

Cross-border mergers – an alternative form of corporate restructuring

UK companies with European businesses looking to restructure are able to take advantage of a new procedure in the UK, as an alternative to a business transfer, which enables a UK company to merge with a company in a different European Economic Area (“**EEA**”) state.

The Companies (Cross-Border Mergers) Regulations (the “**Regulations**”) are now in effect in the UK and have put in place for the first time rules to enable mergers between UK companies and companies in different EEA states. The Regulations apply to both public and private companies with limited liability and apply to a merger between at least two companies from different EEA states.

Pure mergers (as opposed to acquisitions), let alone cross-border mergers, have not historically taken place in the UK. However, the Regulations set out a clearer mechanism for the merger of companies across Europe where a UK company is involved and provide an additional tool for companies looking at their options for restructuring.

Forms of merger

The Regulations provide for three types of merger:

- **Merger by absorption** - where one (or more) companies in an EEA state or states are absorbed by a company in another EEA state.
- **Merger by absorption of a wholly-owned subsidiary** - where an existing EEA company absorbs one or more of its subsidiaries in a different EEA state or states.
- **Merger by formation of a new company** - where a new company absorbs two or more companies in different EEA states.

In each case, the assets and liabilities of the companies being absorbed are transferred to the transferee, and the transferor(s) is dissolved without going into liquidation.

Under the Regulations a UK company can be either the transferring company, or the transferee, in which case it would be the surviving entity.

Contact us

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Procedure for merger

The merger is a Court process, run in parallel in the jurisdictions of the transferee and transferor companies.

In summary, the process in the UK requires the following to be produced to the Court:

- a merger report;
- a directors' report; and
- an independent expert's report on the merger.

The Court can order shareholder or creditor meetings to be called, if applicable, and the proposed merger is required to be advertised in the press.

Employee participation may be required if the UK company is the transferee and, inter alia, there are over 500 employees in the merging company and that company has a system of employee participation, or a UK merging company has a proportion of employee representatives amongst its directors.

The transferee and transferor must obtain pre-merger certificates from a Court in their respective jurisdictions. Once the certificates are obtained, the transferor applies to the applicable Court for the sanction of the merger. The assets and liabilities are then transferred and the transferor(s) is dissolved without liquidation.

Highlight Table

- Automatic transfer of assets and liabilities
- Third party consents are not generally required
- Transferring company automatically dissolved
- Removes a corporate entity from a group
- Means to generate business efficiencies

Advantages of using a cross-border merger

There are a number of reasons why corporate groups may wish to consider this route when contemplating restructuring:

- **No third party consents** - the regime is a much cleaner way of effecting a merger as opposed to a traditional transfer of assets and liabilities. Except to the extent that the Court requires shareholder or creditor meetings to be held, there is no requirement to obtain third party consents to the transfer. All assets and liabilities transfer automatically.
- **Transferor automatically dissolved** - the conventional transfer of liabilities from one entity to another can often prove difficult, with liabilities which fail to be transferred remaining with the transferring entity. Under the Regulations there will be no need to liquidate the transferring company as the transferor is automatically dissolved when the merger takes effect and all liabilities are transferred.
- **Tax relief** - in the UK, re-organisation tax reliefs may also apply to cross-border mergers of UK companies making them tax neutral.
- **Cost savings** - the creation of a single corporate entity following a merger may help to generate business efficiencies: the removal of a corporate entity from a group should result in a reduction in administration costs associated with running these entities in different jurisdictions, together with the potential for increased harmonisation of contractual terms, business principles and policies in the single entity.

Most of the cross-border mergers to date have involved internal group restructurings, usually to move the jurisdictional base of a business. This may therefore be a useful route to consider for companies who wish to streamline their business and to reduce their costs.

Our experience

There have been an increasing number of cross-border mergers sanctioned by the English Courts. We, and our colleagues in other CMS offices, have experience of advising on several cross-border mergers, mostly involving UK and German companies or CEE companies. We would welcome the opportunity to discuss this restructuring option with you.