Brexit

Key issues for corporate law and corporate M&A transactions

1 February 2020

Background

On 31 January 2020 (at midnight CET, 11pm UK time, **exit day**), the UK ceased to be a member state of the EU, and the European Communities Act 1972 – the statutory basis for giving effect to EU law in the UK – was repealed. This is a profound change, but its immediate impact on UK law and regulation is limited in two important ways.

- Under the UK-EU agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), virtually the whole of EU law remains "applicable to and in the UK" from exit day until at least 31 December 2020. The Withdrawal Agreement calls this the "transition period". Here, we call it the "**implementation period**", following terminology used in the European Union (Withdrawal Agreement) Act 2020 (the Act **2020**). The 2020 Act implements the Withdrawal Agreement into UK domestic law.

- Under the European Union (Withdrawal) Act 2018 (the **2018 Act**), all the EU law that applies in and to the UK immediately before the end of the implementation period (a substantial proportion of all UK regulation) will continue in force as UK domestic law (with some modifications) unless and until it is replaced or amended by new UK legislation. Under powers contained in the 2018 Act, the UK government has already issued a large number of statutory instruments to amend that "on-shored" body of law, and make it fit for purpose as domestic UK legislation in a post-Brexit environment. These statutory instruments are due to come into force at the end of the implementation period.

The Withdrawal Agreement provides for the implementation period to end on 31 December 2020, unless the UK and EU agree, by 1 July 2020, that it should be extended for a further one or two years. The UK government has indicated that it does not wish to seek such an extension, and the 2020 Act states that the implementation period ends on 31 December 2020.

Deal or no deal?

The implementation period gives the UK and EU a time-limited opportunity to negotiate, against a stable background, the terms of their future relations in respect of trade and the other areas that are currently regulated by EU law. At the end of the implementation period, any given area of UK-EU relations either will or will not be regulated by a new UK-EU agreement (a **future relationship agreement**).

While experience suggests that nothing is certain about the Brexit process, the text of the political declaration signed between the UK and EU in October 2019, suggests that the law around the establishment of companies is unlikely fall within scope of any future relationship agreement. The position, therefore, in this area at the end of the implementation period will effectively be one of "no deal". Below we consider the likely impact of this in relation to:

- company law in the UK; and

- the law applicable to UK companies in other EEA member states.

Company law in the UK

The establishment and regulation of companies in the UK is primarily a matter for domestic law, albeit subject to EU minimum harmonisation directives (for example, covering incorporation, capital maintenance and disclosure).

The UK Companies Act 2006 (**Companies Act**) and related secondary legislation will, in the short term at least, remain largely unaffected by EU law ceasing to apply in the UK at the end of the implementation period. However, a small number of changes will be necessary to:

- address the position of EEA companies with registered establishments in the UK;
- revoke legislation which relates to participation in pan-EEA entities; and
- ensure that the legislation does not otherwise provide preferential treatment to EEA companies or EEA states which would breach WTO Most-Favoured-Nation rules; and
- correct technical drafting deficiencies.

Originally put in place for the possibility of a "hard Brexit" on exit day, secondary legislation[1] made under the 2018 Act to address these issues is already on the statute book and is due to come into force at the end of the implementation period. Key points in this legislation are as follows.

- The various registration, filing and disclosure requirements on companies incorporated outside the UK that have opened a UK establishment (branch or place of business) are currently less onerous in respect of EEA-incorporated companies as compared with non-EEA-incorporated companies. From the end of the implementation period EEA-incorporated companies will be subject to the same requirements as non-EEA-incorporated companies, subject to a three-month transition period to enable them to comply with the additional requirements.
- The company name checks applied to an EEA company that wishes to register a UK establishment will, from the end of the implementation period, be the same as for all other overseas companies.
- The filing requirements for the appointment of an EEA company as a corporate director or secretary of a UK company currently require less information to be provided to Companies House as compared with the appointment of a non-EEA company. Again, this distinction will cease from the end of the implementation period, subject to a three-month transition period.
- Current companies legislation gives preferential treatment to EEA (including UK) credit reference agencies, credit and financial institutions to access protected information (date of birth and address of company directors) from Companies House. It also sets out that only EEA data processors can be used by these businesses for processing that protected information. From the end of the implementation period, subject to a one-year transitional period, this will be restricted to those agencies and institutions carrying on business in the UK, to avoid giving preferential treatment to those carrying on business in the EEA.
- The rules regarding the shareholder authorisation required for a UK-incorporated company's political donations and expenditure will, from the end of the implementation period, only apply to UK donations and expenditure.
- Any SE (a European public limited-liability company which can be created and registered in any EEA member state) registered in the UK will, at the end of the implementation period, automatically convert to a new UK corporate form: a UK Societas. As much of the existing SE framework as possible will be retained for this domestic entity. However, those parts of the framework that no longer have practical application (for example, because they relate to reciprocity between EEA member states) or are otherwise no longer appropriate will be removed. The intention is that a UK Societas will be a temporary stage for entities rather than a long-term corporate UK choice. SEs will be able to convert to UK public limited companies without the current need to wait two years. It will not be possible to create and register any new UK Societas.
- An EEIG is a form of association between companies or other legal bodies, firms or individuals from different EEA member states wanting to operate together across national frontiers. An EEIG can be set up in any EEA member state. To ensure that any EEIG registered in the UK continues to have a clear legal identity, any EEIGs registered in the UK immediately before the end of the implementation period will be automatically converted to a new UK corporate form: a UK Economic Interest Grouping (UKEIG). The new corporate form preserves the current

[1] The Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2018; the European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018; and the European Economic Interest Grouping (Amendment) (EU Exit) Regulations 2018. This note does not cover the position in relation to accounts and audit matters, which are the subject of separate regulations.

framework, unchanged as far as possible and appropriate, on a UK only basis. It will not be possible to create and register any new UKEIGs.

