

Israel Desk E-mail Bulletin

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Cross-border Merger Act (10th EC Directive) in force from 15 July 2008

Introduction

The Act on cross-border mergers (*Wet grensoverschrijdende fusies van kapitaalvennootschappen: the "Act"*), implementing the 10th EC Directive on cross-border mergers of companies limited by shares, entered into force on 15 July 2008.

Scope

On the basis of the Act, inter alia a public limited company ("NV") or a private limited liability company ("BV") can merge with a company limited by shares which is governed by the laws of another Member State of the EU or the EEA. Such a NV or BV can act in the capacity as acquiring company (inbound merger) or company ceasing to exist (outbound merger). Furthermore, on the basis of the Act, a European Cooperative may also become a party to an inbound and an outbound merger with a European Cooperative incorporated under the laws of one or more other Member States of the EU or the EEA.

The Act also facilitates an (inbound) triangular merger. This merger variant can only be implemented if both the acquiring company and the group company (of the acquiring company), in other words, the company which is to allot the shares to the shareholders of the company ceasing to exist, have their seat in the Netherlands.

Procedure

Required for a cross-border merger on the basis of the Act - supplementary to the regulations for a national legal merger - is that a number of special provisions must be complied with for the benefit of protection of creditors, minority shareholders and employees. It goes without saying that the formalities which, according to the applicable law, apply to the other legal entity or entities involved in the merger must also be observed.

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The members of the Israel Desk strongly focus on Israeli clients that invest or trade in Europe or other regions, as well as on international companies and financial institutions that want to expand their businesses to Israel. The team comprises members from various Loyens & Loeff practice groups.

The experience of the members as regards the Israeli market is combined with their extensive knowledge of international tax law, corporate structuring, banking and securities law, regulatory law, employment law. In addition to being part of the Israel Desk, the members also participate in Loyens & Loeff teams that focus on specific industries and sectors, such as energy, real estate, private equity, fund structuring, corporate finance, and financial products.

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Right of minority shareholders to opt out

New under the Act, is the right of minority shareholders to opt out from a Dutch company ceasing to exist. This means that those shareholders who vote against the merger in the General Shareholders Meeting may submit a request for indemnification. The shares to which this request relates will be cancelled by operation of law as soon as the merger becomes legally effective.

Employee's role

A Regulation pertaining to employee participation is incorporated in the Act, based on the regulation on the European Company (Societas Europea: "SE"). This Regulation, however, does not always have to be complied with. It does not have to be complied with, for example, if less than 500 employees are employed by the merging companies, or if prior to the merger no regime with respect to employee participation in the board of the companies involved was applicable. In the Netherlands, we consider the rules i.a. applicable to companies which are subject to the Large Company Regime. Accordingly, this Regulation will not lead to insurmountable objections if, for example, smaller NVs or BVs are party to a cross-border merger.

Role of European case law

For other variations of cross-border mergers which are not regulated in the Act, European case law (the SEVIC judgement of December 2005) may offer comfort given that it is broader in scope than the Act, based on the freedom of establishment. For a more detailed discussion of the SEVIC judgement, ECJ, 13 December 2005, C-411/03, please refer to the 'Genoteerd' issue of March 2006.

Members of the Israel Desk visit Tel-Aviv on a regular basis. If you would like to make an appointment or would like to receive more information with respect to the above, please feel free to contact jeroen.janssen@loyensloeff.com or any other member of the Israel Desk.

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