

# ATOZ ALERT



## DG Justice paints a gloomy picture of post-Brexit impact on EU company legislation

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The final outcome of Brexit is still uncertain for the time being but, assuming that there will be no room for negotiations between the City of London and the EU post-Brexit, once the UK departure occurs on 30 March 2019 at midnight (CET), the UK will become a “third country” for the purpose of EU rules and this will trigger a series of consequences for both UK and EU businesses.

In the sensitive context of an upcoming round of negotiations between the UK and the EU-27 Member States, the DG Justice and Consumers published a notice last week stressing that Brexit and the UK becoming a third country for the purpose of EU company legislation should have major implications on both UK-based companies and their EU-based branches. This notice to stakeholders may be found here: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=607669](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=607669)

Among the consequences on EU company law, the EU Commission has drawn the market’s attention on the fact that:

- **UK incorporated companies will become third country companies and will no longer be automatically recognised by the EU-27 Member States in application of the Treaty on the Functioning of the European Union.**

In practical terms, this means that the legal personality and the limited liability of UK-domiciled companies having their central administration or principal place of business in one of the EU-27 might no longer be recognised in some Member States. Consequently, such companies might lose their legal standing in the EU and their shareholders might become personally liable for the company’s debts. UK companies should proceed with an analysis of the EU-27 companies’ laws in order to determine their own status and decide whether they are better off forming a subsidiary with legal personality.

In Luxembourg, the amended Law of 10 August 1915 relating to commercial companies (the **1915 Law**) recognises that commercial companies established in third countries can establish a branch, their central administration or operations headquarters in Luxembourg. This is a separate issue from the freedom of establishment across the EU, but nevertheless incumbent on any business licence or sector-specific authorisation regime in Luxembourg. Foreign companies can also be a party to legal proceedings in the Grand Duchy.

- **UK companies' branches set up in the EU-27 Member States will become branches of third country companies**

The switch in the branch' status triggers a switch in the relevant applicable rules across the EU-27.

In Luxembourg for instance, there are additional marketing and registration requirements for branches of foreign, non-EU companies.

- **UK companies will no longer be subject to the existing and forthcoming European<sup>1</sup> provisions on disclosure, incorporation, capital maintenance and alteration, and cross-border mergers**

The forthcoming Directive (EU) 2017/1132 lays down measures for the pan-European coordination of safeguards for stakeholders and third parties relating to the formation, disclosures, obligations, nullity, (cross-border) mergers or divisions of companies with limited liability in Europe. This means that, post-Brexit, the only safeguards available to shareholders, employees, creditors and investors dealing with UK companies will be based on the UK national rules, as applicable after the exit from the EU.

In Luxembourg, the 1915 Law currently allows the cross-border merger between a company based outside the EU and a Luxembourg company, provided the third country's legislation guarantees an effective decision-making process relating to mergers and ensures the protection of the creditors, bondholders, shareholders and workers' rights of the merging companies. Any changes in the UK legislation to these aspects will need to be monitored post-Brexit.

- **Brexit will put an end to the cross-border access to company information available in the EU business registers**

Post-Brexit, the EU business registers interconnection system (**BRIS**) will exclude the Companies House, the UK business register, and information about UK companies will no longer be available via the EU e-justice portal. Thus, certain changes relating to UK companies (e.g. regarding their branches in the EU-27, cross-border mergers involving a UK company) will no longer be communicated across the European platform. However, this information may continue to be available via the Companies' House own portal, which may potentially be integrated in the BRIS, as the latter might open up to third countries registers.

- **The European Company form will no longer be available in the UK**

Currently, a *Societas Europaea* (SE) enables companies from different Member States to create a group that combines and runs their business on a pan-EU basis, while avoiding obstacles arising from the disparity between, and the limited territorial application of, national company laws.

Post-Brexit, a public limited company set up as an SE in the UK will lose its SE status. Consequently, this type of company will lose its automatic right to transfer its registered office anywhere else in the EU without prior dissolution in the UK. Moreover, no further SE will be able to establish themselves in the UK. Therefore, existing UK-based SE will need to consider if they need to be based in other EU-27 Member States and to plan their migration accordingly before March 2019.

- **An European Economic Interest Grouping (EEIG) will no longer be entitled to have UK companies as members**

An EEIG enables legal entities from different EU countries to associate and operate together across national borders. An EEIG may be set up in any one of the Member States, and operate in any part of the EU; its members need to be entities incorporated or having their central administration in an EU Member State. The grouping can enter into arrangements with organisations outside the EU, however these cannot themselves become members of an EEIG. Post-Brexit, a grouping based in the UK will lose its EEIG status. UK companies members of an EEIG established elsewhere in the EU will no longer be allowed to be members of the grouping. Appropriate planning – migration to EU-27, implementation of a cooperation agreement with a UK based entity should be made during next year in order to safeguard an EEIG's members' rights.

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<sup>1</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

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Can we help? Do you have further questions?



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