

Quoted



Implementation of the European Mobility Directive in Dutch law

Changes to cross-border mergers and introduction of cross-border demergers and conversions

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Introduction

On 27 June 2023 the Dutch Act implementing the EU Mobility Directive¹ ('**Implementation Act**') was passed.² The Implementation Act entered into force on 1 September 2023 and, amongst other things, makes amendments to Book 2 of the Dutch Civil Code ('**DCC**'). The Implementation Act brings about changes in the procedure for cross-border legal mergers. Furthermore, it has led to the introduction of a Dutch legal framework for cross-border legal demergers and conversions (these, together with cross-border legal mergers, are referred to as '**cross-border transactions**').

In this edition of *Quoted*, first we will discuss the Mobility Directive, the aim of this directive and the frameworks governing cross-border transactions. We will then outline the procedure for cross-border transactions and point out several relevant changes for domestic legal mergers and demergers.

The Mobility Directive

Freedom of establishment within the European Union ('**EU**') is a fundamental right that may be invoked by all subjects, including companies that have been incorporated in accordance with the laws of an EU Member State and have their registered office, central management or head office in an EU Member State.³

The implementation of previous EU directives has led to a national statutory framework at Member State level for cross-border legal mergers. The Mobility Directive adds on cross-border legal demergers and conversions, which in practice were already carried out on the basis of freedom of establishment and developments in European case law. The lack of a statutory legal framework for these transactions, however, led to fragmentation and legal uncertainty and resulted in suboptimal protection for stakeholders, including shareholders, creditors and employees.

The aim of the Mobility Directive is to provide a predictable and appropriate legal framework for cross-border

transactions by companies, which will enable them to make more effective use of the freedom of establishment. This legal framework has been harmonised for each of the cross-border transactions and provides various forms of protection for stakeholders, making it easier for companies to move or restructure across borders. This should open up new opportunities to foster economic growth, effective competition and productivity.

First of all, the Mobility Directive makes changes in the legal framework for cross-border legal mergers. Furthermore, the Mobility Directive provides a statutory basis for (i) cross-border legal demergers and (ii) cross-border conversions.

Implementation in the Netherlands

The Mobility Directive was due to be implemented in Dutch law by 31 January 2023. The preliminary draft of the proposal for the Implementation Act was made available for public consultation on 7 February 2022. The responses to the consultation proposal led to the necessary amendments being made to the bill. In early December 2022, the actual proposal for the Implementation Act was published. Following a few memoranda of amendment, the House of Representatives (*Tweede Kamer*) rubber-stamped the Implementation Act on 1 June 2023, which was then passed by the Senate (*Eerste Kamer*) on 27 June 2023. The Implementation Act finally entered into force on 1 September 2023.

Scope of the Mobility Directive and Implementation Act

The Implementation Act does not apply to all legal entities. On the one hand, the scope of the Mobility Directive and the Implementation Act is for Dutch purposes limited to public and private limited liability companies. This means that the Dutch foundation (*stichting*), association (*vereniging*), and cooperative (*coöperatie*) and mutual insurance association (*onderlinge waarborgmaatschappij*) do not fall within the scope of the Implementation Act. There is still no Dutch legal framework for cross-border transactions for these types of

1 Directive (EU) 2019/2121 of the European Parliament and of the Council of 28 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and demergers.

2 Amendments to Book 2 of the Dutch Civil Code and the Civil-law Notaries Act in connection with the implementation of Directive (EU) 2019/2121 of the European Parliament and of the Council of 28 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and demergers.

3 Article 54 Treaty on the Functioning of the European Union.

legal entities. On the other hand, the geographical scope of the Mobility Directive and the Implementation Act is limited to companies that are governed by the laws of a Member State of the European Economic Area ('EEA') or an EU Member State.

Both restrictions were criticized during the consultation period of the Implementation Act. The need was expressed for rules under which legal entities of other legal forms, as well as transactions with non-EU or non-EEA legal entities and non-Member States, would also be possible. However, the Dutch legislator has decided not to do anything about this for the time being.

Cross-border legal merger

A legal merger is the legal act performed by two or more legal entities, pursuant to which one of them acquires the assets and liabilities of the other(s) under universal title, or where a new legal entity, which is incorporated by them jointly through this legal act, acquires their assets and liabilities under universal title.⁴ For cross-border legal mergers based on the Implementation Act, as already stated, this legal act is limited to public or private limited liability companies.⁵

A cross-border legal merger where a Dutch public or private limited liability company participates as the company ceasing to exist is referred to as an *outbound merger*. In case a foreign company merges with a Dutch acquiring public or private limited liability company, this is referred to as an *inbound merger*.

