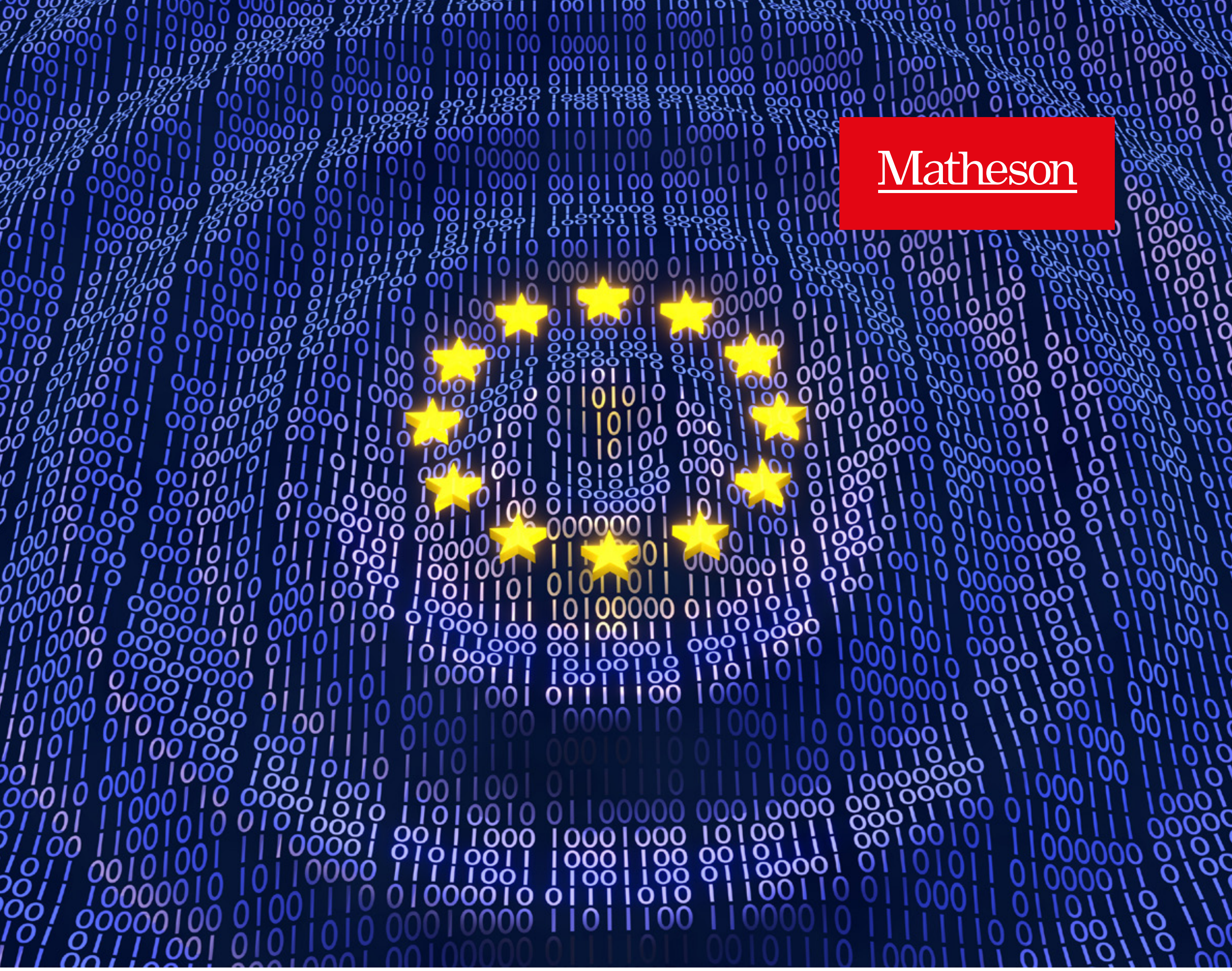
Matheson

New Year, New Era for Efficient European Businesses –

Navigating Cross-Border Restructurings



New Year, New Era for Efficient European Businesses – Navigating Cross-Border Restructurings

Irish companies can now avail of various methods with which to merge, migrate or spin off all - or portions of - their businesses with other European Union ("**EU**") limited liability companies. In our experience, these restructuring tools can be particularly useful for global post-acquisition integration, carve-out, spin-off or rationalisation projects.

This has been made possible by an EU directive introduced into Irish law on 24 May 2023 by the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the "**Regulations**"). The Regulations repealed the previous regulations which governed cross-border mergers in Ireland.

The result is consistent business transfer processes within the EU and, in turn, increased certainty, efficiency and cost-effectiveness for companies.

Available restructuring mechanisms

Three types of cross-border restructuring mechanisms can be used to facilitate the movement of assets, liabilities and / or contracts between European Economic Area ("**EEA**") states:

Cross-Border Mergers

Cross-border mergers, which result in the acquiring company being dissolved without going into liquidation, can be broken down into the following categories:

Merger by acquisition

Where a company transfers all of its assets and liabilities to another company in exchange for the issuance of shares to the shareholder(s) of the transferor company. An issuance of shares in the transferor company is now not required where the shares in the merging companies are directly or indirectly held by the same shareholder(s).

Merger by absorption

Where a company transfers all of its assets and liabilities to a company that is the holder of all the shares in that company.

Merger by formation of a new company

Where two or more companies transfer all their assets and liabilities to a newly-incorporated company in exchange for the issuance of shares in the newly-incorporated company to the members of the merging companies.

