

CROSS-BORDER MERGERS: STILL IN TIME TO COMPLETE A UK CROSS-BORDER MERGER?

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Legal Briefings - By **Rebecca Davis**

Following the UK's departure from the European Union on 31 January 2020 and much uncertainty as to the future of the cross-border merger regime in the UK, it has now been confirmed that the cross-border merger procedure will continue to be available between the UK and EU Member States until the end of the transition period, expected to be on 31 December 2020. For global companies looking to reorganise their group structure as a result of Brexit, this provides a welcome additional period in which to take advantage of the regime, which offers a useful way of migrating UK companies to Europe.

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CROSS-BORDER MERGERS - AN OVERVIEW

Unlike many European jurisdictions, the UK does not have a domestic merger regime. In order to effect a UK 'merger', it is therefore necessary to complete either a share or business transfer, and then to dissolve or liquidate the transferor entity if this is no longer needed. The exception to this is the cross-border merger regime, derived from the European Union Directive 2005/56/EC (as subsequently repealed and codified by Directive 2017/1132/EU), which was implemented in the UK by The Companies (Cross-Border Mergers) Regulations 2007 (as amended) (the "**CBMR**"). Under the CBMR, a merger of one or more UK companies can be completed, providing the merger is with at least one company from a different EEA state.

One of the key advantages of the cross-border merger process is that upon completion of the merger: (i) all of the assets and liabilities of the transferor(s) pass automatically by operation of law to the transferee; and (ii) the transferor entities are dissolved and cease to exist. The regime therefore provides a useful way of amalgamating and migrating entities, either where the scope of their assets and liabilities is to some extent unclear, or where key assets such as licences or liabilities are desired to be transferred without having to complete an additional transfer process. The automatic dissolution of the transferring entities upon completion of the merger can also be a useful way of rationalising group entities which are no longer needed, without having to complete an additional liquidation or strike-off process.

Following the announcement of Brexit, the cross-border merger had a surge in popularity as companies sought to migrate their UK groups to Europe. Shortly before the UK's departure from the EU on 31 January 2020, it was confirmed that the regime would continue to be available for an additional 11 months during the transition period. This therefore provides a welcome additional period in which companies can take advantage of this process to rationalise their existing group structures, before the availability of the regime is expected to cease on 1 January 2021.

HOW DO YOU COMPLETE A CROSS-BORDER MERGER?

The CBMR provide for three different types of cross-border merger:

1. **merger by absorption:** where a UK or EEA company absorbs one or more other UK or EEA merging companies. For this type of merger, there is no need for the companies to be in a direct parent / subsidiary relationship. Several companies can also be merged simultaneously, as long as there is at least one UK and one EEA company involved in the merger;
2. **merger by absorption of a wholly-owned subsidiary:** where a wholly-owned subsidiary is merged into its parent. This can only be completed where the subsidiary is 100% owned by the parent, and where there is solely one UK and one other EEA company. This type of merger is therefore only suitable to merge two companies in a direct parent-subsidiary relationship, although a series of such mergers can be completed in sequence to rationalise a vertical chain of entities;

3. **merger by formation of a new company:** where two or more companies are merged into a new company formed for the purposes of the merger. This is the least common form of cross-border merger and as far as we are aware, has not yet been seen in practice.

The regime is available both for public and private companies as well as for UK LLPs. Cross-border mergers can be subject to the UK Takeover Code (the “**Code**”) if one or more of the transferor entities is a company to which the Code applies.

The process for completing the merger will be different depending on the type of merger which is chosen, but broadly involves:

1. **Preparation and adoption of draft merger terms and a directors’ report on the merger:** these documents must contain certain required information under the CBMR, including corporate and accounting information for the entities, the legal and economic grounds for the merger, and its likely effect on employees and creditors. The same merger terms will need to be adopted by all companies participating in the merger, so will need to be translated into the language of the other EEA state involved, either as one bilingual or two separate documents. Depending on the EEA jurisdiction involved, accounts may also need to be attached to the draft merger terms.
2. **Application to the UK court for a pre-merger certificate:** once the draft merger terms have been adopted by the directors, each of the merging companies must apply for a pre-merger certificate from the competent authority in their jurisdiction (for the UK this is the High Court of England and Wales (the “**UK Court**”), certifying that the company has completed the pre-merger steps required to complete the merger. In the UK, this is achieved by filing a Form CB01 containing the draft merger terms at Companies House, completing a two month waiting period to allow for potential creditors to object to the merger and, following expiry of this period, attending a UK Court hearing in which the court will decide whether to grant the pre-merger certificate. A shareholder meeting to approve the merger, and in some cases an employee consultation process, may also be required depending on the nature of the companies and the type of merger.
3. **Completion of the merger:** once each EEA and UK company has successfully obtained a pre-merger certificate, the companies must make a joint application to the competent authority in the jurisdiction of the transferee for final approval of the merger (again, if the transferee is a UK company, this will be to the UK Court). If the authority approves the merger, this will then take effect on a subsequent date, depending on the transferee’s jurisdiction, from which the assets and liabilities of the companies will pass to the transferee and the transferors will cease to exist. The corporate registries for each of the participating companies must be notified upon gaining final approval for the merger, so that these can complete dissolution of the transferring entities effective on the merger effective date.

While the timing to complete a cross-border merger will depend on the EEA jurisdiction involved, 4-6 months should be allowed to complete the process, although it can take longer where an employee consultation process is required.

CONCLUSION

For corporates seeking to migrate or rationalise their UK group structure, the cross-border merger procedure is a highly useful tool, and its continued availability for a further 11 months will be welcomed by businesses. Given the time required for the procedure however, any companies seeking to use this method would be advised to start their preparations for this now to ensure the process can be fully completed before the regime finally ceases to apply on 31 December 2020, and that any revised group structures are securely in place before the expected end of the transition period.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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