

CROSS-BORDER TRANSFER OF A COMPANY'S REGISTERED OFFICE IN GEORGIAN CORPORATE LAW

LALI LAZARASHVILI
THE UNIVERSITY OF GEORGIA

ABSTRACT

The main purpose of the research is to investigate the fundamental, founding legal issues of a new institute in Georgian Corporate Law – cross-border transfer of company's registered office or redomiciliation. Namely, the aim of this research is to explore issues such as the essence of redomiciliation, significance, preconditions for its implementation, the process of redomiciliation, legal consequences. This article only examines the legal side of redomiciliation and not other issues related to the cross-border transfer of a company's registered office, such as, for example, issues of preferential tax regime. The study developed the concept of redomiciliation, namely, redomiciliation. This is the cross-border conversion of an enterprise, which means the transformation of an enterprise registered in Georgia into an enterprise of another country by transferring registration in that country, or the transformation of a foreign enterprise into a Georgian enterprise by registering in Georgia, as a result of which an enterprise is considered to be the legal successor of the original, pre-redomic enterprise.

The study revealed that redomiciliation have not been implemented in practice to date, one of the obstacles to which is the lack of a clear procedure for its implementation and the existing practice of the National Agency of Public Registry. In addition, the less interest of foreign companies in redomiciliation should probably be explained by the fact that starting a new company or opening a branch in Georgia is more attractive due to the simplicity of establishment than redomiciliation, which is a much more complicated and unclear procedure. The future task is to strengthen the legal framework of redomiciliation, in particular, to adopt a by-law regulating the concrete rules and conditions for the implementation of redomiciliation. It is also desirable to consider the concept of redomiciliation at the legislative level.

Keywords: Corporate Law, tax regime, redomiciliation, cross-border transfer

Introduction

Article 5⁷ of the Law of Georgia on Entrepreneurs of October 28, 1994, with the amendments made by the Law of March 14, 2008, instituted the cross-border transfer of a company's registered office – redomiciliation – which was not previously known in Georgian Corporate Law. This institution is maintained with the same content in the new draft Law on Entrepreneurs (*Centros Ltd v Erhvervs-og Selskabsstyrelsen*, 1999). Although not so little time has passed since the introduction of this legislative innovation, the institute of redomiciliation is still under development in Georgian Corporate Law. The purpose of this article is to investigate the founding legal issues of redomiciliation in Georgian Corporate Law and to lay the groundwork for further research. In addition, this article defines the concept of redomiciliation and explores the essence and significance of redomiciliation, the preconditions for its implementation, the process of redomiciliation, legal consequences, and related issues. This article only examines the legal side of redomiciliation and not other issues related to cross-border transfer of company's registered office, such as, issues of taxation. However, it should be noted that in general, the preferential tax regime is one of the most important interests of the enterprise in the implementation of redomiciliation in the country.

1. The essence and meaning of redomiciliation

1.1. The meaning of redomiciliation

Corporate law offers corporations a variety of options. One of them is to choose the jurisdiction where the corporation will be established (Kraakman Reiner et al., 2019, p. 32). The corporation is not bound by either the founding jurisdiction and may transfer to another jurisdiction. Consequently, in the conditions of competition of jurisdictions and regulatory competition (Kraakman Reiner et al., 2019, p. 33), many countries offer favorable corporate-legal regimes to companies and thus attract them, as the activities of enterprises are to increase state revenues, attract investment and create state investment, contributes to the formation of a well-functioning, flexible and attractive market, and in general - to increase the country's competitiveness. Thus, redomiciliation is important in terms of enhancing the economic well-being of the state.

Redomiciliation is also important for the company itself: It helps to expand the company's entrepreneurial activities, to explore new markets without losing business contacts, especially it is attractive for small and medium-sized businesses,

which are the backbone of the state economy. (Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers, and divisions, SWD/2018/141 final-2018/0113 (COD)).

Redomiciliation is familiar to the legislation of many countries. It is quite relevant in the countries of the European Union (see Lazarashvili, 2020, pp. 29-61 on the movement of enterprises in European Corporate Law) and not only. Offshore countries, for example, offer companies particularly attractive terms for redomiciliation under the preferential tax regime (Tax Havens and Development, pp. 15-16, 35-36).

