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Ahead of Brexit

A corporate law primer on relocating your business to Germany

Contents

Introduction	03
Societas Europaea	05
Cross-border merger	08
Asset deal	11
Seat transfer	13
Comparison chart	15
About Deloitte Legal	16
Your contacts	18

Brexit marks the first time that a member state has indicated its intention to leave the European Union. With no precedent in place, an untested legal framework and inevitable negotiating tensions, the final outcome remains uncertain.

Despite prolonged uncertainy, Brexit is a business risk like any other – one where the variables can be understood, analysed and planned for and one whose impacts and opportunities will vary considerably by sector, and by individual organisation. Businesses therefore are seeking to understand what the implications of various possible scenarios might be on their own business models.

Clearly for businesses based (even partly) in the UK with pan-European operations, the implications are likely to be more pronounced. One possible mitigation to some of the potential issues might be the transfer of some business operations out of the UK to another EU location – with Germany being one such possible location.

This document aims to provide an overview of the key relocation options from a legal viewpoint – to help you consider options for preparing for Brexit.

Introduction

Article 50 and its consequences

On March 29, 2017, Prime Minister Theresa May notified the European Council of the United Kingdom's intention to withdraw from the European Union. With this notice, the Prime Minister has triggered the procedure known as Article 50 of the Treaty on the European Union (TEU).

This has started a 2-year period of negotiation between the EU and the British government. During this negotiation period, the UK and the European Council will attempt to agree on the details of how the exit from the EU will be structured legally as well as looking ahead to how the ongoing UK/EU relationship will work.

At present, it would seem that the UK will indeed exit the EU in March 2019, despite a slow start to negotiations. It is possible for the exiting member state (the UK) and the European Council to unanimously prolong the exit negotiation period beyond 2 years. Should the parties fail to agree terms before the negotiation period ends the UK will exit the EU automatically. The Treaty on European Union contains little detail on what the legal consequences of such a forced exit would be, but both sides remain committed to the 2 year negotiating period to agree exit terms, albeit with increasing talk of a transitional period to ease the shift for business on both sides.

Anatomy of Brexit

The form that the UK's exit from the EU will take, and critically the agreements reached regarding the ongoing relationship – in particular with regards the movement of people and access to respective markets – is yet to be determined.

Considering the potential future options, the common dictum of 'hard' and 'soft' Brexit – the former referring to an exit from not just the EU but also the the European Economic Area (EEA), the latter seeing the UK remaining an EEA member state – is overly simplistic. Given that the UK has ruled out the ongoing free movement of people – a condition of membership of the EEA – then this option is effectively off the table.

The options available for structuring Brexit are actually much more nuanced and manifold than the often-used dichotomy of hard vs. soft Brexit may suggest.

Legal implications of Brexit

The EU treaties set out four fundamental freedoms, which form the foundations of the single market. The EU has made it clear that the 'four freedoms', set out below, are indivisible and that the UK will not be permitted to 'cherry-pick' between them:

1. The free movement of goods
2. The free movement of workers
3. The freedom of establishment and the freedom to provide services
4. The freedom of capital

The UK has acknowledged this position. In ending free movement of people, it will also end its access to the other freedoms, which means, in practical terms, ceasing to be a Member of the Single Market. This will have consequences for businesses trading cross EU borders and employing staff across these jurisdictions.

From a legal perspective, this will have implications for:

- Corporate law
- Employment law
- IP and Data Protection law
- Competition and Anti-Trust law
- Real Estate law
- Global Trade
- Grants and Subsidies (in particular those granted by the EU to UK-based recipients)
- Compliance

In order to manage exposure to Brexit-related risks some organisations are looking at their locational footprint across the UK and EU, and considering if this can be optimised to mitigate against any barriers to trade or access to labour post Brexit. In some instances this may mean that an organisation looks to move some of its operations out of the UK and into another EU member state (or vice versa), or to consider its legal structure to ensure continuity of business during and beyond the exit period.

Relocation options

This document outlines the most common legal structures for relocating the business of a UK-based entity into an entity based another EU member state, using Germany as an illustrative example of the target jurisdiction.

The options discussed in this document are:

- Societas Europaea (SE)
- Cross-border merger
- Transfer of functions/businesses or assets (asset deal)
- Cross-border seat transfer

Societas Europaea

Summary | A pre-existing UK-based stock company can under certain conditions be merged or transformed into a Societas Europaea (SE) which can have its registered office in another EU member state

What is an SE?

