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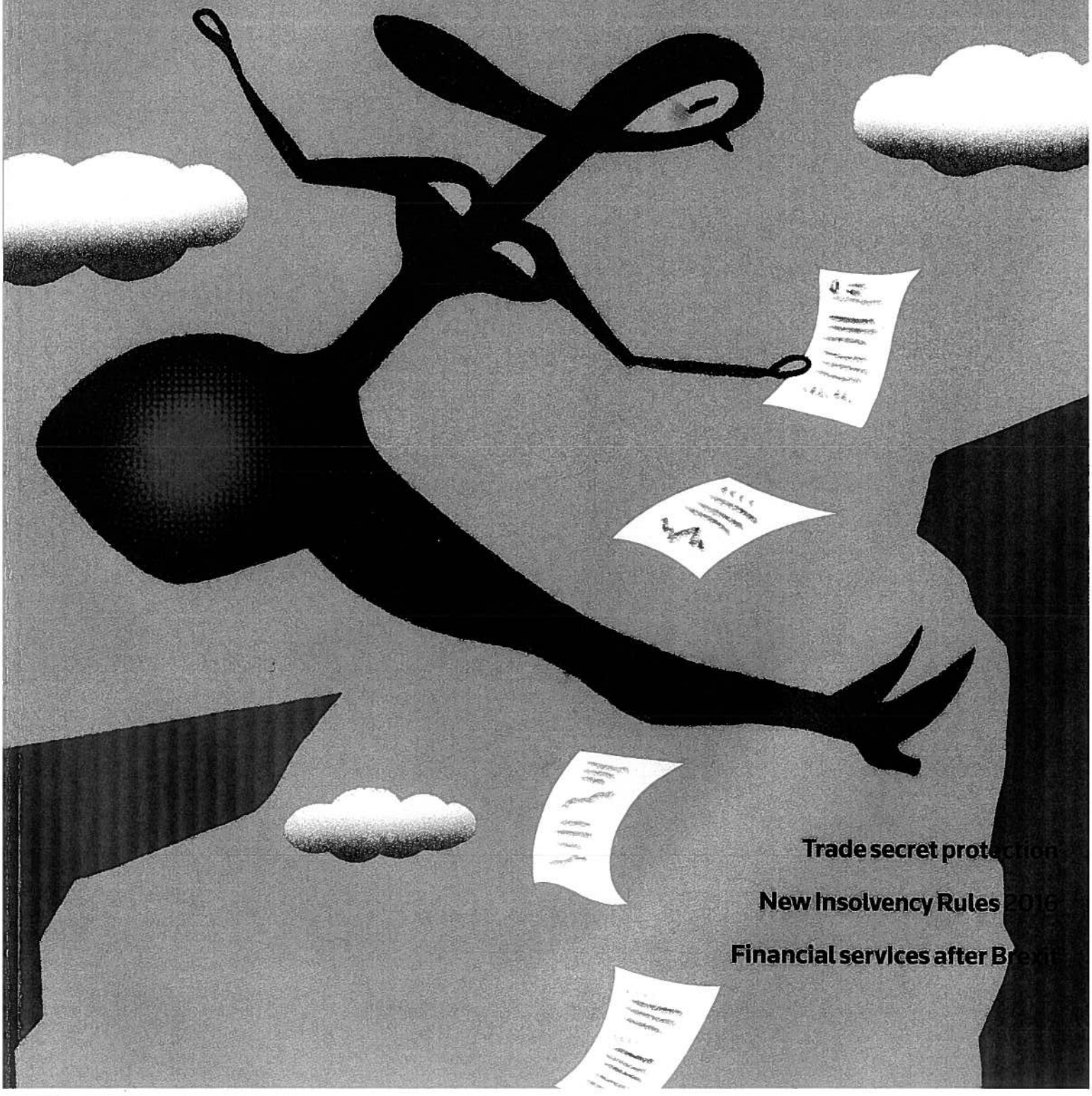
THOMSON REUTERS
March 2017 / Volume XXVIII / Number 2

Gender pay gap reporting

Planning for a gap year



Trade secret protection

New Insolvency Rules 2016

Financial services after Brexit

Over-the-top communications

Over-the-top (OTT) communications are content, services or applications that are provided to the end user over the open internet. OTT services, such as WhatsApp or Skype, challenge the traditional services provided by telecommunications operators.

The draft regulation allows consent for third-party cookies (which are planted by parties other than the owner of the website a user visits) to be provided through browser settings, thereby mandating significant changes for providers of browsers. They should require a clear affirmative action from the end user of terminal equipment to signify his freely-given, specific, informed and unambiguous agreement to the storage and access of third-party tracking cookies in and from the terminal equipment.

The draft regulation poses a challenge to any website using Google Analytics or other analytics software. Under the draft regulation, all developers of software that permits electronic communications must offer the option of preventing third-party cookies. They must inform the end user during the initial set up about the privacy settings options and require the end user to consent to a setting before the end user can continue with the installation.

Companies will need to think carefully about how they obtain user consent and ensure that they clearly explain the purpose of third-party cookies as, if the end user refuses to give consent, browsers are legally obliged to immediately block these cookies.

How this will play out in practice remains to be seen. For example, if a user consents to the use of third-party cookies on one website and refuses consent on another, there needs to be a mechanism for the browser to deal with the conflicting consents.

Relevant web browsers and software developers should be aware that if non-complying software has already been installed at the date when the draft regulation enters into force, it will need to be updated to bring it into compliance with the consent requirements at the time of the first update of the software, and no later than 25 August 2018.