1.2 Redomiciliation as a manifestation of freedom of movement guaranteed by the Constitution of Georgia

The first paragraph of Article 14 of the Constitution of Georgia strengthens the freedom of movement, according to which everyone lawfully staying in Georgia has the right to move freely throughout the country, to choose a place of residence freely and to leave Georgia freely. At the same time, according to the first paragraph of Article 34 of the Constitution of Georgia, the fundamental human rights specified in the Constitution, taking into account their content, also apply to legal persons. The redemption provided by the Law on Entrepreneurs, which implies the free movement of the enterprise from Georgia to another country and *vice versa*, is an expression of the freedom of movement for legal persons.

1.3 The essence of redomiciliation

The term “redomiciliation” is etymologically derived from the Latin word *domicilium*, which means a place of residence, (<https://www.wordsense.eu/domicilium/>) and *re-* from the heading, which is a sign of renewal or repetition of action (Dictionary of Foreign Words, 1973, p. 347). Consequently, redomiciliation can literally be interpreted as relocation, renewal, replacement of the place of residence. The main norm regulating redomiciliation is Article 5⁷ of the Law of Georgia on Entrepreneurs. According to the first and third paragraphs of this article, redomiciliation means the *transfer of the registration of a foreign enterprise to Georgia, or the transfer of the registration of an enterprise registered in Georgia to a foreign country*. Thus, redomiciliation allows, on the one hand, an enterprise registered in

Georgia to “move” to another country, to become a “citizen” of that country, and on the other hand, an enterprise registered in another country to “leave” this country to Georgia and become a “citizen” company of Georgia. It is noteworthy that in this case it means *moving the registered office* of the enterprise from another country to Georgia or from Georgia to another country and not opening an enterprise branch, establishing a subsidiary company or moving the real seat. Moving a registered office to another country, in turn, means deleting the enterprise from the Entrepreneurial Register (State Register, where an entrepreneurial entity is registered) of the country of registration without liquidation and registering the same enterprise in the relevant register of another country.

Pursuant to the first paragraph of Article 5⁷ of the Law on Entrepreneurs, a necessary sign of redomiciliation is the *non-violation of the continuity of the enterprise*. This means that rights and obligations of the enterprise are retained as a result of redomiciliation. Otherwise, an enterprise relocated to another country based on redomiciliation is the legal successor of the original, pre-redomic enterprise, i.e. the successor of its rights and duties.

Thus, redomiciliation of an enterprise takes place when an enterprise registered in Georgia is removed from the Entrepreneurial Registry and registered in the equivalent register in another country, or an enterprise registered in a foreign country is removed from the relevant register of that country and registered in Georgia in the Entrepreneurial Registry. At this time, the enterprise relocated to another country is the legal successor of the original, pre-redomic enterprise.

It is a matter of concern, on the one hand, in which a foreign country, in particular, a Georgian enterprise can be redomiciliated and, on the other hand, from which foreign country it is possible to redomiciliate an enterprise in Georgia. The first question is answered by Article 5⁷, Paragraph 3, Subparagraph “a” of the Law on Entrepreneurs, according to which Georgian enterprise can be redomiciliated in any country with which international agreement is not prohibited. As for the question from which foreign country it is possible to redomiciliate an enterprise in Georgia, the law does not contain any restrictions in this regard. Based on the principle of reciprocity (Aleksidze, 2010, pp. 207-208), in this case, the country that prohibits Georgian companies from redomiciliation should be excluded.

Redomiciliation is also envisaged in the new draft law on Entrepreneurs, in particular, its Article 79. It is a norm with similar content to Article 5⁷ of the current Law on Entrepreneurs. However, the article’s title is “Transfer of registration of an entrepreneur registered in a foreign country to Georgia” and not “Redomiciliation”

as it is in the current law. It is conceivable that the title of Article 79 of the draft is incomplete, as the mentioned norm regulates the transfer of the registration of an entrepreneur registered in Georgia to a foreign country, which is not reflected in the title of the norm. Preferably, the new bill should use the same term - “Redomiciliation,” which is used in the current law and is an accurate, flexible, and concise term to describe the relationship regulated by this norm.

