



Law Society  
of Scotland

# Consultation Response

Corporate re-domiciliation: Consultation on the  
Government's proposals by BEIS, HMRC and HM  
Treasury

January 2022



## Introduction

---

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company and Insolvency law and Tax Law sub-committees welcome the opportunity to consider and respond to the BEIS, HMRC and HM Treasury consultation: *Corporate re-domiciliation*<sup>1</sup>. We have the following comments to put forward for consideration.

## Consultation response

---

### **1. What do you see as the advantages of re-domiciliation compared to existing routes to relocate a company to the UK, and how material are they?**

The current route of having to create a new vehicle, transfer all assets and liabilities to it, then wind up the old vehicle is very prohibitive. In addition, when transferring liabilities, most jurisdictions require some form of creditor consent prior to such transfer. This is a costly and time consuming process, in which creditors may rent-seek and try to obtain a financial advantage. As such, the current system is not attractive and a replacement should be sought. However, as noted in the consultation, a jurisdiction allowing a vehicle to re-domicile into it is only half the story: the other jurisdiction must recognise the re-domicile out. There is a risk, if the old jurisdiction does not acknowledge the re-domicile, that creditors can still sue in the old jurisdiction, and matters become very unclear as to which the governing law of the vehicle should be seen to be. As such, any re-domicile inwards should only be for those jurisdictions which will also agree to the re-domicile to the UK. In particular, whilst the UK recognises that the governing law of a business entity is the place of its location, other jurisdictions (e.g. Germany and Austria) hold to the “real seat” theory – which states that the governing law of a company is where its real seat is. Failure to comply with the governing law of its real seat (e.g. not registering) can mean some of the advantages of the corporate form (e.g. limited liability) fall away. This must be avoided at all costs – and is particularly the case where a company in a “real seat” jurisdiction re-domiciles to the UK but does retain its real seat in its previous jurisdiction.

<sup>1</sup> <https://www.gov.uk/government/consultations/corporate-re-domiciliation>

## **2. From what types of companies, and from which sectors, is there likely to be the most demand for re-domiciliation to the UK, and why?**

We expect the most demand will be from investment vehicles, who have fewer liabilities to be concerned about. These are likely to be the highest constituency. However, trading companies may also seek to re-domicile if the tax advantages are materially advantageous.

It is also worth considering mergers and acquisitions practice. In the UK, corporate acquisitions are undertaken by acquisition: the buyer buys the shares in the seller, and the two separate legal entities proceed post acquisition. In other jurisdictions (e.g. Italy), corporate acquisitions are undertaken by merger: shares are initially bought, but then a legal process (often court-driven) merges the two legal entities into one. In both, a series of new companies are set up, with the buyer (often colloquially referred to as Bidco) being set up in the same jurisdiction as the target. It is easy to see how an inwards re-domiciliation can help keep new company establishments UK based, and may result in legal entities inward re-domiciling as part of this acquisitions process.

## **3. What level of demand might the UK see from firms seeking to re-domicile?**

It is difficult to say – we think there will be initial reticence until a few companies have re-domiciled, and the experience of those companies will dictate how widely the process is used. As such, the precise process – and the point of time at which the company ceases to be governed by its previous jurisdiction but is instead governed by the new one – will be vital.

## **4. From what jurisdictions would companies be most likely to re-domicile to the UK?**

We think that Channel Island companies for which the tax advantages of offshoring are now lesser are likely to transfer most quickly. Political implications may also dictate re-domicile (e.g., the current political environment in Hong Kong).

## **5. Are there aspects to other jurisdictions' re-domiciliation regimes which the UK should seek to replicate or avoid?**

We have no views on this, as we have no experience of outward or inward re-domiciliation given that they are not currently possible under UK law.

## **6. What evidence is there that supports the economic benefits of countries permitting re-domiciliation?**

We express no views on anything other than law, but US academic legal literature (in particular) notes the competitive effect of the market for incorporations, in which if the process is smooth and seamless enough, companies will incorporate in (and re-domicile to) those providing the best terms for a company to be based in.

