Corporate Reorganisations 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Corporate Reorganisations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the Cayman Islands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Nick Cline, Robbie McLaren and Janine Leeder of Latham & Watkins, for their continued assistance with this volume.

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Getting The Deal Through

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England & Wales

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Latham & Watkins LLP

LEGAL AND REGULATORY FRAMEWORK

Types of transaction

1 What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

The term 'corporate reorganisation' can be used to mean a wide variety of transactions, but is most typically used to refer to transactions involving the transfer of assets, whole businesses or shares between entities forming part of the same corporate group on a solvent basis. Certain related company law matters also commonly arise in the context of corporate reorganisations, such as adjustments to the funding and capitalisation of companies, returns of profits or capital to shareholders, and intra-group services and loans. Reorganisations may be operational, meaning the manner in which an underlying business operates changes, or financial, meaning the funding and capital structure changes, but the underlying business continues to operate in the same way.

Corporate reorganisations may be driven by a number of factors, the most common of which are: (1) to prepare for a sale of part of a corporate group or business; (2) to integrate an acquired business or group into the corporate structure of the acquirer (or to prepare for the integration of a prospective target); (3) to improve the efficiency of operations or capital structure; and (4) to facilitate a refinancing or the granting of security. Transactions, such as shareholder distributions and intra-group loans, often arise in reorganisations but may also occur in the ordinary course of business as part of the day-to-day means of managing cash within a corporate group, so are not necessarily indicative of a reorganisation.

Rate of reorganisations

2 Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

Given the wide variety of drivers for undertaking corporate reorganisations, demand tends to be relatively steady, regardless of economic conditions. Some of the drivers for corporate reorganisations are linked to M&A activity, and high M&A activity tends to result in more M&A-related corporate reorganisations, such as reorganisations in contemplation of a disposal or for integration purposes following an acquisition. Larger M&A transactions in particular often lead to substantial post-transaction integration work, and also potentially sale preparation work, if the acquirer wishes to divest any non-core assets acquired as part of the transaction, or needs to comply with a requirement from a competition regulator in relation to the original acquisition.

Conversely, in periods of lower M&A activity, there are countercyclical drivers for reorganisations. If market uncertainty, financial conditions or other factors reduce M&A activity, businesses often choose to focus on internal opportunities, such as improving operational efficiency or the capital structure and funding of the business. The demand for corporate reorganisations, therefore, exists through the economic cycle. Occasionally, one-off factors, such as changes in law or regulation, may trigger short-term increases or decreases in the number of reorganisations as new rules open up new opportunities or close down previously available options.

The pandemic has brought about significant challenges for many businesses, resulting in a growing number of companies considering asset disposals to shore up balance sheets. Furthermore, the pandemic has caused certain types of businesses to reassess strategy and business operations (eg, relying more heavily or solely on e-commerce). Following reassessment, reorganisations may follow to align with these strategic changes.

Jurisdiction-specific drivers

3 Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

One ongoing one-off driver of reorganisations is Brexit, particularly as the transition period has come to an end. The UK's departure from the EU may continue to dramatically impact companies in sectors that are heavily influenced by EU regulation, such as financial services or pharmaceuticals. Many financial services groups have actively taken measures to mitigate the effects of Brexit. One effect has been the loss of passporting rights between the UK and the EU, which many UK financial services businesses had relied on to operate across the EU market (and vice versa). A number of multinational organisations have redomiciled their European headquarters from the UK to the Netherlands and other jurisdictions in continental Europe, while others have established UK branches of European entities. It has been widely reported that many businesses expect more functions to migrate to continental Europe in the wake of Brexit.