1.4. Subject of redomiciliation

Article 5⁷ of the Law on Entrepreneurs defines an enterprise registered in Georgia or in a foreign country as a subject of redomiciliation. In this case, on the one hand, it is noteworthy what is meant by the concept of enterprise registered in Georgia - all organizational-legal forms of entrepreneurial entities, including individual entrepreneurs, or only entrepreneurial legal persons. On the other hand, it is also noteworthy what is meant by the concept of an enterprise registered in a foreign country.

The Law on Entrepreneurs sometimes considers the concept of an enterprise in a broad sense and includes an individual entrepreneur in addition to entrepreneurial companies (for example, subparagraph “b” of paragraph 1 of Article 5⁴). Nevertheless, according to the content of Article 5⁷ of the Law, redomiciliation applies only to entrepreneurial legal persons, i.e. companies. This conclusion can be drawn, at least, from paragraph 4 of this article, according to which the norms regulating the reorganization of an enterprise apply to redomiciliation, since Article 14⁴ of the same law, which regulates reorganization, applies, in turn, only to entrepreneurial legal persons. This issue is regulated in the same way by the new draft law on Entrepreneurs, in particular, Article 79, Paragraph 4. Other legal entities, for example, non-commercial (non-profit) legal persons do not have the possibility of redomiciliation. Thus, only entrepreneurial (commercial) legal persons have the possibility of redomiciliation from Georgia.

If we compare the regulation of European Corporate Law on this issue, we will see that the term enterprise with freedom of movement of enterprises, pursuant to Article 49, paragraph 2 and Article 54 of the Treaty on the Functioning of the European Union, refers to companies or firms constituted under civil or commercial law, including other legal persons governed by public or private law, save for those which are non-profit-making (Edwards, 2003, p. 337). It is noteworthy that in European practice, freedom of movement is mainly applied by entrepreneurs, among which LLCs predominate (Commission Staff Working Document Impact Assessment Ac-

companying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers, and divisions, SWD/2018/141 final-2018/0113 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0141&from=EN> [20.10.2020].

As for the question of which entity is meant in the concept of an enterprise registered in a foreign country according to Article 5⁷ of the Law on Entrepreneurs, in this regard, it is also conceivable that it includes only entrepreneurial legal persons of other countries and not, for example, non-commercial (non-entrepreneurial) legal entities, as the scope of regulation of the Law on Entrepreneurs includes only entrepreneurial entities.

Regarding the redomiciliation of the enterprise in Georgia, the following question is also noteworthy: in what legal form should a foreign company be registered in Georgia? This issue is easily resolved when a redomicilized company in Georgia has the same legal form as provided by Georgian Corporate Law: general partnership, limited partnership, limited liability company, joint stock company, cooperative. However, it is possible for a foreign company to have a legal form that is not known to Georgian Law. It is noteworthy that in Georgian Corporate Law, there is a principle of exhaustive listing of organizational-legal forms of entrepreneurial entities - *numerus clausus* (Chanturia, Ninidze, 2002, p. 13). That is why, according to Article 5⁷, Paragraph 2 of the Law on Entrepreneurs, redomicilized enterprise in Georgia must be registered only in the legal form provided by the legislation of Georgia. Thus, a foreign enterprise must adapt to the forms of entrepreneurial companies proposed by Georgian Corporate Law, and, in such a case, there is a conversion of a foreign company into a Georgian legal form. It is noteworthy that the conversion takes place even when the organizational-legal form is identical. For example, a foreign LLC redomicilates in Georgia, because in this case the foreign company is transformed into a Georgian enterprise. This is why redomiciliation is also called cross-border conversion of the enterprise (Lazarashvili, 2020, p. 37).

