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Corporate Re-domiciliation: Regulatory Policy and Technical Challenges

A. INTRODUCTION

The UK Government’s public consultation on corporate re-domiciliation concluded on 7 January 2022.¹ Re-domiciliation is a process whereby an overseas corporate entity transfers its registration to another jurisdiction without any interruption to its business or legal continuity. A company may wish to do this, for example, to restructure, rationalise group structures, avail itself of different laws and tax rates, or reflect the business realities of its operations. Re-domiciliation transcends tax issues and refers, in this context, to admission to the UK company register as a UK company. In the absence of a re-domiciliation process, overseas companies which wish to relocate their legal identity to a UK jurisdiction may set up a UK parent holding company or incorporate a UK subsidiary and transfer the business to it. In more complex cases, a scheme of arrangement under the Companies Act 2006, Part 26, might be used to compromise claims against the old vehicle to enable the restructure. Often the old company must be wound up, a new company incorporated, and the assets transferred. Old creditors must either be repaid in full or novate their claims to be owed by the new vehicle. Such transfers can trigger taxable events and ultimately involve the liquidation of one entity and its replacement with another. This position also applies intra-UK: a Scottish company cannot become an English company other than by winding up and transferring its assets to a new vehicle.² This position can be contrasted with other jurisdictions which do allow corporate re-domiciliation.³ This UK Government consultation considered whether the UK should provide such a mechanism, noting that any change would require primary legislation.

¹ Department for Business, Energy & Industrial Strategy et al, Consultation on Corporate re-domiciliation (2021).
³ Examples include Singapore, Hong Kong, Ireland, some US states, etc: BEIS para 2.8.
The UK Government’s initial proposal is that the UK allow inward re-domiciliation (non-UK companies becoming UK companies), if permitted by the laws of their existing jurisdiction. The Government is more ambivalent to outward re-domiciliation (UK companies becoming non-UK companies), noting that it is considering the merits of establishing such a scheme alongside the inward process. It is “not minded at present” to enable intra-UK changes.

This article explores policy and technical company law issues which arise in establishing a re-domiciliation regime, including different policy objectives which could be used to justify re-domiciliation, the implications for rule design arising from different objectives, and technical questions as to the process of re-domiciliation.

B. POLICY

As with any legislative initiative, the policy objectives must be clear from the outset so that an appropriate re-domiciliation framework can be devised. Unfortunately, the consultation paper does not clearly outline the UK Government’s policy aims, meaning these must be inferred.

Any re-domiciliation regime needs to avoid providing an opportunity for regulatory arbitrage, whereby re-domiciliation serves to avoid rules that would otherwise apply to a company. This risk is lower than it initially seems—re-domiciliation does not require the pretence that the company has *always* been a UK company. Rather, it applies the law of the old jurisdiction until the exact moment of re-domiciliation, and UK law afterwards. Transferring jurisdiction would not automatically end claims against the company in that old jurisdiction, but it may make it more complicated and challenging for creditors, minority shareholders, employees or customers to hold the company to account, so there is some potential for forum shopping. There are reputational risks for the UK in being seen as facilitating such

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4 See J Harris, “Government consults on introduction of a corporate re-domiciliation regime” (2022) 43 The Company Lawyer 56.
5 BEIS para 4.4.
6 Ibid para 3.4.
flights from other jurisdictions—especially if, as a consequence, dissatisfied claimants are left behind. For this reason, a residual ‘public interest’ threshold (such as requiring good faith or allowing consideration of national security risks) may be included to allow applications to be refused on this basis.8

Identifying avoidable risks is different, though, to establishing the positive policy objectives behind the introduction of a re-domiciliation regime. Possible policy objectives might include economic benefit to the UK and support for open markets.9 The consultation paper suggests that the result of facilitating re-domiciliation will be “to increase the attractiveness and availability of the UK” as a business location.10 Allowing re-domiciliation, it notes, could bring investment, skilled jobs, increase demand for professional services, enhance and expand the innovation base, and contribute to the UK’s world-leading capital markets.11 It thus seems that re-domiciliation is not an end in itself, but a means to economically benefit the UK. This approach justifies the requirement that an applicant company be solvent, be a going concern, and not be in liquidation (or any similar process),12 though the proposal also allows for a mere one-year trading record13 and anticipates that applicant companies may become insolvent shortly after re-domiciling.14 If jobs and economic growth are the aim, it would seem appropriate to include an economic threshold, as is the case, for example, in Singapore, which requires entities to meet two of three financial or sizing criteria.15 No such provision is made in the current proposal. Yet, the proposal includes that an applicant company be required to provide a “wider impact” report,16 which seems to suggest a need for some economic substance. With economic scale

8 BEIS para 3.7.
9 Ibid paras 1.2, 1.5, 4.5.
10 Ibid para 1.4.
11 Ibid paras 1.4-3.2.
12 Ibid para 3.7.
13 Ibid para 3.7.
14 Ibid para 3.10.
16 BEIS para 3.7. Most consultation respondents agreed that there should be no turnover/size requirements: n.22, para 3.60.
and a trading record, a minimum regulatory framework could be adopted, as the applicant entities would be established businesses.

