“Overseas Expansion: How do you do it and who do you talk to?”

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San Antonio, Texas

Robert P. Braubach
Attorney and Counselor at Law[1]
Board Certified: Commercial Real Estate Law
Honorary Consul of Belgium
Honorary Consul of Namibia
106 S. St Mary’s Street STE 200
San Antonio, Texas 78205
Telephone: 210-271-0630
Facsimile: 210-225-1951
Email: braubach@texas.net
Website: www.braubach.home.texas.net

[1] State of Texas; Czech Republic

"Overseas Expansion: How do you do it and who do you talk to?"

I. Introduction: Global Economy

A. Companies can choose to set up business and investment operations wherever they wish subject to approval by the host state.

B. Due to the global economy, U.S. companies wish to enter new markets before competitors. Business transactions, particularly real estate, used to be more local and domestic; however, the development of private equity funds has made it a more global practice.

C. The stronger U.S. Dollar, particularly vis-à-vis the Euro, makes U.S. exports more expensive and U.S. imports cheaper. On July 1, 2018, the exchange rate per Euro was $1.17.

D. In 2017, for the 14th year in a row, Texas was ranked as the number one state by export revenues. Texan exports for 2017 totaled $264 billion. Top export industries are chemicals, computers, machinery and electronics. Mexico is Texas's largest trading partner, with over $94 billion exports to Mexico from Texas in 2017; Canada is the second largest trade partner with $22 billion of exports from Texas.

E. Creation of regional trading blocs and new free trade agreements, as follows:

1. Regional Trading Blocs:

   a. European Union. The EU is a customs union as well as a single internal market (*i.e.* not just a free-trade area) based on the free movement of goods, services, persons, and capital: It has a common external tariff vis-à-vis non-member countries, and has the power to create supra-national EU law, which prevails over the national laws of the 28 Member States comprised of 500 million consumers. The EU is a supranational organization.

   b. European Free Trade Area (EFTA): Free trade area between European Union and Norway, Switzerland, Liechtenstein and Iceland created in 1995.

   c. North American Free Trade Agreement (NAFTA). In 1994, United States, Canada and Mexico create a free trade area with a population of 450 million consumers. US Companies sold $45 billion in goods to Mexico in 1993, prior to NAFTA; in 2015, US exports to Mexico were $236 billion. Total bilateral trade between the U.S. and Mexico reached 530 billion. NAFTA 2.0 will update NAFTA and is being negotiated at this time between the U.S., Mexico, and Canada.

   d. CAFTA. In 2005, U.S., Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Dominican Republic created a free trade area.

e. MERCOSUR. South American trade agreement grouping consisting of Argentina, Brazil, Paraguay, Uruguay, and Venezuela. Bolivia, Chile, Columbia, Ecuador and Peru have associate member status.

f. SADC and SACU. Southern African Development Community and Southern African Customs Union. SADC has 15 South African members; SACU has 5 South African countries.

g. Association of Southeast Asian Nation (ASEAN). 10 members, consisting of Brunei, Indonesia, Thailand, the Philippines, Malaysia, Singapore, Myanmar, Cambodia, Laos, and Vietnam. ASEAN signed a Free Trade Agreement with China.

2. Free Trade Agreements:

a. European Union - Mexico Free Trade Agreement. Effective July 1, 2000, it reduces tariffs on goods and services over a 10-year period and will be replaced by the EU-Mexico Global Agreement with the following benefits:

i. U.S. companies conducting business in Mexico are in a better position to export their industrial products to Europe from a lower customs duty base if their products meet the Mexican rule of origin guidelines.
ii. E.U. – Mexico Global Agreement should be compete by the end of 2018.

3. Trans-Pacific Trade Agreement (TPP): This TPP has been negotiated amongst 11 nations of the Pacific and is now in the ratification procedures. It is the largest regional trade accord in history. The U.S. withdrew from the TPP in January 2017.

4. EU. – Japan Free Trade Agreement to be signed on July 17, 2018, in which the E.U. will open its market to Japan's automobile industry; Japan will open market to E.U. farmers.

F. Recent developments in the EU.
1. United Kingdom Government Referendum: voted to exit from the EU in June 2016.
a. UK will leave the EU on March 2019.

