

Luxembourg Corporate - International corporate migration

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Introduction

A company incorporated and existing in one jurisdiction may consider it desirable to continue as a company existing elsewhere for a variety of reasons including, for example: to be in a time zone closer to investors; to conduct its affairs in a manner more familiar to its stakeholders; to benefit from a more modern and/or flexible statutory or regulatory environment and/or a more appropriate tax framework.

To achieve this, it may consider moving its domicile, thus changing its nationality and becoming subject to the preferred legal system. In this respect, companies that have been incorporated in other jurisdictions may choose to redomicile to Luxembourg. Equally, Luxembourg companies may look to move to other jurisdictions. Also known as 'continuance' or 'redomiciliation' in other jurisdictions, this process is generally known in Luxembourg as 'migration' and may be either inbound or outbound, depending on whether Luxembourg is targeted jurisdiction or the jurisdiction of origin.

Identifying corporate domicile

In determining the nationality of bodies corporate, jurisdictions tend to apply one of the following, two alternative approaches: either the 'real seat' principle, which refers to the place of central administration in Luxembourg parlance; or the 'place of incorporation' principle.

A number of jurisdictions whose companies law is based on English law tend to apply the latter. In contrast, the Luxembourg Companies Law 1915 applies the former, as follows:

- The domicile of a commercial company is located at the place of its central administration;
- Any company whose central administration is located in Luxembourg is of Luxembourg nationality and is subject to Luxembourg law (including the Luxembourg Companies Law), even if it were still incorporated/registered in, and its constitutional documents may still refer to the laws of, a foreign jurisdiction;
- the central administration of a company is generally presumed to be situated at its registered office, subject to any contrary factual matrix based on the place of board and shareholders meetings and the place where its accounts are maintained.

Thus, the core point from a Luxembourg perspective is the location of the corporate's 'central administration', as a question of fact, in addition to the location of its registered office and constitutional compliance with Luxembourg Law.

Inbound Luxembourg migration

Thus, from a Luxembourg perspective, one of the most important aspects of inbound Luxembourg migration will be to transfer its central administration (and consequently its domicile) in addition to its registered office. This will apply Luxembourg nationality and corporate law to the company. In addition, as a separate (but overlapping matter) the company will also wish to establish its tax residency in Luxembourg. Again, this is primarily established by reference to its place of central administration, commonly supported by other factors such as the residency of its directors and place of its bank accounts.

Overlapping considerations of a similar (but not identical nature) may also arise in relation to determining the company's centre of main interests (**COMI**) for the purpose of the EU Insolvency Regulation.

Determining COMI may not only be of key importance in a distressed context but also is necessary in relation to profitable enterprises for an informed understanding of director's duties and in relation to the warranties required in modern financing documents. For further information, please refer to our client briefing on managing COMI shift at the Luxembourg Legal section of www.ogier.com.

A further key point in relation to migration relates to the continuity of legal personality. Luxembourg law requires this as a matter of the other applicable legal system, in addition to that system also recognising corporate migration as available, in order for Luxembourg law to recognise both inbound and outbound migrations as valid.

It is also necessary to be mindful of the approach applied by the relevant foreign jurisdiction, in order to avoid possible issues as to dual nationality and/or tax residency and the resulting

conflict of law complications that could otherwise arise, for example if the locations of the company's central administration and registered office were to diverge. This may be particularly the case where one of the relevant jurisdictions applies the real seat principle and the other the place of incorporation principle.

Inbound migration - process

Inbound migration of a foreign company to Luxembourg will require compliance with the requirements of the laws of the country of origin and will generally involve the following key Luxembourg points/documents:

- Advice on the tax aspects of the migration both in relation to any tax event triggered on exit (e.g. any crystallisation of latent capital gains) under the law of origin and tax status on entry;
- Collation of all required beneficial ownership/KYC documentation;
- Decisions of the company's competent bodies under the law of origin (directors and/or shareholders) (a) authorising and approving the migration to Luxembourg under the exit jurisdiction's companies law and (b) convening an extraordinary general shareholders' meeting to be held in Luxembourg before a Luxembourg notary (the **EGM**);
- Selection of the form of Luxembourg body corporate that the company will adopt and adaptation/drafting of its constitutional documents in a form compliant with Luxembourg law;
- Provision of a legal opinion by Counsel in the country of origin confirming certain matters relating to the migration including continuity of legal personality;
- Appointing a domiciliation agent in Luxembourg to provide the company's registered office and seat of central administration and opening a bank account in Luxembourg;
- Confirmation of the net asset value of the company, which needs to be equal to at least the statutory minimum set forth in the Luxembourg Companies Law of €31,000 for public limited companies (*SA*) and partnerships limited by shares (*SCA*) and €12,500 for private limited liability companies (*S.à r.l.*). An independent auditor's report is also required for *SA* and *SCA*;
- In relation to the EGM to be held before a Luxembourg notary, the following will need to be provided to the notary:
 - duly executed certificate(s) of beneficial ownership, with accompanying documentation as the case may be,
 - power(s) of attorney executed by the shareholder(s) of the company; it is usual for