The Societas Europaea (SE), also described as the "European public limited-liability company", was created in 2001 as a new entity type for the European Union through the enactment of the SE-Directive and the SE-Regulation,[1] followed by supplementary national legislation. At the time of its inception, the SE offered the first reliable legal framework for an EU-wide cross-border merger of companies.

Although designed as a supranational entity type and based on the SE-Regulation, which is an immediately applicable and binding law in all EU member states, many aspects of the SE are governed in detail by national laws that apply depending on where the SE has its registered office. This is due to the fact that the SE-Regulation's provisions are incomplete and expressly delegate the regulation of certain questions to the individual member states. Also, certain aspects of the SE, such as the employee participation, are not governed by the SE-Regulation itself but instead by the SE-Directive which generally has to be transposed into national laws in order to become effective.

Business relocation by way of incorporating an SE

In contrast to most national legal entity types, an SE can only be incorporated with the involvement of already existing legal entities. The four main modes of incorporation are as follows.[2]

Formation by merger

Two or more public stock companies (UK: public companies limited by shares or public companies limited by guarantee having a share capital; Germany: Aktiengesellschaft, Kommanditgesellschaft auf Aktien) can merge forming an SE as long as at least two of the companies participating in the merger are governed by laws of different EU member states. The new SE can be located in any EU member state regardless of where the merging entities are located.

For example, a UK public company limited by shares and a German Aktiengesellschaft can merge, forming an SE with registered office in Germany.

[1] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Accompanying national legislation in Germany was the Act on the Introduction of the European Company (Gesetz zur Einführung der Europäischen Gesellschaft (SEEG)) of December 22, 2004.

[2] As a fifth mode of incorporation, a pre-existing SE can form a new SE as its subsidiary.

Conversion of an existing public limited-liability company into an SE
Lastly, a public stock company can be converted into an SE if it has for at least two years a subsidiary company governed by the laws of a different EU member state. However, the registered office of the converting company may not be changed in the course of converting into an SE. This can however be done as a subsequent step.

For example, a UK public company limited by shares having for more than two years a subsidiary company in Germany could establish a UK-based SE and, in a subsequent step, relocate the SE's registered offices from the UK to Germany.

Less relevant: Formation of a holding SE
An SE can be formed by contributing the shares of two or more public stock corporations or private limited companies (UK: private companies limited by shares or private companies limited by guarantee having a share capital; Germany: GmbH) into the thereby newly formed SE. At least two of such contributed companies must be governed by the laws of different EU member states or have for at least two years a subsidiary company governed by the law of a different EU member state or a branch situated in another EU member state. The new SE can be located in any EU member state regardless of where the contributed entities are located. For example, a German GmbH and a UK private company limited by shares could request their shareholders to form a Germany-based SE by contributing them into the newly formed SE. This mode of establishing an SE does not lead to the dissolution of involved UK-based entities and, therefore, may be considered as having limited value in the framework of "leaving" the UK from a corporate law perspective.

Less relevant: Formation of a subsidiary SE
Two or more companies, firms or other legal bodies governed by public or private law whereby at least two of them must be governed by the laws of different member states or have for at least two years a subsidiary company governed by the law of a different member state or a branch situated in another member state can form an SE as their common subsidiary. The new SE can be located in any EU member state regardless of where the founding shareholders are located. For example, two UK private companies limited by shares, one of whichh operating for more than two years a German branch, can form a Germany-based SE. This mode of establishing an SE does not lead to the dissolution of involved UK-based entities and, therefore, may be considered as having limited value in the framework of "leaving" the UK from a corporate law perspective.

Excursus: Relocation of a UK-based SE
As of 2017, 42 SEs are reported to have their statutory seat in the UK with 14 of them identified as having more than 5 employees.3 It is a special characteristic of the SE that it may freely relocate its registered office from one EU member state to another. Therefore, at least as long as the UK is still a member of the EU, UK-based SEs can mitigate the uncertainties regarding their continuance post-Brexit by relocating to another EU member state.

[3] A. Carslon (2017) SE Companies in 2017. Workers' Participation Europe Network, ETUI.