2. Refugee crisis in the EU
a. 1,006,000 refugees crossed into EU in 2015;
b. 1,260,000 asylum applications in the E.U. in 2016
c. 503,000 asylum applications in 2017 in the E.U.
d. Germany received highest number of asylum applications in 2015 (~315,000);
e. Most refugees are from Syria, but many have also come from:
i. Afghanistan
ii. Kosovo
iii. Iraq
iv. Albania

v. Pakistan
vi. Eritrea
vii. Serbia
viii. Ukraine

f. More than half of all Syrian refugees are under the age of 18;
g. This crisis will have a major impact on the EU and surrounding area

II. Law Firms – Setting up Foreign Offices

a. Law firms open offices overseas for the same reason companies do. They follow their clients and the work.
b. Clients are becoming more and more competitive in order to stay in competition.
c. Larger U.S. companies are sourcing from and selling to other countries and are opening foreign offices. They need lawyers that understand their business, the laws of the U.S. and the other country, and common cross border issues.
d. Use international legal networks

1.A cost effective approach for U.S. law firms to work with global clients is to use international networks to gain access to local lawyers in foreign countries.

2.Firms are using networks like Mackrell International and Multilaw for access to foreign markets.

3.Networks usually require a membership fee and a compensation arrangement.

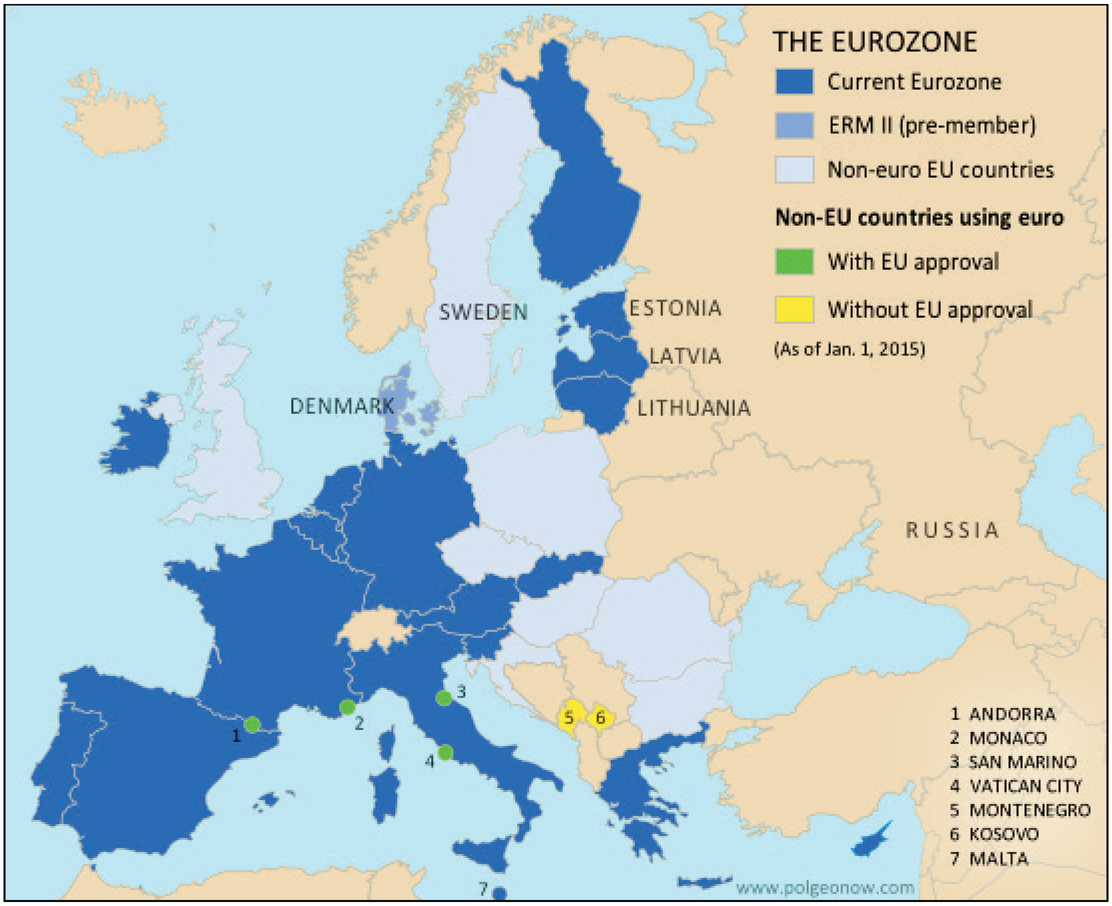
e. Foreign Offices
    1. When specific countries are important to a firm, and the firm has clients doing business there, it makes sense to set up a foreign office there.
    2. Foreign offices assist the firm to work more closely with their clients and to better be able to provide a full service to existing clients, and to attract new work they normally could not attract.
    3. The days of opening a foreign office in the hopes of finding new clients are a thing of the past.