Structure

4 How are corporate reorganisations typically structured in your jurisdiction?

The structuring of a reorganisation will depend on its particular circumstances, but there are a number of overarching concepts that are useful to keep in mind as general guiding principles:

- transactions between group companies should typically be entered into at arm's length (eg, charging reasonable interest on loans, not transferring assets at an undervalue, and charging a market rate for services);
- distributions may only be made if distributable profits are available for the purpose (see below);
- companies must maintain their share capital and may only return share capital to shareholders through limited routes permitted under company law (eg, share buy-backs, reduction of capital procedures or through a winding up);

- directors' duties are owed to each corporate entity to which a director is appointed, and may override the interests of the corporate group as a whole (even if the directors also happen to serve as directors of other group companies); directors must also consider their duties in the context of a reorganisation just as they do for third-party transactions, including assessing the corporate benefit of a particular course of action for the company in question, taking into account the circumstances in the round;
- the articles of association of each of the companies involved (as well as any applicable shareholders' agreement) should be reviewed to check whether they provide for any peculiar restrictions or procedural requirements in relation to the step proposed (for example, the requirement for shareholder approval in respect of an acquisition or disposal even between group companies); and
- any relevant finance documents or other material contracts should be checked for restrictions, particularly for change-of-control provisions.

When considering a reorganisation plan, it is also important to consider whether any transactions could be challenged by a liquidator or administrator in the event of a subsequent insolvency, such as transactions at an undervalue or preference at a time when the company is unable to pay its debts, or if such transactions cause the company to become unable to pay its debts.

With regard to acquisitions of shares of public companies (or private companies with a public company subsidiary), financial assistance is generally prohibited, though this is not the case in relation to acquisitions of shares of private companies generally.

Laws and regulations

5 What are the key laws and regulations to consider when undertaking a corporate reorganisation?

The Companies Act 2006 sets out the primary legal framework in relation to distributions and maintenance of share capital requirements, as well as codifying the duties owed by directors to their appointing companies. However, old common-law rules continue to apply and remain a key part of the analysis of whether a distribution is lawful or not. Other relevant areas of law that generally apply include tax, employment, pensions, data protection and others, though additional areas may apply depending on a company's industry and regulatory status.

National authorities

6 What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

There are no national authorities that are automatically involved in corporate reorganisations. However, a wide variety of authorities may be involved, depending on: the nature of the group undertaking the reorganisation; whether the companies affected by the reorganisation are regulated; and the reorganisation steps themselves. Regardless of the nature of the group or its regulatory status, if a company operates a UK defined benefit pension plan (a DB plan), the UK Pensions Regulator will need to be considered.

Reorganisations of businesses that are regulated (eg, financial services, pharmaceuticals or defence) or dependent on specific licences to operate will usually require additional planning and a longer implementation period. In such cases, a business may need to obtain advice and consult with regulators prior to undertaking any reorganisation. While exemptions for intra-group transactions may be available in some situations, this is not always the case. Even seemingly innocuous matters, such as small adjustments to shareholdings between members of the same corporate group, changing personnel in particular roles or inserting a new indirect intermediate holding company into an ownership chain may require regulatory consent. The implications of failing to obtain mandatory consent can be severe, with potential criminal penalties for both legal entities and individuals.

KEY ISSUES

Preparation

7 What measures should be taken to best prepare for a corporate reorganisation?

Planning the reorganisation prior to its commencement is key. If the optimisation of the capital structure (including funding and tax) is a significant driver for a reorganisation, accounting and tax leads will typically design an outline of the reorganisation with its objectives in mind, sometimes setting out proposed steps for achieving those results. If the steps are specified, legal advisers will need to analyse the proposed steps to establish their feasibility from a legal perspective. If detailed steps are not specified, legal advisers will need to assess and advise on the available options. In either case, tax and legal advisers typically need to work together to create a plan that implements the group's reorganisation objectives.

Although corporate reorganisations are primarily intra-group transactions, they must nonetheless be considered and planned carefully, as a number of internal and external stakeholders are likely to be interested in their objectives and implementation. Communication with key stakeholders is therefore important and should be considered early in the planning stage. Employees in particular may be very sensitive to the implications of a reorganisation and worry about their job security. Auditors will need to review and assess the transactions undertaken and the way they have been accounted for during the course of an annual audit, and tax authorities may do the same from a tax perspective. Prospective buyers will normally undertake due diligence if a pre-sale corporate reorganisation has been undertaken and will want reassurance that the transactions were properly undertaken, the correct assets and liabilities are held in the target group, and the reorganisation has not resulted in the target group inadvertently incurring liabilities. Commercially, customers and suppliers may be concerned about their trading partners' financial stability and reliability, and contracts or assets may not be capable of transfer without a consent or waiver from contractual counterparties – particularly if prohibitions on assignment or subcontracting do not contain a carve-out for intra-group transactions. Lenders (particularly those holding security over affected companies or assets) may need to be consulted and their approval sought under the terms of finance or security documents. In these circumstances, the lenders will need to be satisfied that their risk exposure or security position is not adversely impacted by a proposed reorganisation.

