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GLOBAL GUIDE 2018
BREXIT CROSS-BORDER MERGERS

Cross-border mergers after Brexit with Liechtenstein

Thomas Nigg and Domenik Vogt
GASSER PARTNER Attorneys at Law

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BREXIT: CROSS-BORDER MERGERS

1. Do you think UK companies would still be able to carry out cross-border mergers with companies in your jurisdiction after the UK leaves the EU?

There has been no indication as to whether Liechtenstein is planning to keep the benefits afforded under Directive 2005/56/EC on cross-border mergers of limited liability companies (Cross-border Mergers Directive) in place for mergers with UK companies after the UK leaves the EU.

The provisions governing cross-border mergers as implemented by Liechtenstein law are set out in Article 352a, paragraph 1 of the Liechtenstein Persons and Companies Act (*Personen - und Gesellschaftsrecht*) (PGR), which defines and basically replicates Article 1 of the Cross-border Mergers Directive. It remains unclear whether Article 352a PGR governing cross-border mergers with EEA companies will still be applied to mergers with UK companies.

Article 352a, paragraph 1 of the PGR stipulates that Liechtenstein companies "may merge with companies within the meaning of the Cross-border Mergers Directive formed in accordance with the law of an EEA state and having their registered office, central administration or principal place of business within the EEA". It must be assumed that these provisions will not be applicable to mergers with UK companies.

2. Does your jurisdiction allow for cross-border mergers with non-EEA companies?

While the provisions in Article 351 et seq of the PGR govern domestic mergers, the provisions in Article 352a et seq apply only to cross-border mergers with EEA companies. As a result, there are no specific national laws governing cross-border mergers with non-EEA companies.

However, in practice, the commercial register (the public register of Liechtenstein) allows cross-border mergers with Swiss companies despite the absence of an express statutory basis. According to the practice of the commercial register, the provisions in Article 351 et seqq PGR are applied to cross-border mergers with Swiss companies by analogy, taking into account the similarities between Swiss and Liechtenstein companies limited by shares.

According to an opinion in legal literature on this subject, a cross-border merger with a non-EEA company should be possible if several requirements are met:

- First, the cross-border merger must be principally possible according to the laws of the countries of domicile of all the merging companies. In Liechtenstein, this requirement can be derived from Article 351 of the PGR, as its wording is not restricted to domestic mergers.
- The merging companies must be recognised in the respective country of destination (compatibility). For example, in the case of a merger with a non-EU/EEA company, the corporate form of the foreign merging company must be compatible with the corporate form of the local/domestic company it is merging with (that is, the companies must essentially be comparable with regards to certain criteria (such as legal personality, ownership, capital, liability, incorporation and so on)).
- The shareholders' rights must be considered. For example, it must be ensured that the shareholders of the company being acquired receive shares in accordance with their previous respective stake.
- Certificates of incumbency and confirmations are necessary. These are to prove the above-mentioned requirements and the valid existence of the companies to the respective national public registers.

However, despite this opinion, it remains unclear whether mergers with non-EEA companies (apart from Switzerland) would be possible under Liechtenstein law.

3. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, what would the likely effect be on the merger timetable?

It remains unclear as to whether mergers with non-EEA companies will be possible after Brexit (*see Question 1 and Question 2*). In the case of a cross-border merger between a Liechtenstein company and a Swiss company, the timetable is likely to be shorter than the timetable of a merger structured between two EEA companies. The main reason for this is that the employee participation procedure in the context of cross-border mergers of EEA companies can be very time-consuming.

The Act on employee participation in the context of cross-border mergers of companies (*Fusions-Mitbestimmungsgesetz*) (FMG), which implements part of the requirements under the Cross-border Mergers Directive, only applies to cross-border mergers carried out between EEA companies. The FMG stipulates the following in relation to employee participation:

- The management or administrative organs of the participating companies must, as soon as possible after publishing the draft terms of merger, ask the employee representatives to create a special negotiating body.
- The employee representatives may then create the special negotiating body within ten weeks.
- The negotiations on arrangements for the involvement of the employees must commence as soon as the special body is established and may continue for six months thereafter.

- The parties may decide to extend negotiations up to a total of one year from the establishment of the special body.

This can, therefore, substantially delay mergers between EEA companies.

4. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, are there any other considerations that may be relevant?

