



Navigating Brexit

Our EU cross-border reorganizations guide

Disclaimer

This document is designed as an overview of the topic and does not constitute legal advice. Specialist advice should be sought based upon your individual circumstances.

Introduction

Your business will inevitably be concerned about the impact of Brexit on your current operations and corporate structures. It is crucial that you are taking steps now to assess Brexit risk and ensure business continuity when the UK leaves the EU or at the end of any agreed transitional period.

Key risk factors that may interrupt business continuity include the loss of the following (subject to the terms of any agreement reached between the UK and the EU on their future relationship):

- the right to tariff-free movement of goods with no custom checks between the UK and the EU
- the right to free movement of people, services and establishment under the Treaty on the Functioning of the European Union
- the benefit of the EU's trade agreements
- the application of EU law, regulation and regulatory supervision

Access to free trade and the free movement of people, goods and services has dominated the media coverage on Brexit. However, the right of freedom of establishment could be equally as important as it may result in the legal personality and limited liability status of UK companies and LLPs not being recognized after Brexit by some of the remaining 27 countries in the EU ("**EU 27**") if they apply the real seat theory (ie that the law applicable to the entity is that of the jurisdiction of its principle place of business, as opposed to its place of incorporation)¹. There will also be implications for UK companies that have registered branches in the EU 27.

The impact of ceasing to come under the umbrella of EU law, regulation and regulatory supervision needs to be assessed on a business-by-business basis but could be the critical factor, for example for businesses operating in the financial services and aerospace sectors.

Some businesses may conclude that to ensure a smooth transition when the UK leaves the EU or at the end of any agreed transitional period, it is necessary to undertake a cross-border reorganisation for the purposes of moving from the UK to an EU 27 country or EEA member state². Likewise there may also be businesses operating within the EEA that need to relocate to the UK.

Comparisons

The following pages outlines the options available for EU cross-border reorganizations, focusing on movement from the UK to the EU and some considerations in relation to each of these.

Timing

As ever, timing is key. Any of these reorganisation options are likely to take a number of months to implement and therefore a business seeking to do so needs to take action immediately. This is particularly important if the preferred method of reorganisation is a mechanism of EU law (eg cross-border merger) and therefore may disappear after the UK leaves the EU (or at the end of any agreed transitional period).



¹ EC Notice to stakeholders: withdrawal of the UK and EU rules on company law

² See the [Appendix](#) for a list of the EU 27 countries and EEA member states.

EU cross-border reorganization options

Summary - *options available for EU cross-border reorganisations after Brexit*

1. Incorporate Newco in the EU and transfer the existing business and assets from the UK to Newco – **Yes**
2. Conversion to SE and transfer of registered office – **No**. Our experience shows that this option has been very rarely used in practice.
3. Cross-border merger between a UK company with a company incorporated in another EEA state – **No**.
4. Cross-border conversion – **No**

Incorporate a new EU company and transfer the UK business and assets

Incorporate a new company in the EU (“Newco”) and transfer the existing business and assets from the UK to Newco

Available after Brexit?³

Yes.

Key considerations

Newco would have the benefit of being an EU domiciled entity with all the EU freedoms within which the existing business operates and will be subject to EU laws and regulations.

The process of transferring the business and assets from the UK to Newco could be costly in terms of both time and money, e.g.:

- employee issues (information/consultation processes with transferring employees, dealing with relocating any employees who will be physically moving jurisdiction, possible redundancies and recruitment/training of any new employees)
- acquisition of new premises and disposal/transfer of existing premises (including obtaining any landlord’s consent)

- transfer of contracts, licences and permits (or obtaining new ones) and related consents and approvals (including regulatory)
- transfer of plant and machinery
- tax structuring assessment and relevant registrations, reliefs and clearances obtained

If any of the business operations and employees of Newco are to remain physically in the UK, an assessment would need to be made, where applicable, as to whether the real seat thresholds are passed.



³ i.e. when the UK leaves the EU if there's no Brexit deal or at the end of any transitional period if a deal is agreed

Cross-border merger⁴

The Companies (Cross-Border Mergers) Regulations 2007 (as amended) provide a framework that enables a UK company to merge with a company incorporated in another EEA state.

A cross-border merger may take place by:

- absorption – where an existing company absorbs one or more other merging companies
- absorption of a wholly owned subsidiary
- formation of a new company - where two or more companies merge to form a new company

Available after Brexit?

No. The Companies (Cross-Border Mergers) Regulations 2007 and other regulations relating to cross-border mergers will be revoked on exit day pursuant to the proposed Companies, Limited Liability Partnerships and Partnerships (Amendments etc.) (EU Exit) Regulations 2018.

