Brexit and Irish Companies. It's more than 'No Deal'.

The Issue

- **Cross-Border Mergers**

Cross-border mergers will no longer be permitted between Irish registered and UK registered companies under the European Communities (Cross-Border Mergers) Regulations 2008 (the "Regulations") once the UK leaves the EEA because under the Regulations at least two of the merging entities must be governed by the laws of different EEA member states.

- **Branch of UK Company**

A UK company that has registered as a branch in Ireland will after the UK leaves the EEA become a branch of a non-EEA company. It should be noted however that a branch of a UK company that has already registered as a branch of an EEA company will not have to re-register as a branch of a non-EEA company. The documentation to be filed in respect of such branch in the Companies Registration Office in Ireland will however change going forward.

- **EEA Resident Director**

Section 137 of the Companies Act 2014 requires every Irish registered company (subject to certain exceptions) to have at least one director who is resident in an EEA member state. As the UK will no longer form part of the EEA, an Irish company relying on a UK resident director to satisfy this legal requirement will need to put in place an alternative arrangement.

Our Recommendation

Cross-border mergers involving a UK company that are currently in progress should be completed before the UK leaves the EEA as, in the absence of transitional arrangements, the relevant court will not have jurisdiction to make the necessary orders to give effect to the merger after that date. The requisite legal framework will not exist. From a practical perspective, if an Ireland/UK cross-border merger was to commence before the final outcome of the Brexit negotiations are confirmed, then it would need to be established that both the Irish and the UK High Courts would agree to start the process without certainty as to its outcome.

The directors of an Irish branch of a UK company should familiarise themselves with the filing requirements for a branch of a non-EEA company. Currently the filing requirements for branches of EEA and non-EEA companies are broadly similar but this may not always be the case.

The main exception to this general rule is that it will not apply if the company holds a prescribed form bond to the value of €25,000. Another exception applies where the Registrar of Companies grants a certificate certifying that the company has a real and continuous link with one or more economic activities that are being carried on in the State. This is a less common, time consuming and discretionary process. The most practical measure at this late stage would, where possible, see affected companies appoint an additional EEA resident director to their boards.

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The Issue

Our Recommendation

- **Guarantee by Holding Company**

Under section 357 of the Companies Act 2014 a subsidiary company can file consolidated financial statements of its holding company (established under the laws of an EEA member state) rather than file its own accounts. This is permitted if the holding company provides a guarantee of the subsidiary's commitments and liabilities and certain other conditions are met.

As the holding undertaking must be established under the laws of an EEA state, an Irish subsidiary relying on a UK established holding company for such guarantee will need to reconsider such arrangement. It may need to establish a new holding undertaking elsewhere in the EEA in order to continue to avail of the guarantee. This might of course bring other factors such as third party consents and contractual implications into play.

- **Filing Exemption**

Under section 299 of the Companies Act 2014 a holding company that is a subsidiary undertaking of an undertaking registered in the EEA may avail of an exemption from the obligation to file group financial statements where certain other requirements are satisfied.

An Irish holding company relying on a UK registered holding undertaking under this provision will need to consider whether to establish a new legal structure elsewhere in the EEA in order to continue to avail of the filing exemption. Our comments above in relation to additional factors to be considered (eg consents and contracts) apply equally here.

- **M&A Deals**

Many market commentators and economists have predicted that a No Deal Brexit could lead to a recession in the UK, which could affect other parts of Europe in a contagion like reduction in growth across the region. Any significant economic slowdown will likely impact investor confidence more widely, which may result in a reduction in corporates undertaking M&A activity. On the other hand, this may give rise to greater opportunities for financial buyers where there is less buy side competition for assets.

On transactions where the target has UK operations, buyers should be undertaking thorough due diligence on the target's Brexit contingency planning and, where appropriate, specific Brexit related warranty cover should be included in the relevant transaction documents. Similarly, where the acquisition is being partly funded by a third party lender, buyers will need to consider the impact a No Deal Brexit may have on the availability (and terms) of such finance.