

# Outward migration of a Luxembourg company

Generally, companies incorporated and existing under Luxembourg law can change their nationality and transfer their registered office to another jurisdiction, without interruption of legal personality.

## Introduction

Cross-border corporate migration is the transfer of an existing company incorporated under the law of one jurisdiction to a new host country without interruption of its legal personality and without having to be wound-up. Such a migration is often an efficient mechanism that will enable a company to maximise continuity of its operations in another jurisdiction, ensuring that its corporate history, assets and contractual relationships remain largely unaffected.

## Incorporation theory vs real seat theory

The approach taken to the corporate re-domiciliation regime varies from country to country, and is often not harmonised.

In some jurisdictions, the applicable regime is determined according to the incorporation theory. According to this principle, a company is governed by the law of the country where it was incorporated and, even if it exclusively performs its activities and is administered in the host country, it will remain subject to the law under which it was incorporated.

At present, the UK is a country that adopts the incorporation theory and it is generally not possible to transfer incorporation to the UK and retain the same legal identity.

In other countries, a company is governed by the law of the state where its real seat is located, which is in principle the place where the effective management of the company occurs, where the company holds its board and shareholder meetings and where its important decisions are made, and the place where its accounts are maintained.

Luxembourg applies the real seat theory, which also determines the company's "nationality" and consequently the law to which the company is subject. Companies incorporated under Luxembourg law are generally entitled to change their nationality and transfer their registered office abroad not only to another EEA member state, but also to a third country, without risk of losing their legal personality, provided that the host jurisdiction also recognises such a transfer without discontinuity of the company's legal personality.

This process, is not explicitly established by or described in Luxembourg law but is based and accepted by Luxembourg corporate and notarial practice.

## Procedure in Luxembourg

The procedure set out below relates to the corporate aspects of a corporate migration from Luxembourg to a different jurisdiction (**Outward Migration**) and does not reflect the additional steps and procedures possibly required in the foreign jurisdiction. Any tax aspects of an Outward Migration are also outside the scope of this note.

Before implementing an Outward Migration, the company should take steps to ensure that it complies with any covenants in any agreements to which it is a party.

The first step towards an Outward Migration is for the management of the company to resolve upon and authorise the Outward Migration. The financial statements of the company for the previous financial years should be approved and filed on the Luxembourg Trade and Companies Register (**Luxembourg RCS**). Management also approves interim accounts of the Company as close as possible to the date of the Outward Migration, which effectively serve as the closing balance sheet in Luxembourg and the opening balance sheet for the company once it enters the target jurisdiction.

Depending on the laws and regulations of the target jurisdiction, additional confirmations and documents may need to be prepared and provided (e.g. a solvency and going-concern declaration, or a legal opinion by counsel in the target jurisdiction (a Luxembourg opinion may also be requested in specific circumstances) confirming continuing legal personality and certain other matters).

The management decision described above is then followed by an extraordinary general meeting (**EGM**) of the shareholder(s) of the company, held before a Luxembourg notary (as required under Luxembourg law), where the shareholder(s) are usually represented by power of attorney given under private seal.

At the EGM, the shareholder(s) will, amongst other matters, resolve to:

- Unanimously approve the change of the nationality of the company;
- Consent to the continuation of the legal personality of the company in the target jurisdiction, the new registered office of the company, as well as the change of the company's name, share capital and functional currency (if applicable);
- Adopt new constitutional documents in a form suitable to the new corporate form in the target jurisdiction;
- Adopt interim accounts that serve as the closing balance sheet of the company, supported by an audit report or a valuation report signed by the management of the company (if applicable and required by the laws and regulations of the target jurisdiction);
- Terminate the mandate(s) of the members of the management and the auditor of the company and grant discharge to each member in office; and
- Appoint an attorney/proxyholder to act in the name and on behalf of the company in relation to the completion of the Outward Migration formalities in Luxembourg and in the target jurisdiction.

Depending on the requirements of the target jurisdiction, a Luxembourg legal opinion confirming the ability of the company to migrate and its continued legal personality after migration may be required.

After the EGM has taken place, the company is subsequently registered in the target jurisdiction in accordance with local laws and, once registered, is formally struck off the Luxembourg RCS. A certificate of deregistration/deletion will be issued once this step has been completed.

## Recent developments in the UK

As a result of its adherence to the incorporation theory, as noted above, it is currently generally not possible to implement an Outward Migration of a Luxembourg company to the UK.

However, as part of an important move to increase the attractiveness of the UK as an investment destination, the UK government recently called for consultation on its proposal to introduce a UK re-domiciliation regime that would allow a company to shift domicile to the UK, while maintaining its legal identity ([link to the relevant website of the UK government here](#)).

On 12 April 2022, the UK government published a summary of responses and overall the respondents were broadly supportive of the proposals and it is clear that the UK government intends to introduce such a regime into domestic law ([link to the summary of responses here](#)).

To be noted that the aforementioned summary of responses suggests that there will be further consultation on the detailed design of the UK re-domiciliation regime, but there is no further indication with regards to the timing for the introduction by the UK government of the new regime.

Harneys has extensive experience in outward migrations from Luxembourg to many jurisdictions, including EEA member states and third countries, such as the BVI, the Bahamas and the Cayman Islands



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