THE EUROPEAN MOBILITY DIRECTIVE

a Dutch legal and tax perspective

Karen Verkerk and **Dennis Nijssen** Dirkzwager

INTRODUCTION

EU Directive 2019/2121 of November 27, 2019 ('the Directive') provides EU-wide harmonized rules on cross-border mergers, conversions and divisions. These rules are expected to contribute to the functioning of the internal market for companies and firms and their exercise of the freedom of establishment. Previous Directives covered cross-border mergers, but not conversions and divisions. Meanwhile, the European Court of Justice issued case law that interpreted the freedom of establishment as laid down in the Treaty for the Functioning of the European Union to encompass the right of a company or firm established in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State, provided the conditions laid down in the legislation of that other Member State are satisfied (201/06, Cartesio, C-378/10, Vale and C-106/16, Polbud). By now providing a further legal framework for the structuring of such transactions, the Directive aims to simplify cross-border mergers, conversions and divisions and, at the same time, strengthen the position of stakeholders, including employees, creditors and minority shareholders.

Member States were required to implement the Directive into their national law by January 1, 2023, at the latest. Unfortunately, the Netherlands has not been able to meet this deadline. It has, however, in early 2022 held an internet consultation and on December 5, 2022, the responsible Minister submitted a draft bill for implementation with the Dutch Parliament ('the Bill'), which is expected to enter into force in the course of the year. In this article, we will touch on the highlights of the Dutch implementation, as it illustrates the opportunities (and limitations) presented by the legal framework provided for by the Directive. You may assume that similar legislation has been or will soon be implemented in other Member States.

LEGAL ASPECTS

Type of cross-border transactions covered

In principle, a cross-border merger under the Bill features a legal merger of a limited liability company from one Member State, for example, a Dutch 'naamloze vennootschap' ('nv') or 'besloten vennootschap' ('bv'), with a limited liability company from another Member State, whereby all the assets and liabilities of the disappearing company transfer by law (under universal title) to the acquiring company and the shareholder(s) of the disappearing company becomes shareholder(s)

of the acquiring company. A cross-border division can be structured as a legal demerger ('zuivere splitsing') or a spin-off. In both cases, it is required that the acquiring company is newly established. A cross-border division to an existing company is not provided for by the Bill. Again assets and liabilities are transferred by law, so separate transfer provisions, which may differ in each Member State, are not needed, and the shareholder(s) of the transferring company becomes shareholder(s) of the acquiring company. Last but not least, in case of a conversion, a company transfers its legal seat to another Member State and converts itself into a legal form under the legislation of another Member State. The converted entity does not cease to exist, and the shareholder(s) of the converted entity generally remain the same.

The afore-described transactions can take place both Netherlands inbound and outbound, but only in relation to companies from Member States of the EU or the European Economic Area (the 27 EU Member States plus Norway, Iceland and Liechtenstein). Companies from other countries do not qualify for a cross-border transaction with a Dutch company. It should be noted, however, that some other EU Member States do allow cross-border mergers, divisions and conversions with companies from third countries and that this could open a back door, as a company from a third country could, for example, convert into a Luxembourg company and then subsequently into a Dutch company.

Legal procedure

The general outline of the procedural rules provided in the Bill for all three cross-border transactions (mergers, divisions and conversions) are similar. There is a substantial list of formalities that have to be met, and it goes beyond the scope of this article to address all of those in detail. In broad lines, the explanatory memorandum to the Bill, however, distinguishes three procedural phases:

(i) The preparatory phase includes, among others, the drafting and publication of a proposal as well as the supervision by the accountant;
(ii) In the decision-making phase, the shareholders meeting decides on the transaction; and
(iii) In the executional phase, the issuance of a certificate of approval by the competent authority in both the Member State of departure is required, a completion of the cross-border transaction in the State of arrival, as well as the (de) registration with the trade registers.

In the Netherlands, the competent authority is a Dutch notary, who will, before issuing the certificate of approval, also have to confirm that all formal requirements for the transaction at hand have been met. Furthermore, the notary will have to assess that the cross-border transaction is not aimed at abuse or another fraudulent purpose. The latter implies that approval will be denied if the transaction has a criminal, unlawful or fraudulent intent. The Dutch notary also executes the deed of merger, diversion or conversion

TAX ASPECTS

The Directive is of a corporate law nature and does not directly cover tax matters. As such, the Council did not need to adopt it unanimously. Instead, a normal majority was sufficient. Consistent with this approach, there is also no tax legislation included in the Dutch implementation bill. However, it has been announced that a separate bill covering the tax implications of cross-border transactions will follow separately, later in the year.

That being said, it can be pointed out that Dutch tax law already today provides a basis for tax-neutral mergers and divisions, also in a cross-border context with other EU and EEA Member States. These transactions are, in principle, qualified as a taxable transfer of assets and liabilities to the acquiring entity, but under certain conditions, the associated corporate income tax charge can be deferred. In that case, the acquiring entity continues the tax book value of the transferred assets and liabilities. Such a deferral can also be applied, if the acquiring entity is located in another EU or EEA Member State. It is critical, however, that the Dutch tax claim is not lost in the process. In other words, the acquiring entity should either become a tax resident of the Netherlands or (come to) have, a permanent establishment in the Netherlands, to which the assets and liabilities received are attributed. If the assets and liabilities leave the Netherlands' tax sphere, Dutch corporate income tax would be payable on the difference between their fair market value and tax book value. Furthermore, as an anti-abuse measure, the deferral is disallowed, if the principal objective or one of the principal objectives of the (cross-border) merger or division is tax avoidance or postponement. The latter is assumed to be the case, if the transaction is not carried out for valid commercial reasons or if the shares in any of the companies involved are in part or in whole, directly or indirectly disposed of to a third party within three years after the transaction. In such a case, it is up to the taxpayer to prove that the merger or divisions were not principally aimed at tax avoidance or postponement.

A tax-neutral cross-border conversion is so far not covered by legislation. Following the case law by the European Court of Justice referenced above, the State Secretary of Finance has allowed for a tax-neutral conversion under a specific Decree. This, however, formally does not suffice as implementation of the Directive and therefore a legal basis for cross-border conversions is widely expected to be included in the announced accompanying tax bill.

CONCLUSION

As the legal framework for cross-border mergers, diversions and conversions is harmonized across the EU and EEA, the process of execution will become more consistent in different Member States, and the position of stakeholders should be better safeguarded. Furthermore, the European Commission expects that the administrative costs for the execution of cross-border transactions will reduce significantly. As the tax treatment is also further clarified, the threshold for these transactions could be significantly lowered. This can open up new restructuring opportunities and is something to keep in mind for companies and firms involved in the reorganizing of their European legal structure, for example, after an M&A transaction.

Karen Verkerk is a civil law notary at Dirkzwager specializing in the law of legal entities and company law, M&A and restructures, as well as advising large and medium-sized companies and non-profit institutions in particular with regard to their company structure and governance. She is a member of the Combined Committee on Corporate Law, which advises various ministries and parliament on draft legislation on behalf of the Royal Dutch Notarial Association (KNB) and the Dutch Bar Association. Karen is currently President of TELFA.

Dennis Nijssen is a tax advisor at Dirkzwager and specializes in Dutch corporate income tax as well as European and international tax law. His clients are both private and publicly owned companies. He holds a PhD in Tax Law and also teaches International Tax Law at Raboud University in Nijmegen (The Netherlands).