To plan with all the above in mind, a preparatory due diligence or information gathering exercise is helpful in ensuring the re-organisation is structured and implemented optimally. The number of issues to consider means that larger reorganisations require extensive coordination and project management.

Employment issues

8 What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

The impact of a reorganisation on employees depends on how it is structured. If a reorganisation is effected through transfers of shares and employees remain with their existing employers, the reorganisation should have a limited impact on those individuals, and their terms and conditions of employment. However, if a reorganisation will result in a business or undertaking (or part of one) transferring between group companies, it may result in the automatic transfer of employees' employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). TUPE requires a prescribed notification process (and, in certain circumstances, a consultation process) to be carried out with trade union or employee representatives prior to the transfer, and generally restricts changes to employee terms and conditions, and redundancies and other dismissals, in connection with the transfer.

Employees need not consent to a transfer under TUPE, but they can 'object', in which case they are generally treated as having resigned. If TUPE does not apply, however, employees would need to consent to their employment transferring from one company to another.

Aside from any transfer of employment, another possible outcome of a reorganisation might be employee redundancies. If so, a pre-redundancy consultation process would need to be undertaken with the relevant employees (or their representatives) in accordance with UK law, and redundancy payments would be payable (either on a statutory minimum or company-specific enhanced basis, subject to eligibility requirements). If 20 or more employees are proposed to be made redundant, consultation must start a minimum of 30 days before the redundancies take effect. If 100 or more employees are proposed to be made redundant, consultation must start a minimum of 45 days before the redundancies take effect.

9 What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

The key issue to consider is whether the group operates, has operated, or is a participant in a UK defined benefit pension plan (a DB plan), and whether the reorganisation is being undertaken in connection with an M&A transaction. In any case, the impact of the reorganisation on the DB plan should be assessed and, if necessary, addressed. If a company that participates in a group pension plan is to be sold to a third-party purchaser (with the pension plan remaining with the retained seller group), in practice, the departing company will need to cease participation in the pension plan. If so, the departing company's pension liabilities can be apportioned on a contingent basis to one or more group companies that will continue to participate in the pension plan. The UK Pensions Regulator (the Regulator) and the pension plan trustees are likely to play an important role in this process. Appropriate legal, financial and actuarial advice may need to be obtained by the group before implementing a reorganisation, particularly if a DB plan is involved.

No formal consent is needed from the Regulator in relation to re-organisations. However, if the Regulator considers that a reorganisation is materially detrimental to a DB plan, the Regulator has statutory 'moral hazard' powers, which it can seek to exercise against the group (and any other connected parties, wherever they are located in the world) to require additional funding or other financial support to be put in place to support the DB plan. This can be up to the level of the DB plan's buyout deficit (ie, the cost of securing liabilities in full with an insurance company).

The Regulator has been increasingly interventionist in its approach in recent times and is under increasing political and public pressure to act, particularly in relation to M&A transactions. Accordingly, reorganisations undertaken in contemplation of M&A transactions may come under increased scrutiny and should be planned with the M&A process in mind. The Regulator operates a voluntary 'clearance' process, which allows groups to seek confirmation that the Regulator will not exercise its moral hazard powers in connection with a reorganisation.

The UK government is currently legislating to:

- expand the circumstances in which the Regulator will be able to exercise its existing moral hazard powers; and
- provide the Regulator with new moral hazard powers, which will be able to be exercised against any person, without any degree of connection being required (the Any Person Powers).

Penalties under the Any Person Powers will encompass:

- criminal sanctions of up to seven years' imprisonment or an unlimited fine; or
- a civil penalty of up to £1 million.

The consent of the trustees of the DB plan is likely to be required if the reorganisation will result in any group company ceasing to participate in the DB plan (for example, if that company is being substituted for another group company as a participating DB plan employer). The trustees' consent should generally not be required for any reorganisation steps as such. However, the trustees will need to be informed of any material corporate activity within one month of this taking place and, if they are concerned about the impact of the reorganisation on a DB plan, they may seek to exercise any powers available to them (such as to demand additional employer contributions to the DB plan) or involve the Regulator.

