

Continuation of a BVI company to Luxembourg

Generally, Luxembourg law recognises that a company incorporated under a foreign system of law can migrate or continue its corporate existence to Luxembourg by transferring its registered office and its head office, without interruption of legal personality (**Inbound Migration**). Inbound Migration can be achieved provided that the company's country of origin clearly permits the transfer without interruption of legal personality and the company adopts a Luxembourg corporate form, adapting its memorandum and articles of association (or similar constitutional documents) (**Articles**) to comply with Luxembourg law.

Introduction

Luxembourg adopts the "real" seat theory, meaning that a company is governed by the law of the state where its real seat is situated. The real seat of a company is in principle the place where its head office and place of central administration (ie its management and control centre) is situated, where the company holds its board and shareholder meetings and where its important decisions are taken.

On this basis, it is generally recognised that companies incorporated under the laws of the British Virgin Island (**BVI**) can continue to Luxembourg. The procedure for an Inbound Migration is not specifically set out in Luxembourg law but is rooted in Luxembourg corporate and notarial practice. There are three stages to the Inbound Migration: two in the BVI and one in Luxembourg.

The procedure set out below relates to the corporate aspects of an Inbound Migration into Luxembourg and does not reflect the additional steps and procedures required in both the BVI and Luxembourg if the entity is licensed in the BVI and/or is to be established in Luxembourg as a regulated entity. The tax aspects of an Inbound Migration are also outside the scope of this note.

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

The company should also consider any regulatory compliance or reporting obligations to which it is subject under BVI law. These are beyond the scope of this general guide but every company should consider any applicable compliance and reporting obligations under the BVI Economic Substance (Companies and Limited Partnerships) Act 2018 and the BVI Beneficial Ownership Secure Search System Act 2017. A company continuing out of the BVI that is part of an "MNE Group" for Country by Country Reporting purposes should consider whether it needs to register the changes with the BVI International Tax Authority. Companies that are required to be licensed or regulated by the BVI Financial Services Commission should also consider any special requirements applicable to them.

Initial procedure in the BVI

A continuation of a BVI company out of the BVI is subject to the provisions of the BVI Business Companies Act, 2004, as amended (the **BVI BCA**).

Pursuant to the BVI BCA, subject to its Articles, a BVI company which is in good standing may, by resolution of directors or resolution of shareholders, continue as a company incorporated under the laws of a foreign jurisdiction. Following recent amendments to the BVI BCA, certain advertisement and notice requirements apply as of 1 January 2023. The relevant BVI company must file a notice (in the approved form) with the BVI Registrar of Corporate Affairs (the **BVI Registrar**) of its intention to continue as a company incorporated under the laws of Luxembourg. Said BVI company must, at least 14 days before making such filing: (a) advertise a notice of such intention in the BVI Official Gazette and on its website (if any) specifying that Luxembourg will be its new jurisdiction, and (b) notify its members and creditors in writing of such intention. The notice to the BVI Registrar must include a declaration that such advertisement and notice requirements have been complied with. However, the notice to the BVI Registrar may be rescinded (again, by formal notice to the BVI Registrar).

If the company has a charge over its assets registered with the BVI Registrar and is not prohibited from continuing to a foreign jurisdiction under that charge, the company must, as part of the continuation filing, provide a written declaration to the BVI Registrar stating that (a) notice of the discharge or release of the charge has been filed or (b) the BVI company has notified the chargee of its intention to continue and either (i) obtained the chargee's consent or (ii) received no objection from the chargee. Where the chargee has neither given consent nor objected to the continuation, the written declaration must state that the chargee's security interest will not be diminished or in any way compromised by the continuation and the charge shall operate as a liability of the company following continuation.

As a first step, the Inbound Migration entails holding a board meeting of the BVI company in accordance with its Articles, authorising the Inbound Migration¹.

At its meeting, the board resolves (amongst other matters) to approve the continuation of the company into Luxembourg, (noting the proposed change of nationality, registered address, name and corporate form) and resolves to convene a shareholders' meeting in the presence of a Luxembourg notary.

The board will also consider and approve a balance sheet of the company prepared at a date as close as possible² to the date of the proposed continuation. This will be the closing balance sheet for the BVI company and the opening balance sheet for the company once it transfers to Luxembourg.

If the BVI company intends to adopt the corporate form of a Luxembourg public limited liability company (*société anonyme* or **SA**) it will be necessary to table the balance sheet of the company and obtain a report from a Luxembourg auditor (**Auditor's Review Report**) in relation to that balance sheet in which report the auditor will confirm that, based on its review procedures, the company is worth at least the share capital in issue³.

If the BVI company intends to adopt the corporate form of a Luxembourg private limited liability company (*société à responsabilité limitée* or **SARL**) an Auditor's Review Report will not be required but a valuation report (**Valuation Report**) drawn up by the directors of the company will be tabled wherein the board confirms that the company is worth at least the share capital in issue⁴.

A Luxembourg company needs to have a registered address in Luxembourg from the time of its continuation. Depending on the level of substance to be achieved, the company could either sign a domiciliation agreement with a regulated domiciliation agent or rent its own office space and take the necessary steps in order to recruit staff and/or organise the outsourcing of certain tasks. This agreement should be negotiated with the service provider in Luxembourg prior to the shareholder meeting.

