Managing Corporate Governance in Irish Subsidiaries Series: **Domestic and Cross-Border Mergers**

As part of a series of articles providing insights on the management and corporate governance of Irish-incorporated companies and, in particular Irish subsidiaries of international companies, Pat English (Partner, Head of International Business) and Gráinne Boyle (Senior Associate, International Business) provide an overview of common considerations which arise when implementing domestic and cross-border mergers.

Introduction

Companies are increasingly availing of both domestic and cross-border merger processes as an efficient entity consolidation or rationalisation tool (particularly as part of global post-acquisition integration projects).

While, historically, implementing a merger process may have been viewed as a relatively costly and time consuming alternative to the more traditional business/asset transfer followed by liquidation of the (excess) company, this is no longer necessarily the case given that Irish merger processes are now tried and tested.

There are also other advantages associated with a merger (in particular, see "**Automatic Transfer**" and "**Timing**") which can be particularly useful in certain cases.

By way of re-cap, in a merger scenario, all the assets and liabilities of one or more companies (a "**Transferor**") are automatically transferred to another company (a "**Successor**") and the Transferor is dissolved without going into liquidation.

Both domestic mergers and cross-border mergers are possible under Irish law. A domestic merger involves the merger of two or more Irish incorporated companies. Cross-border mergers involve the merger of an Irish incorporated company / companies with a company / companies incorporated in another EU member state. A cross-border merger can be either an inbound merger (resulting in the dissolution of the relevant EU company / companies) or an outbound merger (resulting in the dissolution of the relevant Irish company / companies). As explained in more detail below, cross-border mergers involving the Irish law always involve the Irish High Court.

Automatic transfer

In a merger scenario, all the contracts, assets, liabilities and employees of the Transferor are transferred to the Successor by operation of law upon the merger taking effect.

This automatic transfer effect can be particularly useful in scenarios where, for example: (i) it may be difficult to expressly identify all the assets (including contracts), liabilities and employees of the Transferor; and/or (ii) the asset profile in question may be such that an automatic transfer is more efficient than seeking and documenting various consents to transfer (for example, if the Transferor is party to a large number of contracts).

However, it is worth noting that, depending on the asset and liability profile of the relevant Transferor, certain additional considerations, actions or documentation may be required to perfect the automatic transfer. This will require some diligence in any pre-merger preparation phase. Some common examples in this respect include:

- the completion of intellectual property registrations;
- the transfer of real estate interests;
- the transfer of employees (including satisfaction of any obligations under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (**TUPE**));
- data protection considerations; and
- the transfer of a regulated activity or business.

Due diligence

Following on from the comment above on pre-merger diligence and similar to implementing a business transfer or shareholder change, it is always strongly recommended that a due diligence exercise is undertaken in respect of the material contracts, assets, liabilities and employees of the Transferor. Any "change of control" provisions within contracts should be reviewed in this context. For example, notwithstanding the automatic transfer of contracts upon a merger, certain contracts may provide for automatic termination immediately prior to a proposed merger (i.e. as an event of default etc).

Corporate approvals

Approval from the board of directors and the shareholders of both the Transferor and Successor are required for both domestic mergers and cross-border mergers.

Additionally, in a domestic merger scenario only, a majority of the board of directors of both the Transferor and Successor are required to sign a declaration of solvency confirming that they have made a full inquiry into the affairs of the merging companies and that, having done so, they have formed the opinion that, the Successor will be able discharge the debts of it and the Transferor for 12 months following the merger. A similar declaration of solvency is required to complete a voluntary liquidation of an Irish company, meaning that the solvency requirement will be faced by companies regardless of whether the dissolution is proposed to be effected by way of a merger or liquidation.

Account requirements

For a domestic merger, both the Successor and the Transferor's audited financial statements for the previous three years must be made available to their shareholders as part of the merger inspection process. As a result, aligning the timing of the merger vis-à-vis the audit cycle is crucial. For example, in proposed mergers involving companies with a financial year end of 31 December, the merger process cannot, subject to limited exceptions and workarounds, be commenced in the current year until the audited financial statements for the previous year to 31 December are available. A workaround to this potential blackout period in moving ahead with a merger, is to commence the merger process in the lead up to year-end (when the previous year's audited financial statements are available), and to complete the merger during the following year (on a date of the company's choice).

