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CROSS-BORDER MERGERS BETWEEN U.K. AND ITALIAN ENTITIES

SOMMARIO: 1. Cross-Border Mergers-Background and Involved Sets of Interests - 2 Legal Framework 2.1 Directive 2005/56/EC - 2.2 U.K. Rules on Cross-Border Mergers - 2.3. Italian Rules on Cross-Border Mergers - 3 Practical Aspects to Consider in the Potential Merger between an Italian Entity and a U.K. Entity - 3.1 Timelines - 3.2 Content of Merger Documentation - 3.3 Institutional Relationships

1. Cross-Border Mergers-Background and Involved Sets of Interests

A cross-border merger is a form of corporate restructuring which involves the dissolution of one or more of the involved entities, established in different jurisdictions, without a liquidation process.It is an alternative to take-overs in the context of corporate restructuring, and the reasons driving the choice to follow the merger rather than take-over route may be several: tax-related, strategic, commercial or even procedural (the absence of a liquidation process may make the process simpler, although other formalities will apply depending on the jurisdiction).

As in other areas of the law, the legal discipline of cross-border mergers has to strike a balance between competing sets of interest: on the one hand, private, or "corporate" in this case, autonomy in setting a course of action; on the other one the protection of potentially weaker groups of interests, which calls for a measure of public scrutiny on the preparation and implementation of a cross-border merger. European legislation, and the

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corresponding implementation instruments in Italy and the U.K., focus on the interests of shareholders, creditors and employees of the involved entities. In order to ensure that the prospected merger does not cause undue prejudice to any of these categories of interested parties, relevant rules provide for the involvement of a public authority in the process. The relevant authority differs jurisdiction by jurisdiction: it is the courts, for instance in the U.K.; it is the notary public in Italy.

The following paragraphs provide an overview of the European legal framework for cross-border mergers, and of the implementing legislation in the U.K. and Italy. The last part of this article underlines certain practical considerations to be taken into account in the context of a potential merger between a U.K. entity and an Italian entity.

2. Legal Framework.

2.1 Directive 2005/56/EC

European Directive 2005/56[1] responding, as stated in its premises, to a "need for cooperation and consolidation between limited liability companies established in different Member States", introduced a framework of rules for cross-border mergers between limited liability companies. Three types of cross-border mergers fall within the scope of the directive: (i) mergers involving the dissolution without liquidation of one or more companies, and the transfer of their assets and liabilities to another existing entity, which in exchange for such transfer issues shares or other securities to the shareholders of the entities being dissolved; (ii) mergers involving the dissolution without liquidation of one or more companies, and the transfer of their assets and liabilities to a new company formed by them, which issues shares or securities to the transferor entities' shareholders; and (iii) mergers involving the dissolution without liquidation of a company, and the transfer of its assets and liabilities to a parent company owning the entirety of its capital.[2]

The directive refers to existing merger regulations in the member states and addresses potential conflict of laws up front by providing, as an overall

[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, 2005 O.J. L310.
[2] Directive 2005/56, article 2(2).

competence watershed, that, for what pertains the legality of the decision-making process with respect to the merger, each participating company is subject to the legislation and monitoring of the member state having jurisdiction over such company; monitoring of the completion and overall legality of the cross-border merger is then a matter for the scrutiny of the member state having jurisdiction over the entity that results from the cross-border merger.[3] The directive identifies as subjects whose interests need peculiar attention and protection in the context of a cross-border merger, employees, creditors, debenture holders and holders of securities or shares of the merging companies. With respect to employees, the directive goes as far as to direct the member states to regulate the participation rights of employees in the company resulting from a merger in accordance with relevant European law; this is to ensure that employees of the participating companies do not get, as a consequence of the merger and any related changes in the identity of their employing party, less favourable participation opportunities than they enjoyed in their original employer entity.[4]

In terms of process, the administrative or management organ of each of the merging companies has to draft two key documents: the common terms of merger, and a report explaining to the shareholders the legal and economic terms of the proposed merger. In addition, the directive also requires that the member states legislate around the preparation of an independent expert report, addressed to the shareholders of the merging companies. This latter requirement may however be waived with the unanimous consent of all the shareholders of all the participating entities. Process and documentation requirements are simplified for mergers in which a parent entity acquires a wholly owned subsidiary.[5]

The terms of merger have to be approved by the general meeting of the shareholders of each participating entity. As mentioned above, the directive leaves it to the member states to identify, for merging entities falling within their jurisdiction, the competent authority to issue a certificate attesting to the completion of the pre-merger requirements. The member state having jurisdiction on the entity resulting from the merger identifies the competent

[3] Directive 2005/56, art. 4 and art. 11.
[4] Directive 2005/56, art. 16.
[5] Directive 2005/56, article 15.

authority to certify the completion of the cross-border merger; the law of this latter state also determines the date of effectiveness of the merger.