1.5. Other forms of enterprise movement

Redomiciliation is a form of enterprise movement, though not the only one. Freedom of movement of enterprises can also be exercised through the actual movement of an enterprise, which means the establishment of a real seat by an enterprise

registered in one country in another country (Lazarashvili, 2020, p. 32). In this case, the enterprise maintains a legal address in the country of registration, when in fact, it operates in the address of another country (Lazarashvili, 2020, pp.32-33). In the case of redomiciliation, it is the transfer of *the registered legal office and not the real seat*. This means that in the case of the redomiciliation of a Georgian enterprise, the enterprise will be removed from the Entrepreneurial Registry of the National Agency of Public Registry (Georgia) and will be registered in the equivalent register of another country, or, conversely, in case of redomiciliation of a foreign enterprise, this enterprise is removed from the relevant register of another country and registered in the Entrepreneurial Registry in Georgia.

European Corporate Law attributes the transfer of both the real seat of the enterprise and the registered office to the so-called Primary Establishment (Andenas & Wooldridge, 2009, p. 11). Also, according to it, the freedom of movement of enterprises can be exercised using the so-called through Secondary Establishment (Edwards, 2003, p. 342), it includes the establishment of a branch, representative office or subsidiary by an enterprise registered in one Member State (Edwards, 2003, p. 342), which are also forms of relocation of the enterprise. Unlike the Primary Establishment, in this case the enterprise does not emigrate and remains a “citizen” of the country of establishment, only expands its area of activity by opening a representative structural unit (branch, representative office) in another country, or establishes a subsidiary in another country.

1. Obstructive circumstances of redomiciliation

Paragraph 3 of Article 5⁷ of the Law on Entrepreneurs (Paragraph 3 of Article 79 of the Draft Law on Entrepreneurs) refers to the obstructive circumstances of redomiciliation in the presence of which the enterprise is not allowed to move. Distinguishing, on the one hand, the obstructive circumstances of an enterprise registered in Georgia and the obstructing circumstances of an enterprise registered in a foreign country in Georgia.

2.1. Obstructive circumstances of an enterprise registered in Georgia

Pursuant to sub-paragraphs “a”, “b” and “c” of paragraph 3 of Article 57 of the Law on Entrepreneurs redomiciliation of an enterprise registered in Georgia is not allowed in a foreign country, if one of the following circumstances occurs:

- According to the international agreement concluded by Georgia with the country where the Georgian company transfers the registration, the redomi-

ciliation of the enterprise is prohibited;

- There is a court dispute against the enterprise in Georgia;
- A criminal case is being conducted against the enterprise in Georgia;
- Insolvency proceedings are underway against the enterprise in Georgia;
- At the time of redomiciliation, the enterprise has a tax debt to the Georgian tax authorities.

It is clear that the legislature, on the one hand, respects the international agreement concluded with another country, which prohibits the redomiciliation of a Georgian enterprise in that country. On the other hand, the legislature protects the interests of creditors and third parties so that redomiciliation is not used as an “escape” from the company’s liability. It is true that the enterprise retains its rights and obligations after the redomiciliation, and even in this case, appropriate proceedings can be instituted against it, but the emigration of the enterprise to another country makes it somewhat difficult and costly to have a legal relationship with it. That is why, according to the law, the company is prohibited from redomiciliation if there is a lawsuit against it in Georgia. In this case, the ongoing dispute in both civil and administrative proceedings is taken into account. However, it should be noted that the company mentioned in the civil and administrative dispute should participate in the procedural status of the defendant because the above norm requires a lawsuit against the enterprise, and the party against whom the lawsuit is filed is the defendant. Thus, disputes where the company is a plaintiff, according to the rule of law, should not be a hindrance to redomiciliation. Here the company itself decides whether to redomicilate before the dispute is resolved. The possibility of continuing the dispute is not lost for the redomicilated company. It will continue the dispute as the procedural successor of the redomicilated company, i.e. the plaintiff, because as mentioned, redomiciliation has legal consequences of reorganization, i.e. succession of companies is allowed based on the first part of Article 92 of the Code of Civil Procedure of Georgia. There are separate criminal proceedings against the enterprise, which is also a hindering circumstance for redomiciliation. The fiscal interests of the state as a creditor are also separated. In this case, pursuant to Article 5⁷ paragraph 4, paragraph 3 of Article 14 of the Law on Entrepreneurs should be applied, which provides for the registration authority to provide information to the Tax Authority about the reorganization of a particular company and the possibility of tax audit of the enterprise. The new draft law on Entrepreneurs also envisages the mentioned regulation.