Equally, it may make economic sense to attract insolvent or near-insolvent entities to increase demand for professional services and reinforce the UK’s significant grip on managing complex cross-border insolvencies. The attractiveness of UK insolvency and restructuring regimes for large and complex multinational insolvencies is well known, often involving use of the Companies Act 2006, Part 26 (schemes of arrangement) and now Part 26A (restructuring plans). The courts have played their part by being open to “good forum shopping”, allowing UK jurisdiction to trump that of the place of incorporation.\(^\text{17}\) Allowing overseas companies in financial distress to re-domicile here would allow those businesses to avail of UK mechanisms under the rules of the place of incorporation. If these considerations are the policy drivers, then the framework should allow for re-domiciliation applicants to be insolvent or in financial distress.

It may be that the policy objective is simply to reinforce a political message of “Open Britain”. This objective would require merely a bare-bones, facilitative, framework aimed at attracting overseas businesses which can then be trumpeted as wishing to “relocate” to the UK, even if these entities do not bring employment or other economic activity, and even if they are insolvent. Re-domiciliation of itself does not require any relocation or physical presence of a business in the UK. Possibly, the proposal is less about regulatory arbitrage by companies and more about regulatory competition by the UK, post-Brexit, now that the EU has adopted a Directive on cross-border mergers, conversions and divisions (which will come into force on 31 January 2023).\(^\text{18}\) This Directive will facilitate EU companies wishing to re-domicile between Member States and reinforce their freedom of establishment.\(^\text{19}\) The UK

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19 The Directive gives effect to existing ECJ jurisprudence, especially Polbud (Case C-106/16) [2018] 2 CMLR 5.
Government’s policy may be to modernise the UK framework to ensure that UK company law does not fall behind competitor jurisdictions. That driver might require wider reforms than re-domiciliation, such as providing for cross-border mergers.\textsuperscript{20}

Whatever the objective, excluding outward re-domiciliation by UK companies creates policy inconsistencies. This would render inward re-domiciliation unattractive to potential client companies, since they will not wish to be locked into the UK jurisdiction any more than the jurisdiction which they are leaving. Further, preventing outward re-domiciliation while allowing inward re-domiciliation runs contrary to a flexible, enabling, open markets approach based on freedom of choice, which is the foundation of UK company law policy.\textsuperscript{21} Indeed, a majority of consultation respondents favoured permitting inward and outward re-domiciliation, though the Government notes that respondents were unable to evidence the potential demand for outward re-domiciliation.\textsuperscript{22}

Freedom of choice, economic efficiency and open markets would suggest that provision should be made also for intra-UK re-domiciliation. However, prohibition might be justified if the policy basis is state-level economic benefit, since internal re-domiciliation merely redistributes corporate activity within the UK. Equally, a failure to provide for intra-UK re-domiciliation may simply reflect a political unwillingness to alter the current balance of incorporations. Even so, not allowing for intra-UK re-domiciliation is likely to create policy contradictions. Despite this conceptual concern, a lack of firm support for intra-UK re-domiciliation, at least as evidenced by the Government’s summary of consultation responses, is likely to remove this issue from any future agenda.\textsuperscript{23}

There are, therefore, several unresolved policy challenges and inconsistencies which the consultation has surfaced. The opacity as to the precise policy goals makes

\textsuperscript{21} Company Law Review Steering Group, \textit{Modern Company Law for a Competitive Economy, Final Report}, vol 1, ch 1, para 1.10-1.15.
\textsuperscript{22} HM Government, \textit{Corporate Re-domiciliation Consultation: Summary of Responses} (2022) paras 2.4, 3.33, 3.82-3.84, 3.89.
\textsuperscript{23} Ibid paras 2.5, 3.38.
it difficult to determine the appropriate overall framework, which in turn impacts on the detailed rules required, to which we now turn.

C. TECHNICAL CHALLENGES: ENTRY ON THE REGISTER

Whatever the policy objectives of any re-domiciliation regime, there are many practical questions as to the process which must also be addressed. How these questions are answered will dictate how definitive the UK’s company register can be said to be.