2.2 U.K. Rules on Cross-Border Mergers

Directive 2005/56 has been implemented in the United Kingdom with the Companies (Cross-Border Mergers) Regulations 2007.[6] These regulations reflect the process delineated in the directive and apply to mergers in which at least one of the participating entities is a U.K. company, and at least one is a company of an E.E.A. state other than the U.K. The regulations cover the same categories of mergers identified in the directive (merger by absorption, merger by absorption of a wholly-owned subsidiary and merger by formation of a new company).

The pre-merger certificate for any U.K. merging companies is issued by the court, upon application of the relevant companies. The requirements to obtain the pre-merger certificate mostly track the requirements under the directive, however the U.K. Regulations also prescribe certain additional publicity and notification requirements. For instance, the directors have to deliver copies of their report on the legal and economic grounds for the merger to the employee representatives (or to the employees) of the merging entity at least two months before the planned date of the members' meeting to resolve on the proposed merger;[7] in addition, copies of the terms of merger, directors' report and independent expert report (unless preparation of this latter document has been waived) have to be made available for members' and employees' inspection at the registered office of the U.K. merging company at least one month in advance of the planned date of the members' meeting.[8] Publicity is also required in respect of the U.K. Registrar of Companies: the directors of a merging U.K. company have to deliver to the registrar details on any meetings of members and/or creditors called to deliberate on the merger, as well as copy of court orders calling such meetings, the terms of mergers and details of the merging companies. This information must be provided to the registrar at least two months in advance of the planned date of the members' meeting deliberating on the merger, and the registrar, one month in advance of the

[6] Companies (Cross-Border Mergers) Regulations 2007, n. 2974 of 2007, adopted on 15 October 2007.
[7] U.K. Regulations, regulation 8(5).
[8] U.K. Regulations, regulation 10.

same meeting, has to publish a notice of receipt of such documents in the London Gazette, Edinburgh Gazette or Belfast Gazette, depending on the place of registration of the relevant merging entity.[9]

With respect to the approvals required in connection with a cross-border merger, under the U.K. Regulations, the draft terms of mergers must be approved by a majority in number representing 75% in value of each class of members of the U.K. merging entity. Members' approval is not required if (i) the U.K. merging company is the transferor in a merger by absorption of a wholly owned subsidiary or (ii) the U.K. company is an existing transferee entity, whose members have been able to consult the relevant merger documents in the time frames prescribed under the directive, and would have been able, in a number representing at least 5% of the transferee company share capital, during the one month period following the publication of the registrar's notice in the Gazette, to request a members' meeting to deliberate on the merger.[10]

The U.K. regulations also provide for a potential meeting of the creditors, or class of creditors, of a merging U.K. company to deliberate on the merger, meeting which may be called by the court upon the application of any creditor.[11] At any such meeting, the merger must be approved by a majority in number, representing at least 75% in value, of the relevant class of creditors.[12]

In a merger where the resulting company is a U.K. company, the U.K. court will issue an order approving the completion of the cross-border merger, on a joint application of all the merging companies. Requirements for the issuance of the order are that (i) a pre-merger certificate, approving the same terms of merger for all merging entities, has been issued in the U.K. and in any other relevant E.E.A. jurisdiction in respect of the other merging entities, (ii) that the application be made no later than six months after the date of issuance of any pre-merger certificate and (iii) that any necessary arrangements for employee participation have been made.[13]

[9] U.K. Regulations, regulation 12.
[10] U.K. Regulations, regulation 13.
[11] U.K. Regulations, regulation 11.
[12] U.K. Regulations, regulation 14.
[13] U.K. Regulations, regulation 16.