Key considerations

Allows cross-border mergers between companies established within the EEA and the dissolution of one or more companies without going through a formal liquidation procedure. A merger should be possible even if the EEA company with which the UK company proposes to merge is a dormant company or a new company incorporated for the purposes of the merger.⁵

The merger takes place by operation of law without the need to transfer the individual assets and liabilities of the merging company.

Detailed statutory procedure must be followed which includes:

- satisfying the relevant pre-merger requirements (eg preparation of draft terms and report on the merger, independent expert report in some instances, shareholder and (in some instances) creditor approval)
- each merging company must obtain certification from the competent authority in its jurisdiction (the courts in the UK) that the pre-merger requirements have been met
- approval of the merger by the competent authority of the jurisdiction where the merged entity will be registered, typically a court/notary
- registration of the merger with the relevant companies registries

The process could take anywhere from four to over 12 months to complete, depending on the employee situation of the merging companies (eg where a merging company operates employee participation or where employee representatives participate in an administrative or supervisory body of a merging company).

⁴ This may be combined with a Part VII scheme under the Financial Services and Markets Act 2000 for businesses in the insurance and banking sector

⁵ Re Easyjet Global Services Ltd [2018] EWCA Civ 10 and Re ITAU BBA International Ltd [2012] EWHC 1783 (Ch)

Conversion to Societas Europaea ("SE") and transfer of registered office

An SE is European public limited company ("PLC") which can be set up and registered in any EEA member state in line with Council Regulation (EC) No 2157/2001 and the European Public Limited Liability Company Regulations 2004 (as amended).⁶

An SE can transfer its registered office to any other EEA member state. Companies established in more than one member state can merge and operate under the single legal and management structure of an SE.

Available after Brexit?

(Any SE registered in the UK on exit day will automatically convert to a United Kingdom Societas, a new type of corporate form created under the proposed European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018.

Key considerations

There are a number of different ways of establishing an SE but the most likely method in the context of a Brexit reorganisation would be conversion from a UK PLC to an SE.

The key criteria for this route is that the UK PLC must have had a subsidiary in another EEA member state for at least two years. This method has the advantage over a cross-border merger (or SE formation by the merger route – see below) that the existing UK company retains its legal personality so there is no transfer of business and assets or dissolution of the existing company.

Following formation of the SE it would need to complete the process to transfer its registered office address to another EEA state. This is an involved and time consuming statutory process requiring a number of steps including the preparation of a transfer proposal, explanatory report, public notice, examination and approval by shareholders at a general meeting, solvency statement and sanction by the Secretary of State for Business Innovation and Skills.

A possible alternative is the merger route where two or more PLCs formed under the laws of at least two different EU member states merge to form an SE. There is no requirement for all the companies involved in the merger to be active. The merger process is similar to that for a cross-border merger save that the resulting legal entity is an SE.

Other key factors to consider in relation to SEs include:

- if the UK company is currently registered as a private company it will also need to re-register as a public company as an initial step
- as a PLC, an SE would have to comply with the regulatory requirements applicable to PLCs in the jurisdiction in which it is registered. These are usually more onerous than those applicable to a private company
- an SE has a high minimum share capital requirement (EUR 120,000)
- an SE cannot be registered until an employee involvement arrangement is in place enabling employees to participate in the decision-making process of the SE
- the registered office must be in the same country as the SE's head office and in some jurisdictions at the same address
- set up and running can be complicated as both EU and local laws apply

⁶ Supplemented by the European Public Limited Liability Company (Employee Involvement) (Great Britain) Regulations 2009 and similar separate regulations for Northern Ireland.

Cross border conversion

A cross-border conversion takes place by moving the registered office of an existing company to another member state without losing its legal personality. CJEU case law⁷ has confirmed that such a conversion is within the scope of the right to freedom of establishment and member states may not impose mandatory liquidation on companies that wish to transfer their registered office to another member state.

An SE can transfer its registered office to any other EEA member state. Companies established in more than one member state can merge and operate under the single legal and management structure of an SE.

Available after Brexit?

No.

Key considerations

Theoretically a simple procedure and potentially preferable to a cross-border merger because the company's corporate identity remains intact, all that changes is its legal form (e.g. UK limited company to German GmbH) and the law that it is governed by.

However, UK legislation does not currently permit the transfer of a registered office address outside of the UK (other than for an SE) or removal of a company from the Companies Register without dissolution (eg following liquidation, by striking off or as a result of a cross-border merger or SE formation by the merger route).

The conversion route would therefore mean challenging UK legislation as being incompatible with EU law and the right to freedom of establishment through the courts. It is unlikely that at this stage of the Brexit process, any company would take this route.



⁷ Polbud C-106/16

Appendix: countries in the EU and the European Economic Area (EEA)

EU 27 countries:

Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

EEA:

The EU 27 and Iceland, Liechtenstein and Norway.

Switzerland is not an EU country nor is it an EEA member state but is part of the single market.

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