Due to the uncertainty involved in mergers with non-EEA companies, the following considerations are based on cross-border mergers between Liechtenstein and Swiss companies:

- Liechtenstein law stipulates a specific formal requirement in relation to the common draft terms of the merger, which must be publicly certified (*Article 351a, Paragraph 3, PGR*). The commercial register in Liechtenstein normally certifies the common draft terms of the merger.
- As mentioned in *Question 2*, the shareholders' rights must be considered (that is, it must be ensured that the shareholders of the company being acquired receive shares in accordance with their previous respective stake).
- Liechtenstein does not provide for any employee participation rights whatsoever. However, during the course of a merger, the employee representatives must be informed of the merger as well as heard and consulted in relation to it. They must be informed before the publication of the registration of the merger at the latest. An appropriate consultation period (normally between two and four weeks) is recommended. In the absence of employee representatives, the employees themselves must be informed and consulted.
- If the creditors of the legal entities involved in the merger cannot demand satisfaction of their claims, security will be provided to them (provided the creditor files his/her claim within six months of the day on which the entry of the merger in the register kept at the registered seat of that legal entity whose creditors they are has been published by notice). However, the creditors are only entitled to this right if they can demonstrate satisfactorily that the merger would jeopardise the performance of the claim they hold (*Article 351i, Paragraph 1, PGR*).

5. Has there been any indication in your jurisdiction as to whether cross-border mergers involving a UK company that commence prior to the Brexit deadline of 29 March 2019 would be unable to complete if the deadline for completion is due to fall after the UK leaves the EU?

There are no specific guidelines concerning cross-border mergers involving a UK company due to complete after the Brexit deadline. At present, there has been no indication as to how these mergers will be treated. In the case of major amendments to laws, it is not uncommon for the Liechtenstein legislator to set transitional provisions. However, it is unclear whether this will also be done in the case of mergers in the context of the Brexit.

Practical Law **Contributor profiles**

Thomas Nigg

GASSER PARTNER Attorneys at Law

T +423 236 30 80
F +423 236 30 81
E thomas.nigg@gasserpartner.com
W www.gasserpartner.com/en

Professional qualifications. Master of Laws (LLM) in Corporate, Foundation and Trust Law, University of Liechtenstein, 2018; Liechtenstein bar exam, 2010; Master of Arts in law, University of St. Gallen HSG, 2008; Bachelor of Arts in Law, University of St Gallen HSG, 2005

Areas of practice. Representation of clients before public authorities in civil, criminal and administrative matters; corporate; foundation and trust law; civil law and law of succession; white collar crime; commercial law; M&A.

Recent transactions. Formation of AGRARINVEST SE by means of a cross-border merger between Agrarinvest AG (Liechtenstein) and Agroinvest Plus AG (Germany).

Professional associations/memberships. Liechtenstein Bar Association; HSG Alumni, International Association of Young Lawyers (AIJA); International Bar Association (IBA); "Ad-hoc"-judge at Liechtenstein's State Court; Member of the Liechtenstein Arbitration Association.

Publications

- *Getting the Deal Through – Arbitration 2018.*
- *ICLG Enforcement of Foreign Judgments 2018 and 2017.*
- *Liechtenstein; Das Sanktionsrecht des Landesfürsten, LJZ 2017.*
- *Getting the Deal Through – Private Client 2018.*
- *Getting the Deal Through – Asset Recovery 2018.*
- *The Asset Tracing and Recovery Review, Fourth and Fifth Edition, Global Legal Insights, Litigation & Dispute Resolution 2017.*
- *Informationsrechte von Begünstigten von liechtensteinischen Stiftungen im Spannungsfeld des Steuerrechts, SteuerRevue 2017; International Civil Fraud, First Edition.*

Domenik Vogt

GASSER PARTNER Attorneys at Law

T +423 236 30 80
F +423 236 30 81
E domenik.vogt@gasserpartner.com
W www.gasserpartner.com/en

Professional qualifications. Liechtenstein bar exam, 2017; Master of Laws (LLM), University of Cambridge, 2015; Master of Laws (LLM), Vienna University of Economics and Business, 2014; Bachelor of Laws (LLB), Vienna University of Economics and Business, 2012

Areas of practice. Corporate; foundation and trust law; civil law and law of succession; commercial law; M&A.

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- *Global Legal Insights, Litigation & Dispute Resolution 2017.*