Preparing for the future

Traditional players such as telecommunications companies, which already fall within the scope of the Directive, will find new business opportunities in relation to the possibility of processing content and metadata information. However, new players such as OTT communications service providers will need to incur additional costs to redesign and adapt their services to the new legal framework. Web browsers and electronic communications software providers will also have to invest in designing new privacy settings in line with the draft regulation and anticipate software updates to obtain users' consent to third-party cookies.

With the draft regulation suggesting fines ranging up to €20 million, or 4% of the total worldwide turnover for the unlawful processing of communications data, and envisaging a right to compensation and damages, it is important for companies to start to implement new internal compliance programmes. Many of the changes under the draft regulation are still controversial and their scope is unclear. Companies should expect guidance from the DPAs, which will be responsible for the enforcement of the draft regulation, in order to further clarify the scope of their obligations.

Guadalupe Sampedro is a partner at Bird & Bird LLP.

The E-Privacy Regulation is at https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications.

First EU reverse cross-border merger: the first of many?

For the first time in English legal history, the High Court has approved a reverse cross-border merger under the Companies (Cross-Border Mergers) Regulations 2007 (*SI 2007/2974*) (2007 Regulations) in *Formenta and the Companies (Cross-Border Merger) Regulations 2007* (*not yet reported*). In this case, an English limited company, Formenta Ltd, was absorbed by its Italian subsidiary, Newco Immobiliare SRL.

As businesses respond to the legal and commercial uncertainties of Brexit, cross-border mergers may increase. This newly permitted reverse cross-border merger has the potential to play an important role in allowing UK parent companies to move their headquarters to EU member states.

What is a reverse merger?

Under the 2007 Regulations, a cross-border merger by absorption of a wholly-owned subsidiary involves a company transferring all of its assets and liabilities to another company, which holds all the shares or other securities representing its capital (*see box "Cross-border mergers"*).

At the final stage of the merger, the transferor subsidiary company is dissolved without going into liquidation.

In a reverse cross-border merger, rather than the transferor being the subsidiary that is merged into the parent company, the transferor is the parent company that is merged into the subsidiary.

The Formenta merger

The Formenta merger involved the absorption of an English limited parent company by its Italian subsidiary company. It was motivated, among other things, by a desire to restructure, slim down and streamline the administration and operation of the corporate group. Before the decision in *Formenta*, the 2007 Regulations had never been used to permit a reverse cross-border merger under English law, although it had been permitted under the equivalent Italian law.

In Italy, the competent body to administer cross-border mergers are Italian Notaries Public, who are organised through the National Association of Notaries. The Italian National Association of Notaries regularly

guides the Italian Notaries Public to carry out reverse cross-border merger procedures under its direction statement No 204-2009/1, linking it to section 2505 of the Italian Civil Code for domestic mergers involving wholly owned subsidiaries.

The underlying argument for why the cross-border merger procedure should be available for both reverse and forward cross-border mergers is that where the merger takes place between wholly owned entities, it is effectively a matter of internal reorganisation, with no material impact on shareholders, therefore removing the need for external supervision and protection.

High Court decision

Formenta applied to the High Court, which appreciated the commercial reasons for the merger and accepted that it was effectively an internal matter for the corporate group. It is a well-established principle of English law that the courts will not interfere with the administration of a company where the shareholders can validly express and act on their wishes themselves. Accordingly, the court indicated that it saw no problem with the concept of a reverse cross-border merger and approved the application.

Market conditions

Following the UK's decision to leave the EU, this type of merger has significantly gained in importance when it comes to considering the future of pan-European corporate structures.

While large entities have used the 2007 Regulations to restructure their European operations, for example in *Honda Motor Europe Ltd*, the 2007 Regulations are principally geared to small and mid-sized businesses that are often still family run (*[2013] EWHC 2842 (Ch)*).

At present, cross-border mergers seem to be dominated by two distinguishable scenarios: shoring up for Brexit; and repatriation ahead of Brexit.

In respect of shoring up for Brexit, English limited companies are being converted into European limited companies, such as Italian SRLs or German GmbHs, to continue trading in the UK and exercise their European rights in the UK in a situation that enables them to "hop over the English Channel" at short notice, should the need arise as a result of Brexit.

Repatriation takes account of the fact that the English limited company model was, and to a lesser extent still is, a bestseller in continental Europe, where it is often used by entrepreneurs to avoid much more onerous capital requirements for local limited company structures. Where a business venture has turned out to be a success, the initial advantage is quickly consumed by the fact that reporting has to occur abroad, that is, at Companies House, and in a foreign language: English. The 2007 Regulations are frequently employed to repatriate the legal structure to where the operative business is. Brexit has prompted entrepreneurs to employ the 2007 Regulations now, while their existence and applicability is still certain.

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Cross-border mergers

A cross-border merger is a procedure introduced by the Directive on Cross-Border Mergers of Limited Liability Companies (*2005/56/EC*) (the Directive). It is a process by which a company from an EEA state can be absorbed into a company from another EEA state without needing to be liquidised, therefore ensuring corporate continuity. The Companies (Cross-Border Mergers) Regulations 2007 (*SI 2007/2974*) implement the Directive in the UK.

There are three different types of cross-border merger:

- Merger by absorption, where an existing company absorbs one or more other merging companies.
- Merger by absorption of a wholly-owned subsidiary.
- Merger by formation of a new company; that is, two or more companies merge to form a new company.

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