Matheson

Cross-Border Mergers under the lens of the Mobility Regulations

In welcome news for companies with EU operations, the Mobility Directive (Directive (EU) 2019/2121) (the "**Mobility Directive**") has, following its transposition into Irish law, now seen a number of applications go through the Irish courts since our earlier update.

By way of reminder, the new regime enables Irish limited liability companies to participate in cross-border conversions, mergers and divisions involving other EEA limited liability companies, pursuant to the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (as amended) transposing the Mobility Directive (the "**Mobility Regulations**").

Pre-existing Irish rules on EU cross-border mergers have been in place in Ireland since 2008 but the Mobility Regulations introduce new procedures for cross-border mergers ("**CBMs**") involving Irish companies.

Following the introduction of the Mobility Regulations, while the more novel 'conversions' have gradually appeared before the Irish courts, perhaps unsurprisingly, the most common applications to date are the more familiar, CBMs. As such, this article focuses on what we are seeing to date as regards the application of the Mobility Regulations to CBMs in practice, having completed the very first CBM under the new Mobility Regulations, along with a number of other CBMs since.

Where are we now?

The Irish High Court (the "**Court**") is the competent Irish authority under the Mobility Regulations in respect of both inbound and outbound CBMs. It is now clear from the Court's practice in dealing with applications under the Mobility Regulations to date that the Court's role is substantive and that the parties to any CBM will be required to be fulsome in their approach to the information they are presenting to the Court in seeking the relevant merger approval, particularly with respect to the background and rationale / purpose being advanced for the proposed merger, together with sufficiently robust detail in relation to all financial and other impacts of same.

The Court can be seen to be taking a detailed and sophisticated approach in dealing with merger applications. Therefore any parties seeking the relevant merger order will be well advised to place sufficient importance and emphasis on preparing fully to satisfy the Court's requirements as part of the process and anticipating a 'more rather than less' approach by the Court.

The recent publication of updated superior court rules (the "**Court Rules**") now also provides welcome clarity in relation to some of the practical aspects of CBMs.

Focusing on the updated Court Rules, one welcome feature is that online court applications are now expressly enabled for CBM applications. This promises to offer increased flexibility to parties involved in a CBM as hearings may now take place in-person, via online video link, or a hybrid of both but it remains to be seen how this will operate in practice.

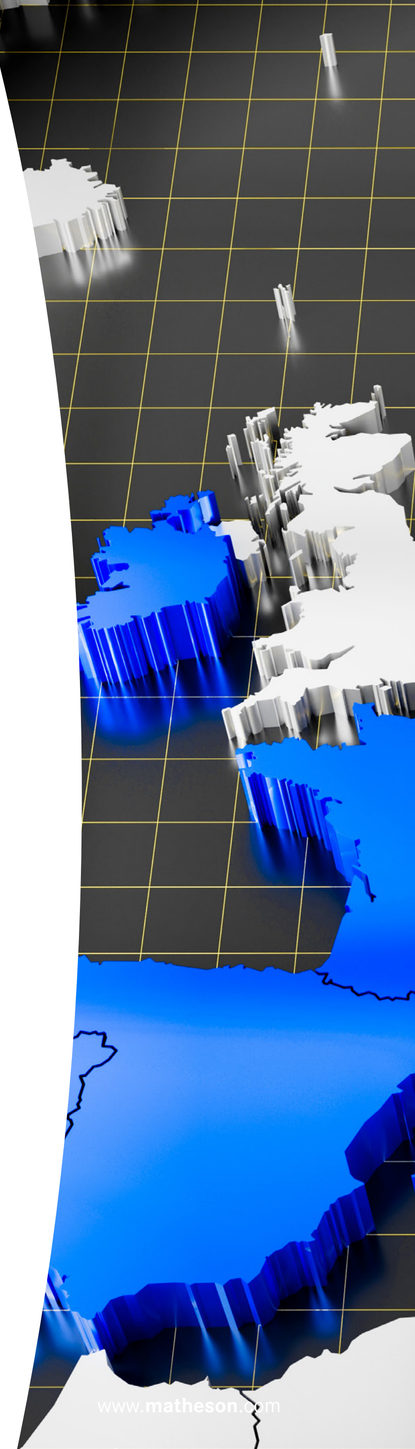
Other notable clarifications in the Court Rules include the following:

(i) the Court order will state the effective date of the CBM and is conclusive evidence of its completion;

(ii) an Irish merging company must satisfy the Court that there has been no material adverse change to the net asset position of the Irish merging company since: (a) the date of its accounts set out in the common draft terms of merger; and (b) the date on which the relevant affidavit is sworn;

(iii) any application by a creditor to obtain adequate safeguards from an Irish merging company does not suspend the CBM process (but may require the republication of notices or additional advertisements to be placed setting out details on the relevant hearing date(s)); and

(iv) any document exhibited to an affidavit or presented to the Court that is not in English (or Irish) must have a certified translation into English (or Irish), with the translator's competence and qualification to be verified through an affidavit to ensure the admissibility of the translated document as evidence to the Court.