In relation to other employee benefits (including defined contribution pension arrangements), the impact of the reorganisation is unlikely to have a material impact from a legal perspective, although this may still need to be addressed. For example, if employees are transferring from one group company to another (under TUPE or otherwise), the receiving employer will need to ensure it has suitable benefit arrangements in place for provide the transferring employees. The impact of the reorganisation on any share incentive arrangements will also need to be evaluated (eg, whether the reorganisation will result in the accelerated vesting of any employee share options).

Financial assistance

10 Is financial assistance prohibited or restricted in your jurisdiction?

The historic prohibition on the giving of financial assistance by a company in connection with the acquisition of its shares by a third party was repealed in respect of private companies on 1 October 2008. Therefore, the current position under English law is that private companies that are not part of group involving a public company may give financial assistance to fund a third party's acquisition of its or its parent company's shares.

The position is different in relation to public companies, which are prohibited from giving financial assistance for the purpose of the acquisition of their shares or shares in a parent company. This prohibition also prevents private company subsidiaries from financially assisting such acquisition of shares in a public company that is its parent company. The term 'financial assistance' is broadly defined and can include (without limitation) cash payments, gifts, loans, transfers above or below fair market value, asset transfers, incurring liabilities, releasing debts and providing security.

If a reorganisation involves the acquisition of shares in a public company or its parent, it is essential for companies to ensure that the parties involved comply with the relevant provisions of the Companies Act 2006 (the CA 2006). A breach of the financial assistance prohibition may result in fines, and directors may face fines or prison terms of up to two years, or both.

Common problems

11 What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

One common area of difficulty is in relation to 'capital contributions' (ie, contributions to the capital of a company without the issuance of shares). Capital contributions are common in some jurisdictions, but are a source of uncertainty and confusion in England owing to a lack of statutory framework (the CA 2006 makes no reference to capital contributions) and conflicting guidance regarding their treatment from tax and accounting authorities, and in case law.

HM Revenue & Customs' guidance manual states that capital contributions are 'occasionally' made and proposes that they should be treated as either 'distributable reserves . . . as a gift or a donation' or, if such payment may be repayable in any circumstances, as a loan. The Privy Council case of *Kellar v Williams* states that 'if the shareholders of a company agree to increase its capital without a formal allocation of shares, that capital will become, like share premium, part of the owner's equity, and there is nothing in the company law of . . . England to render their argument ineffective', indicating that a capital contribution should go to a non-distributable reserve. Finally, the guidance in the technical release on realised and distributable profits issued by the Institute of Chartered Accountants in England and Wales in April 2017 states that a capital contribution will be treated as a realised profit (thereby increasing distributable reserves) if it is received in the form of 'qualifying consideration'. The question of whether consideration is qualifying is not always straightforward, as the definition of 'qualifying consideration' includes cash, assets readily convertible into cash, the release, settlement or assumption of liabilities by a third party and various other forms of consideration that are essentially 'cash-like' by nature, but these may need to be set off against any liabilities contributed.

As a result of the uncertainty surrounding capital contributions, tax, accounting and legal advice should always be sought if capital contributions are proposed, and the terms on which a capital contribution is given and received should be clearly documented and recorded.

Other common issues in relation to employment and pensions include the need to consider the powers of the Regulator and pension plan trustees in any reorganisation involving a DB plan and the application of TUPE. The internal flow of services and licences, and the changes that arise as a result of a reorganisation, are also commonly overlooked. Developments in recent years in relation to data protection also need to be considered to ensure changes in the flows of personal data resulting from the reorganisation are compliant and accurately reflected in policies and consents.

ACCOUNTING AND TAX

Accounting and valuation

12 | How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

The accounting treatment will depend on the precise steps carried out as part of the reorganisation. As seen above in relation to capital contributions, the accounting treatment may not be straightforward, so it is important to obtain accounting advice before undertaking a reorganisation to ensure the desired accounting outcomes are achieved. In addition, if distributions are contemplated, it may be necessary or desirable to obtain assistance from accountants in verifying both whether the relevant companies have sufficient distributable profits and whether distributions received from subsidiaries may be treated as realised profits (in addition to whether an impairment in the book value of the subsidiary making the distribution should be made as a result of the distribution).

