is a need to create rules that apply across the bloc because internet companies, banks and social media firms might be headquartered in a different member state from where a person's guardian or heir lives.

"We definitely need uniformity of law in this digital area," said Sjef van Erp, a professor who is directing research on digital inheritance through the European Law Institute.

Van Erp said that American companies already comply with a similar law in the United States. A 2015 model law is in effect in most US states, other states are not required to implement it.

But Van Erp said the US version could be a cautionary tale: the EU should avoid a patchwork system so that lawyers can easily find out whether people have bank accounts or profiles on social media and other online services regardless of where they're based.

"We're afraid in Europe that some member states will follow the law and some won't at all," he said.

Van Erp said he plans to draft his own proposal for new legislation early next year and share it with the

European Commission.

The Commission is planning to propose separate legislation in early 2018 to help police collect so-called e-evidence, or data needed in investigations across EU borders. But van Erp said there needs to be another law addressing when family, guardians and even debt collecting bailiffs can access data.

Often, family members or debt collectors do not know if a person has digital accounts at all, and they can only find out with proof that they have the right to access it.

"This is not about looking for evidence, it's about looking for the asset itself," van Erp said.

Continued on Page 12

Continued from Page 11

Notaries, for their part, say digital assets like photographs, music or videos should be treated like physical assets, with personal rights and intellectual property rights applying normally.

“The phenomenon of digital succession should not be handled separately, but instead the traditional structure of succession must be adapted to the digital reality,” according to a briefing paper prepared ahead of the 4th Notaries of Europe Congress taking place in Spain this week.

However, notaries also recognise that “new solutions” sometimes have to be found to adapt traditional successions to the digital reality.

“The boundaries between personal and social relationships are blurred, when speaking of social media, blogs, and digital assets, making it hard to know where one begins and the other ends,” the paper says.

When it comes to social media accounts, provisions are already in place in the event of death. Facebook for instance specifically offers the option of completely closing the account and eliminating the profile, or keeping the account to allow friends and relatives to leave messages after the person’s death.

Notaries insist however that terms and conditions of social media platform should respect the domestic succession regulations of each country. “Of course, the document of legitimation should be a notarial instrument, as in the case of an ordinary will,” the paper says.

But notaries are also open to the idea of introducing online testaments, in order to deal with changes in things like electronic contact details, passwords, or account numbers.

“Perhaps, there could be mixed documents, or two complementary documents,” the notaries suggest.

Other legal experts argue that

binding legislation on digital accounts won’t be as effective as a softer approach. Companies could agree voluntarily to include terms of service that address how other people can access users’ data. Many firms already do that.

An association of Italian lawyers set up a working group with Microsoft and Google to try to hammer out a voluntary agreement on when the firms will give people access to someone else’s account data. But their meetings stopped months ago, one source with knowledge of the meetings said.

Some lawyers think it isn’t worth the effort to draft a new EU law that would touch on inheritance issues – a broader area where legislation differs widely between member states.

“It could definitely be helpful in some cases, but nothing will happen for a long time. Every country has its own rules,” said Paul Grötsch, director of the German forum for inheritance law.

“We don’t have this kind of EU law for real estate inheritance. There’s no need to create one just for digital heritage if we don’t have it for property,” he added.

Legal struggles over access to digital assets have recently grabbed headlines in Germany. In May, a Berlin appeals court ruled in favour of Facebook’s decision not to give parents of a deceased teenager access to her account after someone else had already asked the social media platform to shut it down. The court cited data protection reasons for its decision to side with Facebook.

In August, a Facebook executive summed up the firm’s policy in a blog post: “Where the law permits, we try to respect the wishes of those who have passed away. Sometimes, however, we simply don’t know what the person would have wanted.”

Van Erp said privacy has become one of the main concerns for lawyers trying to trace a person’s digital

accounts and assets – and Facebook’s case in Germany is a glaring reminder of that.

France passed a new national law in October 2016 regulating the use of data, and it also included measures creating the right for people to give instructions for how their data is used after they die.

Olivier Proust, a partner at the law firm Fieldfisher in Brussels, said the French law is “one of the only data protection laws in the world that grants this right to individuals.”

Since the law went into effect one year ago, France’s data protection agency CNIL has received 10 complaints from people who wanted to access a deceased person’s data, a spokeswoman said.

The French law goes further than any EU rules so far: A broad data protection regulation that will go into effect across the bloc next year does not extend rights to the dead.

Privacy lawyers argue that with no laws outlining when companies must give access to someone’s data after they die, companies should follow the same rules that apply to living people – if the person did not have a will specifying what should happen to their online accounts.

“In many circumstances the deceased will not leave clear instructions as to what they wish to happen with their personal information/data and in this case data controllers should respect the data protection principles in GDPR [EU data protection regulation],” said Ailidh Callander, a legal officer at the NGO Privacy International.

Van Erp said his draft will differentiate between the different rights that should be given to guardians, heirs to digital assets or accounts and bailiffs seeking to collect debt.

“Normally you’d say email is personal, but after death, how on earth will you find out if it’s a correspondence with a bank?” he said.

OPINION

DISCLAIMER: All opinions in this column reflect the views of the author(s), not of EURACTIV.com PLC.

Cross-border mobility of companies: 'Real seat' vs 'incorporation'

.....