In a cross-border merger, the same requirements do not apply. In such a merger, where the date of the last annual financial statements of any merging company is more than 6 months old, the requirement to prepare an accounting statement can be dispensed with by way of unanimous shareholder approval. However, as part of the court approval process, details of the current financial position of the merging companies will be required to be provided (and the Irish High Court may request additional financial information upon review of the application, in particular where the Successor is an Irish company).

In either merger scenario, the requirement for both auditor or independent expert reports and input is either not required, or can be dispensed with by way of unanimous shareholder approval.

Limited liability requirement

In a cross-border merger, the merging Irish company must be a company with limited liability.

For a domestic merger: (i) at least one of the companies must be a private company limited by shares (**LTD**); and (ii) none of the companies can be a public liability company.

Court approvals

While court approval is one route that can be taken to implement a domestic merger, an alternative process is available which does not require court approval. In our experience, this summary approval process as it is known, is more commonly used to implement domestic mergers in Ireland and this type of domestic merger is the one considered in this article.

By contrast, both inbound and outbound cross-border mergers require certain approvals from the Irish High Court. As a result, it should be borne in mind that litigation counsel (including solicitors and barristers) will need to be engaged as part of the court approval process in a cross-border merger. The High Court schedule will also need to be factored into the timing of a cross-border merger. For mergers exceeding EUR1 million in value, the merging companies can seek to avail of a "fast track" process as part of the Commercial List of the High Court.

Some companies view the fact that the cross-border merger has been effectively blessed by the court as a helpful advantage, particularly when evidencing the completion of the merger with third parties and authorities.

Timing

The timing (and relative predictability of same) involved in implementing both domestic and cross-border mergers is seen as an advantageous feature. In contrast, in a liquidation scenario, the timing involved to complete a liquidation and for liquidators to discharge their duties, can vary and be dependent on the particular circumstances of the liquidation (including the asset/liability profile of the company).

Further, in a merger scenario, the company can elect the effective date of the merger (subject to any objection from the court in a cross-border merger scenario, which would be uncommon). In contrast, the date of the dissolution in a liquidation scenario (i.e. the conclusion of the liquidation) cannot be determined or set in advance and is subject to change. As a result, the certainty of the merger date is a useful aid, for group planning purposes, to various stakeholders within the business (e.g. tax and finance teams).

Once the preparation and due diligence phases associated with the merger have been completed, the approximate timing to implement a merger are as follows:

- assuming the required financial statements are available, implementing a domestic merger can take as little as 32 days to implement (and, on average, 6 – 8 weeks); and
- depending on the High Court's schedule, and the parallel merger process in the local law of the foreign merging company, implementing a cross-border merger can typically be completed in a 3 to 4 month period.

Publicly available information

In a domestic merger scenario, copies of: (i) the directors' declarations of solvency; and (ii) the shareholder approvals, will be publicly filed with the Irish Companies Registration Office ("**CRO**"). A copy of the merger terms (merger proposal) will not be made publicly available.

In a cross-border merger scenario, more publicly disclosed actions are required to be completed including:

- public filing of copies of: (i) the merger terms; (ii) the court order; and (iii) the shareholder approvals, with the CRO;
- publication of notice of the merger in the CRO Gazette and two national daily newspapers; and
- depending on the asset/liability profile, the location of creditors and / or the existence of minority shareholders of the Transferor, the Irish High Court may prescribe that additional publications are made in appropriate international newspapers etc.

Evidence of merger

Upon completion of the relevant merger filings with the CRO, the CRO will proceed to update their public records to reflect that any Irish Transferor has been dissolved by way of merger and the company status will thereby change to "dissolved by way of merger" or "dissolved by way of EU merger" (as appropriate). However a certificate of merger will not be issued by the CRO.

Instead companies will typically provide evidence of completion of a merger to third parties or authorities by providing copies of:

- the Irish Transferor's CRO record showing it as having been dissolved by way of merger (as noted above);
- the merger terms; and / or
- in a cross-border merger only, the Irish High Court order (in the case of an Irish Successor), or the notarial deed of merger or equivalent in the relevant EU member state (in the case of an Irish Transferor).

Conclusion

Mergers can be a very efficient and attractive alternative to traditional liquidation options, especially in cases where the operation of law transfer concept provides the desired one step transfer effect for assets and liabilities.

There is also increasing familiarity with, and experience of, domestic and cross-border mergers in Ireland which is the backdrop for their increasing use, in particular as part of global entity integration and consolidation projects.

For more information on the above, or for further guidance and insight in respect of the corporate governance of Irish-incorporated companies generally, please contact Pat English, Gráinne Boyle or your usual Matheson contact.

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