1.2. Obstructive circumstances for redomiciliation of an enterprise registered in another country to Georgia

Article 57, Paragraph 3, Subparagraph “a” of the Law on Entrepreneurs, singles out the only impeding circumstance of redomiciliation in Georgia of an enterprise registered in another country - when an international agreement with this country prohibits the redomicilization of an enterprise. However, it is also clear that the enterprise that decides on redomiciliation in Georgia must meet the requirements of redomiciliation established by the relevant foreign law, from which it emigrates to Georgia.

2. The process of redomiciliation

The Law on Entrepreneurs does not contain specific regulations on the procedural issues of redomiciliation. Paragraph 5 of article 5⁷ of the Law provides for the definition of these issues by a government ordinance which has not yet been adopted. However, the law guidelines on the basis of which the main stages of the redomiciliation process can be identified. In particular, the starting point for shedding light on the process of redomiciliation is that redomicilization is a manifestation of one form of reorganization - conversion. With this in mind, to shed more or less light on the procedure of redomiciliation of Georgian companies, the reorganization procedure is to be taken into account.

Article 14⁴ of the Law on Entrepreneurs outlines the following main stages in the process of reorganization of a company:

- Making a decision of the General Meeting of Partners on the start of the reorganization process of the company (Article 14⁴.1).
- Registration of the mentioned decision in the Entrepreneurial Register (Article 14⁴.6, Article 14.3).
- Informing the creditors about the start of the reorganization and offering the fulfillment of the obligations ahead of time (Art. 14⁴.6, Art. 14.4, Art. 14⁴.8).
- Registration of the completion of the reorganization in the Entrepreneurial Register.

It is necessary to observe these stages in the case of enterprise redomicilization, of course, taking into account the specifics of redomiciliation. In the case of redomiciliation, paragraph 6 of Article 14⁴ should not apply, according to which, in several exceptional cases, it is not necessary to observe all stages of the reorganization pro-

cess. (E.g., conversion of a JSC to a LLC, conversion of a LLC to a JSC, a change in a legal form where the enterprise's ability to satisfy creditors is not diminished).

Paragraph 5 of Article 5⁷ of the Law on Entrepreneurs provides for the definition of specific rules and conditions of redomiciliation by a government ordinance, which has not been adopted yet. Is it possible, despite the absence of a government ordinance, to implement redomiciliation in practice? This question must be answered in the affirmative. According to Article 22, Paragraph 10 of the Organic Law of Georgia on Normative Acts, a legislative act has the force of direct action, regardless of whether a by-law has been adopted (issued) for its implementation, unless otherwise provided by the legislative act itself. Also, according to Article 22, Paragraph 11 of the same Organic Law, it is inadmissible to refuse to comply with the norm established by a legislative act because the relevant by-law is not adopted (issued) for its implementation, unless otherwise provided by the legislative act itself. The Law on Entrepreneurs does not stipulate that enterprises will not be redomiciliated before a government decision is made. Nevertheless, according to the position of the National Agency of Public Registry, because the norms regulating the rules and procedures of redomiciliation are not established by law, at this stage the registration of enterprises is not registered in the Entrepreneurial Registry (letter of the National Agency of Public Registry 30.10.2018 # 452522). This position does not comply with the requirements of the above norms of the Organic Law on Normative Acts. In the absence of a clear procedure for redomiciliation, the practice of the National Agency of Public Registry is one of the obstacles to the implementation of redomiciliation in practice to date. In addition, the less interest of foreign companies in redomiciliation should probably be explained by the fact that the establishment of a new company or branch in Georgia is more attractive due to the simplicity of establishment than redomiciliation, which is a more complicated procedure. However, it is not excluded that a foreign company, in some cases, when establishing a branch in Georgia, in fact moves to Georgia by relocation of the actual location (a similar case in the case of the European Court of Justice in the Centros case, see Case C-212/97, Centros Ltd v Erhervs-og Selskabsstyrelsen [1999] ECR I-1459).