III. U.S. Consulates can assist small and medium size companies to enter foreign markets

a. U.S. Consulates and Embassies can provide specialized assistance and help locate sales agents for U.S. products through their commercial attaché at the Embassy.
b. U.S. Embassy in Brussels has a service to help U.S. companies locate agents and distributors in Belgium (website: https://be.usembassy.gov/)

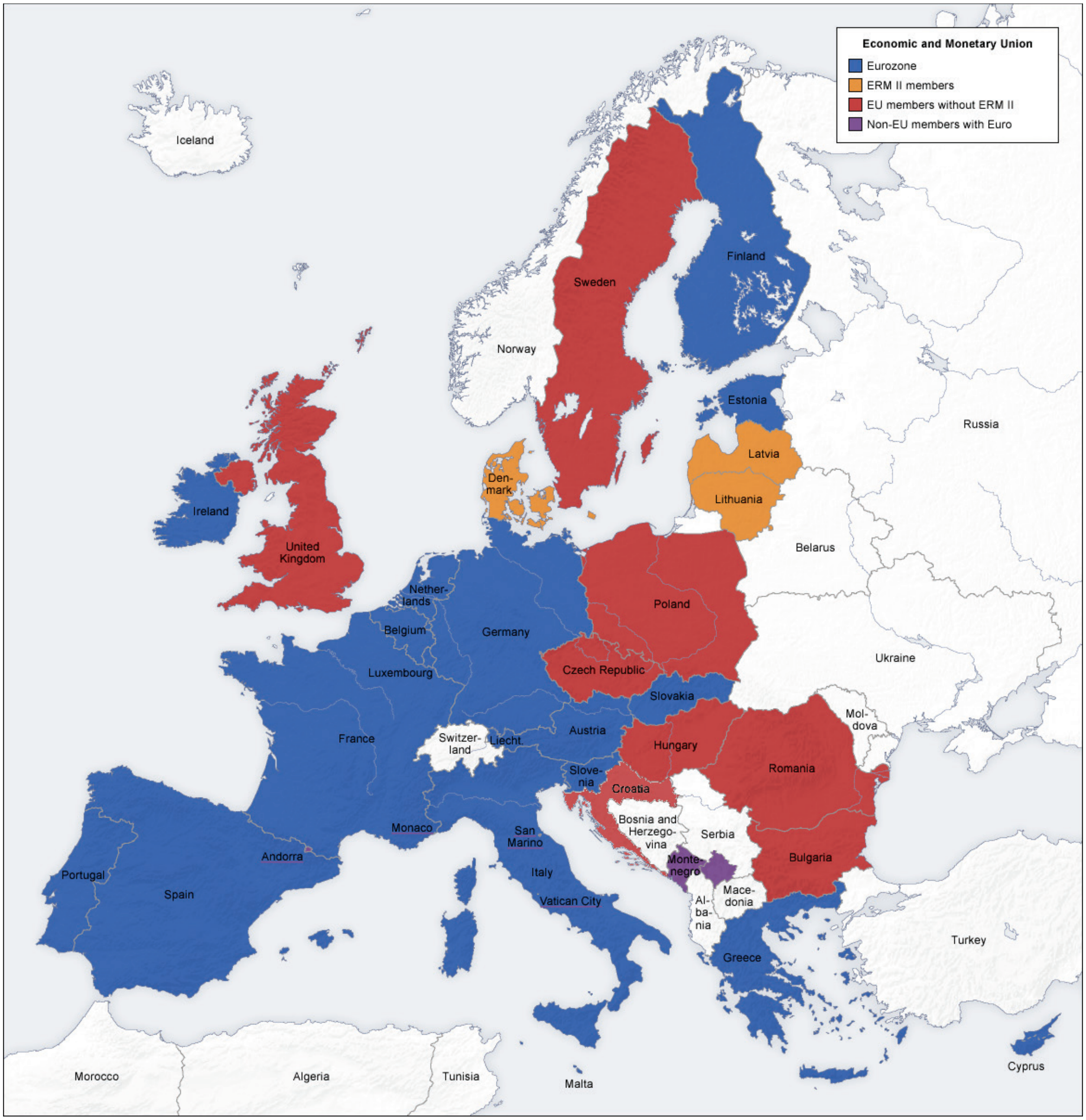
IV. Currency Movements

A. U.S. Dollar – In 2002 the Euro was worth around $0.90 on average. As of July 1, 2018 the Euro was worth $1.17, making U.S. exports more expensive.



B. Euro Zone – 19 EU Member States out of the 28 members enjoy the unified currency and interest rates.

C. Interest Rates. The European Central Bank reflects a negative interest rate of -0.04% in the Eurozone.


Economic and Monetary Union
Eurozone
ERM II members
EU members without ERM II
Non-EU members with Euro
Iceland
Norway
Sweden
Finland
Russia
Estonia
Latvia
Lithuania
Den-
mark
Ireland
United
Kingdom
Belarus
Nether-
lands
Poland
Belgium
Germany
Ukraine
Luxembourg
Czech Republic
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Herzego-
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Serbia
Monaco
San
Marino
Andorra
Monte-
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Bulgaria
Portugal
Spain
Italy
Vatican City
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Mace-
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Turkey
Greece
Morocco
Algeria
Tunisia
Malta
Cyprus

V. Indirect Presence For U.S. Small and Medium Sized Companies

A. Sales Agreements

1. Export Sales: U.S. Company sells directly to EU Consumer is a simple approach to test the business climate for your product. Internet sales are more and more popular; EU consumer protection rules and EU customs plus value added taxes apply to deliveries in the EU. U.S. companies may want to first explore the market by attending trade fairs to learn more on the local market.

