

**Deloitte.**



**Legal news**

Deloitte Czech Republic

March 2018



## Legal news – March 2018

# Options to transfer the registered office from non-EU countries

**A cross-border transfer of the registered office as stipulated in the Czech Transformation Act has recently experienced a mild but noticeable development. The key limit of the Transformation Act is the fact that it only relates to cross-border transformations with the EU (or EEA) states. Under this Act, no cross-border transformation has been possible to date with countries such as Switzerland, the USA or Russia and will not be possible with Great Britain after its exit from the EU. However, general guidance on the cross-border transfer of the registered office of any legal entity under the current Civil Code might be an interesting solution.**

The transfer of the registered office as stipulated in Czech Act no. 125/2008 Coll.,

on transformations of commercial companies and cooperatives, as amended (the “Transformation Act”)<sup>1</sup> has recently experienced a mild but noticeable development resulting from the case-law of the Court of Justice of the European Union<sup>2</sup>. Application of the Transformation Act is limited as it only relates to cross-border transformations with the states (corporations from the states) of the European Union or the European Economic Area.

No transformations are thus possible with a number of jurisdictions that are economically significant, such as Switzerland, the USA or Russia and, very likely, Great Britain after its exit from the European Union at the end of March 2019.

This basic limitation of the Transformation Act could be overcome thanks to the

changes introduced into Czech law by the Civil Code effective since 1 January 2014<sup>3</sup> (the “**Civil Code**”). The Civil Code contains a general provision regulating the cross-border transfer of the registered office of any legal entity that may also be used to transfer the registered office of a legal entity (a commercial corporation) between the Czech Republic and any country outside of the EU (EEA).

### **An option for the cross-border transfer of the registered office with non-EU countries under the Civil Code**

The existence of the guidance stipulated in Section 138 et seq. of the Civil Code seems to provide legal entities from third countries with an opportunity to transfer their registered offices to the Czech Republic (and vice versa) without this opportunity being included in an international treaty as

<sup>1</sup> Specifically, Section 384a et seq. of the Transformation Act.

<sup>2</sup> Refer namely to the case of Cartesio, C-210/06 CARTESIO Oktató és Szolgáltató bt.

<sup>3</sup> Act no. 89/2012 Coll., the Civil Code, as amended.



was the case with the previous wording of the Commercial Code.

The provision is general, applicable to all legal entities and as such it relates to all commercial corporations unless a special legal regulation contains a specific provision. The special regulation is the above-mentioned Transformation Act that explicitly provides for transformations of (Czech) commercial corporations but its applicability to cross-border transformations is limited to other EU (EEA)<sup>4</sup> member states only. For legal entities (and namely commercial corporations from an economic point of view) from third countries, there is no provision in any other legal regulation. It thus may be inferred that these legal entities may transfer their registered offices pursuant to the Civil Code.

This approach is confirmed by the statement of reasons underlying the new Civil Code which reads as follows in this respect: *“in the globalised world, cross-border changes in registered offices of legal entities and establishing and transferring their branches cannot be prevented. For this reason it is proposed to stipulate transfer of a legal entity’s registered office from abroad to this country and vice versa and define as of which date the registered office’s transfer is effective. However, the absolute freedom is hindered by legal provisions prohibiting legal entities from violating public order”*.<sup>5</sup>

### **Are we going to transfer registered offices of companies instead of making cross-border mergers with Great Britain after Brexit?**

It should be admitted that in practice we hesitate to transfer companies from (or to) third countries. There is some logic in this approach because there is undisputable legal and tax unclarity in this respect, making companies use other legal instruments for cross-border transfers of assets and activities.<sup>6</sup> The potential of cross-border transfers of registered offices with respect to countries with which it has not been possible so far is undoubtedly great as this relates to countries with which no transformations could be made at all, such as the above-mentioned Switzerland, the USA, Ukraine or Russia. No less interesting is the application of this legal regulation

<sup>4</sup> Refer to Section 3 in connection with Section 59b of the Transformation Act.

<sup>5</sup> Statement of reasons for Act no. 89/2012 Coll., the Civil Code. ANAG Publishing House, p. 69

<sup>6</sup> Eg. standard direct transfers of assets and establishing new companies or branches. It should be pointed out that such procedures have their limits and various practical disadvantages, including taxation.



to Great Britain with respect to the forthcoming date of its exit from the European Union as of 29 March 2019.

Companies willing to transfer the centres of their businesses to the EU or vice versa in respect of Brexit should ideally start addressing the situation now. The processes of cross-border mergers and registered office transfers may take several months to complete and effective from Great Britain's exit from the EU, British companies are likely to lose all legal advantages of EU harmonisation (predominantly, they will lose the option to make cross-border mergers that have been relatively popular today).

If they miss the deadline, the general transfer of the registered office under the Civil Code may become a solution to the legally complicated situation. Application of this provision might not only be limited

to transfers of companies between Great Britain and the Czech Republic. Theoretically, the Czech Republic could be a "gateway" or an "interchange station" through which British (but also American, Swiss, Russian, Chinese and other) companies could enter the EU to subsequently place their registered offices to the final country, using the harmonised mechanisms of cross-border mergers or (intra-European) transfers of registered offices.