Strategy assessment: Merits and demerits of establishing an SE

The SE has had a remarkable success as a newly introduced legal entity type and is currently being used by several high-profile businesses. Well-known examples include Airbus, Allianz, SAP, Porsche or Moët Hennessy Louis Vuitton (LVMH). Germany has emerged as the jurisdiction with by far the largest number of active and substantial SEs in the EU. It is home to 232 SEs identified to have more than 5 employees in 2017, followed by the Czech Republic with 90 and France with 24.4 The attractiveness of the SE in Germany is partly attributed to the fact that the SE offers shareholders a slightly higher degree of flexibility regarding employee participation compared to German legal entity types.

The overall success of the SE is particularly remarkable given the relatively high degree of complexity connected to its establishment and maintenance – a complexity that is compounded by the fact that, due to subtle differences in the national laws, a "German SE" is different from for example a "French SE".

When assessing the overall "pros and cons" of opting for an SE compated to more established, national entity types, the below topics should be taken into consideration.

The Societas Europaea…	On the other hand it also…
• Simplifies the operation of companies present in several countries of the EU, • Encourages greater business mobility as it allows the EU-wide transfer of its registered office without liquidation, • Promotes the mobility of workers and participation in business management, • Allows businesses operating on a EU-wide scale to re-organize efficiently, • Allows the creation of accompany with a European character and image, • Improves leverage for financing, • Allows for chosing between one-tier and two-tier corporate governance model.	• Comes at a comparably high cost and complexity, • Can only be incorporated under certain conditions, • Has high minimum capital requirements (EUR 120k), • Has mandatory requirements for employee participation in management decision-making, • May be impacted by post Brexit trading arrangements if situated in the UK.

In essence, the incorporation of an SE can be a viable option for relocating the business of a UK-based entity into another EU member state, but it is too complex and far-reaching to be considered solely as a Brexit-risk mitigation strategy. Incorporating an SE should be part of a more holistic business strategy, aiming at e.g. demonstrating the EU-wide presence of the business or at attracting financing or investment.

[4] A. Carslon (2017) SE Companies in 2017. Workers' Participation Europe Network, ETUI.

Cross-border merger

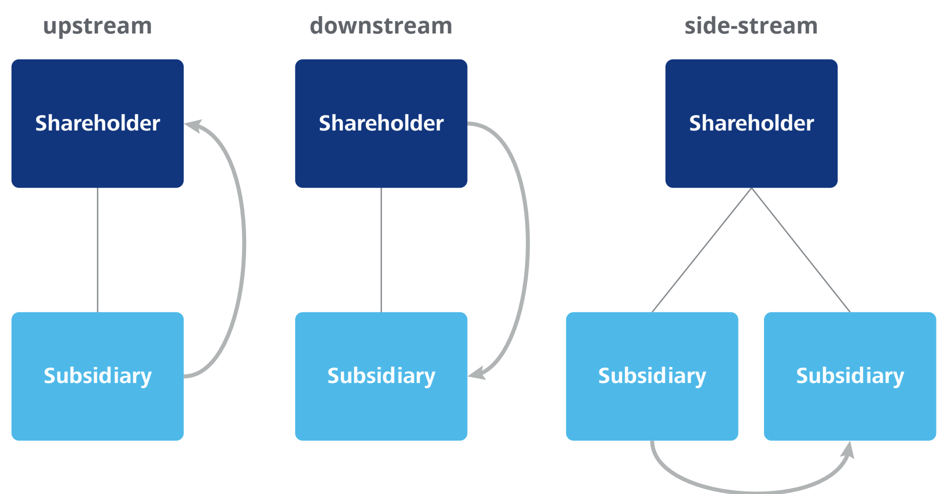
Summary | Eligible UK-based companies can be merged into an eligible company based in another EU member state via a cross-border merger under the EU merger directive

What is a cross-border merger?

In a merger, the transferor entity transfers any and all of its assets and liablities to a transferee entity with the result of the transferor entity dissolving without liquidation. The transferee entity can either already exist before the merger (merger by absorption) or be newly established in the framework of the merger (merger by way of new formation). The transfer of assets and liability is performed by operation of law and leading to a universal succession.

Since the enactment of the EU merger directive[5] in 2005 and its subsequent transposition into national law, certain companies within the EU can merge across jurisdictions.

Fig. 1 – Scenarios



Business relocation by way of cross-border merger

Scenarios

Mergers can take place in different ‘directions’. Merging a subsidiary into its holding company is referred to as an upstream merger with the reverse being referred to as downstream merger. The term side-stream merger describes the merger of sister companies. Figure 1 provides a simplified overview.