The European Commission is planning an initiative to address the problems raised by the cross-border mobility of companies.
[Peter Rosbjerg / Flickr]

EU member states have adopted contrasting approaches to the cross-border mobility of companies, with some insisting on “real” economic activity and others happy to consider the legally-registered office instead. How the EU eventually decides could have important implications, writes Corrado Malberti.

Corrado Malberti is Professor of Commercial Law at the University of Trento. A notary in Turin, Milan and Como, he has been Chair of the Company Law working group of the Council of the Notariats of the European Union since 2011.

The European Commission is planning an initiative to address the problems raised by the cross-border mobility of companies. Apparently, this legislation will review the cross-border merger directive and introduce a set of rules on cross-border divisions and cross-border conversions. In addition, it seems that this initiative could also harmonise the private international law principles concerning the law applicable to companies across the European Union.

Even if all these measures pursue the goal of facilitating the cross-border operations of legal entities, they pose different challenges for their enactment, given the implications they

might have on national company law, and since they will concern fields that today have not been yet harmonised at EU level. These topics are also important for practitioners, and, for that reason, the Notaries of Europe Congress will be devoted to the cross-border mobility of legal entities.

Probably the most contentious measures are those aiming at harmonising the law applicable to companies, since EU Member States have adopted different approaches in this respect.

These approaches fall under two different theories – the “real seat”

Continued on Page 14

Continued from Page 13

theory and the “incorporation” theory. The real seat theory determines the legislation which governs a company based on the place where the fundamental management decisions of the company are implemented, while the incorporation theory simply relies on a formal element, which is that of the place where the registered office is located or where the incorporation procedure was completed.

The adoption of either criterion at European level will have important implications for the countries that will have to adopt the other approach.

In reality, in the perspective of enhancing the cross-border mobility of companies, the debate on these criteria is more theoretical than practical. Certainly, some real seat countries, especially in the past, limited the cross-border mobility of legal entities by invoking this theory.

However, also countries that adopt the incorporation theory, such as the UK, do not allow their companies to be converted into foreign legal forms. On the contrary, some real seat countries, like Luxembourg, widely recognise the possibility of carrying out cross-border conversions, at least as some other countries that adopt the incorporation theory do.

From a practical perspective, both approaches are legitimate, at least as long as they do not facilitate abuses or legal, tax, and employee protection arbitrages, by creating letterbox companies, a problem which, it should be conceded, is more likely to occur in countries that adopt the incorporation theory.

With regard to cross-border mergers, the European Commission will not be writing on a blank slate: Since 2005, the European Union has a successful directive that allows these transactions across all Member States. In this field, the main goal pursued seems to be that of improving the existing legislation.

This laudable goal, however, should

not result in disruption of the general principles that were enacted in 2005. In this perspective, the controls regarding the legality of cross-border mergers should be preserved. Maybe further harmonisation could be pursued with regard to the scope of the transactions concerned, the protection of creditors and that of minority shareholders.

Yet, a deeper unification in this field should be closely coordinated with national company law, since a European intervention only in the field of cross-border mergers could result, at least in some Member States, in granting the stakeholders involved in these transactions fewer safeguards than they would have in national mergers.

The harmonisation of cross-border divisions could be another valuable means to enhance the cross-border mobility of companies. This legislation should closely follow the approach adopted for cross-border mergers. Therefore, also for cross-border divisions it will be necessary to ensure the control of the legality of divisions in all Member States involved.

Certainly, the stakeholders that participate in the cross-border divisions should be protected by adopting safeguards that should be at least comparable to those provided for cross-border mergers. However, the harmonisation of cross-border divisions should take into account some distinctive features of these transactions: for example, currently European company law does not require Member States to have legislation on divisions, and therefore it seems peculiar to impose on Member States to allow these transactions only if carried out at cross-border level.

Finally, the possibility of carrying out cross-border conversions is the most delicate of the initiatives under consideration. In the past, these transactions have been labelled in many ways: Cross-border transfers of seat, transfers of registered office or changes in the applicable law. At present, it seems that the idea would be to allow

companies incorporated in a Member State to change their legal form and adopt that of another Member State. This transaction combines some of the challenges raised by the harmonisation of cross-border mergers and the private international law applicable to companies.

In truth, to achieve the mobility goals pursued by the Commission, it is not necessary to harmonise the law applicable to companies, and legislation may be drafted on cross-border conversions compatible with all the private international law criteria existing in the Member States. With regard to the procedural aspects, deference should – again – be given to the positive experience of the system of controls devised by the cross-border merger directive. Also with regard to the protection of the stakeholders involved in this transaction, inspiration should be taken by the rule on cross-border mergers, yet, it should also be highlighted that, where interests of stakeholders are not involved, it would be conceivable to provide more speedy and simplified procedures.

The Notaries of Europe Congress will address the problems raised by cross-border conversions and will provide useful indications to the European institutions on the principal aspects of a legislation that will meet the needs of practitioners. The works of the Congress will also provide guidance on how, in this field, it is possible to strike the right balance between practice and theory and national and EU legislation.



For information on
EURACTIV Special Reports...

Contact us

Dan Luca

pr@euractiv.com
tel. +32 (0)2 226 58 18

Other relevant contact

Frédéric Simon

frederic.simon@euractiv.com
tel. +32 (0)2 788 36 78