Tax issues

13 | What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

Specific tax advice should always be obtained in good time during the planning phase of the reorganisation, and the documents implementing a reorganisation should be reviewed from a tax perspective to ensure the desired tax treatment is achieved. This is important because reorganisations can impact taxation at both the corporate group level (in terms of the reorganisation steps and the tax profile of the group going forwards) and shareholder level. Depending on where the relevant group companies and shareholders are based, consideration may need to be given to non-UK as well as UK tax systems.

In principle, some of the key aims of any tax structuring will be to avoid the incurrence of any 'dry' tax charges caused by the reorganisation (ie, the triggering of a tax charge if the liable entity has not received any corresponding income or gain that would enable it to pay the tax charge), and also to minimise or eliminate any transfer taxes or stamp duty that may be incurred as a result of the reorganisation steps. These aims can often be achieved through relying on various reorganisation exemptions provided for in tax legislation, but care is typically required to ensure that such exemptions are available. It is, therefore, important for tax advisers to work closely with the legal advisers drafting the documentation for implementing the reorganisation steps and review its terms to ensure the desired tax treatment is achieved.

It is usually permissible for companies forming a group for capital gains purposes to transfer assets on a tax-neutral basis. The intention of this is to treat companies in the same group as one taxable entity. When an intra-group transfer is on a no-gain, no-loss capital gains basis, there may be a de-grouping charge if one of the companies in the group exits within six years of the transfer.

While usually not mandatory, consideration should be given to whether any tax authority filings or clearances are desirable in connection with a proposed reorganisation, particularly if the application of exemptions or relief is essential to avoid a dry tax charge.

In addition, in July 2013, the Organisation for Economic Co-operation and Development (OECD) published an Action Plan on 'Base Erosion and Profit Shifting' (BEPS). The Action Plan's 15 'actions' are aimed at providing an international framework to address and combat international tax avoidance. Over recent years, the OECD and G20 countries have introduced a number of tax measures aimed at implementing the BEPS project. There is now a greater focus on BEPS when structuring new transactions, and larger corporate groups will likely continue to review their internal funding structures and react accordingly in light of recent and future developments. Further, the EU mandatory disclosure regime (DAC6) came into force on 1 July 2020 to identify potentially aggressive tax arrangements. DAC6 requires intermediaries and, in some cases, taxpayers to disclose arrangements with an EU cross-border element, which can then be exchanged and shared among the tax authorities of EU member states. However, communication from HM Revenue & Customs (HMRC) on 31 December 2020 clarified that this regime will be implemented in the UK for a limited time and to a limited extent, requiring reports to be made to HMRC of arrangements meeting 'hallmark D' of the legislation only. HMRC will instead consult on and implement the OECD's mandatory disclosure regime, to replace DAC6 and transition from European to international rules.

CONSENT AND APPROVALS

External consent and approvals

14 | What external consents and approvals will be required for the corporate reorganisation?

Various third parties will usually have an interest in a reorganisation. Whether the third-party consent is required or not will depend on the specific facts of the reorganisation (eg, whether a company has third-party financing arrangements in place, whether contracts or land will be transferred, whether a business is subject to regulatory oversight, whether contracts contain change-of-control provisions and whether shareholder rights are engaged). In some cases, advance consent may not be necessary, but a company may be obliged to give notice before or after the reorganisation is implemented.

For regulated groups, mandatory consent or notifications may be required. Such consent and notifications are usually required before a reorganisation can be implemented, and it is especially important for a group to undertake a detailed analysis of any regulatory requirements if the group is involved in a heavily regulated sector, such as energy and power, telecommunications or financial services. Failure to obtain a mandatory consent could give rise to criminal liability for a company or its directors.

Internal consent and approvals

15 | What internal corporate consents and approvals will be required for the corporate reorganisation?

As with most considerations in relation to reorganisations, the internal corporate consents and approvals required for the corporate re-organisation will depend on the steps being taken and the extent of the reorganisation. As a matter of good corporate governance, directors should act formally in relation to significant decisions and record their decisions in board minutes, even if their decision is to delegate responsibility for oversight and implementation of the reorganisation to an individual or committee.