Law applicable to UK companies in other EEA member states

Whereas domestic law in the UK recognises the limited liability of companies incorporated in other jurisdictions, regardless of whether that jurisdiction is in the EEA or not, this may not be the case under the local law of other EEA member states.

For UK-incorporated companies, Article 54 of the Treaty on the Functioning of the European Union continues to override any such local law rules during the implementation period. However, at the end of the implementation period , UK-incorporated companies will no longer have the Treaty right to freedom of establishment in other member states. Local law rules will then determine the treatment of UK companies in each EEA member state. In a member state that applies the "real seat" principle, local law may provide that a UK-incorporated company with its central administration or principal place of business in that country is not locally incorporated. Local law may therefore treat the entity not as a company with separate legal personality but as a partnership, and consequently its shareholders may have personal liability for its debts.

Similarly, a branch of a UK-incorporated company in an EEA member state will become a branch of a "third" country (i.e. non-EEA member state) company in that jurisdiction. A member state's domestic company law for third country companies (e.g. on branch registration) may differ from EU law, which it must apply to any branch of a company incorporated in another EEA member state.

More generally, UK businesses that own or run business operations in EU member states may face changes to the law under which they operate, depending on the sector and EU member state as the result of the UK becoming a "third", i.e. non-EEA, country.

Corporate M&A transactions

The vast majority of corporate M&A transactions, whether domestic or cross-border, are primarily governed by private contractual arrangements. That will remain the case. English contract law is often chosen to govern both domestic and cross-border M&A transactions and is largely unaffected by EU regulation. However, parties should obviously ensure that any relevant provisions (for example, around dispute resolution) are drafted to provide maximum certainty both before and after the end of the implementation period.

Any changes to the regulatory environment at the end of the implementation period which may impact on closing a contractual transaction (for example, the need for regulatory clearances) must also be considered, particularly if that environment may change during the negotiation of the transaction.

These issues will need to be considered against the background of the evolving future relationship agreement negotiations between the UK and EU.

More generally, buyers will have been considering the potential commercial, fiscal and regulatory impact of Brexit on a potential target company as part of their due diligence since the result of the UK's 2016 referendum was announced. Such considerations will remain relevant both in the short term and the longer term, as the new relationship between the UK and the EU unfolds.

Although the vast majority of corporate M&A transactions are governed primarily by private contractual arrangements, there are two EU directives which have an impact in this area.

- ***Cross-Border Mergers Directive***: The EU cross-border merger regime provides a regime for mergers between limited liability companies established in different EEA member states. It was implemented in the UK by the Companies (Cross-Border Mergers) Regulations 2007 (**2007 Regulations**). At the end of the implementation period, absent any future relationship agreement, the UK will no longer have access to the regime and EEA member states will no longer be required to give effect to mergers involving a UK company. The 2007 Regulations will be revoked and mergers under the regime involving UK companies will not be possible.
- ***Takeovers Directive***: This established the legal framework through which company takeovers are regulated in the EEA. Absent any future relationship agreement, the Takeovers Directive will, from the end of the implementation period, cease to apply in the UK. Section 943(1) of the Companies Act, which requires the Takeover Panel to make rules giving effect to certain Articles of the Takeovers Directive, will be amended to require the Takeover Panel to make rules in accordance with a new Schedule to the Companies Act (which will

replicate the relevant requirements of the Directive). This amendment, and certain other amendments to the Companies Act, will be made by regulations[2]. The Takeover Panel will also update the Takeover Code.

The main practical consequence of the Takeovers Directive ceasing to apply is that the "shared jurisdiction" regime established by the Takeovers Directive will fall away so far as the UK is concerned. Shared jurisdiction applies where the target of an offer has its registered office in one EEA member state and its shares are admitted to trading on a regulated market in another EEA member state (but not the member state where it has its registered office). Offers for companies that have their registered office in the UK and that satisfy the "residency" test within the Takeover Code will fall fully within the jurisdiction of the Takeover Panel. Offers for companies that have their registered office in an EEA member state and their securities admitted to trading on a regulated market in the UK will no longer be regulated by the Takeover Panel. A small number of companies may fall outside any takeover regime as a result.

Please speak to your usual Dentons contact or one of the following for more information.

Contacts

Richard Barham
Partner
D +44 20 7246 7109
M +44 7795 618263
richard.barham@dentons.com

Nikolas Colbridge
Partner
D +44 20 7246 7102
M +44 7769 248817
nikolas.colbridge@dentons.com

Simon Massey
Managing Practice Development Lawyer
D +44 141 271 5625
M +44 792 054 1931
simon.massey@dentons.com

Anna Janik
Managing Practice Development Lawyer
D +44 20 7246 7384
M +44 7747 656819
anna.janik@dentons.com

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[2] Takeovers (Amendment)(EU Exit) Regulations 2019. Originally put in place for the possibility of a "hard Brexit" on exit day, the 2020 Act modifies the date on which this legislation comes into force from exit day to the end of the implementation period.