2. Agency Agreement. The EU agent is independent intermediary, who acts on behalf and for the account of a U.S. principal for the sale of the U.S. products. Title to the goods remain in the name of the principal until the sale is concluded. Each EU country has an agency law based on the EU Agency Directive 861653, which covers the status of commercial agents and agency agreements, and covers important points such as notice requirements upon termination of an agent and rights of compensation to Agent for a terminated agent and severance.

    a. EU National Laws. All EU countries give EU Agent protection in event of termination.

    b. EU Competition Law. Article 101 does not apply to agency agreements if Principal bears the commercial and financial risks.

3. Distribution Agreement. The distributor purchases the goods on his own account and takes title to the goods from the Supplier. A distributor, as opposed to an agent, assumes the risks of the operations. Key provisions in the distribution agreement are:

    a. Exclusive or non-exclusive;

    b. Territory to be covered by the Agreement; territory could be a single EU Country or Europe, Middle East, or Africa (EMEA).

    c. Duration of Agreement; i.e. fixed term or indefinite duration.

    d. The Belgian Distribution Law of 1961 is applicable to fixed term agreements in such a way that it (1) presumes a renewal of the agreement unless the parties provide notice in a manner provided for by the Act, and (2) provides that as of the third renewal of the agreement, it is considered to be an agreement of indefinite duration. However, the protective provisions of the Act with regard to termination do not apply as long as the agreement is considered a fixed term agreement. Belgium is unique in that its 1961 Distribution Law protects the exclusive distributor in event of improper notice of termination and grants the exclusive distributor specific protection upon termination of the contract; either a reasonable notice period or an adequate compensation in lieu of notice must be paid.

