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Legal Updates

ACCELERATED DIVERGENCE POST-BREXIT

On Monday, the signing by U.S. President Trump of an executive order implementing the new US-UK trade deal, hours or days ahead of another expected trade deal between the US and the European Union, stresses once again the growing divergence between the UK and the EU following Brexit. The full details of this agreement and of a future US-EU agreement are yet unknown but such divergence underlines further the need for overseas investors to consider their operations in Europe in light of the unique post-Brexit situation.

This is in particular true of cross-border corporate structuring, which has long been a key feature of European business integration. The UK's exit from the EU in 2020 significantly affected the legal frameworks that had facilitated mergers, restructurings and joint ventures across the Channel. Since then, businesses and their advisors have had to adapt (revert) to a more complex legal environment and secure an understanding of both English and continental laws to carry out their corporate projects.

Before Brexit, UK companies benefitted from the EU Cross-Border Merger Directive (2005/56/EC)[1] which enabled streamlined mergers between companies in different EU member states[2]. Today, this regime no longer applies to UK-EU transactions: UK companies can no longer merge directly with EU companies (and vice-versa) through the simplified procedures enabled by the Directive, the principal of which was merger by absorption (the existing company absorbs one or more other merging companies)[3].

Then, the principal effect of a UK-EU cross-border merger were that (1) the assets and liabilities of the non-surviving entity and the rights and obligations arising from its employment contracts, were automatically transferred to the surviving entity, and (2) the non-surviving entity was dissolved without going into liquidation. Today, companies must rely on more traditional methods of achieving similar results — involving the lex societatis of each of the companies involved.

Although less streamlined than a merger, the cross-border acquisition of assets or shares remains of course a possibility. Combined with a holding company structure and unified cross-border operations, companies may set up and manage parallel legal entities in each jurisdiction. In addition, group consolidation can be achieved in each country by coordinating the mixed use of national tools for intra-country mergers, and for the European side, the laws implementing the Directive nationally, to maximise the simplification of the group across the UK and, if necessary, more than one EU (or EEA) member state. Rather than relying on a single legal transaction, restructurings require to occur in stages, such as initial share acquisition, followed by intra-group mergers or asset transfers. Establishing equivalent entities in each jurisdiction involved allows for flexibility in asset flows and regulatory engagement. Relocating or reconfiguring holding company structures to more favourable jurisdictions, such as Luxembourg or Ireland, may facilitate ongoing EU operations while preserving links to the UK.

Hence key legal considerations now rule the structuring of cross-border transactions: governing law and jurisdiction, particularly where mutual recognition of judgments is no longer guaranteed, but also taxation considerations in the absence of automatic neutrality provisions, as mergers and asset transfers can trigger tax liabilities on both sides. Differences in corporate governance must also be addressed (board operations and employee representation) as well as regulatory compliance, which covers not only sector-specific approvals but also merger control/ competition law reviews (potentially duplicated notifications) and foreign investment screening (the National Security and Investment Act 2021 in the UK, the Foreign Direct Investment Screening Regulation 2019/ 452 and the national regimes in the EU)[4]. Ongoing bilateral discussions may eventually restore simplified processes and shared approaches, but for now, companies must operate within a fragmented legal environment.

The recent Carlsberg Britvic UK merger is one such example. In January, the Danish multinational brewer Carlsberg Group[5] announced that its wholly owned subsidiary Carlsberg UK Holdings Limited had completed the acquisition of the UK soft drinks business Britvic plc following the High Court approval of the takeover by way of a scheme of arrangement[6]. This followed the approval of the UK Competition and Markets Authority and the EU Commission last December and the approval of Britvic's shareholders last August. The process of combination of the two businesses had begun in July 2024 when the Danish brewer Carlsberg announced its recommended offer to acquire multi-brands soft drinks player Britvic plc to create a single integrated beverage company in the UK called Carlsberg Britvic. Britvic shares were suspended and delisted shortly after the court approval.

It is conceivable that, but for Brexit, the businesses would have been combined in reliance on the EU merger regime. Given the absence of a single legal tool, successful UK-EU cross-border restructuring now requires a multi-jurisdictional strategy that leverages the available tools without relying on such a regime. As for the UK, it continues to offer flexible and court-sanctioned procedures to implement complex restructurings, such as schemes of arrangement and restructuring plans. For strategic cooperation, joint ventures remain a viable solution, often governed by shareholders' agreements with bespoke exit and dispute resolution mechanisms.

The era of simple, EU-facilitated cross-border mergers is over for UK companies—but advisors with expertise in both jurisdictions are also uniquely positioned to guide clients through the new regulatory environment: proactive planning and precise execution are key to successful cross-border mergers and reorganisations in the post-Brexit era.

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1. Implemented in the UK as the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974).
2. Extending to European Economic Area (EEA) countries.
3. The Regulations also permitted merger by absorption of a wholly owned subsidiary and merger by formation of a new company (two or more companies merge to form a new company).
4. See earlier articles: https://www.linkedin.com/pulse/tightening-european-unions-powers-review-foreign-direct-brochet-gweyc and https://www.linkedin.com/pulse/national-security-investment-act-2021-annual-report-2024-brochet-rurqc.
5. Carlsberg A/S.
6. Under Part 26 of the Companies Act 2006.

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