Process

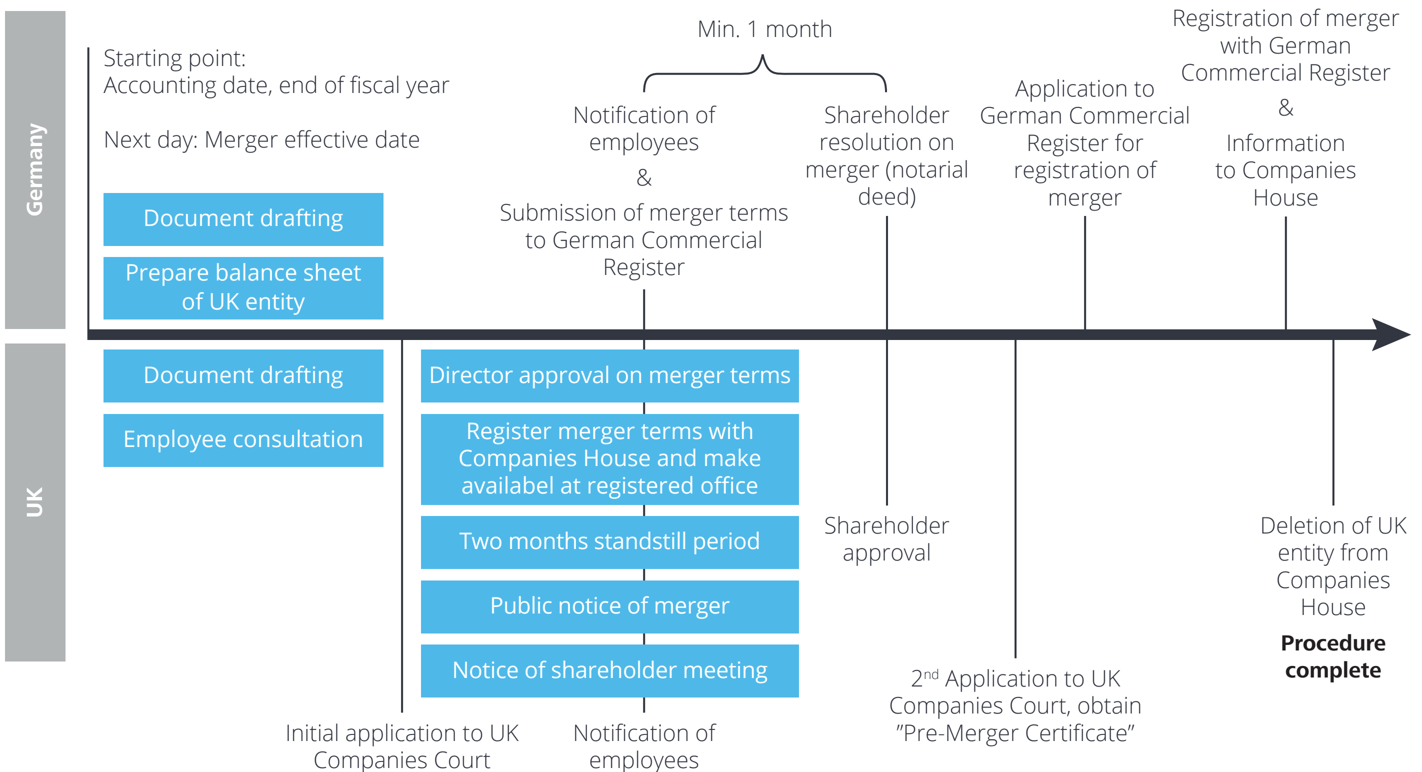
A cross-border merger is typically prepared by performing a pre-merger due diligence. This is done in order to identify legal risks associated with the merger. Such due diligence would for example aim to identify if any contractual relationships affected by the merger contain change-of-control clauses that may grant the other party special termination rights. It may also identify any licenses or public permits of the merging companies and determine whether they can be transferred or would need to be re-applied after the merger.

Taking the outcome of the due diligence into account, the legal documentation can be drafted. Key documents are

- the Terms of Merger (Verschmelzungs-plan) as the central document governing the details and legal effect of the merger,

[5] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. Now codified as Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

Fig. 2 – Process



- resolutions of the shareholders/board of directors of the involved companies approving the merger,
- application letters to the respective commercial registries and other public notices and
- documentation necessary for due involvement of employees, works councils, etc.