**7. Are there other administrative, financial, or other barriers that would still prevent a company re-domiciling to the UK even with a re-domiciliation regime being established?**

Equivalence must be very clear between concepts, and any administrative restrictions and hurdles will be very important. Thus clarity and certainty as to the process – e.g. exactly what needs to be provided, when the old jurisdiction “lets go” and the UK “takes hold”, and any transfer requirements need to be drafted incredibly clearly.

**8. What should the Government consider to ensure firms in regulated industries can re-domicile to the UK?**

It should be easy for a UK regulated company to move into the UK (if the other requirements are met). More complicated, though, arises where the company is regulated by another regime, and more attention will need to be paid to that.

**9. Do you have any wider concerns about a re-domiciliation regime that the Government should be aware of?**

The primary one is recognition by other jurisdictions. It is noted that the outgoing jurisdiction will need to provide authorisation, but a re-domiciliation system which results in any jurisdiction challenging the re-domicile will be fatal to the whole system.

**10. The Government’s view is that an economic substance test is not necessary for re-domiciliation. Do you agree?**

Yes – there is no economic substance test to incorporate in the UK, and so it is incongruous to propose one for re-domicile.

**11. Are there factors that would influence your choice of place of incorporation within the UK?**

Yes, UK governmental changes to company law (the PSC regime, and now the National Security & Investment Act) have raised severe challenges to the attractiveness of Scottish vehicles, as it is less attractive to hold their shares in security than English companies. This, coupled with the fact that share security in Scotland involves the transfer of the shares to the lender, is anecdotally driving otherwise Scottish companies to incorporate using English vehicles.

**12. Will the existing arrangements that do not allow companies to move between certain UK nations have a bearing on overseas companies' decisions whether to redomicile in the UK?**

This is unlikely. It may mean that most inward transfers chose to re-domicile to England rather than Scotland, though.

**13. Do you have any views on how the regime should best ensure departing country conditions are met? Is there anything else we should consider?**

This will be key, as the form acceptable to the UK will need to be negotiated and agreed with each relevant departing country. Further, precisely what needs to be confirmed will vary from departing country to departing country. Market participants will need to know which countries *can* be departed from and which cannot. These challenges may necessitate a “white list” approach, in which only departing countries who have gone through this process can be departed from.

**14. Do you have views on our proposed approach, which would allow all bodies corporate to re-domicile to the UK, subject to the relevant entry criteria?**

It is sensible, but creates an array of logistical challenges. The UK's low entry requirements for each business form mean that identical businesses can choose between a range of vehicles. As such, incoming companies will meet the requirements of a number of different business entities. It would be helpful to agree, as part of any “whitelist” approach above, which legal entities from approved jurisdictions can be transferred into which UK company, and where there could be overlaps (e.g. private company and unlisted public company, or limited liability partnership and limited partnership) set out criteria to help filter. For example, it seems evident that an LLP should be able to redomicile to become a company. However, what it means to be an LLP and a company in different jurisdictions differs, thus making the area very confusing without a pre-agreed whitelist with associated vehicle types.

**15. Should we preclude directors who do not have a good standing (i.e. pending court cases) from re-domiciling to the UK? If so, is confirmation from the departing jurisdiction's competent authority the best way of assessing this?**

This seems sensible, but may risk providing a legislative lacuna at which certain directors evade liability by being automatically removed. Some form of temporary stay and periodic fine for those not in “good standing” could achieve both ends. It is worth considering whether “good standing” is the right criteria – in some jurisdictions this is meaningful, but in others (e.g. the UK at the moment) it is not. There is a risk that this could make being “in good standing” important in the UK when it has never been before.

**16. Do you have any views on our good faith criteria?**

It is difficult to understand what it means – how will HMG decide whether an application is being made in good faith? What criteria will be used to judge this? How can someone starting the process (which may

have severe ramifications in their departing country) have any certainty as to what exactly is required here? As such, it seems that this is too vague to be meaningful in practice.

**17. Should it be necessary for firms to have completed a reporting period to re-domicile? What other reporting information should be provided to the Registrar or should it be able to request and is the audited accounts requirement sufficient and proportionate?**

The vast majority of companies will not have filed any information, and so a large number of vehicles would be excluded from the analysis. Perhaps there could be a simplified accounting system for those who had not yet completed their accounts: an interim balance sheet and P&L – whether or not audited – would provide the relevant information without excluding a large number of companies from the regime.

