LAYTONS LLP

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UK based insurance & financial services operating in other EU countries after 31 December 2020

Commercial, Corporate, Tax

The Legal Problem

UK based insurance and financial services businesses operating in other EU countries after the end of 2020 are due to lose their EU regulatory passporting rights to use the UK Regulatory permissions and will become third country providers, as it appears there will be no transitional regime in place for automatic transfer to local regulatory regimes. Continuation of the regulated activity without obtaining local regulatory consents is likely to result in fines penalties and other enforcement action.

The Commercial Solutions

Potential solutions to this regulatory difficulty include:

1. setting up a local licenced branch, or local subsidiary
2. selling the business to another locally licenced third party business; or
3. running off the business over the rest of the year and withdrawing from the market

For those looking to remain in business in the local EU market through their own locally regulated branch or subsidiary company it will be necessary to apply to the local financial services authority for relevant permissions to carry on the relevant regulated activity. Usually there are substantial requirements to fulfil in obtaining the local regulatory permissions and these may easily take several months to obtain (even in pre Covid-19 days). There are likely to be additional time delays to obtain clearances from national tax authorities in the UK and the other EU state. Some of these time delays may overlap but it would be wise to allow at least 6 to 8 months to implement such a change even once it has been structured and planned.

The race against time to make the transfer of a UK regulated business to another EU country before Brexit day.

With the prospect of a hard Brexit at the end of 2020, anyone looking to do a transaction setting up their own locally regulated branch or subsidiary should be prepared for the complication and the time involved in making the transfer. Laytons LLP have been involved in a number of these transactions and we wished to share some issues with you from a UK perspective of looking to transfer a UK regulated business into an entity in another EU state.

The issue of how regulated businesses reorganise themselves on Brexit is hugely challenging and is a race against time for the following reasons:

1. Regulatory Consents

The regulatory authorities in the country in which the regulatory business is operated can take several months at the best of times to give the regulatory consents for the new branch, subsidiary company or whatever entity is created. Until that branch or new company has received the necessary regulatory approval, the local business can't be transferred and operated the regulatory supervision of the new regulatory authority. The timing for this is further complicated by the method of transfer of the business and by tax clearances which may be required and compliance procedures that are likely to need to be dealt with before transfer.

2. Tax Issues

If the business needs to be restructured to meet regulatory requirements the relevant tax issues will need to be addressed in both the UK and the EU state in which the business is operated. This will involve taking local advice in that EU state as well as considering the UK tax issues with a view to identifying the most efficient tax structure. It is likely that the EU Tax Mergers Directive, which has been implemented into UK tax legislation and is intended to provide relief from UK corporation tax for incorporation of EU branches, will apply. However, local advice should be obtained on whether, and if so how, the Directive has been implemented and the extent to which it relieves taxes in the EU state in which the business is operated. It may be desirable to apply for tax clearances or rulings to the UK and the tax authority of the EU state in which the business is operated, and to ensure that tax compliance and notification requirements are observed and that any taxes which may be triggered, such as stamp or transfer taxes, are budgeted for and duly paid. It is prudent to allow 30 to 60 days from submission of the clearance application to HMRC for clearance to be granted.

3. Transactional Delays

The method of the transfer of the business from a UK company to another local EU entity, can be done by various methods and these are likely to include: the European Merger regulation; or, selling the business assets and undertaking from the UK business to say the Local EU limited entity. If the European merger regulation route is chosen, this is a procedure regulated by the English courts, and there is a need for various shareholder and other resolutions to be passed and court hearings to be held it is unlikely that the procedure will be completed in less than 3-4 month when allowing for the court hearings.

If a sale and transfer of the assets and undertaking arises then sufficient time needs to pass to go through employee consultation under the EU Transfer of Undertakings Regulations and to obtain multiple third party consents to assign or novate contracts.

Important – Start now as there are only 8 months left before the UK ends its transitional departure from the EU.

The net effect of all these restrictions on the timetable are likely to mean that somewhere between 6 and 8 months is need to take all the steps involved in the transfer to meet the timetable restrictions of Regulatory authorities, Courts
and Tax authorities. Notwithstanding all the difficulties of Covid-19, the next month is the time when businesses must move from planning a transfer of their regulated business, to executing the transfer, otherwise they may be too late.

Laytons LLP have been involved in various roles in EU cross border mergers and would be pleased to provide UK legal and tax advice.

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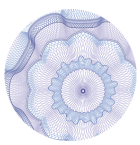

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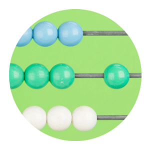

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