Due to the participation of commercial registries in different jurisdictions, waiting periods and so on, a cross-border merger will generally take at least 5-7 months to implement.

The above illustrative example timeline for merging a UK private company limited by shares into a German limited liability company (GmbH) shows the procedural steps of the merger process. Some follow-up procedures (e.g. updating registries regarding real estate, IP or permits) may be required post-merger.

A cross-border merger is only possible between eligible entity types. For the UK this would be public and private companies limited by shares or public and private companies limited by guarantee having a share capital; eligible German entity types are the Gesellschaft

mit beschränkter Haftung (GmbH), the Aktiengesellschaft (AG) and the Kommanditgesellschaft auf Aktien (KGaA).

Strategy assessment: Merits and demerits of cross-border merger

A cross-border merger is a suitable, reliable method for relocating the business of a UK-based entity to another EU member state. The transfer of all assets and liabilities of the transferor entity through universal succession offers a significant degree of safety and transparency.

As it stands, it appears likely that a cross-border merger between UK-based companies and companies of other EU member states will no longer be possible after Brexit. If this option is the one that poses the most appropriate mitigation to Brexit risk (after a full Bredit risk and options assessment) then an organisation might start to consider such projects in advance of the UK formally leaving the EU.

The cross-border merger...	On the other hand it also...
• Leads to a universal succession regarding all assets and liabilities of the transferor entity which inter alia means that – in the absence of change-of-control clauses – contractual relationships transfer automatically and without the need to obtain consent of the other contract party, • Does not require a separate liquidation of transferor entity which is dissolved as an effect of the merger, • Can typically be implemented tax-neutrally, • Is a tried and tested method.	• Requires careful planning and preparation (pre-merger due diligence), • Is a somewhat lengthy and complex procedure involving external authorities such as Commercial Registries in the affected jurisdictions, • Will come at a certain implementation cost due to its complexity and formal requirements, • Entails some uncertainty around accounting treatment, • May in some cases require some prior restructuring.

Asset Deal

Summary | The business of a UK-based company can be relocated to a company based in another EU member state by transferring the assets and liabilities comprising the business

What is meant by asset deal?

A company can transfer its business to another company by individually transferring the movable and real estate property, intellectual property, personnel, contractual relationships – in other words: all assets and liabilities – that comprise the business. Such a transfer can be done as a sale, e.g. in return for a purchase price. It can also be done as a contribution, e.g. in return for a participation in the company that receives the business.

In contrast to a merger, which results in a universal succession, an asset deal results in a singular succession. This means that all assets and liabilities to be transferred are technically transferred individually (although typically by means of only one asset transfer agreement). The assets and liabilities to be transferred must be described with sufficient precision to ensure a valid transfer and the transfer of liabilities generally require the consent of the respective creditor in order to be legally effective.

The transfer of personnel belonging to the business is typically an automatic consequence of transferring the business itself, due to the TUPE (transfer of an undertaking) rules in the respective jurisdictions.

Business relocation by way of an asset deal

A business transfer by way of an asset deal is typically prepared by conducting a due diligence in which the items to be transferred are identified and legal requirements for an effective transfer are assessed. In particular, it is advisable to identify the contractual partners (customers, suppliers) whose consent will be required in order to make a first assessment of any negotiations that may be triggered. Also, the precise structure and scope of the asset deal are defined, together with follow-up tasks. For example, in case a UK private company limited by shares transfers its UK-based business to a German GmbH, the German GmbH may have to register a UK branch as a follow-up task.

On the basis of the due diligence findings, the documentation for transferring the business is drafted. This is typically includes

- an agreement governing the sale & transfer (or: the contribution) of the business,
- shareholder/board resolutions approving the sale & transfer (or: the contribution) of the business,
- further corporate law documentation required for implementing the contribution, in particular if it is made in return for new shares (or as part of incorporating the receiving company),
- documentation regarding consent of contractual partners (e.g. suppliers, customers),

- documents required under applicable TUPE rules (e.g. information letters to employees),
- any documentation required for follow-up tasks such as branch registrations.

