Brexit

Key issues for corporate law and corporate M&A transactions

5 January 2021

Background

The UK left the EU on 31 January 2020. However, under the agreement on the UK's withdrawal from the EU, the UK continued in most respects to be treated as if it were still part of the EU until 31 December 2020. Now that this transition period has ended, the full effects of this profound change in UK law and regulation apply.

On 24 December 2020, the UK and the EU finally agreed a deal – the Trade and Cooperation Agreement (**TCA**) – to govern significant aspects of the trade relationship between the UK and EU from 1 January 2021 onwards. For more information about the TCA, see The UK-EU Trade and Cooperation Agreement: an overview. While the announcement of the TCA has been a source of relief for both UK and EU businesses, its scope does not include the establishment and regulation of companies.

What does this mean for company law?

Company law in the UK

The establishment and regulation of companies in the UK has always been primarily a matter for domestic law, albeit subject to some EU minimum harmonisation directives (for example, covering incorporation, capital maintenance and disclosure). The UK Companies Act 2006 (**Companies Act**) and related secondary legislation, therefore, in the short term at least, remain largely unaffected by EU law ceasing to apply in the UK. However, a small number of changes have been necessary to:

- address the position of EEA companies with registered establishments in the UK;
- revoke legislation which relates to participation in pan-EEA entities;
- 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.

Key changes, which apply from the end of the transition period, include the following.[1]

UK registered establishments of EEA-incorporated companies

[1] These changes were introduced by secondary legislation made under the European Union (Withdrawal) Act 2018, principally: the Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019; 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.

- The Companies House registration and filing requirements for companies incorporated outside the UK with a UK registered establishment (branch or place of business) were previously less onerous in respect of EEA-incorporated companies. EEA-incorporated companies are now subject to the same requirements as non-EEA-incorporated companies. An EEA-incorporated company with an existing registration has three months from 1 January 2021 in which to provide Companies House with the following additional information:
    - information on the law under which the company is incorporated;
    - the address of its principal place of business or registered office;
    - the company's purpose (its "objects");
    - the amount of share capital issued; and
    - the company's accounting period and period of disclosure (for companies that are required to disclose accounts under their parent law).
- Public facing material, such as websites, business letterheads and order forms, used in carrying on the activities of the UK establishment of an EEA-incorporated company must now include (in addition to information about the UK establishment):
    - the company's country of incorporation;
    - the identity of the registry where the company is registered and its registration number if applicable;
    - the location of the company's head office;
    - the legal form of the company;
    - a statement of its limited liability status, if the liability of its members is limited;
    - if applicable, notice that the company is being wound up, or is subject to insolvency or any other analogous proceedings;
    - if the company chooses to refer to its share capital, it must do this by reference to paid up capital.
- For EEA-incorporated companies registering a new UK establishment, the company name checks applied are the same as for all other overseas companies (there is no longer an overriding right to register the corporate name).

Pan-EEA entities

- Any SE (i.e. a European public limited-liability company which can be created and registered in any EEA member state) still registered in the UK has been automatically converted to a new UK-only corporate form, a UK Societas. A UK Societas can convert to a UK public limited company or be wound up. The intention is that a UK Societas is a temporary stage for entities rather than a long-term corporate UK choice.
- Any EEIG (i.e. 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) still registered in the UK has been automatically converted to a new UK corporate form, a UK Economic Interest Grouping. The new corporate form preserves the current framework, unchanged as far as possible and appropriate, on a UK-only basis.

Other anti-discriminatory measures

- Companies House previously required less detailed information on the appointment of an EEA-incorporated company as a corporate director or secretary of a UK company. UK companies with an existing EEA-incorporated officer as at 1 January 2021 must, within three months of that date, provide Companies House with additional information relating to the legal form of the corporate officer and the law by which it is governed. This will bring the information filed into line with that filed in respect of non-EEA-incorporated corporate officers.
- The rules regarding the shareholder authorisation required for a UK-incorporated company's political donations and expenditure now only apply to UK donations and expenditure.
- The Companies Act rules around the distribution by UK-incorporated investment companies of accumulated revenue profits now include a requirement that the relevant company's shares are admitted to trading on a UK regulated market (rather than an EEA regulated market). A similar condition – membership of or access to UK regulated market rather than EEA regulated market – applies to determine whether a company is an intermediary for the purpose of the rules allowing a subsidiary which is an intermediary to hold shares in its holding company.
- Previously the Companies Act gave EEA credit reference agencies and credit and financial institutions access to protected information from Companies House (e.g. the residential addresses of company directors and people with significant control). Subject to a one-year transitional period, this is now restricted to those agencies and

institutions carrying on business in the UK and any processing of protected information must take place within the UK.

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 previously overrode any such local law rules. However, UK-incorporated companies now no longer have the Treaty right to freedom of establishment in other member states, and local law rules 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.

To the extent that they have not done so already, companies with a presence in an EEA member state should check the impact of the UK becoming a "third" country for regulatory purposes in that member state.

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 competition clearances and dispute resolution) are drafted to reflect the new environment.

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**). The UK no longer has access to the regime and the 2007 Regulations have been revoked. Cross-border mergers can, of course, continue to be structured as private contractual arrangements.
- ***Takeovers Directive***: This established the legal framework through which company takeovers are regulated in the EEA. The Takeovers Directive no longer applies in the UK. However, the Companies Act[2] now replicates certain Articles of the Directive and the Takeover Panel is required to ensure that the Takeover Code gives effect to those provisions.

  The main practical consequence of the Takeovers Directive ceasing to apply is that the "shared jurisdiction" regime established by the Takeovers Directive has fallen 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.

[2] Amended by the Takeovers (Amendment) (EU Exit) Regulations 2019.

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