The changes to the former Dutch rules primarily relate to the introduction of more harmonised rules for each of the transactions, and the introduction of rules to protect the interests of shareholders, minority shareholders and creditors.

Cross-border legal demerger

In the case of a legal demerger, this may concern a full demerger (*zuivere splitsing*) or a partial demerger (*afplitsing*). A full demerger is the legal act pursuant to which the assets and liabilities of a legal entity that ceases

to exist within the framework of the demerger are acquired under universal title by two or more other legal entities (i.e., the acquiring entities).⁶ A partial demerger is the legal act pursuant to which the legal entity being demerged continues to exist and only some of its assets and liabilities are acquired under universal title by the other legal entity (i.e., the acquiring legal entity).⁷

The Implementation Act applies if, in the case of legal demergers of public or private limited liability companies, one or more companies are incorporated under the laws of another Member State (*outbound demerger*) or if one or more public or private limited liability companies are incorporated in the Netherlands through the demerger of a company under the laws of another Member State (*inbound demerger*).

Legal demergers into existing acquiring companies are explicitly excluded in both the Mobility Directive and the Implementation Act. For domestic legal demergers, a legal demerger into existing acquiring companies remains possible.

Cross-border legal conversion

In the case of a cross-border legal conversion, a Dutch public or private limited liability company is converted into a company under the laws of another Member State (*outbound conversion*) or a company under the laws of another Member State is converted into a Dutch public or private limited liability company (*inbound conversion*). Such a change of legal form does not discontinue the existence of the company.

Dutch corporate law already provided for provisions on changes of the legal form of Dutch legal entities. These provisions remain fully in force for procedures to change legal form without a cross-border character, but are expressly declared not applicable with regard to cross-border legal conversions. Cross-border legal conversions are therefore based entirely on the new rules.

⁴ Article 2:309 DCC.

⁵ Article 2:333b DCC. For the record, this was already the case under the previous regulations.

⁶ Article 2:334a(2) DCC.

⁷ Article 2:334a(3) DCC.

Procedure for cross-border transactions in outline

The Implementation Act contains, in outline, a uniform procedure for cross-border transactions. This procedure is described below, focusing attention where necessary on the differences between the three types of cross-border transactions.

1. Proposal

If a Dutch public or private limited liability company:

- is party to a cross-border merger (both inbound and outbound mergers);
- is the demerging company in a cross-border demerger (outbound demerger);
- is converted into a company under the laws of another Member State (outbound conversion),

a joint proposal for a merger, demerger or conversion must always be drafted by the management boards of the companies concerned.⁸

The contents of this proposal must meet the requirements imposed on it by Dutch law and the laws of the other Member States involved. The proposal will provide the legal framework for the transaction and contain information that is relevant for the management board, shareholders, creditors and employees of the companies involved.

The Dutch legislator has confirmed that the proposal and, where applicable, amendments to articles of association must in any case also be prepared in the Dutch language.

2. Explanatory report

An explanatory report must be drafted by each Dutch public or private limited liability company involved in the transaction. This explanatory report must consist of a section for the shareholders and a section for the employees.

The section for the shareholders is not required if all shares are held by the same shareholder or if all shareholders agree to waive that requirement. The part for the employees is not required only if (i) the companies involved and their subsidiaries have no employees or (ii) if these employees are all members of the management board of the companies involved or their subsidiaries.

3. Auditor

In principle, a Dutch auditor must be involved with each of the transactions. The auditor:

- scrutinises the proposal for a merger, demerger or conversion;
- states whether the proposed share exchange ratio is fair (in the case of a merger or demerger);
- states whether the proposed cash compensation for the shareholders is fair (in the case of a merger, demerger or conversion);
- issues a statement concerning the assets of the companies involved (in the case of a merger or demerger);
- issues a report giving his opinion on certain statements in the explanatory report (in the case of a merger, demerger or conversion).

The statutory regulations contain several exceptions on the basis of which under certain circumstances these reports or statements are not required.

4. Notification

The management board of each of the Dutch companies involved will inform the shareholders, creditors and the works council (or if there is no works council: the employees) of the companies concerned that they may submit their comments on the proposal for the transaction to their respective companies no later than five working days prior to the date on which the resolution upon the (implementation of the) transaction will be adopted. The management board will draw up a notice to this effect that will be filed with the Dutch trade register or published there by electronic means. Any comments received must be filed immediately upon receipt at the office of the company and be made available for inspection by the shareholders and those who have a particular right vis-à-vis the company.