the shareholders not to attend in person,

- interim financial statements/balance sheet and the independent auditor's report (if applicable),

- legal opinion of overseas Counsel;

• The Luxembourg EGM will typically resolve as follows:

- ratification of the resolutions taken by the relevant bodies in the country of origin,

- approval of the migration,

- adoption of the selected Luxembourg corporate form of vehicle and the required amendments to the company's constitutional documents,

- appointment of director(s) and auditor(s) (if applicable);

• Collation of any other information the Luxembourg Trade and Companies Registry (**Luxembourg Companies Registry**) may require;

• Registration of the now Luxembourg-domiciled company with the Luxembourg Companies Registry and publication in the Luxembourg Official Gazette;

• Deregistration of the company in the country of origin; and

• Holding of a first board meeting in Luxembourg, as required to take care of housekeeping matters.

Companies considering migrating into Luxembourg will also need to consider whether any other Luxembourg licensing or regulatory requirements arise in relation to the activity expected to be carried on by the company in Luxembourg.

Continuity

For any inbound or outbound Luxembourg corporate migration, its validity and effectiveness also require that it is permitted, without interruption of continuing legal personality, by the law of the other relevant jurisdiction, as confirmed by the legal opinion of overseas Counsel to the Luxembourg notary. Thus a valid migration necessarily requires that both jurisdictions recognise continuity of legal personality and therefore of continuity of claims against and ownership of assets by the migrating corporate.

Tax matters - inbound migration

Migration of a foreign company and/or the transfer of its tax residency into Luxembourg may

carry certain tax consequences. Specific advice should be sought in each case, however, the principal Luxembourg tax matters may include the following points.

Re-valuation of assets

The transfer of tax residency of a company into Luxembourg is regarded for Luxembourg tax purposes as (re-)constituting the company. The company may therefore opt to re-value its assets at their fair market value as at the date of migration instead of continuing with their book value as recorded in its accounting records prior to migration. This would have the effect of re-basing the assets' capital value for Luxembourg tax law purposes post-migration by establishing an opening tax balance sheet.

This is regarded for Luxembourg law purposes as the realisation of latent capital gain prior to the commencement of Luxembourg tax residency and thus does not give rise to a Luxembourg charge to tax. The re-valued fair market values will be treated as the assets' acquisition prices, constituting the basis for any future capital gains computation under Luxembourg Law. *Mutatis mutandis*, the acquisition date of the assets will be the date of migration to Luxembourg.

Asset revaluation is a choice, not a requirement. The company may therefore alternatively prefer to maintain the book values recorded before the transfer of the tax residency to Luxembourg. The company's choice will turn on the nature of the assets and/or the company's activities.

This may be appropriate for certain investment holding companies (*SOPARFI*) who will benefit from an exclusion from their taxable assets of income derived from and any capital gain in the value of certain investments ("financial participations") under Luxembourg tax law. This is known as the "participation exemption regime".

Eligibility requires an investment holding period of at least 12 months (or a forward-looking undertaking to do so). Specific advice should be sought as to the inclusion of a company's pre-migration holding period in this assessment as well as in relation to the other applicable criteria, as anti-abuse measures may apply.

Tax residency requirements - "Substance"

Under Luxembourg law, Luxembourg corporate entities (which includes both companies and limited partnerships) which either have their registered office or their central administration in Luxembourg are considered to be Luxembourg tax resident.

However, in addition to the requirements of Luxembourg domestic tax law, companies whose investments and/or directors are international, may also need to have regard to relevant foreign tax laws, which may require a degree of physical footprint in Luxembourg to ensure that the

company's Luxembourg tax residency is not at risk of challenge by a foreign tax authority. This is commonly known as "substance". Substance is more a matter of creating a tangible economic reality in Luxembourg than an exhaustive list of prescribed requirements. However, factors focussed on by foreign tax authorities in assessing substance commonly include:

- active, Luxembourg-based employees;
- majority of directors being Luxembourg resident;
- directors' and shareholders' meetings being held in Luxembourg;
- specific Luxembourg office space and utilities;
- accounting and specific company documentation being held at the company's Luxembourg office; and
- company bank accounts being in Luxembourg with real cash movement passing through them.

