DUTCH LAW IMPLEMENTING CROSS-BORDER MOBILITY DIRECTIVE IN FORCE AS PER 1 SEPTEMBER 2023

A Law implementing the EU Cross-Border Mobility Directive was adopted by the Dutch Parliament on 27 June 2023. A Decree published on 12 July 2023 provides that the Law will enter into force on 1 September 2023.

The Law introduces:

- New rules on cross-border conversions
- New rules on cross-border demergers
- Some amendments to the existing rules on cross-border mergers
- Transitional provisions.

Key issues

- Cross-border conversion
- Cross-border demerger
- Amendments to the rules on cross-border merger
- Employee participation in cross-border operations
- Transitional provisions

Introduction

Based on the EU principle of freedom of movement and European case law enforcing this principle, legal practice throughout the EU has managed to facilitate cross-border conversions and demergers over the past years. In 2019, the EU Cross-Border Mobility Directive was adopted, but national legislation implementing the Directive was needed. The Dutch government has now taken action. In the meantime, cross-border conversions and demergers currently taking place should, in our view, as much as possible be carried out in line with the Directive and the Law.

In this alert we will, in the context of the Law, highlight the most important legal quirks and features of converting and demerging cross-border within the EU, both outbound and inbound. We will also highlight the changes in Dutch corporate law when it comes to cross border mergers. Finally, special attention is paid to protection of employee participation, which in all three forms of cross-border mobility (conversion, demerger and merger) is basically the same.

1. Cross-border conversion

General characteristics

Cross-border conversion entails that a company with its registered seat in one member state, transfers its registered seat to another member state. The Directive contains rules for the conversion of a public or private limited liability company governed by the laws of one of the EU/EEA countries into a public or private limited liability company governed by the laws of the host state. A private company may be converted into a public company and *vice versa*.

The converting company is not liquidated and maintains its legal personality; it only loses its national legal form and takes on a similar legal form in the host state. There is no transfer of assets; the company remains the owner of its assets, contracts, branches, etc.

A few EU/EEA countries (such as Luxembourg) enable cross-border conversions to non-EU/EEA countries. If such a conversion is the aim, a cross-border conversion to Luxembourg may be the first step.

Registered seat and real seat

As said, the cross-border conversion under the Directive entails the transfer of a company's registered seat. Whether the 'real seat' (in the meaning of the headquarters or the centre of main interest) has to be transferred as well, depends on the rules of private international law of the host state. If a company transfers its registered seat to the Netherlands (i.e., in case of an inbound conversion), a transfer of the real seat is not required.

Procedure

The board of the company wishing to perform a cross-border conversion prepares a conversion proposal. The filing of the proposal has to be published in the national official gazette. Mostly, the company's articles of association have to be amended to align them with the laws of the host state. The shareholders meeting has to adopt a resolution to convert and to amend the articles of association. The conversion and amendment of the articles of association are executed by a civil law notary of the state of departure (or other competent authority as determined by national law), who will also issue a certificate confirming that all procedures and formalities with respect to the envisaged cross-border conversion have been observed and complied with. The laws of the host state determine at which moment the conversion takes effect.

Majority required for resolution

The resolution to perform a cross-border conversion is taken by the shareholders meeting with a majority of not less than two thirds of the votes cast. The articles of association may require a higher majority, but not higher than 90% of the votes cast. If the articles of association contain a quorum requirement, it may not be higher than 90% of the represented share capital.

Exit right shareholders

Shareholders who voted against the conversion have the right to dispose of their shares for adequate cash compensation. The same applies to holders of shares without voting rights. If a shareholder is not satisfied with the compensation offered, he can request the competent authority or body (in the Netherlands, independent experts appointed by the President of Enterprise Court in Amsterdam) to determine the compensation. The shares of the shareholder who has requested compensation cease to exist at the moment the conversion takes effect.

Protection of creditors

A creditor can oppose the intended conversion with the appropriate administrative or judicial authority (in the Netherlands, the district court) and request a guarantee for the payment of his claim. The opposition has to be filed within three months after the publication of the conversion proposal. The court shall reject the opposition if the creditor has not provided credible proof that the company's financial situation will be worse after the conversion and that the company has not provided sufficient guarantee.

Status of pre-conversion shareholder resolutions after the conversion

Neither the Directive nor the Law clarifies what the effect of a conversion is on existing shareholder resolutions, e.g., delegations of powers granted to the board. We therefore recommend that these resolutions be renewed by the shareholders meeting at the moment the conversion takes effect or as soon as possible thereafter.