5. Filing and publication

The proposal, the report by the auditor (if applicable) and the notice must at all times be filed with the Dutch trade register or published there by electronic means. In addition, in the case of a cross-border merger and demerger certain financial information of the companies involved, usually comprising the three most recently adopted financial statements and annual reports, as well as interim financial statements where relevant, must be included.

⁸ In the case of conversion, only by the board of the company to be converted.

The same documents, including the explanatory report, the auditor's report (if applicable), any comments in response to the notice and any written recommendations or comments that have been submitted by the works council, participation council or association of employees, must be filed at the offices of the company or made accessible by electronic means. For cross-border mergers and demergers, the three most recently adopted financial statements and annual reports must also be included, even if they ordinarily do not need to be made available for public inspection.

6. Announcement

The aforementioned filing and publication will be announced in the Dutch Government Gazette (*Nederlandse Staatscourant*). Such announcement will state where the documents have been filed or can be inspected, including the address details.

7. Opposition period

Up to three months following the announcement in the Government Gazette, creditors may oppose the proposal for a transaction, specifying the security that is being demanded. The company must, under penalty of an objection being declared well-founded, provide any creditor who so demands with security or give it any other safeguards that its claim will be settled. These safeguards are conditional on the transaction taking effect.

8. Decision-making

The resolution upon the transaction and its implementation will usually be adopted by the general meeting. Only in the case of a cross-border merger and under certain specific circumstances may the management board adopt this resolution.

Under the Implementation Act, a majority of at least two-thirds of the votes cast is required for a resolution of the general meeting. The articles of association may require a larger majority, provided that this majority (i) does not exceed 90% of the votes cast or (ii) does not require that more than 90% of the issued capital must be represented at the meeting.

9. Exit rights and appeal against exchange ratio

A shareholder who votes against the proposal for the transaction and its implementation at the general meeting has one month following the adoption of the resolution to make use of its exit rights and claim compensation. This compensation is in cash terms and is conditional on

the transaction taking effect. The shares that were held by the shareholder concerned will be cancelled the moment the transaction takes effect.

If the shareholder who exercised its exit right is of the view that the proposed cash compensation is not reasonable, this shareholder has the right to appeal and claim additional cash compensation. Such additional cash compensation will be determined by one or more experts to be appointed by the Netherlands Enterprise Court and will be binding for all holders of shares of the same class or designation.

It is permitted for the articles of association or an agreement between the shareholder(s) and the company to provide for provisions on determining (additional) cash compensation. In that case, such provisions will be considered by the expert(s). The amount of cash compensation determined in compliance with such agreement, is only binding for the parties to that agreement.

In the case of a cross-border merger or demerger, a shareholder of the company ceasing to exist or, in the case of demerger, the demerging company that continues to exist, will acquire shares in the capital of the acquiring company. To this end, an exchange ratio must be determined which will be used to determine the number of shares to be allotted to such shareholder. The shareholder who has not made (or cannot make) use of the exit rights described above may appeal against the proposed exchange ratio and request to have it determined again. This, too, will be done by one or more experts to be appointed by the Netherlands Enterprise Court. These experts must also take account of the rules laid down in the articles of association and the agreement in such a case. The changes to the exchange ratio will (only) result in an additional cash payment to the shareholder and does not result in more shares being allotted.

10. Employee participation

Under the Implementation Act, when determining the employee participation regime in the acquiring or converted company, the European rules will apply more often than before. This means that the relevant (merging, dividing or converting) private or public limited liability company will more often need to negotiate the employee participation regime with the employees, gathered in a special negotiating body. If, during the six months preceding the publication of the proposal for the transaction, this private or public limited liability company

has an average of 80 employees, negotiations should in principle take place.

11. Certificate

Under the new rules, the Dutch civil-law notary remains the competent authority to scrutinise the legality of the transaction.

The civil-law notary issues a statement, declaring that the procedural requirements for all resolutions prescribed by the applicable statutory provisions have been observed. If applicable, the civil-law notary also has to declare that the procedure for establishing rules on employee participation has started. Such statements are issued in the form of a certificate issued prior to the implementation of the transaction. This certificate by the civil-law notary will be issued in the case of:

- an outbound cross-border merger;
- an outbound cross-border demerger; and
- an outbound cross-border conversion.

Such certificates are issued at the request of the company concerned, which request may only be made after the resolution for the transaction and its implementation has been adopted. The application of the certificate must be accompanied by the relevant documentation and information concerning the companies involved and the transaction procedures and formalities as such.