This list is illustrative only, specific advice should be taken on a case-by-case basis.

Registration duty

Migration and transfer of tax residency into Luxembourg carries a fixed registration duty of €75, due on the notarial act passed at the EGM approving the in-bound migration.

Group Financing

Prior to conducting an inbound migration into Luxembourg it may be prudent to review the company's intra-group financing to ensure an efficient tax profile in the context of Luxembourg tax rules.

Outbound migration – process

The following key points are generally required from a Luxembourg perspective to migrate from Luxembourg to a foreign jurisdiction, in conjunction with the requirements of the applicable foreign law:

- Board meeting to approve migration, convene an EGM, terminate any Luxembourg related agreements and prepare closing accounts (as the case may be);
- Although not a legal requirement, interim accounts of the company as of the day of migration;
- As the case may be, preparation of a legal opinion by Counsel in the inbound jurisdiction (a

Luxembourg opinion may also be requested in specific circumstances) confirming continuing legal personality and certain other matters;

- Verification that the annual accounts of the company in respect of all prior fiscal years have been approved/filed and that all filings required under Luxembourg law have been made;
- Unanimous shareholders approval at an EGM before a Luxembourg notary, where the following documents will need to be provided:
 - duly executed declaration(s) of beneficial ownership (with accompanying documentation as the case may be), and
 - power(s) of attorney executed by the shareholder(s) of the company;

The EGM will usually resolve upon e.g. (subject to the condition precedent of a due registration in the inbound jurisdiction):

- the change of nationality and the migration,
 - the new corporate name and registered address,
 - the adoption of new constitutional documents in a form suitable to the new corporate form in the inbound jurisdiction,
 - the resignation of the director(s)/auditor(s) (as applicable) and their discharge,
 - the appointment of a proxy-holder of the company in relation to the Luxembourg migration formalities;
- Registration of the company in the inbound jurisdiction; and
 - Formal deregistration of the company from the Luxembourg Companies Registry and publication in the Luxembourg Official Gazette.

Tax matters – outbound migration

When a company transfers its tax residency out of Luxembourg, its liability to Luxembourg taxes will cease as it is, from that time on, out of scope for Luxembourg taxation. This may give rise to tax consequences at the time of exit of the company.

Similarly to the position that the transfer of tax residency a company into Luxembourg is treated, for Luxembourg tax purposes, as the constituting of the company, the transfer of tax residency out of Luxembourg is regarded as a starting point, to effect the liquidation of the company for Luxembourg tax purposes. This deemed liquidation has the following consequences:

- Any latent, accumulated capital gains will become chargeable to tax if there is any realisation of the assets of the company. Depending on the nature of the assets, capital gains may be tax exempt, eg if falling within the participation exemption regime;
- The company's taxable liquidation profit (if any) will be calculated;
- Certain market-standard group financing techniques may result in a very low taxable liquidation profit. This is therefore subject to minimum floor, flat rate tax of €3,210 in relation to qualifying investment holding companies (SOPARFIs); and
- The distribution of any liquidation proceeds (if any) is not subject to any Luxembourg withholding tax.

This is subject to two exceptions. First, where a Luxembourg company with a Luxembourg permanent establishment (ie a physical business in Luxembourg) migrates to another jurisdiction but continues to maintain its physical business in Luxembourg, certain valuation rules ensure in practice that no notional capital gain is crystallised by virtue of the deemed liquidation on exit.

Secondly, where the Luxembourg company migrates to another EEA member state and retains ownership of the relevant assets and responsible for the relevant liabilities. The company may defer payment of Luxembourg tax arising on the crystallisation (by the deemed liquidation) of such latent capital gains until the actual realisation of such gains.

Also in case of an outbound cross-border merger, a physical business in the form of a PE in Luxembourg should be maintained.

Cross-border merger

Cross-border merger is also an available option in relation to change of nationality/applicable law. Although the legal process and certain consequences differ from those of a migration process, the same outcome can be achieved through a sometimes more straightforward merger process, especially when involving EU companies. For further information, please refer to our client briefing on this subject at ogier.com/publications/luxembourglegal.

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