Status of pledged shares after the conversion

Neither the Directive nor the Law clarifies what the effect of a conversion is on existing pledges on shares or similar security rights. It was suggested in Dutch literature that (for inbound conversions) the Dutch legislator provides that such rights are converted by operation of law into a right of pledge under Dutch law, but this suggestion was not followed. We therefore recommend to renew the security right under Dutch law (at the latest) at the moment the inbound conversion takes effect, and to clarify whether the voting right is still with the pledgee or with the pledgor.

Reasons for conversion

For various reasons, inbound and outbound conversions can be attractive. In 2018, there were 115 cross-border conversions involving a Dutch company, of which 94 were outbound. Conversion into a Dutch company may be advantageous because, e.g., under the Dutch rules applying to BVs there is a large flexibility to attach any number of voting rights (including zero) to shares, and shareholders in a joint venture may be granted a direct right to appoint their nominee managing and supervisory directors.

2. Cross-border demerger

Business rationale for cross-border demergers

There may be various reasons for a cross-border demerger. Often, they are carried out to effectuate a restructuring of a group or to prepare an intended sale of a business unit. An important advantage of a demerger is that, given the transfer under universal title, no separate transfer formalities with respect to every asset need to be followed. Another motive could be the wish to establish a company or a business unit outside the EU/EEA. Dutch law does not and will not facilitate such a cross-border demerger, but an intermediate step to a country that does facilitate this, such as Luxembourg, may be used. Thus, for example, a cross-border demerger to Luxembourg could take place, after which a cross-border conversion/demerger/merger from Luxembourg to a non-EU/EEA country is possible, **provided that** the country of arrival also recognizes such cross-border conversion/demerger/merger.

Main characteristics of demerger

The Law introduces a legal basis for cross-border demergers in Dutch law. As a result, part of the assets of a Dutch BV or NV (from a Dutch perspective the scope is limited to Dutch BV's or NV's only) can be demerged under universal title to one or more newly incorporated foreign EU/EEA companies and part of the assets of a foreign EU/EEA company can be demerged under universal title to one or more newly incorporated Dutch BV's or NV's.

The following demergers fall under the scope of the Law:

- *full* demerger, whereby the demerging company ceases to exist and at least two newly incorporated acquiring companies are incorporated which acquire all the assets and liabilities of the demerging company, while the shareholders of the demerging company become shareholders of the acquiring companies;
- *partial* demerger, whereby the demerging company does not cease to exist and only part of its assets and liabilities is transferred to one or more newly incorporated acquiring companies and the shareholders of the demerging company become shareholders of the acquiring companies; and
- demerger *by separation*, whereby part of the assets and liabilities is acquired by one or more newly incorporated acquiring companies, but the demerging company itself (not its shareholders) becomes shareholder of the acquiring companies.

A cross-border demerger whereby existing companies act as acquiring companies shall **not** be possible under the new provisions.

Procedure

Similar to the domestic demerger procedure the cross-border demerger procedure is divided into:

- preparatory phase: preparation and filing of demerger proposal and explanatory notes and related documents such as annual accounts, works council advice/auditor's statement, and an announcement in an official publication gazette followed by a three-month creditor objection period;
- decision-making phase: in case of an inbound merger, a resolution by the general meeting of the Dutch demerging company to demerge of which the minutes will need to be laid down in a notarial deed of proceedings to be executed by a Dutch civil law notary); and
- execution phase: a demerger whereby the demerging company is a Dutch company will take effect on the day after the notarial deed of demerger is executed; if the demerging company is a company under the laws of another EU/EEA country and one or more Dutch companies are incorporated as a result of the demerger, the manner and date on which the demerger takes effect will be determined by the laws of the country of the demerging company.

Majority required

The resolution to perform a cross-border demerger is taken by the shareholders meeting with a majority of not less than two thirds of the votes cast. If a higher majority is required, it may be not higher than 90% of the votes cast. If a quorum is required, it may not be higher than 90% of the represented share capital.

Exit right shareholders

Shareholders who voted against the demerger, as well as any holder of shares without voting rights, who, pursuant to the exchange ratio, is entitled to shares in that acquiring company can submit a claim for adequate cash compensation. The holder of shares who submits this request will not be allocated any shares in the acquiring company. If a shareholder is not satisfied with the compensation offered, he can request the competent authority or body (in the Netherlands, independent experts appointed by the President of Enterprise Court in Amsterdam) to determine the compensation. The shares of the shareholder who has requested compensation cease to exist at the moment the demerger takes effect.

Protection of creditors

A creditor can oppose the intended demerger with the appropriate administrative or judicial authority (in the Netherlands, the district court), requesting a guarantee for the payment of his claim. The opposition has to be filed within three months after the publication of the demerger proposal. The court may require that the company gives the requested guarantee when it deems that the company's financial situation will be worse after the demerger.

