

## **KRS: Moving Seats of Companies within the EU is not fully assured**

**It is an increasingly frequent requirement of companies to move their seats to another European member state however, as the expert of the Kovács Réti Szegheő Attorneys at Law reveals, experiences and the actual cases indicate that because of the divergence between the respective regulations of member states, free movement of seat within the European Union is not fully assured. In the opinion of Dr. Enikő Vida the situation can only be satisfactorily handled by way of adopting EC laws.**

As experiences show, it has become increasingly frequent that companies wish to move their seat into another European member state. Questions arise, what possibilities companies wishing to exercise the right of settlement have and what the limitations to the right of settlement can be, the expert of Kovács Réti Szeghető Attorneys at law pointed out.

Dr. Enikő Vida emphasised, that it is of vital importance whether a certain cross-border transaction qualifies as international movement of seat or an international transformation.

A material difference is that in the course of international movement of seat, preserving the original legal personality of a company, only the seat is moved into another member state while in the course of international transformation, the affected company changes applicable laws too therefore a company operating under the laws of one member state is transformed into a company operating under the laws of another company so its legal personality is not continued.

### **Cartesio Case**

In judgement C-210/06 of the Court of Justice of the European Union regarding the Cartesio case, these two factual situations are clearly separated and regarding international movement of seat, its position was that allowing thereof belongs to the sole discretion of the laws of the member state of origin.

As the Court of Justice of the European Union stated in the Daily Mail case, a company formed under the national laws of a member state shall solely exist under such national laws that regulate its formation and operation. Until uniform community regulation is passed regarding movement of seat, movement of seat while preserving legal personality shall be provided for by international treaties among the member states. Such options are to be examined in each respective case, underlined the expert of Kovács Réti Szegheő.

### **Directive 2005/56/EC**

The question arises, what qualifies as international transformation as opposed to international movement of seat. Community law legislation has so far been only passed regarding cross-border mergers.

Pursuant to Directive 2005/56/EC, a merger means an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and



liabilities to another existing company (amalgamation) or, two or more companies, transfer all their assets and liabilities to a company that they form (merger) or one company transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

The referenced community directive does not regulate such possibility whereas a company under the laws of one member state wishes to transform into a company under the laws of another member state, dr. Vida Enkő emphasises.

### **The case of VALE Építési Kft.**

The issue has been brought before the Court of Justice of the European Union in the case of VALE Építésügyi Kft. whereas the Court of Justice of the European Union passed a judgement on 12 July, 2012. It stated therein, that the equal treatment principle laid down in Article 54 of the Rules of Operation of the EU requires that in the event that national regulations ensure the possibility of transformation for companies under the national laws, such member states shall allow for companies under the laws of another member state to transform into a company under such national laws by way of forming such companies.

The problem is, Hungarian regulation does not recognise such legal grounds for transformation according to which a company under the laws of another member state transforms into a Hungarian company. Hungarian laws recognise mergers, splits and change of company forms. Change of company form means, if a business company, by way of joint and several succession chooses another company form. The question is, whether it qualifies as a change of company form if a company registered in another EU member state moves seat and is formed again in another member state in such a manner, that it files for deletion of its registration in the country of origin and files for registration of its original company form as legal successor in the recipient member state, dr. Enikő Vida points out.

In the above referenced judgement of the Court of European Union took such a position without determining the legal grounds for transformation that in case Hungarian regulation allows for Hungarian companies to register a legal predecessor, than it may not disallow such an option for a company under the laws of another member state. However, the change of seat of the case published last summer, according to the current regulations does not formally qualify as transformation, as pursuant to the grammatical interpretation of the Act on Business Associations, it shall not be regarded either as merger or split or even change of company form, consequently Hungarian rules of transformation are difficult to apply thereto.

### **Conclusion**

Until cross-border transformations of such nature are appropriately provided for at the level of legal rules, the issue cannot be handled properly and therefore it is up to the wisdom of those administering law how to deliberate cases brought before them.

The fact can be established that due to the difference between the member state regulations, freedom of settlement is currently not fully assured; apart from free movement of seat within the European Union and merger regulated at communities level, transformation can be appropriately managed may only take place by way of adopting legal rules at communities law level, summarised the expert of Kovács Réti Szegheő.