

## IMPLEMENTATION MOBILITY DIRECTIVE

*Important changes to procedures concerning cross border transactions following the implementation of the law regarding cross-border conversions, mergers and demergers as per 1 September 2023*

### INTRODUCTION

On 1 September 2023, the law regarding the implementation of cross-border conversions, mergers and demergers (the "**Law**") came into effect in the Netherlands. This Law implements Directive (EU) 2019/2121, also known as the Mobility Directive. The Law makes it easier for companies to carry out cross-border transactions. At the same time, the rights of shareholders, creditors and employees are strengthened. The cross-border transactions include conversions, mergers, and demergers.

Although it was already possible to effectuate cross-border mergers (implemented in the Dutch Civil Code as per July 2008) and cross-border conversions (and not so much cross-border demergers) based on EU case law, a regulatory framework was lacking in the Dutch Civil Code.

Ultimately, the Mobility Directive will facilitate group companies within the EU, to restructure when required as part of companies' life cycles.

### **Doing business in the Netherlands**

The main legal entity used for (or to expend the business) in the Netherlands is a Dutch private limited liability company (B.V.). The B.V. is a flexible legal entity form and the articles of association (and shareholders agreement) of the company can be customised to the needs. Therefore, the B.V. is frequently used in the Netherlands as a holding company in (international) group structures and as an operational company.

A B.V. is a company with legal personality and has a capital that is divided in shares. It is possible to create different classes of shares and to vary in relation to, among others, voting rights, profit sharing rights and non-voting shares. Pursuant to the creation of classes of shares, it is for example also possible that holders of different classes of shares have the right to appoint different classes of directors.

Governance of the company can be included in the articles of association of the company and/or the shareholders agreement.

[Although there are no material tax provisions included in the Law, cross border mergers, demergers and conversions may have tax implications both for the entities involved and for their shareholders (either in the Netherlands or abroad). Considering that most cross border transactions are probably mergers, it should be noted that a cross-border merger is not considered to be a taxable event for Dutch withholding tax purposes. As such, a cross border merger could be a good alternative for a dividend distributions which would trigger Dutch (conditional as from January 1, 2024) dividend withholding tax.

### SCOPE

The Law only applies to capital companies of EU member states or member states of the European Economic Area. The Law only applies to Dutch private and public limited liability companies (B.V. and N.V.), and is not applicable for cross-border transactions of other Dutch legal forms.

### THREE PHASES

The process regarding cross-border transactions are divided into three different phases: the preparatory phase (1), the decision-making phase, and (2) the implementation phase (3).

The preparatory phase is about preparatory acts relating to the cross-border transaction. For example, informing shareholders and creditors about the conversion, merger or demerger proposal. The general meeting takes a decision on the proposal in the decision making phase. The execution phase begins once the general meeting has approved the cross-border transaction.

### STRENGTHENED RIGHTS OF SHAREHOLDERS, CREDITORS AND EMPLOYEES

An interesting change in the preparatory phase is that the shareholders and the works council (or employees) of the companies concerned receive more information at an earlier stage about the cross-border transaction.

In addition, shareholders have the right, after the decision on the cross-border transaction, to challenge the compensation included in the proposal if they do not consider it reasonable.

For creditors, the objection period is extended from one month to three months. During this period, creditors can object to the proposal and, for example, demand a guarantee from the companies concerned.

### **FRAUD TEST**

Another new feature in the Law is that, prior to the execution phase, the Dutch civil-law notary is designated in the Netherlands to carry out a fraud test in relation to the Dutch companies involved in the cross-border transaction. This means that if the civil-law notary determines that a cross-border transaction is used for, in short, unlawful or other fraudulent purposes, the civil-law notary will not issue the so-called pre-cross-border transaction certificate; as a consequence thereof the cross-border transaction cannot be effectuated.

### **'SECOND' ACCOUNTANT STATEMENT**

Pursuant to the Law the following statements from an accountant are no longer required: (i) in relation to a cross-border merger, the *second accountant statement* (as referred in article 2:328 paragraph 1 second sentence of the Dutch Civil Code) in case the Dutch merging company involved is a Dutch private limited liability company (B.V.), (ii) in relation to a cross-border demerger, the *second accountant statement* (as referred in article 2:334aa paragraph 2 of the Dutch Civil Code) in case the Dutch demerging company involved is a Dutch private limited liability company (B.V.).

The above only applies in case an exemption applies for the merger or demerger (i.e. pursuant to which the simplified procedure is applicable), otherwise the so called 'first accountant statement' and the 'accountant report' is still required.

The Law corrects a sloppiness which was not corrected whilst implementing the Flex BV Act (as the Dutch private limited liability company (B.V.) no longer has a minimum capital since the introduction of the Flex BV Act),

### **ROLE OF THE CIVIL-LAW NOTARY IN THE NETHERLANDS**

The Mobility Directive requires that a competent authority monitors the legality of the cross-border transaction and for this purpose issues a pre-cross border transaction certificate. As part of the issuance of a pre-cross border transaction certificate the Mobility Directive requires a fraud test by the competent authority. Pursuant to the Law, the Dutch civil-law notary is appointed as the competent authority and it is the Dutch civil-law notary that issues the pre-cross border transaction certificate for

the Dutch company involved in the cross-border transaction. The fraud test is in line with the current tasks and role of the Dutch civil-law notary in the Netherlands as notarial gatekeeper and it makes sense - as the fraud test does not extend to tax aspects (the Mobility Directive concerns only company law) - that the Dutch civil-law notary makes the fraud assessment.

Within the Dutch notarial profession, there is already extensive knowledge and expertise available regarding cross-border transactions. The fraud test as implemented in the Law has the same purpose and scope as the general duty that the Dutch civil-law notary has under current laws applicable to the Dutch civil-law notary.

### **TRANSITIONAL REGIME**

The Law provides a transitional arrangement for cross-border transactions that have already started. This means that if the conversion, merger or demerger proposal drawn up in phase 1 has been filed with the trade register before 1 September 2023, the provisions of the Law do not apply to the cross-border transaction.



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