The asset deal does not affect the continued existence of the company transferring its business. Even if the asset deal results in a transfer of all assets and liabilities of the company and if the purchase price or shares it has received in return are distributed to its shareholders, the company will continue to exist. If a continued existence of the company is no longer desired, it would need to be e.g. dissolved and liqduidated (voluntary liquidation) or merged into another legal entity. The voluntary liquidation of even an “empty” company can be a lengthy process with some degree of residual legal risk for the involved managing directors.

Strategy assessment: Merits and demerits an asset deal

The asset deal is the most straight-forward approach to a business relocation and comes with the lowest level of legal requirements. For situations where a cross-border merger is not desirable or not possible (which may well be the case after Brexit), the asset deal can be regarded as a ‘last resort’.

Depending on the nature of the transferred business however, it can be burdensome to obtain the consent of suppliers, customers etc. in order to validly transfer their contractual relationship. Sometimes, contractual partners that are approached for their consent see this as an opportunity to re-negotiate the economic or legal terms of their contract. Another draw-back in case of a planned relocation from the UK to Germany would be that the UK-entity will need to be dissolved and liquidated after the asset deal.

The asset deal...	On the other hand it also...
• Can be implemented flexibly in terms of timing and requires comparably few formalities (depending on the nature of the transferred assets), • Is a straight-forward procedure with typically manageable implementation cost (as long as the number of third parties to be approach for consent is limited), • Allows for a transfer of only selected assets or liability, so-called ‘cherry picking’ (but TUPE regulations need to be considered regarding employee transfer).	• Requires the consent of contractual parties when transferring contractual relationships, which can cause material administrative cost and prompt contractual parties to re-negotiate commercial terms of contracts, • Entails the burden of having to dissolve and liquidate the remaining “empty” entity after the trasnfer, which can be a time-consuming process, • Leads third parties to question the effectiveness of transfers, since it does not result in a universal succession and is not publicly registered, • Potentially leads to capital gains taxation depending on amount of hidden gains and subject to detailed local review.

Seat transfer

Summary | Instead of transferring all assets and liabilities to another entity, a relocation of a UK-based company to another EU member state can be done in a cross-border seat transfer

What is a cross-border seat transfer?

In the context of cross-border seat transfer, the registered office of a company can be relocated from one EU member state to another.

The relocation of the registered office can coincide with a change of the legal form of the company (e.g. a UK private company limited by shares can relocate its registered office to Germany and simultaneously transform in to a German GmbH). In such case, while the legal form changes, the legal personality of the entity remains the same. The below will focus on a simultaneous relocation and change of legal form.

Business relocation by way of cross-border seat transfer

While a cross-border seat transfer of a UK-company to Germany is in principle possible, there are significant uncertainties regarding process and timeline.

General admissibility

The admissibility of cross-border seat transfers has always been controversial. Furthermore, a cross-border change of legal form traditionally is not admissable. Neither the German Transformation Act (Umwandlungsgesetz, UmwG), nor any law on the EU-level stipulates the process of a cross-border change of legal form. The admissibility results from the jurisprudence of the European Court of Justice (ECJ), especially its rulings Cartesio and Vale.[6] With Vale, the ECJ established explicitly that a cross-border seat transfer is protected by the freedom of establishment under Articles 49 and 54 of the Treaty on the Functioning of the European Union (TEUF), both from the perspective of the exit state and from the perspective of the entry state. Therefore, on the basis of ECJ jurisprudence, the German law can not effectively prohibit a company incorporated under EU or EEA foreign law from changing into a German legal form as long as the company also moves its administrative seat to Germany. A member state must allow the cross-border change of legal form, if and to the extent that it also allows a change of legal form in national law.

Legal requirements

Since the cross-border seat transfer under change of legal form is not regulated by law, the requirements are still unresolved. The German jurisdiction tends to apply the German Transformation Act by analogy (Court of Appeal Berlin (Kammergericht, KG), 03/21/2016 – 22 W 64/15; Higher Regional Court Nürnberg (Oberlandesgericht, OLG) 06/19/2013 – 12 W 520/13). But opposing or alternative views hold that an analogous application of the SE-Regulation might be preferable.

Judging from the – rather few – decisions of German courts on the matter of cross-

[6] Cartesio: 12/16/2008, C-210/06; Vale: 7/12/2012, C-378/10.

border seat transfers and change of legal form to date, the following general prerequisites can be expected to apply to a cross-border seat transfer from the UK to Germany.