Many of the technical matters surrounding re-domiciliation will be for the incoming entity’s advisers prior to making a re-domiciliation application, for example, ensuring that the corporate form, articles of association, and board composition meet the requirements of the Companies Act 2006. Commonly, the incoming entity must re-register any outstanding charges so they appear on the public record without affecting their perfection (which will have already been secured under their previous law of incorporation). A key issue is that there must be a specific moment at which re-domiciliation occurs, with the Companies House record being definitive as to the company’s status.25

One possibility is to adopt an objective administrative process, based on a clear set of deliverables, which will be required for admission by Companies House to the register.26 Once met, the existing jurisdiction would release the entity from its register. Ideally, admission and release would occur simultaneously,27 but that may be difficult to achieve. One option is to limit re-domiciliation to jurisdictions which have reached bilateral agreements with Companies House whereby the respective registries agree to move in tandem once both registrars are satisfied that their jurisdiction’s re-domiciliation requirements have been met. Of course, agreement might be reached

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24 Cf Companies Act 2006 s859A ff.
27 Directive 2017/1132 art 86p(3), as amended, requires the existing registry to remove immediately the registration of the departing company on notification by the new registry of the company’s new registration.
quickly with jurisdictions, such as Canada or New Zealand, where there is already a commonality of corporate processes and registries. Such an objective approach strengthens the UK register: a company would only be admitted if the existing jurisdiction has released it. This approach would reduce opportunistic registry-hopping, as both registries must agree, but would also limit the regime’s scope to certain jurisdictions.

Alternatively, a subjective approach would leave the moment of transfer to the UK jurisdiction, based on a confirmation from the transferring company. Companies House would check that the company may re-domicile under the outbound jurisdiction’s laws, then ask the company to confirm that they have done all that is required to re-domicile. This is simpler, but less certain: if the incoming company lies or errs, it would still be on the UK register, which is conclusive as to the fact of incorporation in the UK, while also remaining on the overseas register. Applying a subjective approach would mean that courts would need to determine ex post the company’s status and which governing law would apply. Thus, a subjective approach to re-domiciliation would weaken the register as a definitive statement of a company’s status. It is envisaged that, in these circumstances, Companies House would have powers to seek the winding up of the UK company, but that option may not materialise for some time after the registration.

The choice between approaches depends on whether re-domiciliation is to be regarded as a matter purely for UK law (so could accept a subjective approach), or, as a matter of respect for the outgoing jurisdiction and in the interests of comity and clarity, entry on the UK register should only be permitted alongside removal from the foreign register.

The other difficult “timing” issues which would need to be addressed arise from those areas of UK law which sometimes require a retrospective examination of facts and circumstances. For example, historic transactions concluded within a certain period prior to a company’s insolvency can be subsequently challenged upon that

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28 Companies Act 2006 s 15(4).
29 BEIS para 3.15.
insolvency,\textsuperscript{30} likewise derivative claims and unfairly prejudicial petitions have a backward trajectory. The question is whether that backward examination can consider events which occurred when the company was an entity under the previous jurisdiction or is limited to events postdating admission to the UK register. The latter approach might encourage forum shopping while the former may be unfair if relevant acts could not have been challenged under the law of that jurisdiction. A further issue is determining the value of distributable profits which a company may have, which is dependent, essentially, upon it having accumulated realised profits.\textsuperscript{31} The issue is whether there are indeed distributable profits where the governing accounting principles differ significantly as between the former jurisdiction and the UK. There are also questions as to whether the Companies House record should start afresh from the date of UK registration or whether some measure of corporate history should be available on the public record, comprising at least an indication of the incoming entity’s prior registration(s).

\textbf{D. CONCLUSION}

Clearly the consultation document is only an opening gambit, as was acknowledged by the UK Government.\textsuperscript{32} While the Government has committed to further development of the proposal and the intention to introduce a re-domiciliation regime,\textsuperscript{33} issues of policy and process will need to be addressed before attempting to devise an appropriate framework. Both categories of issue will impact on the detail and conceptual framework of UK company law.

Interestingly, while a majority of consultation respondents supported outward re-domiciliation alongside inward re-domiciliation, they were unable to offer firm evidence of demand for either option,\textsuperscript{34} so time will be needed for a more detailed analysis and engagement with the business community. From a Scottish perspective,

\begin{itemize}
\item \textsuperscript{30} See Insolvency Act 1986, ss 238-246ZB; also Company Directors Disqualification Act 1986 s 7A.
\item \textsuperscript{31} Companies Act 2006 s 830.
\item \textsuperscript{32} HM Government (n 22) para 2.2.
\item \textsuperscript{33} HM Government (n 22) paras 1.4, 4.1.
\item \textsuperscript{34} HM Government (n 22) paras 3.17, 3.89.
\end{itemize}
it may be advantageous that there seems to be little support, at least among consultation respondents, for intra-UK re-domiciliation, as recent research suggests that Scots law may lose out: it is difficult enough to attract the incorporation of new Scottish companies, without adding the need to retain existing companies. Scots private laws need to modernise to mitigate its unattractiveness compared to English law. The potential for re-domiciliation makes this issue even more acute.

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35 HM Government (n 22) paras 2.5, 3.38.  