



Knowing where you stand

Implications of Brexit for M&A and due diligence

The decision of the UK to leave the EU and the largely unresolved terms of Brexit has resulted in uncertainty across the global economic, trading and legal environments. This uncertainty has already had implications for mergers and acquisitions (“**M&A**”) in general.

Although M&A activity in the Irish market remained strong during 2018, Brexit uncertainty has the potential to affect levels of M&A activity as prospective buyers may adopt a wait and see approach. This article sets out some commercial, financial and legal risks to M&A posed by Brexit, focusing in particular on the scope of Brexit related due diligence.

Brexit risks

Some of the risks that Brexit poses to M&A transactions include:

- **Regulatory:** Brexit will lead to a regulatory divergence between the UK and the EU. This change in regulatory landscape may create difficulties regarding regulatory authorisations and compliance
- **Trade:** Brexit will likely remove full access to the single market and EU trade agreements for UK companies, creating uncertainty around the conditions of trade for many UK companies
- **Market:** possible exchange rate volatility, movement in interest rates and instability on major exchanges pose serious risk to buyers
- **Cost:** UK companies post-Brexit may experience a significant increase in business costs which can be an important factor when considering the potential acquisition of a business
- **Performance:** Brexit is likely to result in the performance of many contracts becoming significantly more onerous, uneconomic or delayed
- **Labour:** Brexit will potentially result in increased difficulty with employing workers from the EEA in the UK and vice versa

There are also Brexit related legal risks on M&A transactions to consider. These risks are normally assessed during the due diligence process.

Brexit related due diligence

Due diligence is an integral part of M&A transactions. Brexit related issues that now require enhanced focus during due diligence in M&A transactions include:

- **Jurisdictional issues:** where the buyer, seller or target is located in different jurisdictions. Potential issues to consider include cross-border money transfers, consideration payment, currency exchange, deferred payment amounts or merger control notifications
- **Preferential trading arrangements:** if the target makes sales into or imports from EU countries and/or non-EU countries on the basis of a preferential trading agreement, it will be important to determine whether such activities are critical to the target. It will also be essential to explore whether this can be continued post-Brexit or whether there are any alternative methods available to the target and any associated costs
- **Reliance on EEA labour:** if the target relies on EEA nationals working in the UK, a buyer will have to consider the viability of the business where labour may have to be replaced post-Brexit and compliance with any associated rules and regulations is required
- **EU funding:** if the target relies on EU funding as part of its business, the buyer should ascertain the importance of the funding to the business and whether the funding will be discontinued post-Brexit

The above provides a snapshot of potential commercial and financial Brexit related obstacles for M&A transactions.

- **Existing contracts:** while it will be important to determine the jurisdiction in which key suppliers and customers are based, it will also be important to review contracts that the target is a party to. Issues that may arise include potential termination provisions, regulatory compliance, governing law and jurisdiction clauses, payment in sterling and pricing mechanisms
- **Business recovery/restructuring:** currently, cross border restructuring in the EU is regulated by the Recast EU Insolvency Regulation and the Recast Brussels Regulation. Post-Brexit, these regulations will cease to apply in the UK and unless alternative measures are introduced, there will be increased cost and time implications and significant disruption to restructuring practices. For example, outbound insolvency processes commenced in the UK will not have automatic recognition in EU member states. Inbound insolvency processes commenced in EU member states would similarly not have automatic recognition in the UK
- **Intellectual property rights:** it is common to review intellectual property rights during due diligence. Given the existence of the EU intellectual property rights system, depending on what kind of withdrawal agreement is made, there is uncertainty surrounding the enforceability of EU intellectual property rights post-Brexit. Suggestions have been made regarding automatic conversion of EU trade marks to UK registered rights, which would be a welcome solution. However, in a no-deal scenario, it is uncertain how EU intellectual property rights will be enforced. Buyers should therefore review the extent of UK and EU rights held by the target business to ensure that any necessary actions are taken to secure these rights post-Brexit
- **Data protection:** the GDPR is now enforceable in the EU. A buyer should review whether the target's business is compliant with the GDPR and national legislation. The level of this review will depend on the data processing activities of the target including whether the business involves the transfer or receipt of personal data from other countries. However, given that the GDPR will still apply to UK businesses that have an establishment in the EU and which offer goods or services to data subjects in the EU, a review of the target's data protection compliance will be required in many transactions

Conclusion

Given that "nothing is agreed until everything is agreed", Brexit related due diligence in M&A transactions needs to be extensive in identifying and mitigating potential Brexit related risks as identified above. Notwithstanding the recent agreement between the UK and the EU on the terms of the draft Withdrawal Agreement, uncertainty remains as to whether this will be accepted and so a no-deal Brexit remains a possibility.

What is clear is that heightened analysis by potential buyers in the assessment of the viability of target businesses is necessary. A key consideration is how the target business will transfer to the post-Brexit environment, and the risks and effects of this move on the target's business. This will allow buyers to evaluate whether the target is correctly positioned to make a post-Brexit transition. In turn, this will help buyers in their overall assessment of a target business.

Contacts

For more information please contact any of the below:



Gerard Ryan

Partner, Head of Corporate & Commercial

+353 1 6644 202

gerardryan@eversheds-sutherland.ie



Norman Fitzgerald

Partner, Head of Dispute Resolution and Litigation

+353 1 6644 239

normanfitzgerald@eversheds-sutherland.ie



Marie McGinley

Partner, Head of Intellectual Property, Technology and Data Protection

+353 1 6644 457

mariemcginley@eversheds-sutherland.ie



Peter Fahy

Partner, Head of Pensions

+353 1 6644 206

peterfahy@eversheds-sutherland.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

eversheds-sutherland.ie

© Eversheds Sutherland 2019. All rights reserved.

EVE.DUB.2088 01/19