Brexit & more – Quo vadis?

Impact on corporate governance, branches, European corporate entities, cross-border mergers, governing law and jurisdiction

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Introduction

Apart from the COVID-19 backlash, on 31 December 2020, the transition period ended and the UK entered into a new trading relationship with the EU under the EU-UK Trade and Cooperation Agreement ("**TCA**").

The deal is still to be ratified by the EU, however it became applicable provisionally as of 1 January 2021, bringing a fundamental shift in the EU-UK relationship.

Although the deal is not expressly detailing on any corporate law aspects, we will try to see together, absent a legislative clarification from the Luxembourgish legislator, the main corporate law aspects to be addressed differently when involving a UK driven element.

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Corporate law status – COVID-19

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- According to the law adopted on 25 November 2020, the measures taken during the lockdown via the Regulation dated 20 March 2020 and further extended via various laws throughout 2020 were extended until **30 June 2021.**

- As such, the following **derogatory measures** still apply:
  - The ability (i) to hold general meetings of shareholders without physical attendance and (ii) to take decisions of other corporate bodies, such as managers/directors, remotely or by circular resolutions, without having to physically attend, notwithstanding any contrary provision in its articles (or in the absence of such a provision); Same means for participation shall apply, ie:
    - ✓ via remote or electronic vote, provided that the full text of the resolutions has been communicated to the shareholders; or
    - ✓ via a power of attorney granted to an intermediary designated by the company; or
    - ✓ via videoconference or audio conference, which must allow the identification of each shareholder.

  - The suspension of the deadline of one month provided for the filing of an insolvency request, as set forth under article 440 of the Commercial Code.

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Underlying Brexit corporate law principles

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- TCA does not deal with corporate law in any significant way, thus the UK's approach to implement any changers on corporate law is a no-deal exit, even if the TCA provides for **specific non-discrimination provisions and "best endeavours" commitment.**

- The majority of English company law is not derived from EU law. The Companies Act 2006 is the core legislation governing the incorporation and operation of UK companies, which has been directly amended at times to incorporate EU directives (e.g. on matters such as accounts, disclosure of information and shareholder rights, etc.).

- **However, when a specific EU directive matter was not directly taken over in the UK legislation, it shall be analyzed on a case by case basis if these principles shall still remain applicable.**

- The most significant EU provisions applying to UK companies were the ones addressing equity capital markets (including in relation to the requirements to prepare a prospectus, obligations of disclosure and transparency and provisions to prevent market abuse. The European Union (Withdrawal) Act 2018 has converted any directly applicable EU laws into UK law. Going forward, we expect the same level of uniformity and symmetry in relation to EU rules to be maintained by the UK legislator.

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Incorporation of companies

Incorporation of companies (I)

- One of the biggest drawbacks of EU is the loss by the UK of the four fundamental freedom principles, among which the freedom of establishment (as set out in Article 54 of the Treaty on the Functioning of the European Union).

- As of the end of the transitioning period, the UK incorporated companies will be regarded as third-country companies from a EU law perspective. When assessed from the EU law/national EU Members laws, this might have potential side effects on:

  - Recognition of the type of company;
  - Shareholder liability impact;

- The UK incorporated companies will be recognised in accordance with the private international law of each country.

- As a result, their legal personality may no longer be recognised automatically by member states under the freedom of establishment rules. UK incorporated companies may still be recognised in accordance with each member state's national law, but this will need to be considered on a case by basis.

Incorporation of companies (II)

- Certain EU jurisdictions (including Luxembourg) apply a ***'real seat'* approach**: national law is applied to third country companies where the activities of those companies are effectively *directed* from that EU jurisdiction. This can include where the board of directors meet or where the effective management is located.

- If, after 31 December 2020, a UK company is deemed to have its "real seat" in an EU Member State, that Member State's national law may not recognise the UK company as incorporated, having separate legal personality and limited liability status – due to **dissatisfaction of incorporation rules.**

- Cross-border relocation of the effective place of management between certain EU Member States and the UK (adhering to the "incorporation theory") – **permitted** to the extent it is allowed under compatible provisions of international private law in each relevant jurisdiction, as is already the case in Luxembourg. However, such mechanisms may no longer benefit from, or be based on the EU principles of the freedom of establishment and freedom of movement.

- European company forms registered in UK (such as the European Company (SE), the European Economic Interest Grouping (EIG) or the European Cooperative Society (SCE)) **will lose their status** and will need to be converted into domestic UK company forms.

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Cross-border mergers

Cross-border mergers

- The EU cross border mergers regime is no longer available to UK companies. EU member states also no longer have to give effect to cross border mergers that did not complete before **31 December 2020.**

- Where a cross border merger involving a UK company is pending after the end of the transition period, **national rules** for mergers with third country companies **will apply**. Mergers between UK companies and EU companies might be impossible to implement as would normally be regulated by the cross-border EU merger directive.

- **Luxembourg law allows for a cross-border merger with a third country to take place**, provided the respective third country legislation allows as well the merger to take place. National rules applicable for mergers involving third-countries will apply whenever a merger with a UK company will be under discussion.

- It lies with the UK legislator to clarify whether a cross-border merger with a third country company would be permitted for UK companies.

