10 Brexit M&A implications

1 No substantive changes to M&A transactions

The structure and execution of private M&A transactions should not be materially impacted. This is because EU-derived legislation plays little part in the laws governing these transactions.

Brexit may in fact be a driver for M&A activity as a way of resolving some of the issues relating to cross-border trade and cross-border provision of services, for both regulated and indeed non-regulated entities.

2 Merger control/FDI: greater political interference

The increasing prevalence of FDI regimes will continue. UK merger control is likely also to become more politicised, as the UK is no longer subject to EU constraints on political interference in merger control decisions.

The UK has already demonstrated that there will be more interference on the grounds of "national security" with its National Security and Investment Bill.

Some transactions will also no longer benefit from a "one stop-shop" merger control review by the European Commission. Instead, they will require review by both the European Commission and the UK's Competition and Markets Authority. This will need to be factored into the risk profiles and timelines for transactions.

3 Brexit due diligence

The investigation of Brexit-related risks will continue to be an essential part of any due diligence process.

This will be particularly relevant for example where:

- one transaction party is a UK entity and another is an EU entity
- the target business has significant interests or personnel in each of the UK and the EU
- the target business is reliant on supplies of goods or services between the UK and EU

Reviews will focus on understanding how the target business has transitioned to a post-Brexit era and both the short and long-term risks of that transition. Where due diligence does identify Brexit-related risks, the buyer may want to mitigate those risks using specific Brexit warranty or indemnity wording.

4 Structuring transactions/price adjustment mechanisms

While the full impact of Brexit remains to be seen, parties may consider using price adjustment mechanisms when structuring transactions to deal with any quantifiable Brexit related risks.

For example, buyers could push for a more completion accounts-style working capital adjustment, allowing for uncertainties and fluctuations around performance and receivables to be taken into account when valuing the business.

Buyers could also defer consideration or use an earnout structure to provide additional price protection in the post-completion period.

5 Cross border transfers of data

For the time being, the UK can continue to transfer personal data to and from the EU under existing arrangements. This may continue for six months after Brexit, while the UK applies for an adequacy decision (confirmation that the UK has an adequate level of data protection).

Retained EU case law (including the *Schrems II* decision of the Court of Justice of the European Union) continues to apply in the UK. The *Schrems II* decision requires organisations to carry out a risk assessment in relation to any transfers of personal data outside the European Economic Area or the UK (other than to countries benefitting from an EU or UK adequacy decision). A risk assessment involves comparing the protections under the laws in the country with which the data is being shared with those in the EU.

If the protections are not equivalent, organisations must consider whether any supplementary measures can be implemented to ensure an adequate level of protection for the personal data which is shared. These may include technical measures (such as encryption) or contractual or operational measures (such as policies and procedures). If this is not possible, organisations may need to stop sharing data.

We expect cross-border data transfers to become a regulatory focus from now on. As a result, we expect *Schrems II*-related steps to feature heavily in data protection due diligence.

6 Employment

We do not expect any material impact on transactions for now. This is because the EU-UK Trade and Cooperation Agreement contains robust "level-playing field" commitments. As a result, we do not expect the UK to embark on deregulatory employment law reform.

Through the "level-playing field" commitments, the EU and UK have agreed not to weaken or reduce labour and social protections below the levels in place at 31 December 2020 and to strive to increase their respective labour and social levels of protection.

Following completion of an acquisition, relocation of staff will be more problematic for some companies, although many financial services firms for example have already implemented contingency plans to maintain market access for their clients.

We also anticipate new challenges going forward where teams are split across jurisdictions. In particular, these will arise in connection with maintaining a strong culture, ensuring appropriate supervision and oversight, and managing redundancies or business restructuring

7 Tax

The UK has already taken the opportunity to diverge from EU tax rules on the reporting of cross-border arrangements: on 31 December 2020, the UK unexpectedly announced that it will not continue with the full implementation of the EU's "DAC 6" reporting regime as though it had remained a member state.

The UK will require reporting of a much narrower category of arrangements. However, this also means that multi-national groups which include both UK and EU entities will now need to navigate two overlapping regimes.

Separately UK companies can no longer mitigate cross-border withholding taxes or tax on share disposal gains through the EU Parent-Subsidiary Directive or the EU Interest and Royalty Directive.

However, most UK companies did not rely heavily on these treaties in any case. Instead, they made use of the UK's extensive network of bilateral double tax treaties and the UK's domestic law participation exemption for share disposals (known as the substantial shareholdings exemption) - all of these are unaffected by Brexit.

These and related issues need to be considered when structuring M&A transactions and undertaking due diligence.

The UK has historically been an attractive jurisdiction through which to structure investments into other countries. Despite Brexit this will remain true for most investments into other EU jurisdictions, but is not necessarily the case for all Member States and appropriate advice should therefore be sought ahead of undertaking a transaction structured in this way.

8 Governing law / jurisdiction clauses

No change is needed to an English governing law clause, as English and EU courts are likely to continue to recognise a contractual choice of English law.

Exclusive jurisdiction in favour of the English courts should also still be recognised (although EU courts need only do so if the clause was concluded after 1 January 2021) and enforceable.

For **non-exclusive** choice of court clauses, local laws will apply regarding whether a court in an EU member state will accept jurisdiction. They therefore carry risks of non-enforceability and/or increased costs and time delay in enforcement.

Permission to serve proceedings is now needed for a party in an EU member state in the same way as for defendants in other jurisdictions. Accordingly, an overseas party which wants a dispute to be heard by the English courts should appoint an agent for service in England.

9 For public companies, the UK Takeover Code is still relevant

Some amendments have been made to the UK Takeover Code to reflect Brexit. Some companies are now no longer in scope, whilst a very small group of dual-listed companies could find themselves subject to dual regulation under the Code and similar rules in an EU member state.

For the most part, however, the Code continues to apply in the same way.

10 No cross-border mergers involving UK companies

The ability for companies to merge with or into companies incorporated in other EEA states is no longer available to UK companies. This is because they no longer fall within the EU cross-border merger regime and there is no equivalent system under UK law.

The UK has no concept of legal "merger" in the way that most of the EU has. As a result, only acquisition structures are now available for UK companies.

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