Reorganisations will usually involve the boards of multiple companies making decisions. Each company's board (even if boards comprise the same individual members) must independently consider significant transactions relevant to that company in terms of the corporate benefit of the transactions proposed. The directors of a company owe statutory duties to that company under the Companies Act 2006 (the CA 2006), even if that company forms part of a larger group. Directors must act in the best interests of that company and should consider any potential conflicts of interest they may have in relation to proposed transactions. If it is not clear whether a matter is in the best interests of the company or presents a conflict, directors should consider whether to seek shareholder approval of the relevant matters.

Shareholder approvals or resolutions may be mandatory under constitutional documents, shareholder agreements or company law for certain actions. Because some constitutional documents and shareholders' agreements prevent directors from making significant disposals or acquisitions in the absence of shareholder approval (or approval of a certain class of shareholder), constitutional documents and shareholders' agreements (if any) should always be checked. Such documents may contain exemptions from shareholder approval requirements for intra-group transactions, but this should be verified. Shareholder approval may also be required if a director of the selling company in a group is a shareholder in the buyer company. In this instance, the disposal may constitute a substantial property transaction under section 190 of the CA 2006, though transactions between a holding company and wholly owned subsidiaries are exempt from this requirement.

ASSETS

Shared assets

16 | How are shared assets and services used by the target company or business typically treated?

Assets and services that are shared by a party to the reorganisation should be identified in the planning stage of a reorganisation so that an assessment can be made as to the impact of the reorganisation steps on them. If assets are owned by the group and services are internally provided, a reorganisation is less likely to cause significant challenges. However, if an entity holds contracts with third parties on behalf of the group and services are provided to a company involved in a reorganisation on a pass-through basis, the terms of the underlying third-party contract will need to be checked to ensure that the services may continue to be provided following the implementation of the reorganisation. If the terms are such that the services could not continue to be provided following a proposed reorganisation, it may be necessary to seek the third party's consent to continue providing the services following the reorganisation or, failing that, make alternative arrangements.

It may also be necessary for companies to license back intellectual property or information technology contributed to a company by its parent, or to grant new licences to newly incorporated group members to allow them the use of shared assets, such as intellectual property or information technology. Consideration should be given to the terms and documentation of shared assets and services, particularly as regards transfer pricing arrangements within a group. Particular care should be taken if a reorganisation is undertaken in preparation for a sale, especially if the proposed target requires licences and services provided by the selling group to operate.

Transferring assets

17 | Are there any restrictions on transferring assets to related companies?

Transferring assets between related companies is generally permitted and is common in practice. If the transfer is on arm's length terms (ie, for fair market value), then there are no issues or restrictions, because there is no extraction of value from one company in favour of the other. Issues and restrictions may arise where a company proposes to transfer assets for less than fair market value or pay more than fair market value for assets (which may be treated as a deemed distribution if the payer is a subsidiary or sister company of the transferor).

If a company has given a charge over its assets, the consent of one or more lenders under the terms of the applicable finance or security documents will likely be required. Assets that are subject to a fixed charge will need to be released and a non-crystallisation certificate may need to be obtained for those assets that are subject to a floating charge before they can be transferred as part of a reorganisation.

Some classes of assets are subject to additional requirements in connection with their transfer. For example, if assets relate to accreditation marks, their transfer will require special permission to ensure the transferee has the ability to uphold and enforce the accreditation system. Intellectual property rights will be transferred subject to any licences of which the transferee has notice.

Before transferring personal data overseas between companies, the terms pursuant to which such data is transferred and subsequently stored should be checked to ensure that the data transfer and storage will be carried out lawfully and in accordance with applicable data protection laws (eg, by way of binding corporate rules or data transfer agreements).

Following Brexit and the end of the transition period, the UK will be classified by the EU as a third country (ie, a nation situated outside the European Economic Area (EEA), which does not provide an adequate level of protection for personal data). This means that personal data can only pass freely between the EEA and the UK if there is a suitable transfer mechanism in place (eg, Standard Contractual Clauses) – though an interim period of four (plus a further optional two) months has been granted by the European Commission pursuant to the EU & UK Trade Cooperation Agreement to allow for the finalisation of an adequacy decision for the UK.