Procedure in Luxembourg

The above board meeting is then followed by a meeting of the company's shareholder(s) held in the presence of a Luxembourg notary (as required under Luxembourg law). The shareholders' meeting is usually held by power of attorney of the shareholders who do not need to be present at the meeting.

At the meeting, the shareholder(s):

- Acknowledge and confirm the resolutions adopted by the board of directors regarding the consent to the continuation and the change of capital and of the functional currency (if applicable)
- Adopt a new set of Articles complying with Luxembourg law
- Confirm the change of the company's nationality and confirm the new registered office of the company in Luxembourg

¹ Written resolutions of its directors authorising the continuation can also be adopted.

² Not more than three months from the date of the continuation.

³ The Auditor's Review Report will generally be worded as follows: "nothing has come to our attention that causes us to believe that the global value of the net assets of the continuing company does not at least correspond to the number and value of the shares in issue representing the capital of the continuing company on continuation into Luxembourg". If the net worth of the company is less than €30,000 (or equivalent in foreign currency) then it will be necessary to recapitalise the company to meet the minimum capital of an SA.

⁴ If the net worth of the company is less than €12,000 (or equivalent in foreign currency) then it will be necessary to recapitalise the company to meet the minimum capital of a SARL.

- Discharge the directors in office and appoint a new board (ie transfer its centre of management and control to Luxembourg)
- Adopt the opening balance sheet of the company, supported by the Auditor's Review Report or the Valuation Report signed by the directors of the BVI company (as applicable), as of the date of the meeting

It will also be necessary to provide the Luxembourg notary with the following documents:

- The company's certificate of incorporation and the (BVI) Articles
- A recent certificate of good standing issued by the BVI Registrar
- The company's share register signed by the directors
- Signed shareholders' proxy forms (where the shareholder is a legal person, a signed authorised signatory list of the shareholder giving the proxy will also be required) and passport copies of the person(s) signing the proxy
- A copy of the minutes of the board meeting approving the continuation
- Client Due Diligence (**CDD**) documentation. The company, following its Inbound Migration, must comply with the Luxembourg law of 13 January 2019 establishing the register of beneficial owners (**RBE**) and is required to identify, obtain and maintain specific up-to-date information concerning its beneficial owner(s) and to file such information with the Luxembourg RBE. The initial filing on the RBE may be made by the notary who documents the Inbound Migration of the company, or it will be made by the company within one month following its continuation into Luxembourg. If the notary deals with the RBE filing, then the CDD to be provided to the notary will need to include sufficient information to enable compliance with the RBE law. Generally, CDD to be provided will include a signed structure chart of the continuing company, a beneficial owner declaration and passport copies of the beneficial owners. The RBE is accessible online (under certain conditions) by the professionals subject to the Luxembourg law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.

A legal opinion as to BVI law, stating that the company can continue from the BVI to Luxembourg, may be required depending on the Luxembourg notary who documents the notarial deed⁵.

The company is in existence in accordance with Luxembourg law from the time the notarial deed is executed.

The Luxembourg notary then registers the newly domiciled company in the Luxembourg Trade and Companies Register (the **RCS**) and obtains an RCS extract, which is issued in French or German.

The RCS extract is translated into English and certified in accordance with section 29 of the BVI Business Companies Regulations (the **Regulations**).

Final procedure in the BVI

For a certain period, the company will exist in the two jurisdictions and the Company's registration in the BVI needs to be cancelled.

For this purpose, the original notarial deed and a certified translation of the RCS extract, with the apostille, and an opinion from a Luxembourg lawyer confirming that the company has continued its corporate existence in Luxembourg is couriered to the BVI registered agent for filing with the BVI Registrar.

The BVI Registrar, if satisfied that the requirements of the BVI BCA and the Regulations have been met, will issue a certificate of discontinuance of the company in the approved form, strike the name of the company off the BVI Register (with effect from the date that the application is properly filed in the BVI) and publish the striking off notice in the BVI Official Gazette. The certificate of discontinuance is then sent to the Luxembourg notary.

⁵ For this purpose, the BVI lawyer issuing the legal opinion will require a copy of the company's certificate of incorporation and Articles, a copy of the resolutions of directors and the resolutions of the shareholders' meeting approving the continuation and a certificate of incumbency issued by the company's registered agent in the BVI.

General

An Inbound Migration can be implemented quickly and generally timing depends on whether there are charges registered against the company's assets and the time that it takes the company to prepare the closing balance sheet and to audit the balance sheet in Luxembourg (if required). Once this documentation is prepared and in the normal course, the Inbound Migration can be documented before the Luxembourg notary within four days of receiving all necessary documentation.

The certificate of discontinuation in the BVI is usually issued two days after the necessary papers are lodged with the BVI Registrar or it can be issued on the same day as the filing is made on payment of an additional fee.

As a final step, the company will ensure that its subsidiaries/investments and bank accounts reflect the correct citation of the company in their records and will notify its contractual counterparties of the changes resulting from the Inbound Migration.



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