Timing and Practicalities

From a practical perspective, it is critical to obtain comprehensive advice on all potential tax, accounting, financial, regulatory or business issues as part of the pre-planning phase for a CBM. In addition, and as part of that pre-planning phase, a due diligence exercise should be completed to cover an analysis of all assets, liabilities and employees (including the number of employees, agency workers and the relevant employing entity) transferring by operation of law upon the CBM taking effect.

Given the Mobility Directive's varied transposition across other Member States, there is also an increased focus on collaboration with European counterparts to ensure that all required items are addressed as part of the CBM in each relevant jurisdiction. In that regard, a cross-jurisdictional analysis should be carried out as early as possible in the CBM process to identify gating items and timing issues that may be presented by the laws applicable for the other non-Irish merging party / parties, particularly regarding any specific requirements of designated relevant authorities (which is often a notary public) outside Ireland.

With respect to timing on the Irish side, the typical timeline to complete a straightforward CBM under the Mobility Regulations appears to be in the region of 3 to 6 months. That said, significant consequences in terms of timing and the conditionality for completion can arise If any merging party:

(i) Is a listed company or a subsidiary of one (as disclosure obligations under relevant securities laws or listing rules may be triggered);

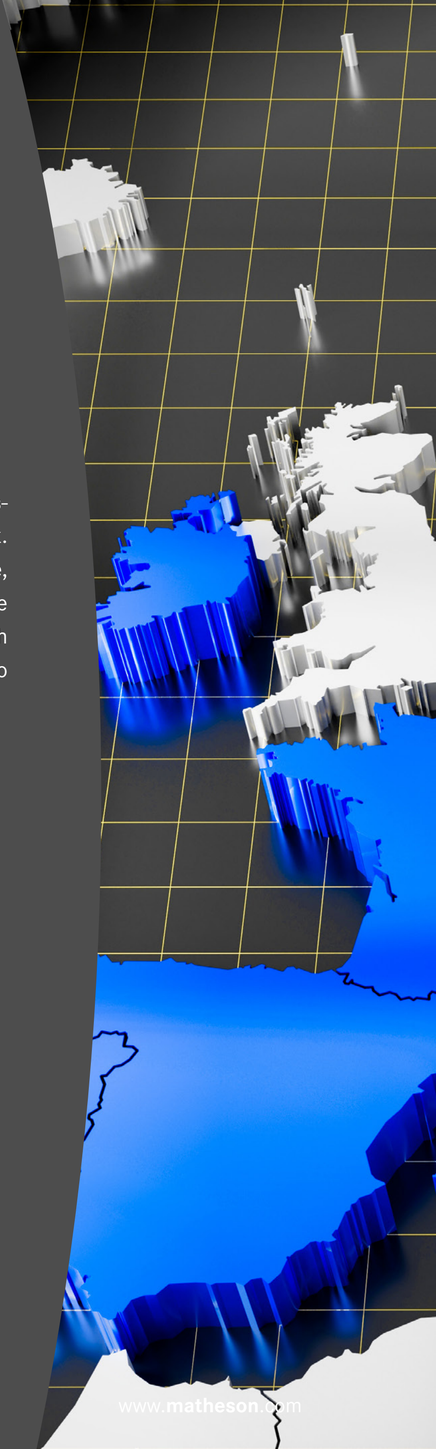
(ii) Is a financial services entity regulated by the Central Bank of Ireland (the "**CBI**") (as the CBI must be notified by the Irish company intending to participate in the CBM at least 90 days before the shareholder approval of the CBM is to be passed; or

(iii) Operates within a "special sector," subject to sector-specific or additional merger controls or notification requirements, such as the electricity, water, telecommunications, media, and broadcasting.

Additionally, parties should factor in any potential creditor application(s) for the provision of adequate safeguards, as well as the possibility that the Court may extend the 3 month-period by which it must complete its examination of the legality of the CBM under the anti-abuse provisions contained in the Mobility Regulations.

CONCLUSION

The Mobility Directive offers enormous potential with expanded cross-border restructuring options and tools available within the new framework. For those companies seeking to unlock the potential of the new regime, the pre-planning phase is more critical than ever to allow sufficient time to ensure that all requirements are met from both an Irish and non-Irish perspective. Being fully and properly advised and prepared is key to ensuring a smooth scrutiny process through the Court.



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