Copy of the order approving the merger must be sent to the U.K. registrar of companies within seven days of the date of issuance.[14] The U.K. registrar will then give notice of the order to the relevant registers in the E.E.A. countries of jurisdiction of any other participating company.[15]

The U.K. regulations, in line with the directive, also include provisions on employee participation rights. These provisions apply if one of the merging companies had, in the six months prior to the publication of the terms of merger, an average number of employees exceeding 500 and a system of employee participation, or if the U.K. merging company has employee representatives among its directors, members of its administrative or supervisory organ, their committees or the management group which covers the profit units of the company. Under the regulations, the merging companies may either choose to be subject to a set of standard rules for employees participation, provided for in the same regulations, which set forth minimum requirements for employees participation; or they may choose to form a special negotiating body, whose members will be elected by the employees of the participating companies (the number of members which employees of each company may elect depends on the percentage of the total work force of the merging company which they represent). The special negotiating body has the task to negotiate with the merging companies an employee participation agreement. Relevant negotiations may be carried out over a period of up to 12 months, and if no agreement can be reached within such period, the standard rules of participation apply.[16]

Under the regulations, as a result of a cross-border merger, all the assets and liabilities of the transferor companies are transferred to the transferee company, which also assumes the rights and obligations under the contracts of employment to which the transferor entities were parties. The transferor entities are dissolved, and in case of a merger by absorption, their members become members of the transferee entity.[17]

[14] U.K. Regulations, regulation 19.
[15] U.K. Regulations, regulation 21.
[16] U.K. Regulations, part 4.
[17] U.K. Regulations, regulation 17.

2.3 Italian Rules on Cross-Border Mergers

In Italy, directive 2005/56 has been implemented through legislative decree n. 108 of 2008,[18] which makes cross-border mergers subject, with respect to any participating Italian company, to the rules already established with a 2003 amendment of the Civil Code for domestic mergers; articles 2501 to 2505-quater of the Civil Code apply thus to cross- border mergers with some modifications provided for in the 2008 decree.

The 2008 rules cover mergers between one or more Italian companies and one or more companies established in another E.U. member state. At first sight, the scope of the Italian rules is thus slightly narrower than the one of the U.K. rules, which also encompass mergers involving companies established in a EEA (but not EU) state. However the 2008 decree is also applicable to mergers involving companies not established in the EU provided that the rules implementing the European directive on cross-border mergers are applicable to such companies under the legislation of the member states having jurisdiction on all the other E.U. companies participating in the proposed merger.[19]

The merger process is articulated into three phases which track the process set forth in the European directive.

The first phase consists of the preparation and filing of the merger documentation, which, as under the U.K. rules, includes the terms of merger, whose content is prescribed by art. 2501-ter of the Civil Code and article 6 of the 2008 decree; the directors' report on the legal and economic grounds for the merger, whose content is detailed in article 2501-quinquies of the Civil Code and article 8 of the 2008 decree; and an independent expert report (unless waived with the consent of all shareholders of all participating companies, consistent with the European directive requirements).[20] The terms of merger have to be filed with the registrar of companies of the places where companies participating in the merger have their seat, at least 30 days prior to the planned date for the shareholders' decision on the merger project, and by the same deadline, details of the companies participating in the merger as well as of the ways in which

[18] Legislative Decree n. 108, of 30 May 2008, Gazzetta Ufficiale n. 140 of 17 June 2008.
[19] Decree 108/2008, Art. 2(2).
[20] Decree 108/2008, Art. 9.

creditors and minority shareholders may exercise their rights have to be published in the Italian Official Gazette.[21] During this same 30 days period, the terms of merger and the balance sheets of the companies participating in the merger for the previous three fiscal years have to be made available at the registered office of the companies participating in the merger, so that the shareholders may view and copy them, and the directors' report has to be sent to employees' representatives or, in their absence, made available directly to the employees.[22]

The second step is the adoption of a resolution on the proposed merger by the shareholders of the participating entities. Majorities required to approve a merger proposal vary depending on the kind of company involved.[23] Effectiveness of the resolution approving the merger may be made subject to a subsequent resolution approving procedures for employees' participation in the company resulting from the merger.[24] In case of mergers by absorption of a wholly owned subsidiary, a shareholders' resolution of an Italian transferor company is not required;[25] in this same type of mergers, as well as in mergers where the company being incorporated is at least 90% owned by the incorporating one, an Italian transferee company, if so provided in its act of incorporation or articles of association, may validly approve the merger by resolution of its administrative body, adopted in the form of *atto pubblico*; similarly to the U.K. rules, shareholders representing at least 5% of the share capital may in any case request that a shareholders' resolution be passed.[26] Further, for mergers of a wholly owned, or 90% and more-owned, subsidiary, the requirement to prepare an independent expert report does not apply (in case of merger of a wholly owned subsidiary, not even a directors' report on the legal and economic grounds for the merger is required).[27]

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[21] Decree 108/2008, Art. 7.
[22] Art. 2501-septies C.C. and Decree 108/2008, Art. 8.
[23] Art. 2502 C.C. For *società di persone*, the majority of the members, determined in accordance with their right to participate in company profits, has to vote in favour of the proposed merger; for *società di capitali*, the same majorities as for an amendment of the act of incorporation or articles of association apply (see art. 2368 C.C.).
[24] Decree 108/2008, Art. 10.
[25] Decree 108/2008, Art. 18.
[26] Art. 2505 C.C.
[27] Art. 2505 and 2505-bis C.C.