Due to the fact that there is no explicit legal framework governing the cross-border seat transfer, the procedural steps and detailed requirements depend on the individual case and on the view of the involved registry courts. Even within Germany, different courts appear to have diverging views on e.g. the order of steps to be undertaken.

1 Company's and target legal form
Legal form of relocating company must be comparable to one of the enumerated German legal forms in Sec. 191 para. 1 UmwG while the German target legal form must be recognized under Sec. 191 para. 2 UmwG

2 Transformation resolution
Requirement for a notarized transformation resolution according to Sec. 193, 194 UmwG, which includes the new Articles of Association, Sec. 243, 218 UmwG

3 Conversion report
According to Sec. 192 UmwG, which can be waived under certain conditions

4 Contribution in kind
Under German law, certain changes in legal form are considered a contribution in kind and require the legal documentation connected therewith (e.g. an asset foundation report)

5 Performance record and possible employee participation
Some German courts request a performance record as well as employee participation according to Sec. 122l para. 2 UmwG

Strategy assessment: Merits and demerits of cross-border seat transfer

While in principle a cross-border seat transfer with change of legal form appears to be a beneficial strategy to relocate a UK-based company's business to another EU member state, the significant uncertainties regarding the legal procedure to be followed somewhat lessen the attractiveness of this option.

Despite groundbreaking court decisions by the ECJ and ongoing discussions about the introduction of a clarifying EU directive on the cross-border seat transfer, no legislation to this effect has been enacted so far. It remains to be seen whether such legislation might be introduced prior to Brexit taking effect.

The cross-border seat transfer (with change of legal form)...	On the other hand it also...
• Ensures the continuing legal identity of the relocating company and thereby avoids the effort of transferring assets and liabilities (including contractual relationships) between legal entities, • Avoids the burden of dissolving and liquidating the UK-based entity, • Does not require the formation of a separate German entity.	• Entails a significant degree of uncertainty regarding its legal requirements, procedure and timeline, • Can be potentially time-consuming or difficult to plan precisely due to said uncertainty.

Comparison chart

Summary | Options for relocation should be carefully assessed considering legal, tax, accounting and business implications for the organisation

	Societas Europaea	Cross-border merger	Asset deal	Cross-border seat relocation
Suitable for	medium to large businesses	all business sizes	all business sizes	all business sizes
Consent of contract countierparties required	No	No	Yes	No
Procedural complexity	high	medium to high	low to medium	medium to high (uncertain)
Estimated duration	~half year	~half year	~1,5+ years (due to liquidation)	unclear
Risk profile for involved MDs	low	low	medium (MDs may need to act as liquidators)	low
Possible to implement post-Brexit	unlikely	unlikely	likely	unlikely
Bottom line	must be closely aligned with overall business strategy, typically a transformative undertaking beyond mere Brexit risk control	preferable in particular if many contracts need to be transferred	flexible procedure, especially for small to medium-size projects; 'last resort' of e.g. merger is not desirable	lack of legal framework leads to uncertainty regarding procedure and timing

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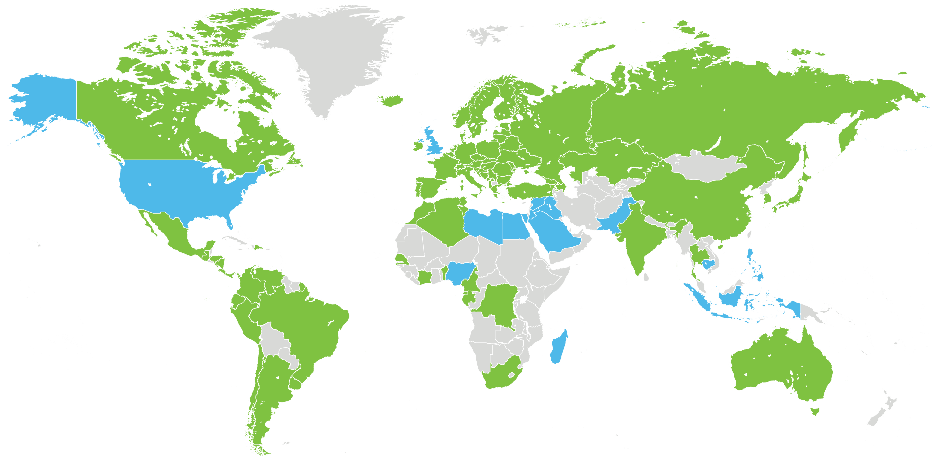

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