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Opening a branch in Luxembourg

Opening a third-country branch in Luxembourg

- As the freedom to establish will no longer be automatic, setting up a branch in Luxembourg by a UK incorporated company will fall under the regime applicable to third countries. A pre-requisite should be that the mother company should be in a legal form comparable to the types of companies recognized by the Directive 2017/1132.

- The incorporation will imply obtaining a **business permit** from the Ministry of Commerce.

- The opening of a branch in Luxembourg will fall under the scope of Article 1300-9 of the Company Law, imposing certain **extended obligations to submit documents/fulfil formalities regarding:**
  - Their law of incorporation;
  - Their articles of association and all constitutive documents (including the amendments) (which will also include submitting annually updated information on social capital, corporate seat and business object);
  - The extent of the powers of the representatives.

- Accounting documentation prepared and audited according to the governing law of the mother company should be disclosed as well for the branch. However, when such documents are not compliant with the standards imposed by EU law, consolidated financial statements and related reports & other documentation need to be prepared and submitted in accordance with the Luxembourg law. In some cases, such documentation will also need to be audited.

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Accounting reporting and filing

Accounting and corporate reporting changes

- **UK incorporated companies and groups:** UK incorporated companies will have to use 'UK-adopted IAS' for financial years beginning after 31 December 2020. In practice these standards are currently the same as the EU-adopted IAS, but differences may occur later if the UK and the EU take different approaches to future standards or amendments.

- **UK subsidiaries and LLPs with an EEA-registered parent:** After 31 December 2020, EEA companies with a UK incorporated subsidiary are no longer eligible for certain exemptions from preparing and filing accounts.

- **Operating as a UK company with a cross-border presence in the EEA:** UK companies that have a presence in the EEA, for example a branch, will need to check the local accounting and reporting requirements in each country in which they have a presence as UK reporting requirements may no longer be considered equivalent to the reporting requirements of those EEA countries after 31 December 2020.

- **From a Luxembourg law perspective:** article 1711-7 of the Company Law provides an exemption of the preparation of consolidated statements when there is non-EU mother company, if the mother company prepares consolidated statements that apply the same rules or equivalent as the ones applicable in Luxembourg and the respective statements are audited according to the applicable national law.

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Governing law and choice of jurisdiction clauses

Governing law and choice of jurisdiction clauses (I)

- **Choice of law**: Given that Regulation (EC) No.593/2008 (Rome I), which governed the choice of law for contractual obligations in EU member states was included by the UK in their national law, (i) the choice of English law will still be given effect by EU member states' courts, and (ii) English courts will continue to uphold the parties' choice of law, even if that of an EU member state.

- **Choice of courts/jurisdiction and enforcement judgments:** the key regime for recognition of English choice of court clauses and enforcement of English judgments in EU member states has switched from being Brussels (Recast) to the Hague Convention.

  - The UK has applied to join the Lugano Convention, which would provide a broadly equivalent regime to the first Brussels Regulation (before it was "recast" and strengthened), but consent from all other signatories has not yet been obtained **and it is therefore not in force in the UK.**

  - At its turn, the Hague Convention, **arguably in force in the UK**, provides that exclusive choice of court agreements must be respected. The Hague Convention applies between the courts of participating states (i.e. the EU, Mexico, Montenegro, Singapore, and now the UK in its own name) with respect to contracts entered into after the Hague Convention came into force in the state of the chosen court.

Governing law and choice of jurisdiction clauses (II)

- **Arbitration:** Brexit does not affect the jurisdiction of arbitral tribunals or the enforcement of arbitral awards between the UK and EU member states. The UK and each of the EU member states (and the parties to the Lugano Convention) are all parties to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

- The New York Convention provides that each of its signatories will recognise and enforce arbitral awards made by arbitral tribunals seated in the jurisdiction of other signatories. When an arbitration is "seated" in a particular jurisdiction, it means that it is subject to the supervisory power of the courts of that jurisdiction.

- Brexit has not affected the UK's membership of the New York Convention. Therefore, arbitral awards made by tribunals seated in the UK continue to be enforceable in each and every EU member state. Whether Brexit will result in increased interest in arbitration, to the detriment of court litigation, remains to be seen.

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Insolvency law aspects

Insolvency law aspects

- The automatic recognition of English insolvency proceedings applies for any insolvency proceedings opened **before 31 December 2020** under Regulation (EU) No 2015/848 on insolvency proceedings (the Insolvency Regulation). However, the recognition of any insolvency proceedings commenced in the UK as from 2021 will need to be assessed on a country-by-country basis as the Insolvency Regulation will no longer apply in respect of English insolvency proceedings.

- Luxembourg courts accept **the principles of unity and universality of bankruptcies** and that the courts of the jurisdiction –in the case of non-EU states – of the principal establishment of the debtor are competent to open insolvency proceedings and to rule on insolvency-related matters in connection with that debtor.

- In principle, the opening of foreign (non-EU) insolvency proceedings in respect of a Luxembourg entity **is recognised** in Luxembourg. However, in order for said proceedings to be enforceable against the Luxembourg-situated assets of a debtor entity, the judgment is subject to an *exequatur* recognition procedure (which will include various verifications of compliance with mandatory law provisions).

Questions?

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Thank you !

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