4. Suppliers may reserve right to sell to stated clients in designated territory.

5. Agreement should provide for an alternative dispute resolution or mediation to avoid the costs and delays of litigation.

6. EU Competition Law. Applies to distribution agreements if there are export bans (i.e. prohibiting a party from cross-border sales), price fixing, and other provisions therein which might violate EU Competition Law Article 101. EU regulation on Vertical Restraints in Competition 330/2010 dated April 20, 2010 applies to all distributors' agreements. EU de Minimis Rule exclusion from EU Competition Law for small and medium-sized enterprises (SMEs) companies if their effect on competition and trade between Member States is negligible or without an appreciable impact and when each of the parties has a small market share which does not exceed 15% if between non competitors.

7. Franchise Agreement. EU National Law. Most of EU countries do not have specific rules governing franchising. Parties are thus free to regulate their rights and obligations as they wish, within the general principles of contract law. Regulation 330/2070 applies.

8. License/Manufacture Agreement. Agreement in which U.S. Company licenses its technology in form of patents and know-how, trademarks, or copyrights to EU licensee with a royalty.

VI. Direct Presence for U.S. Sellers

A. A Representative office of a U.S. Company is normally not a registered branch office and cannot engage in trading in business and cannot make any business decisions.

B. Branch Office. The choice between a Branch Office of a U.S. Company and a U.S. subsidiary company in the EU often depends on the taxation structure in the foreign country, and if the U.S. Company wants losses incurred in the EU in the start up of the operations, and repatriation of profits. Other aspects in considering a branch are the administrative costs, and tax treaties available to resident companies. You normally see branch offices used by banks, financial institutions, and insurance companies. You might also use a branch office with certain investment funds for financial institutions to establish a presence in the EU.

1. Formalities to establish a branch. Certified incorporation documents of U.S. Company before a notary public with an Apostil. Legalized copy of the Board meeting authorizing creation of a branch; Certificate of Register of Commerce confirming existence of the company; Appointment of a legal representative in the EU Country.

2. Liability. A foreign branch is part of its head office and does not constitute a separate legal entity. All branch liabilities are direct liabilities of U.S. company.

3. Taxes. Branches of foreign companies are subject to non-resident corporate tax on income from business conducted by the branch.

C. Subsidiary. When the U.S. company sets up a wholly owned subsidiary company in the EU, it establishes a separate legal entity for both corporate liability and tax purposes.

1. Formalities to establish an E.U. subsidiary.

   a. Choice of Entity. Proper entity to operate or hold investment assets are corporations and partnerships and that most U.S. companies use forms of entities most closely resembling limited liability companies (LLC's) in the event they wish to "check the box" for U.S. tax purposes.

   b. Stock Corporations. Most civil law countries have a stock corporation with shares representing 100,000 Euro.

      In Germany, "Aktiengesellschaft" or AG is a stock corporation. German AGs have a "two-tiered board" structure, consisting of a supervisory board and a management board.

      In France, "Société Anonyme" or SA is a stock corporation. There is a choice between a one-tier and a two-tier board of management.

   c. Advantage of Limited Liability Company. A LLC is flow through entity with all income and expenses pass through directly to its members, and the LLC does not pay a company tax. As re liability, LLC has the same or better liability protection than a corporation.

   d. EU Limited Liability Companies. Most all EU Member countries provide for formation of various companies which closely resemble a U.S. LLC. Although there is not a true Limited Liability Company in Europe, these EU companies relate closely to a LLC used in the U.S. but one cannot make an exact correlation. Companies often viewed as Limited Liability Companies in Belgium are SPRL/BVBA, and in France and Luxembourg is SARL comparable to GMBH in Germany. GMBH is a popular entity in Germany and requires only 20,000 Euro capital. GMBH must have one EU Resident Director, and one other Director of any nationality. Capital can be used by company after formation. In the Czech Republic, the SRO is similar to an LLC except that it is subject to company tax and requires capital of 0 CZK, a recent change in Czech Law.

   e. The difference between the SPRL/BVBA (a private limited liability company) and the SA/NV (a public limited liability company) is, among others, the size of the corporation (e.g. initial capital of SPRL/BVBA is 18,550 Euros in lieu of 61,500 Euros), the transferability of the shares and the possibility to issue e.g. shares, warrants or convertible bonds.