During this grace period, personal data can continue to be transferred between the EEA and the UK, pending an adequacy decision. Assuming the European Commission grants the UK adequacy, EU-to-UK personal data transfers will continue without the need for any legal or contractual safeguards.

18 | Can assets be transferred for less than their market value?

If a transfer of an asset is made to a parent or sister company for consideration that is less than the fair market value of the asset, or if payment in excess of fair market value of an asset is made to a parent or sister company, the maintenance of capital rules are engaged and must be considered. Such a transfer will generally be considered a distribution and must therefore comply with detailed requirements to ensure it does not constitute an unlawful distribution. In order to determine whether a transfer at less than fair market value or a payment in excess of fair market value is permitted, the company must first establish the value of the distribution and assess whether it has sufficient distributable profits to justify the proposed transfer. A distribution that does not comply with the relevant rules will be unlawful, and the consequences of unlawful distributions may include:

- a shareholder who knew or had reasonable grounds to believe that a distribution (or part thereof) was unlawful may be liable to repay the unlawful amount;
- a director who authorised the payment of an unlawful distribution may have breached statutory or common-law duties and may therefore be personally liable to repay the company; and
- distributions constituting an unlawful return of capital may trigger a default under third-party finance arrangements.

If a company has distributable profits, a transfer of an asset for consideration that is equal to or greater than the asset's net book value will be permitted, even if the consideration is less than fair market value. In those circumstances, a transfer at net book value is deemed to be a distribution of zero, whereas a distribution for more than net book value will increase the company's distributable profits. However, if the consideration is less than net book value, the transferring company may only make the transfer if it has distributable profits of at least the amount of the difference between the price paid and the net book value of the asset (ie, the deficit); and the transfer does not entirely extinguish the company's distributable profits, even if the transaction leaves the company with only a nominal amount of distributable profits following the transfer. If a company does not satisfy these criteria, the transfer will constitute an unlawful distribution.

Even if an asset is deemed to be lawfully distributed for the purposes of the Companies Act 2006, a transfer may still result in a breach of the common law maintenance of capital rules or the Insolvency Act 1986 prohibition on transactions at an undervalue, particularly in the current circumstances, as such transactions may be challenged if the company subsequently goes into administration or liquidation within a statutory 'hardening period'.

Finally, a director's statutory duties must always be considered, as noted above. A transfer may constitute a lawful distribution, but not be in the best interests of the transferor and therefore result in a breach of duty being committed by the company's directors.

FORMALITIES

Date of reorganisation

19 | Can a corporate reorganisation be backdated or deemed to have already taken place, for example, from the start of the financial year?

If a group wants to give effect to a step from a given date in the past, it is possible to state in the contract that parties agree that the step is to take effect from an earlier date. This will only be an effective agreement between the relevant parties, and will not alter obligations to third parties, particularly to HM Revenue & Customs (HMRC). A company's auditor may question attempts to give retroactive effect to a reorganisation, so it is prudent to consult the auditor before undertaking reorganisation transactions.

If steps or a reorganisation has occurred historically without formalisation, then steps can be taken to ratify and document the transactions that were undertaken. If this is the case, there will usually be evidence in the form of accounts and bank statements. Where reorganisation steps are documented retrospectively, the documents may state that the steps took place on an earlier date, notwithstanding that the document recording it is dated with a later date, though actions that require certain formalities to be complied with, or registrations or notifications to be made, will only take effect when the relevant formalities, registrations or notifications have taken place.

The above situations are not the same as backdating documents (ie, dating a document with an earlier date than that on which it is actually executed). Backdating documents can result in a number of criminal offences being committed, including under the Theft Act 1968, the Fraud Act 2006 and the Forgery and Counterfeiting Act 1981, and may additionally constitute a misrepresentation, which could give rise to civil liability.

Documentation

20 | What documentation is required in a corporate reorganisation?

It is not usually necessary to include extensive protections in documents between members of the same group, so the documents implementing a reorganisation are generally shorter and less detailed in their content. However, it is nevertheless important that the transactions undertaken and their terms are properly recorded, authorised and executed. In some instances, a more arm's-length approach may be appropriate, such as if the solvency of one of the parties is an issue or where one of the parties may be sold following the reorganisation.

