

Response to Brexit-related queries from UK representatives

1. Evidence of real and effective establishment

As seen in Communication No. 2/2019 of the Executive Director of the Office of 22 February 2019 (as amended on 12 April 2019) on the impact of the United Kingdom's withdrawal from the European Union on certain aspects of the practice of the Office, specifically in paragraph 42, in the event a UK representative requests a change of establishment to another EEA Member State, the Office may require the submission of evidence that real and effective business is being carried out from the new place of establishment. The same applies, where the representative requests a new (second or subsequent) ID in another EEA Member State, while maintaining the existing UK based ID.

In practice, in all cases there is a request for change of legal address or creation of a new (subsequent) ID, the Office is objecting by requesting evidence that the new address reflects a real and effective place of business or employment of the requestor, and is not merely a post office box or an address for service in the EEA. In our objection letter we clarify that the evidence should not be limited to the mere existence of premises at these addresses but should prove real and effective business being carried out and invoiced from the different locations by the requestor.

Similar objections are raised where a request is received for the creation of a new association ID number in a different Member State, where the association members are identified as being the same members as those already linked to an existing UK based association.

In order to clarify, with this objection we are not requesting evidence of the existence of a physical location (such as an office), but rather evidence that the requestor, or the individual association members, are physically present at the premises at the new address and carrying out business or employment from this address. This presence does not have to be full time nor the exclusive place of business or employment of the requestor, however we require evidence that each person is effectively working from the new location.

Consequently, evidence in the form of photographs, office rental contracts or utility bills, flight tickets proving regular flights to and from the country, company invoices with no link to the individual representative, etc. are not considered sufficient. Arguments not supported by evidence are not deemed sufficient either, nor are claims of potential future establishment in the new EEA Member State. Additionally, claims that all of the UK based association members (i.e. at the UK 'head office') may, at any given point of time also work from the new address (any 'sub-office') are also deemed insufficient. This applies also to partners in a LLP, owing to the different roles partners can have, the mere fact that the requestor is a partner in the LLP does not as a matter of course prove real and effective business or employment of the requestor in one of the international sub-branches in another Member State.

While it is not possible to provide an exhaustive list of which evidence is sufficient, as each case must be assessed on its own merits, we will consider any form of evidence that is deemed relevant by the requestor for proving a link between his/her personal business establishment at the new address. Evidence we have accepted for example consisted of official documents of incorporation of a company (such as an excerpt of the public company register including names of office managers and directors), employment contracts, official evidence of tax establishment, etc. While a single item of evidence may not be sufficient, a combination of items will strengthen the probative value of the evidence as a whole.

We also highlight in our objection letters that all personal and confidential data can be removed or blacked out from the evidence.

2. EEA nationality requirement: changing from “professional representative” to “legal practitioner”

Legal practitioners (Art 120(1)(a) EUTMR) do not have to be nationals of an EEA Member State.

Therefore, if there are any persons currently entered on the list of “professional representatives” before the Office (under Art 120(1)(b) EUTMR), that are barristers, solicitors, or registered trade mark attorneys, and have their qualifications recognised in another Member State which entitles them to act before the national office in question (e.g. Certificate of Admission to the Law Society of Ireland), they can be entered into the Office’s database as a legal practitioner. They will still have to comply with the establishment requirement (see previous point). If successful, the Office will take note of the change of type of representative: the person will be removed from the list of ‘professional representatives’, and entered into the database as a ‘legal practitioner’.

3. Exemptions

As seen in paragraph 49 of Communication No. 2/2019, the Office will refuse any request for exemption from the nationality requirement received prior to the withdrawal day, where the requestor is a UK national. The Office is not in a position to make any exceptions in this regard, irrespective of the personal circumstances of each of the requestors.