f. Parent Liable for Conduct of its Subsidiary. EU case ruled that Parent is liable for infringements of EU competition law committed by wholly-owned subsidiaries; Parent owned 100% of subsidiary and controlled subsidiary and parent was held liable for conduct of its subsidiary for infringement of Article 101 of Treaty. Also for a joint venture, Eu Du Pont T-76/08 and Dow Chemical, T-77/08;

g. Company Formation in Belgium (NV/SA).

i. Incorporator set up initial capital with a bank, and bank issues a standard certificate confirming amount in a blocked capital account of 61,500 Euros.

ii. Incorporators draw up a financial plan for the corporation with a Belgian notary.

iii. Articles of incorporation and by-laws are signed by incorporators in presence of notary and legalized by notary, and proper translation of the corporate documents. NV/SA must have 2 shareholders and three Directors (if there are only 2 shareholders, company only needs 2 Directors).

iv. After payment of registration duty, notary records incorporation documents with a local court, and submits the corporate charter, including appointment of Board of Directors, for publication in the Official Gazette.

v. Company must request a Value Added Tax (VAT) number.

vi. Taxes. Belgian companies are taxed at 33.99% rate on taxable income.

2. Separate Legal Entity. A subsidiary constitutes a separate legal entity from its shareholders; liabilities are limited to the subscribed capital of the company, and its income is subject to corporate income taxes.

D. European Company Statute (SE)

1. This Regulation approved by the E.U. Council on October 28, 2001, allows companies to operate throughout the E.U. as a single legal entity to be called *Societas Europaea* or SE. It will eventually allow the SE to operate under one set of Community corporate-law rules, with a unified management and reporting system. An SE established in one Member State may operate through branches in other Member States. Unclear how advantageous this will be in practice, as the tax rules are minimal. It does not appear that many of these SE Companies have been set up. The SE was intended as a vehicle to facilitate large, cross-border mergers in the EU, but it didn't really respond to any perceived need of business and has been rarely used in practice.

VII. International Leasing and Foreign Real Estate Purchases.

A. What to do when your U.S. client asks for advice on a real estate lease or purchase outside the United States?

1. Are there any restrictions on leasing or ownership by foreigners?
2. Legal system in the country you are leasing or negotiating a purchase; civil law, common law, or sharia law?
3. Utilize local counsel to guide your negotiations.
4. Understand the differences in which practices and laws differ from those in the U.S. and understand how to deal with these differences.
5. Does the term of the lease require it to be recorded in the deed records?
6. Does the tenant have a mandatory renewal right, such as countries in the E.U. like France and Italy?
7. Does the tenant have early termination rights, like in France and Belgium? A commercial lease in France for a term of 9 years gives a tenant a right of termination only at the end of the third and six year, and every three years following for longer leases.
8. Directors of a company often sign contracts outside the U.S. whereas in the U.S., a president or vice president would sign the documents.

VIII. Conclusion

As with regard to establishing a direct presence in the EU, the choice of entity in the EU requires careful advice from qualified lawyers. LLC type companies (S.R.O. in Czech Republic, SARL's in France, Luxembourg SPRLS in Belgium, GMBH's in Germany) are a popular form of doing business as they can be treated as LLC's for U.S. tax purposes, if they "check the box" for U.S. tax purposes. From a local point of view, such companies are usually not pass-through as they pay corporate taxes in the country of organization, but if they elect pass-through status for U.S. purposes, the U.S. parent company can often credit the tax (the indirect credit) when the European subsidiary remits funds to the parent company. Dutch holding companies are still popular; however, Luxembourg and Belgium are popular as well. Corporate laws are not harmonized in Europe (except for the European Company SE). German GMBH company is popular entity to do business in Germany, the largest economy in the EU.

As regards to indirect presence, the EU distributor takes title in its own name and reduces the risk of doing business in the EU for the U.S. Seller, and allows the U.S. Seller to do business in the EU with limited risk; the distribution structure remains a popular vehicle for the U.S. supplier to enter the EU market.