Particular attention should be paid in the redomiciliation process, and future government ordinances should also address the interests of creditors, partners and employees of the enterprise. Creditors should be notified of the redomiciliation and offered the opportunity to fulfill or secure their obligations ahead of time. For partners who did not support redomiciliation, redemption of shares must be ensured by the company paying appropriate compensation. Employees should also be given appropriate safeguards to protect their rights.

These issues are similar to procedural issues of freedom of movement of companies in European Corporate Law and in this case, the experience of European Corporate Law can be used as an example, the draft of the 14th Directive, a new proposal of the European Commission (Lazarashvili, 2020, pp. 40-41).

1. Legal consequence of redomiciliation

The legal consequences of redomiciliation derive from the first and fourth paragraphs of Article 5⁷ of the Law on Entrepreneurs. According to paragraph 4, redomiciliation of an enterprise registered in Georgia is equivalent to *reorganization of the enterprise*. This underscores the basic legal effect of redomiciliation; it leads to the reorganization of the enterprise and not to liquidation. Consequently, redomiciliation also produces the legal consequences of reorganization, in particular, the legal succession of enterprises. A redomicilized enterprise is considered to be the legal successor of a pre-existing pre-redomicilization company and its rights and responsibilities are transferred. The inheritance of rights and responsibilities is also indicated by the first paragraph of Article 5⁷ of the Law, which stipulates the uninterrupted implementation of the continuity of the redomicilized enterprise.

From an investigation of the above issues, it is possible to form the concept of redomiciliation. *Redomiciliation* - this is cross-border conversion of an enterprise, which means the transformation of an enterprise registered in Georgia into an enterprise of another country by transferring registration in that country, or the transformation of a foreign enterprise into a Georgian enterprise by registering in Georgia, as a result of which an enterprise is considered to be the legal successor of the original, pre-redomic enterprise.

Conclusion

The study revealed that redomiciliation is a new, evolving institution in Georgian Corporate Law, which is a manifestation of the extension of freedom of movement guaranteed by the Constitution of Georgia to legal entities. It is regulated by Article 5⁷ of the Law on Entrepreneurs. The study developed the concept of redomiciliation, namely, redomiciliation - this is the cross-border conversion of an enterprise, which means the transformation of an enterprise registered in Georgia into an enterprise of another country by transferring registration in that country, or the transformation of a foreign enterprise into a Georgian enterprise by registering in Georgia, as a result of which an enterprise is considered to be the legal successor of the original, pre-redomic enterprise.

It is noteworthy that redomiciliation has not been implemented in practice to date. One of the obstacles to which is the lack of a clear procedure for its implementation and the existing practice of the National Agency of Public Registry. In addition, the less interest of foreign companies in redomicilization should probably be explained by the fact that starting a new company or opening a branch in Georgia is more attractive due to the simplicity of establishment than redomiciliation, which is a much more complicated and unclear procedure.

It should be noted that in order to better understand the nature of redomiciliation, the experience of European Corporate Law on the issue of movement of companies is important for Georgian Corporate Law. The future task is to strengthen the legal framework of redomiciliation, in particular, to adopt a by-law regulating the clear rules and conditions for the implementation of redomiciliation.

Redomiciliation is also envisaged in the new draft law on Entrepreneurs, in particular, its Article 79. It is a norm with a similar content to Article 57 of the current Law on Entrepreneurs. However, the title of the article is “Transfer of registration of an entrepreneur registered in a foreign country to Georgia” and not “Redomiciliation” as it is in the current law. It is conceivable that the title of Article 79 of the draft is incomplete, as the mentioned norm regulates the transfer of the registration of an entrepreneur registered in Georgia to a foreign country, which is not reflected in the title of the norm. Preferably, the new bill should use the same term - “Redomiciliation,” which is used in the current law and is an accurate, flexible, and concise term to describe the cross-border transfer of a company’s registered office. It is also desirable to consider the concept of redomiciliation at the legislative level.

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