Copy of the shareholders' resolution approving the merger must be filed with the Italian registrar of companies. It is at this point of the process that Italian law becomes concerned with the interests of creditors and debenture holders: the merger cannot be completed before 60 days from the date of the filing of the merger resolution with the registrars. During this 60-day period, creditors and debenture holders of the Italian companies participating in the merger may oppose the merger decision. With respect to creditors, the 60-day period may be waived, if creditors have consented to the merger, if dissenting creditors have been paid or the relevant amounts have been deposited at a bank, or if an independent expert report has been prepared for all the participating companies by the same auditing company, which guarantees that the financial situation of the merging companies makes creditors' protections unnecessary.[28] Debenture holders may oppose the merger decision unless the merger project has been approved in a meeting of debenture holders. If there are holders of convertible debentures, notice of the proposed merger must be published in the Official Gazette at least 90 days prior to the filing of the draft terms of merger, so that they can exercise their conversion rights within the following 30 days.[29] A pre-merger certificate may be issued by an Italian notary at the request of the Italian entity participating in the merger. Such document certifies, among other things, the filing of the resolution approving the merger with the registrar of companies and that the terms and procedures to protect creditors' interests have been duly complied with in accordance with the Civil Code rules.[30]

If the company resulting from the merger is an Italian entity, the notary public verifies that all the requirements for the completion of the merger have been complied with and issues a certificate to this effect within 30 days of receiving, from each participating company, the pre-merger certificate and the resolution approving the merger.[31] Completion of the merger takes place then through the passing of a notarized act of merger, which has to be filed within 30 days of its adoption with the competent registrar of companies in respect of all the companies taking part in the merger. The merger is effective upon the filing of the act of merger with the office of the

[28] Art. 2503 C.C.
[29] Art. 2503-bis C.C.
[30] Decree 108/2008, Art. 11.
[31] Decree 108/2008, Art. 13.

registrar of companies within whose jurisdiction lies the Italian company resulting from the merger.[32] An original provision in the Italian implementation of the European directive is the one that grants a right to withdraw from an Italian merging company to any dissenting shareholder, if the company resulting from the merger is not an Italian company.[33]

As a result of a merger, according to article 2504-bis of the Civil Code and article 16 of the 2008 decree, the surviving entity acquires all the rights and obligations of the merged entities.

The 2008 decree also provides for employees participation rights in the Italian company resulting from a cross-border merger; employees are entitled to participation rights, if at least one of the companies participating in the merger had an average number of employees exceeding 500 in the six months preceding the merger and had in place a system of employees' participation. Relevant rights have to be negotiated in the context of national collective agreements applicable to the company resulting from the merger. The decree also provides for default rules, based on pre-existing domestic and European legislation, applicable in case an agreement on participation rights is not reached in the collective bargaining frame, within 12 months of the date of effectiveness of the decree.[34]

3. Practical Aspects to Consider in the Potential Merger between a U.K. Limited Company and an Italian Entity

U.K. rules and Italian rules on cross-border merger are quite detailed, and European rules provide a helpful background to fill in any possible gaps. The practical steps to prepare and implement a merger between a U.K. entity and an Italian entity may however be tricky; in particular, it is important for a lawyer acting on a matter of this kind to consider carefully timelines, the required content of the merger documentation on both the U.K. and the Italian side, and the fact that involved institutions (courts, notaries, companies registrars) are not always familiar with the procedures and not used to work with one another on a cross-border basis.

[32] Decree 108/2008, Art. 15.
[33] Decree 108/2008, Art. 5.
[34] Decree 108/2008, Art. 19.

