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German Tax and Legal News

Evidence of power of representation of the director of a UK PLC - Mere inspection of Companies House is not sufficient

Comprehensive certificate of a UK notary as proof of authority of a director of a UK PLC towards German commercial register

By court order of January 26, 2015 (file 12 W 46/15), the Higher Regional Court of Nuremberg ruled that a certificate of authority of a German notary for the director of a UK PLC based on mere inspection of UK Companies House is not sufficient even if all directors participated in the application for registration with the German commercial register.

Facts of the Case
In the present case, an application for registration of the amendment of the articles of association of a German GmbH was filed with the German commercial register. The filed certificate of authority for the sole two directors acting on behalf of the shareholder of the GmbH – a UK private limited company (PLC) – was issued by a German notary. The application was rejected by the German commercial register since the certificate was deemed not being sufficient as it was based on a mere inspection of the Companies House.

Court Ruling of the Higher Regional Court
The OLG Nuremberg confirmed in the appealing proceedings the decision of the German commercial register and its general obligation to verify the power of representation of acting directors, including those of non-German companies, in connection with an application with the German commercial register. The mere inspection of a foreign companies register shall only be sufficient in cases, where it has judicial competence that corresponds with the one of the German commercial register. According to the OLG Nuremberg, the Companies House is not legally comparable to the German commercial register since - unlike the German commercial register - the Companies House does not verify the authority of acting directors when making registrations.

Since the power of representation of a UK director is not regulated in only one law and further UK case law applies, a notary's certificate shall only be sufficient if it contains the confirmation that the notary obtained his knowledge by examining the company's corporate documents by explicitly making reference to these documents. This shall even apply if all registered directors participated in the application for registration with the German commercial register.

Practical Advice
The OLG Nuremberg confirmed the higher courts rulings in so far as German notary's certificates based on inspection of the UK Companies House are not sufficient as evidence of power of representation. According to the prevailing opinion, also of the OLG, such evidence can only be given by a certificate issued by an English notary. Unlike other cases, the OLG Nuremberg decided that such notary's certificate is also required if all directors of a PLC or Limited, who are registered with the Companies House, executed the relevant documents to be filed with the German commercial register which is to be assessed critically in terms of European law. A similar decision was made by the OLG Düsseldorf (in its decision of 21 August 2014, case I-3 Wx 190/13) in a case where only one director was appointed for the UK company.

Practice, however, shows that for the avoidance of interim rulings (Zwischenverfügungen) close coordination with the German commercial register is vital. Generally, for a UK PLC or Limited it is advisable providing the German commercial register with a certificate authority from an English notary, favourably from a Scrivener Notary (having a specific international qualification). The statements of the UK notary should not be of formulaic nature only, but he should make explicitly reference to the documents and statements he has examined (e.g. articles of association, board resolutions). However, if the foreign entity has a registered branch in Germany, a certificate issued by a German notary based on sole inspection of the German commercial register is sufficient.

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