Reorganisations involving a transfer of shares or a business typically involve the following documentation:

- an asset or share purchase agreement;
- formal transfer documentation (eg, stock transfer forms for shares, property transfers or assignments, assignments or licences of intellectual property rights, assignments or novations of contracts, including licences);
- ancillary documents, including board or shareholder minutes or resolutions, notices to employees, HMRC notifications, clearances or applications for relief, loan agreements (if consideration for the transaction will be left outstanding as an intra-group loan), releases from charges, new banking security documentation; and
- other documents for separation purposes (eg, transitional services agreements, service agreements and additional intellectual property licences).

Representations, warranties and indemnities

21 | Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

It is not common practice for the parties to a reorganisation to include extensive protective provisions in the documentation implementing a reorganisation. Transfers are often made with either no warranties or very limited warranties covering, for example, a few key matters, such as the transferring party's title to the relevant assets or shares. A warranty on title is advisable for the purposes of satisfying the directors' duties for the directors in the buyer company. The transferee's directors may also want the documentation to confirm that all major known liabilities are disclosed; although, if the parties have common directors, this may not be considered necessary. It is not common to include representations, indemnities or provisions relating to confidentiality, price adjustments or post-transfer conduct in intra-group documentation; however, a more arm's-length approach may be appropriate if one party may be sold following the reorganisation. Regardless of the terms of the documentation, purchasers may consider it necessary to seek indemnification or warranty protection from sellers in relation to pre-sale reorganisations affecting a target company.

Assets versus going concern

22 Does it make any difference whether assets or a business as a going concern are transferred?

From a tax perspective, a transfer of a business as a going concern is outside the scope of VAT. The VAT treatment of a transfer of assets that does not comprise a going concern will need to be considered individually, but it is likely that VAT will be payable if assets are transferred other than as part of a going concern.

Types of entity

23 Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

Additional restrictions, such as the prohibition on financial assistance, apply to public companies, potentially making reorganisations of public companies and their groups more challenging. In addition to company law issues, public companies listed on a stock exchange will need to comply with the rules and requirements of the exchange, which may include additional requirements, restrictions, and disclosure obligations, such as in relation to transactions with related parties.

Governmental and public bodies are often created by statute, so the relevant statute that created them will need to be considered and reviewed for any specific rules and restrictions applicable to them.

Post-reorganisation steps

24 Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation?

Post-reorganisation steps and filings often include:

- announcements (particularly relevant if one of the companies in the group is a listed company, subject to Listing Rules and DTRs);
- applications to HMRC for stamp duty relief or stamp duty land tax relief;
- registrations of the new proprietorship details in respect of Intellectual property assignments
- notifications to landlords as required under lease terms;
- execution of novations and relevant notices of assignment to customers and suppliers;
- administrative matters, including documentation for insurance, PAYE, payroll, pensions and VAT;
- Companies House filings (eg, registration of security and notifications of changes to persons with significant control of an entity); and
- updating company books (particularly the target).

UPDATE AND TRENDS

Hot topics

25 What are your predictions for next year and how will these impact corporate reorganisations in your jurisdiction (for example, expected trends or pending legislation)?

Business uncertainty is likely to continue for the foreseeable future given the impact of the pandemic. We anticipate an uptick in activity as the coronavirus pandemic and the continuing impact of Brexit continue to act as drivers for corporate reorganisations.

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26 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

UK government intervention has provided a vital lifeline for many businesses during the pandemic, which has included financial support schemes and wage subsidies for workers put on furlough. Perhaps the most pertinent to this practice area was the new insolvency legislation, which introduced a moratorium period safeguarding companies against creditor actions, along with the suspension of existing wrongful trading rules in respect of directors' actions. Pursuant to the wrongful trading rules, directors can be held liable if they continue to trade where there is no reasonable prospect of the business avoiding a formal insolvency.

The suspension of existing wrongful trading rules was introduced on 1 March 2020 and has since been extended through the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. The suspension is now due to end on 30 April 2021. This temporary relaxation is designed to give some comfort to directors who continue to trade in the current difficult economic climate.

Directors should continue to remind themselves of their duties towards the company and consider their duties in the context of any reorganisation, particularly if the corporate entity to which they are appointed comes under financial stress.

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