**18. Are the proposed solvency requirements sufficient and proportionate? If not, what would you recommend?**

This seems satisfactory to ensure that the company will not be deemed insolvent in the UK. It is right to ensure that a confirmation be obtained under the departing country's rules to ensure that companies cannot leave quasi-insolvency to come to the UK. The precise ambit of this will vary from jurisdiction to jurisdiction, though, and so again this indicates that a "white list" approach may be helpful.

**19. The Government is not minded to prescribe a minimum turnover/size of companies that can re-domicile. Do you agree?**

The likely costs of the process will impose a self-regulating economic restriction on the size of companies that will choose to re-domicile. There may be commercial reasons why companies with a relatively low turnover/size will choose to re-domicile and they should not be excluded for that reason alone.

**20. Are there any other entry criteria we should consider?**

Where a company has a trading history, it might be sensible to have historic financial information (perhaps for the three previous years) conforming to the requirements of the UK registered as part of the process, to give some perspective to those seeking information on the re-domiciled company as a counterpart.

**21. What measures ought to be adopted to ensure re-domiciliation is not used to harm creditors in other jurisdictions?**

As previously set out, the consent of the previous jurisdiction would be required. Thereafter, UK law on creditor claims, ranking, etc., should be sufficient.

**22. Are there further safeguards required to prevent exploitation of UK rules, which may be more flexible and business friendly than some foreign regimes?**

The decision to re-domicile will be largely based upon a benefit to the company. Denying re-domicile just because the UK regime is more business friendly than the jurisdiction from which the company wishes to re-domicile would seem to defeat the purpose of the new regime.

**23. The Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill makes provision for the disqualification of directors in companies that are dissolved without becoming insolvent. Is this measure sufficient for UK authorities to investigate directors of companies that have re-domiciled?**

As long as the necessary legislative changes were made to include re-domiciled companies.

**24. Given investigations may be necessary what bilateral arrangements may be required with exporting jurisdictions?**

An inter-governmental (public law) agreement with an exporting jurisdiction might be beneficial but for political (as opposed to economic) based re-domiciliation, this may not be practical.

**25. Are there any other matters relating to insolvency that would have implications for a UK re-domiciliation regime?**

Antecedent transactions (transactions at under-value and in fraud of creditors, etc.) may date back to a time prior to the re-domiciliation and would have to be included in the insolvency regime. Would the use by the re-domiciled company of a name that would have been prohibited in the UK allow for the same remedies against the directors of the company? There are a number of issues to be explored in this area.

**26. Do you agree that existing protections and sanctions against director misconduct provide sufficient protection for the UK's re-domiciliation regime?**

The provisions are fit-for-purpose for UK registered companies and should therefore apply to re-domiciled companies, with the caveat that historic act (or omission) from prior to the re-domiciliation would be included within the ambit of the UK regime.

**27. Do you have views, including evidence from other jurisdictions, to inform how the Registrar could seek assurance over the standing of the company before approving re-domiciliation, in order to safeguard the UK's business environment?**

As we have already pointed out "good standing" is not a term of art in the UK and the process to be applied by the Registrar would have to be clear and compatible with the current company formation regime in the UK.

**28. Do you agree that Companies House should have the ability to refuse an application or petition for the winding up of companies in the circumstances as set out above?**

If a Petition is presented to a Court, it should be for the Court to determine whether the Petition is to be granted. In a creditors' voluntary liquidation, there may be grounds for providing the Registrar with a power to refuse to accept the notice but it would have to be a clearly defined power.

**29. Would you be in favour of the UK introducing an outward re-domiciliation regime?**

It is hard to see circumstances where justifying inward re-domiciliation does not also justify outward re-domiciliation and this would give a mutuality of position. There is a potential that only permitting inward re-domiciliation could have a 'chilling effect', by which we mean the full potential of the change would not be realised if companies, once domiciled in the UK, could not leave on the same basis.

**30. What do you see as the economic or other benefits to the UK of allowing outward re-domiciliation?**

Reciprocity in commercial relationships is usually to the benefit of all parties but we make no comment beyond the law. If the UK as a jurisdiction allowed outward re-domicile, it is likely that there would be a greater number of jurisdictions that would reciprocate, allowing for a smoother legal process.