Where it is determined that the transaction does not comply with all relevant conditions or that not all necessary procedures and formalities have been completed, the civil-law notary will not issue the certificate. If desired, he may give the company the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

If the civil-law notary establishes during his scrutiny of the documents that the cross-border transaction has been set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, he will not issue his statement (the pre-transaction certificate). In his assessment the civil-law notary may contact the companies involved himself and may consult other relevant authorities (in the Member States involved) in order to obtain information and documents. He may also seek the advice of (external) experts.

The civil-law notary must file the pre-transaction certificate with the Dutch trade register upon the issuance thereof.

The Dutch trade register will then share the certificate with the competent registers of the Member States where the companies involved in the transaction are (in the case of a merger) or will be (in the case of a demerger or conversion) registered.

12. Notarial deed

In the case of an inbound cross-border merger, an outbound cross-border demerger or an inbound cross-border conversion, a Dutch notarial deed is required for the implementation of the transaction.

At the bottom of such deed, the civil-law notary must declare - also here, at the request of the company - that he has ascertained that all procedural requirements have been observed for all resolutions prescribed by the applicable statutory provisions (this declaration is usually referred to as the final certificate). It will also be stated that the rules on employee participation have been laid down in accordance with the applicable statutory regulations.

When a Dutch entity is formed as a result of the transaction, it must also be stated that all incorporation formalities have been observed.

13. Transaction taking effect

The moment a transaction takes effect varies depending on the relevant transaction:

- for an outbound cross-border merger, this will be determined in accordance with the laws of the Member State of the acquiring company;
- an inbound cross-border merger will take effect the day after the Dutch deed of merger has been executed;
- an outbound cross-border demerger will take effect the day after that on which each of the following three conditions have been met:
 - the Dutch deed of demerger has been executed;
 - the pre-demerger certificate has been issued; and
 - the final certificate has been issued;
- for an inbound cross-border demerger, this will be determined in accordance with the laws of the Member State of the demerging company, but not earlier than the day on which both of the following conditions have been met:
 - the Dutch civil-law notary has issued the final certificate; and
 - the Dutch trade register has given notice of the registration of the public or private limited liability company to the register of the Member State of the demerging company;

- for an outbound cross-border conversion, this will be determined in accordance with the laws of the destination Member State;
- an inbound cross-border conversion will take effect the day after the Dutch deed of conversion has been executed.

Transitional law

The law that applied prior to the Implementation Act came into force remains applicable to the cross-border transaction for which a proposal had already been filed with the Dutch trade register or had been published by electronic means before that moment.

Changes to rules on domestic mergers and demergers

The legislator has taken the opportunity afforded by the Implementation Act to make several changes to the rules on domestic mergers and demergers.

Previously, in cases where shares were allotted within the framework of a merger, a statement from a Dutch auditor was required to confirm that the sum of the equity of the companies ceasing to exist at least corresponded to the nominal value of the shares that their shareholders would acquire as a consequence of the merger⁹. Under the new rules, this is no longer needed if the acquiring company is a private limited liability company. In the case of demergers, a similar statement relating to the value of the assets retained by the demerged company that continues to exist is no longer necessary, if it concerns a private limited liability company.

Another change allows companies that are part of the same group to merge using a simplified procedure. Previously, this was reserved exclusively for mergers between a company ceasing to exist and its sole shareholder or where the merging companies were all held by the same shareholder. Under the new rules, the simplified procedure also applies to mergers between companies that are indirectly held by the same person or entity. Share transfers prior to a merger, in anticipation of a simplified merger procedure, are therefore no longer needed.

Conclusion

The Netherlands has implemented the Mobility Directive by means of the Implementation Act.

This *Quoted* sets out the main changes to Book 2 DCC pursuant to the Implementation Act. The Implementation Act has led to certain changes to the Dutch statutory framework for cross-border legal mergers, and has introduced a statutory framework for cross-border demergers and conversions.

The procedure for cross-border transactions on the basis of the Implementation Act has been described in outline in this *Quoted*.

Cross-border transactions for which the proposal has been filed prior to 1 September 2023 may be completed on the basis of the rules prior to the Implementation Act. All transactions from 1 September 2023 onwards fall within the scope of the new rules.

⁹ As the case may be, plus payments pursuant to exchange ratios and plus the total amount of compensation to which shareholders may lay claim (on the grounds of Article 2:330a DCC).

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Quoted is a periodical newsletter for contacts of Loyens & Loeff N.V. Quoted has been published since October 2001.

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