3.1 Timelines

With respect to timelines, the steps and deadlines provided for in the U.K. Regulations and in the Italian rules are mostly similar, but do not coincide entirely. It is helpful to draft, as a first step before undertaking the merger preparation, a parallel timeline, setting forth next to one another deadlines to be respected in Italy and deadlines to be respected in the U.K. In particular, waiting periods between, on the one hand, the date of filing of the merger documentation and/or the date on which relevant documentation is made available to the shareholders, and, on the other one, the date of the shareholders' meeting to resolve on the merger, are different in the U.K. and Italy. In Italy, the merger terms have to be filed with the competent office of the companies' registrar at least 30 days before the shareholders' meeting planned to approve them; during the same 30-day period the merger terms and the balance sheets of the companies taking part in the merger have to remain available at the Italian company's seat for shareholders' view. Both terms may be waived with the unanimous consent of the shareholders. For a U.K. merging entity, terms are slightly different. The merger documentation has to be filed with the U.K. companies registrar at least 60 days before the relevant shareholders' meeting, rather than 30, and then 30 days before the proposed meeting, the same documentation has to be made available for shareholders' view at the companies seat. No provision is made for a waiver of these terms. Further, the waiting period for the shareholders' meeting may be significantly longer, in practice, in the U.K., as the relevant meeting has to be called by court order and the relevant order must also be filed with the U.K. companies registrar 60 days before the date of the meeting. In order to obtain a court order calling the meeting, a claim form has to be filed with the competent court, together with several exhibits, including corporate documentation on the participating entities, and a hearing has to be scheduled with the court registrar. The court will also expect to receive the draft terms of merger and directors' report. It should be taken into account that the waiting period for the hearing may range from a few days to one month or more, depending on the time of the year and on the court agenda. If the documentation is in order, the order calling the meeting will be issued on the same day of the hearing. Taking into account these requirements, a period of about three months should be accounted for in the U.K., once the terms of merger have

been drafted, before a shareholders' resolution on the merger may be passed.

Once the merger has been approved by the shareholders' of both the Italian entity and the U.K. entity, timelines to obtain the pre-merger certificate in the two jurisdictions may once again differ. In Italy, as explained earlier, the pre-merger certificate is issued by a notary, which allows for greater flexibility in timing; in the U.K. the pre-merger certificate is a court order, and once again, a claim form has to be submitted and a hearing scheduled in order to obtain it. It is a good idea to schedule the second hearing already at the time of scheduling the first one, as this protects against having to deal with long court waiting times once the shareholders have approved the merger. If all the requirements have been met, the court will issue the pre-merger certificate on the same day of the hearing. On the other hand, the issuance of a pre-merger certificate in Italy may be delayed by the waiting period imposed to protect creditors' and debenture holders' interests. The relevant 60-day waiting period is only waived if the relevant creditors and debenture holders have consented to the mergers, or, in respect of creditors, if the conditions explained earlier are met. Under U.K. rules, as seen, the presence of creditors does not necessarily impose a delay; a delay may occur however if any creditor exercises its right to request a meeting of the creditors for the approval of the merger on their part. As this possibility introduces a measure of contingency in the timing of the merger, it may be advisable, if there are creditors, and if it is practicable to do so, to seek their consent in advance.

3.2 Content of Merger Documentation

Turning to the content of the merger documentation, relevant requirements are very close under Italian and U.K. rules with respect to the terms of merger and the independent expert report; however, there are some subtle differences in respect of the directors' report. The U.K. version of this document must include indeed, in addition to a description of the legal and economic grounds for the merger, a statement of any material interests of the directors of the U.K. company and of the effect of the merger on such interests; if there are debenture holders for the U.K. entity, the report must also refer to any special interest of their trustee in the merger.

3.3 Institutional Relationships

Navigating the cross-border relationship between involved institutions may also pose some issues in the context of a cross-border merger between Italy and the U.K, and it requires special care on the part of attorneys assisting the involved entities, particularly if the administrators of such entities are not actively involved.

In the U.K., cross-border mergers under the 2007 Regulations have been just a handful; as a result neither the courts nor the registrar of companies have much familiarity with the requirements and procedures. Language barriers also pose an obstacle, and it should be taken into account that English courts are likely to request certified English translations of any documents drafted in Italian.

Further, the coordination and communication between companies registries in Italy and in U.K. in respect of the final act of merger may be hampered by different work practices and different languages. For instance, if the entity resulting from the merger is an Italian company, it is the responsibility of the U.K. merging company to file the act of merger prepared by the Italian notary with the English registrar of companies within 14 days of its issuance.[35] The U.K. registrar, however, will not proceed to strike off the register the dissolved U.K. entity until it receives formal notice of the completion of the merger from the Italian companies registrar. It may be advisable to connect with the relevant Italian office of the companies registrar in order to facilitate the provision of such notice.

Overall, the field of cross-border mergers is largely uncharted territory at least in the U.K. This provides an opportunities to develop an interest line of practice for professionals assisting clients in this area, but it also warrants heightened caution in interpreting and applying the relevant procedures.

F. STRUMIA, *Cross-Border Mergers between U.K. and Italian Entities*, 4 Businessjus 1 (2012)

[35] U.K. Regulations, regulation 19(3).