Cross-Border Conversions

Cross-border conversions, a relatively new concept under Irish law, enable a limited-liability company (without being dissolved, wound-up or liquidated) to:

- convert from a limited liability company under the law of one EEA state into the equivalent legal form under the laws of another EEA state;
- transfer all its assets, liabilities and contracts by operation of law upon conversion; and
- transfer its registered office address to the destination EEA state while retaining its legal personality.

Unlike many other European countries, before the introduction of the Regulations, no Irish company (apart from an Societas Europaea) could re-domicile or "change its seat" to another European country through an Irish statutory process. This conversion process can now be completed without the need for a winding-up or the loss of the company's legal personality. Retaining legal personality upon conversion may be particularly relevant for regulated companies who want to re-domicile but who do not want to merge with an existing entity or a new company in another EU member state.[1]

Cross-Border Divisions

An EU company can transfer all or part of its business to a newly-incorporated company or companies. The process usefully facilitates spin-off or de-merger transactions.

Full division

When all of a business is transferred, the transferring company will be dissolved without going to into liquidation. Shares in the receiving company or companies will be issued to the members of the (former) transferring company.

Division by separation / partial division

If part of a business is being transferred, the transferring company can either: (i) be issued shares in the receiving company or companies (a "division by separation"); or (ii) receive a mixture of a cash payment and / or shares in the shareholder of the receiving company or companies (a "partial division").

1. For further analysis on the cross-border conversion process, please see our previous update here.

What companies can avail of the these restructuring tools?

Limited liability companies which have their principal place of business, registered office, or central administration located in the EU (including public and private companies).

What does the process involve?

While the specific steps will need to be considered on a case-by-case basis, the following are the basic procedural steps which generally apply:

- Terms of agreement between the companies in respect of the conversion / merger / division are signed;
- A directors' explanatory report for members and employees (covering legal and economic aspects of the transfer) is prepared (unless waived);
- An independent expert's report is prepared (unless waived);
- Documents are publicly filed with the Irish Companies Registration Office ("**CRO**") / company website;
- Shareholder approval of the conversion / merger / division is obtained;
- A pre-certificate is issued by the competent authority of each EU member state involved;
- A scrutiny of legality is additionally carried out by the competent authority of the EU member state of the surviving / receiving company;
- Registration of the conversion / merger / division is recorded by the national public registry of each EU member state involved (in Ireland, the CRO).

Additional Considerations

Certain restructurings may also be subject to:

- obtaining approval from the Competition and Consumer Protection Commission and any other relevant authorities;
- where the company is a financial services entity regulated by the Central Bank of Ireland (the "**CBI**"), notifying the CBI of the restructuring at least 90 days before the date of the shareholder approval; and / or
- where the company works within a "special sector," obtaining additional merger or notification requirements, such as the electricity, water, telecommunications, media, and broadcasting.

Why should a business avail of these restructuring tools?

These restructuring tools 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. In each scenario, all (or some in the case of a partial division) of the contracts, assets, liabilities and employees of the transferring company are transferred by operation of law. This automatic transfer effect can be particularly useful where, for example: (i) it may be difficult to expressly identify all the assets (including contracts), liabilities and employees of the transferring company; and / or (ii) the asset profile of the company means that an automated transfer is more efficient than seeking and documenting various consents to transfer (for example, if the transferring company 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 (e.g. IP rights, real estate).

The Regulations in practice to date

Following the introduction of the Regulations, while a handful of 'conversions' and 'divisions" gradually appear before the Irish courts, the most common applications that have been made to date are cross-border mergers. As at the date of publication of this article, the CRO records report that, out of the 19 applications made pursuant to the Regulations, 17 applications were cross-border mergers.

While the deadline to implement the EU directive was 31 January 2023, many EU companies have not yet introduced the equivalent local legislation. Some EU countries are permitted to still complete a conversion / merger / division under their existing legislative framework, but others will need to wait until local legislation is introduced.

How Can Matheson Help?

Matheson LLP have advised on the vast majority of complex, high-profile cross-border restructurings in recent years, including the very first cross-border merger under the Regulations. The International Business Group, a dedicated practice within Matheson's Corporate Department, operates as advisor of choice to the majority of global international companies with Irish operations, prides itself in their accessibility, advice and support to clients (with a particular emphasis on efficient response times), and has significant experience of the complex issues and matters that arise in such projects.

For further advice and guidance on global restructurings, please contact Gráinne Boyle, Catherine Carrigy, Sam Costello or another member of the International Business Group.

Contacts

Gráinne Boyle
Partner
T +353 1 232 2645
E grainne.boyle@matheson.com

Catherine Carrigy
Senior Associate
T +353 1 232 2072
E catherine.carrigy@matheson.com

Sam Costello
Solicitor
T +353 1 232 2508
E sam.costello@matheson.com

Matheson

DUBLIN
70 Sir John Rogerson's Quay,
Dublin 2
Ireland

T: +353 1 232 2000
E: dublin@matheson.com

CORK
Penrose One,
Penrose Dock, Cork,
T23 FF2K

T: +353 2 1240 9100
E: cork@matheson.com

LONDON
7th Floor, Octagon Point,
5 Cheapside,
London EC2V 6AA, UK

T: +44 20 7614 5670
E: london@matheson.com

NEW YORK
250 Park Avenue,
New York, NY 10177,
United States

T: +1 646 354 6582
E: newyork@matheson.com

PALO ALTO
228 Hamilton Avenue,
Third Floor,
Palo Alto, CA 94301

T: +1 650 617 3351
E: paloalto@matheson.com

SAN FRANCISCO
95 Third Street
San Francisco,
CA 94103

T: +1 650 617 3351
E: sf@matheson.com