**31. What is your view of the economic or other risks to the UK of allowing outward re-domiciliation?**

The legal risks would be the denial of an amenable forum for creditors (both UK and non-UK based) to pursue payment of their debts. Directors may choose to re-domicile in an effort to escape director-related sanctions (both financial and related to disqualification).

**32. In your view, is there a demand for outward re-domiciliation from current UK-incorporated firms? If so, which jurisdictions would they likely seek to re-domicile to, and why?**

As no such regime has existed to date, we are not aware of any great demand.

**33. What types of companies, and in what sectors, is there likely to be the most demand for re-domiciliation out of the UK, and why?**

We have no views on this.

**34. Are there other administrative, financial, or other barriers that would still prevent a company re-domiciling out of the UK even with an outward re-domiciliation regime being established?**

Each set of circumstances will be largely specific to the company concerned and the jurisdiction to which it wishes to move and so we have no view on this.

**35. What is your view on these potential conditions for outward re-domiciliation? Are there other conditions you think that the Government should require to minimise the economic risks to the UK?**

Introducing a re-domicile regime will necessarily give rise to case-specific issues. As a general rule, however, regulations should not be directed at “one-off” circumstances but to create a “level playing field” between foreign companies and UK companies seeking to apply the regime to their own circumstances.

**36. If the Government are to place a time limit on being domiciled outside of the UK before being allowed to return what would be the positives and negatives in your view? If appropriate to set a time limit, how long should this be for?**

If the conditions for re-domicile are met (including the payment of the fees connected to such a move) there seems no reason to prevent a company returning if it believes it is advantageous to do so (or if it considers its original re-domiciliation to have been disadvantageous).

**37. Is clarification required as to whether a company will become or cease to be UK resident following a re-domiciliation to or from the UK?**

Yes, we consider clarification will be required in legislation. Current provisions are generally fact-specific and require exercise of judgement. For the sake of clarity and certainty in tax treatment, we suggest a clearly set out test will be required, perhaps something akin to the statutory residence test under the Finance Act 2013.

**38. Which of the above options would be preferable and why?**

With regards to inward re-domiciliation, we consider option 1 is preferable. It appears inconsistent with the existing tax treatment of UK companies to allow a company to move to UK and not automatically become UK tax resident. It is hard to see how having re-domiciliation provisions based purely on central management and control could be justified. It also brings clarity which the concept of central management and control often does not. We recognise that this may result in companies having to call on DTA provisions more often, however, we consider that this will be one of the considerations of a company deciding re-domicile.

In relation to outward re-domiciliation, we broadly favour option 1. We consider it is important to consider the mischief which the tax treatment of the regime would be seeking to tackle. Treating a company as

ceasing to be UK resident by virtue of the re-domiciliation is in line with what companies can presently do (albeit in a more complex and burdensome way), for which there are checks and controls to capture tax at the point of exit/asset transfer, and it seems sensible to continue to permit this, subject to paying any exit charges and subject to satisfying the central management and control provisions.

### **39. Are there are any other options which should be considered?**

No comment.

### **40. Do you have any views on how material this risk is, and what additional protections might be introduced to prevent such loss importation?**

We recognise the potential risk here and agree that legislation may need to be strengthened so as to ensure pre-residence losses are not relievable against UK profits. We suggest that any measures should draw a clear line between losses incurred pre-UK domiciliation and those incurred after. We note there are similar provisions in relation to loan relationships legislation.

### **41. Do you have any views on this?**

We consider the proposed approach to market value re-basing to be broadly reasonable and favour current rules being expanded to migrations from companies from non-EU jurisdictions. This approach broadly continues the approach which has been taken in existing CGT rules, for example, gains on UK land held directly or indirectly by non-UK residents. This approach also prevents the generation of tax-deductible losses if market values are lower than cost.

We recognise that internally generated goodwill may cause some concern to HMRC in terms of the suggested approach, due to the associated valuation difficulties and the generally accepted position around base-cost.