**Limits of cross-border transfers of registered offices under the Civil Code**

The Civil Code defines several limits for the relocation of registered offices: a legal entity may not be transferred if it is not permitted by the other country's law or if it violates public order. The registered office of a prohibited legal entity pursuant to Section 145 of the Civil Code may not be transferred to the Czech Republic.

In order to transfer its registered office to the Czech Republic, a foreign legal entity must provide a resolution on the selected form of the Czech legal entity and founders' legal procedure as part of its petition to be recorded in the Czech public register. Internal relations and the liability of members (partners) and members of bodies for debts incurred after the transfer of the registered office are subject to Czech law. Accordingly, a Czech legal entity may transfer its registered office abroad if permitted by law of the receiving state. Under Section 140 of the Civil Code, a Czech legal entity is obliged to publish its intention to relocate its registered office over a period of at least three months (as opposed to the Transformations Act stipulating a two-month period in Section 384k).



The question is what the “intention” should include. As opposed to the Transformation Act, the Civil Code does not provide for the project of registered office transfer, does not require an expert opinion, does not contain any specific rules for accounting documents, etc. The question is whether the incomplete information contained in the Civil Code should be supported by other rules, eg whether the provisions of the Transformation Act should be applied analogically (although the interpretation above does not indicate so).

Similarly to the Transformation Act, creditors of a legal entity are authorised to require sufficient security when the recovery of their debts is impaired and if no agreement is achieved the issue will be decided by court. As opposed to the Transformation Act, Section 140 (2) of the Civil

Court stipulates that if a legal entity fails to provide security under the court’s decision, members of the statutory body (except for those who prove that they undertook sufficient efforts to meet the resolution) are liable for unsecured debts.

**Considerations with respect to cross-border registered office transfers should include the tax regime that includes several obstacles at the moment**

Czech Act no. 586/1992 Coll., on income taxes, as amended (the “Income Taxes Act”) only provides guidance on indirect (tax-neutral) mechanisms of cross-border mobility of companies within the EU (EEA), ie the cross-border transfer of the registered office of a European Company (SE) or European Cooperative Society (SCE) and the cross-border merger.

There is no information in the Act (or in the EU Directive<sup>7</sup> the principles of which the Income Taxes Act has adopted) on the cross-border transfer of the registered office of a company with a legal form different from an SE or SCE or the cross-border transfer of a registered office from/outside of the EU (EEA).

However, the broader guidance of the Transformation Act as amended based on the above-mentioned EU judicature (referring to the fundamental freedom of establishment within the EU) allows for cross-border transfers of registered offices of companies that have a legal form other than SE or SCE within the EU (EEA) and the Income Taxes Act should be applied in this situation analogically to SE or SCE.

---

<sup>7</sup> EU Directive 2009/133/ES on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, as amended.



On the contrary, outside of the theoretical framework of the Civil Code, there is no legal standard or case law addressing (tax) aspects of registered office transfers from/outside of the EU (EEA) today. In this situation, migrating companies may be exposed, for example, to the risk of potential additional taxation on exit (so called ‘exit tax’ to be introduced in the Czech Republic in 2019) of companies transferring their registered offices outside of the Czech Republic, the problem of determination of the tax base of assets of the company transferring its registered office to the Czech Republic, unclear procedural obligations (such as the need for the tax office’s approval of a company transfer), etc.

It is possible that the predictability of the tax regime will have a critical impact on the practical applicability of the cross-border transfer of registered office under the Civil Code. At present, the issue is rather confusing as there is no explicit guidance. Without the appropriate amendments to tax regulations, the current situation may be discouraging for a number of companies considering transfers of their registered offices, namely in a context in which “time-tested” methods of relocation, such as sales, may be used to achieve a similar objective.



**Daniel Vitouš**  
+420 733 593 673  
[dvitous@deloittece.com](mailto:dvitous@deloittece.com)



**Monika Majerková**  
+420 603 787 807  
[mmajerkova@deloittece.com](mailto:mmajerkova@deloittece.com)



Options to transfer the registered  
office from non-EU countries

## Legal news – March 2018

# Contacts

If you are interested in obtaining additional information regarding the services provided by Deloitte Czech Republic, please contact our legal specialists:

Ambruz & Dark Deloitte Legal, s. r. o., advokátní kancelář  
Nile House  
Karolinská 654/2  
186 00 Praha 8 - Karlín  
Czech Republic  
Tel.: +420 246 042 100  
Fax: +420 246 042 030

[www.deloittelegal.cz](http://www.deloittelegal.cz)

**Subscribe to dReport** and other newsletters and invitations  
here <http://www.deloitte.com/cz/subscribe-en>



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see [www.deloitte.com/cz/about](http://www.deloitte.com/cz/about) to learn more about our global network of member firms.

Deloitte provides audit, consulting, legal, financial advisory, risk advisory, tax and related services to public and private clients spanning multiple industries. Deloitte serves four out of five Fortune Global 500® companies through a globally connected network of member firms in more than 150 countries and territories bringing world-class capabilities, insights, and high-quality service to address clients’ most complex business challenges. To learn more about how Deloitte’s approximately 245,000 professionals make an impact that matters, please connect with us on Facebook, LinkedIn, or Twitter.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional advisor. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.