

## Recruitment sector M&A and the impact of Brexit

Nick Davis, partner, head of Corporate and head of the Recruitment Services Group at Mishcon de Reya LLP, discusses the impact Brexit is having, and may continue to have, on recruitment sector M&A

Uncertainty remains as to how the United Kingdom's withdrawal from, and future relationship with, the EU will ultimately affect recruitment businesses and M&A activity in the recruitment sector. We are, however, already seeing an impact on M&A strategy in this sector and on how market participants are approaching their due diligence for and implementation of M&A transactions.

Despite the uncertainty, the current M&A outlook is not necessarily gloomy: record employment levels are ensuring that high quality recruitment businesses with strong management teams continue to attract interest from both strategic and private equity buyers. The weak sterling is also attracting buyers from overseas, most noticeably from Asia and the US. We are seeing particularly strong deal activity in the £5 million - £50 million range, with small and medium sized companies taking advantage of the current climate to add scale or exit.



### Challenges on the horizon

There are likely to be challenges on the horizon, particularly for recruitment firms that are heavily reliant on industries that benefit from the UK's membership of the single market, such as financial and professional services. For financial institutions, the loss of "passporting" rights, pursuant to which an institution can undertake certain regulated activities in other EEA member states on the basis of its home state authorisation, is a key issue. Whether and how financial institutions will be able to obtain access to EU markets either on the basis of the "equivalence" of the UK regime to the EU regime or pursuant to the terms of a free trade agreement between the EU and the UK are by no means certain. Some businesses are already taking mitigating action. Notably, we are seeing the acquisition of businesses with international offices and we expect this trend to continue as UK-based recruitment businesses seek to hedge against the potential risks of Brexit; of particular interest will be businesses with European offices in countries like Ireland and Germany.

The potential impact of Brexit adds an extra dimension to the due diligence questions of a potential buyer of a recruitment

business: for example, how reliant is the target on EU registered trade marks and designs? More generally, the terms of the target's contracts may take on greater significance in light of Brexit: for example, the location of the parties or of performance; whether the contract's term is likely to run post-Brexit; the potential application of termination provisions should Brexit have adverse consequences; or the application of the dispute resolution or jurisdiction clauses.

### Adopting a Brexit "lens"

With Brexit negotiations ongoing, it is impossible to predict how the detailed mechanics of implementing an M&A transaction will be affected, but there are practical considerations which dealmakers should bear in mind. "Brexit clauses", under which a buyer might have the ability to withdraw before completion or a specified part of the target business would not transfer in the event of a divergence between UK and EU rules, have rarely been seen in M&A transactions. As the UK's future relationship with the EU becomes clearer, however, the use of such clauses should be kept under review. In the meantime, where either the buyer or seller will provide transitional services post-completion, should a mechanism be included for adjusting the terms on which the services are provided depending on the outcome on Brexit? A buyer might also consider protecting themselves against Brexit-related risks by negotiating the inclusion of specific deferred or contingent consideration structures.

Draft transaction documentation will need to be reviewed through a Brexit "lens". If, for example, the sale agreement or any other transaction document will refer to the "EU" or "Europe", the parties will need to consider whether the term should be interpreted as at the date of signature or as constituted from time to time. Also, should the documents be subject to the jurisdiction of the English courts or to arbitration, particularly where the transaction is cross-border in nature? While it is expected that exclusive English jurisdiction clauses will continue to be enforceable post-Brexit in member states, it is not yet clear how this will be achieved; there is no suggestion that the enforceability of arbitration agreements will be affected by Brexit.

As negotiations with the EU progress and a clearer picture of the post-Brexit landscape eventually emerges, M&A activity in the recruitment sector is likely further to evolve. At this stage, although a prospective buyer will not be able to protect themselves against every potential Brexit-related risk, they will need to ask the right questions and consider the "worst case scenario" when assessing and implementing an acquisition to put themselves in the strongest possible position.