### **42. Do you have any views on the impact of the proposals for a re-domiciliation regime on personal taxation?**

In relation to personal taxation, we note that it will be up to the individuals involved to weigh-up the relevant tax implications, for example, in terms of CGT and IHT, when deciding whether to re-domicile a company, however, we do suggest that the regime should take account of the tax treatment of existing options available to individuals to transfer assets abroad.

A change in place of incorporation of a company could change the status of shares which, in-turn, could result in CGT charges that would not otherwise exist. Similarly, the potential for IHT charges could be a disincentive to some businesses considering re-domiciling, for example, investment companies that would not qualify for IHT business property relief (in contrast to trading companies that could qualify).

If outward re-domiciliation is permitted, there is a potential that trustees of a discretionary trust which holds shares in a UK company and where the settlor was non-domiciled, may consider outward re-domiciliation so that assets become excluded property for the purposes of 10-year IHT charges. We consider that this is likely to be caught by the GAAR regime, however, some form of deemed exit charge to mitigate against anti-avoidance could be introduced to put the matter beyond doubt.

For remittance basis users, clarity in the regime would be welcome – for example, at what point does something become a non-UK sited asset and if/when would there be a deemed a transfer of asset abroad? We note the potential for a tax charge to arise in some circumstances where a company re-domiciles to the UK due to the origins of its value being foreign income and gains. This may act as a disincentive to some businesses. We suggest that there would be merit in the introduction of an apportionment regime to mitigate against this, where income/gains are apportioned based on the company being UK resident or not at the time of the income/gains.

In relation to the Transfer of Assets Abroad provisions, there seems to be a potential that these could be engaged under a re-domiciliation regime. We suggest that this should be clarified.

#### **43. Do you have any views on the impact of the proposals for a re-domiciliation regime on STS?**

In relation to take-overs, we recognise that there may be a need for some kind of time-based charge to prevent companies undertaking outward re-domiciliation to avoid stamp duty charges, and thereafter re-domiciling into the UK within a short period of time. The temporary non-resident regime for CGT would be one example that may merit consideration. Any such timeframe would require careful consideration so as not to unfairly impact upon those businesses who are seeking to move reasonably and without tax motivations.

More broadly, we consider there would be merit in the territorial scope rules for SD and SDRT being aligned.

#### **44. Do you have any views on the impact of the proposals for a re-domiciliation regime on VAT?**

We have not identified any particular anti-avoidance risks connected to VAT.

#### **45. Do you have any views on any other tax consequences of a company re-domiciling in or out of the UK and whether any other amendments to UK tax law should be considered?**

In relation to the tax consequences generally, we note that a company seeking to re-domicile to the UK would need approval from the outgoing jurisdiction to re-domicile and the re-domiciliation would be subject to any existing double tax treaties. However, there are some specific matters which may merit consideration.

We note the potential for inward re-domiciliation to be used by a company which is going to be paying dividends in order to avoid foreign withholding taxes. This could result in companies seeking to re-domicile to the UK to avoid foreign withholding taxes, and thereafter seeking outward re-domiciliation within a short timeframe. We consider that the GAAR regime and abuse of law doctrines which exist in other jurisdictions (for example, in Germany and France) is likely to be sufficient to mitigate against this. A charge for temporary residence could also be considered.

In relation to the tax consequences of outward re-domiciliation (addressed in broad terms at Q35 and 36 above), we note the potential for tax charges which may prejudice certain types of shareholders, for example, minority shareholders in certain entities could face a tax charge which is out of their control. It is likely to be complex to design and operate a charging regime which can take fairly account of all potential tax consequences.

We have not identified any potential consequences in connection with the Scottish devolved taxes.

While not necessarily a tax consequence, we note that the requirements of the Trust Registration Service may act as a disincentive to companies seeking to re-domicile to the UK where shares are held in a trust and there is otherwise no UK connection. The relevant details would need to be disclosed to HMRC under the Trust Registration Service regardless of tax liability.

In order to ensure certainty and clarity in the law, it will be preferable to ensure that the relevant tax provisions are clear within legislation itself, rather than relying on guidance to set out the detail of the provisions.

**For further information, please contact:**

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

[alisonmcnab@lawscot.org.uk](mailto:alisonmcnab@lawscot.org.uk)