

## EXECUTIVE SUMMARY

Businesses often incorporate as companies to benefit from separate corporate personality and limited liability for shareholders. The EU right to freedom of establishment allows companies duly incorporated in one Member State to be recognised and enjoy these benefits in any other Member State without question. The UK's decision to withdraw from the EU removes this right from UK companies and other EU corporates in the UK. There is a material risk that post-Brexit UK companies operating in the EU could cease to be recognised, with serious consequences for shareholders and creditors.

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# The Future of UK-EU Corporate Mobility

Dr Stephen Connelly

Companies are legal creatures and only exist if recognised by a state. This is not a problem when a company operates in its 'home' state of incorporation - local company law ensures this. Difficulties arise when a company leaves its home state and seeks to operate in a different 'host' state.

The host state could refuse to recognise the company, causing serious consequences. EU law provides 'freedom of establishment': any company duly incorporated in one Member State must be recognised without discrimination in all EU states.[1] The result has been significant corporate mobility across the single market.



With Brexit, UK companies will lose this right to freedom of establishment. Companies with a significant presence in an EU country should prepare for the following possible scenarios:

SCENARIO 1	SCENARIO 2	SCENARIO 3
<p><b>Company is now local</b></p> <ul style="list-style-type: none"> <li>The company is re-characterised as a local company</li> <li>The company is not compliant with local corporations law</li> <li>Contracts and claims of the company are deemed unenforceable</li> <li>Members of the company become personally liable</li> </ul>	<p><b>Company does not exist</b></p> <ul style="list-style-type: none"> <li>The company is deemed not to exist</li> <li>The business is re-characterised as a partnership</li> <li>The shareholders become partners with unlimited liability</li> </ul>	<p><b>Company exists, but...</b></p> <ul style="list-style-type: none"> <li>It is only allowed to trade subject to additional admission conditions, such as a license or greater capital requirements</li> </ul>

## Loss of freedom of establishment

### Four worked examples



'UK1 Ltd' is incorporated to develop land in Germany. Its shares are later sold to German nationals. UK1 Ltd signs up a German contractor, but the contractor's works are faulty and UK1 Ltd sues it in Germany.

1

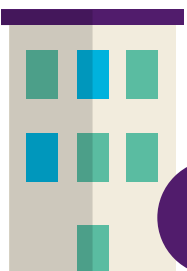
**Result: The German court re-characterises UK1 as a non-compliant German company. The company does not exist and so is unable to sue the German contractor.[2]**



'UK2 Ltd' is incorporated with £1 of share capital, with a view to trade into Denmark. The Danish regulator unilaterally decides that UK trading companies should have a minimum capital of DKK50,000.

2

**Result: The authority may validly demand that UK2 Ltd top up its capital or cease trading in Denmark.[3]**



'UK & NI LLP' offers its Amsterdam-based member-partners Dutch health insurance. When the LLP makes a claim, the Dutch insurer seeks to avoid paying out, arguing that the member-partners are not 'employees subordinate to a corporate'.

3

**Result: The Dutch court could hold that the LLP is not a corporate in the required sense, and allow the policy to be avoided.[4]**



A German company in difficulty decides it is advantageous to migrate its business to a new UK company, to take advantage of UK insolvency law. Its creditors object.

4

**Result: A German court could refuse to recognise the migration, arguing that the business remains in Germany and that the UK company is therefore German.[5]**

#### References

[1] Articles 49 and 54 Treaty on the Functioning of the European Union.

[2] *Überseering BV v Nordic Construction Company Baumanagement GmbH* (2002) C-208/00.

[3] *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (1999) C-212/97.

[4] *The Segers Case* (1986) ECR I-02375.

[5] Cf. *Hans Brochier Hldg Ltd v Exner* (2006) EWHC 2594.

## POLICY RECOMMENDATIONS

- 1** Businesses with an EU presence, using a UK corporate form (LTD, PLC, LLP), should undertake an immediate legal risk assessment of the consequences of loss of freedom of establishment (*See Scenarios Page 2*).
- 2** Creditors and shareholders of these UK corporates should undertake due diligence to protect their position and investments.
- 3** HM Government should expressly deal with the loss of freedom of establishment in the UK-EU Withdrawal Treaty, e.g. via a grace period for recognition and re-registration.
- 4** To encourage inward investment, HM Government should provide assurances and guidance to incoming EU corporates on how UK law will continue to recognise them.
- !** Anyone wishing to organise a briefing seminar or to explore these legal issues in greater detail should contact Dr Stephen Connelly (details below).



### Dr Stephen Connelly

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