3. Amendments to the rules on cross-border merger

In the past fifteen years, we have been working with the codified rules regarding cross-border mergers. The EU legislator has used the occasion of the Directive to make some amendments and harmonising changes to the cross-border merger rules, in particular:

- Shareholders, employees and creditors will have the right to comment on the merger proposal until five days before the adoption of the merger resolution
- The resolution to perform a cross-border merger is taken by the shareholders meeting with a majority of not less than two thirds of the votes cast. If a higher majority is required, it may be not higher than 90% of the votes cast. If a quorum is required, it may not be higher than 90% of the represented share capital.
- The share exchange ratio and amount of compensation for exiting shareholders can be contested with the President of the Enterprise Court.
- The period during which the intended merger can be opposed by creditors, will be increased from one to three months.
- The employee number threshold triggering the obligation to install a Special Negotiating Body has been lowered (see further under 4).

In all these cross-border operations, the civil law notary or other competent authority as applicable will need to determine whether in accordance with local law the cross-border operation has been set up for unlawful or fraudulent purposes leading to or aimed at the circumvention of EU or national law, including tax law, or for criminal purposes.

4. Employee participation in cross-border operations

The position of employees and their representatives may deteriorate if a company moves its seat or (part of) its activities to another jurisdiction, and they can e.g., no longer influence any (supervisory) board appointments or dismissals. The Directive, therefore, acknowledges that the rights of companies to convert, merge and demerge across borders should go hand in hand, and be properly balanced, with the protection of employees, creditors and members. This has resulted in the requirement that the cross-border operation proposal will provide for a dedicated section for employees. The information that needs to be provided for in the section for employees, addresses:

(a) the implications of the cross-border operation for employment relationships, as well as any measures for safeguarding those relationships;

(b) any material changes to the applicable conditions of employment; and

(c) the impact on the employment relationships within the subsidiaries of the company.

On the basis hereof, the works council, or in the absence hereof, the employees directly, can file their remarks in relation to the proposal (which the board then, may or may not, take into account for an updated version of the proposal, before the relevant shareholders meeting). This new requirement will be on top of existing local consultation requirements, such as pursuant to the Dutch Works Council Act, or Dutch Merger Code (*SER-Fusiegedragsregels 2015*). The mandatory steps towards employees and their representatives reinforces their role in relevant cross-border operations: the employee representatives will be assured of more timely and more extensive information on the intended cross-border operation.

Similar to the existing rules in relation to a cross-border merger, the principle is that the employee participation structure after the cross-border operation will be subject to the local rules of the receiving member state. There are, however, several exceptions, resulting in the requirement to establish a Special Negotiating Body to negotiate the new company's applicable employee participation regime. Whether these exceptions are triggered, it is e.g., required to compare the employee participation rights before and after the cross-border operation. If the cross-border operation weakens the employee participation rights, a Special Negotiating Body to negotiate the new company's applicable employee participation regime, will need to be established.

We know from our experience with cross-border mergers so far that the test whether such exception applies, and a Special Negotiating Body will need to be appointed, is influenced by the Dutch law requirement for works councils of companies subject to the large company regime providing for a recommendation right (for the works council) in relation to all of the members of the board of supervisory directors.

This right is considered of a higher order than a right to appoint half of the supervisory board members, which in practice for outbound operations triggers the exception to establish a Special Negotiating Body. The same applies for inbound operations where the new company meets the conditions of the large company regime but is confronted with a three-year waiting period. The level of employee participation in the Netherlands will then likely be inferior to the previously existing regime, again triggering the establishment of a Special Negotiating Body.

The Law lowers the employee number threshold that triggers one of the further exceptions to the basic rule (currently relevant to cross-border mergers only). If, in the situation of an outbound cross-border operation, one of the companies had 80 employees in the six-month period preceding the merger proposal, being 4/5 of the threshold employee number for employee participation in the Netherlands, a Special Negotiating Body will also need to be installed. Currently, in relation to cross-border mergers this employee number is set at 500. The Law may therefore result in more occasions where the applicable employee participation regime is to be negotiated.

5. Transitional provisions

The current provisions applying to cross-border mergers will continue to be applicable on initiated mergers in case the merger proposal was already published with the trade register at the moment the new law enters into force.

The current rules (based on European Court of Justice case law) applying to cross-border demergers and conversions will continue to be applicable on initiated demergers and conversions in case the demerger/conversion proposal was already published with the trade register at the moment the new law enters into force.

Obviously, these transitional provisions do not apply to those parts of cross-border mergers, demergers and conversions which are governed by the laws of another member state of the EU or the EEA.

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