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New legislation on (cross-border) mergers, demergers and conversions

On 27 April, the House of Representatives approved a draft law that makes important changes to, among others, books 12 and 14 of the Companies and Associations Code on (cross-border) mergers, demergers and conversions. The bill seeks to (partially) transpose Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and demergers.

What will change?

a) Cross-border mergers, demergers and conversions

The draft law introduces a new regime on cross-border demergers (replacing the repealed Articles 12.73 and 12.90 of the Companies and Associations Code). Furthermore, it develops a more detailed regime on cross-border conversion. The approach on cross-border mergers is also refined in a number of areas.

As a result of this new approach, cross-border merger, cross-border demerger and cross-border conversion procedures (hereinafter collectively "cross-border restructurings") will now be very similar.

Below is an overview of the main novelties for these three forms of cross-border restructuring:

- Extension of information and reporting obligations

  - The governing body(ies) of the company(ies) involved in the restructuring will have to prepare a joint proposal as is already the case today. However, the statutory mandatory content is expanded. Notable new mandatory disclosures include (i) the guarantees (such as guarantees or pledges,...) that will be offered to creditors after the restructuring, (ii) disclosure of subsidies received during 5 years prior to the restructuring (if the surviving company is not a Belgian company) and (ii) description of the monetary compensation that will be offered to shareholders and holders of profit-sharing certificates exercising their exit right.

  - A new form of publicity for cross-border restructurings concerns the mandatory notification to holders of shares and profit-sharing certificates, creditors and employees' representatives (or, if there are none, the employees themselves) that they can comment on the proposal until no later than the fifth working day before the meeting of the competent body that will decide on the restructuring.

    The proposal and notification must be filed with the clerk of the enterprise court and published in the Annexes to the Belgian Official Gazette no later than three months before the decision on cross-border restructuring. However, the law now offers the alternative possibility of making these documents available on the website of the company(ies) for at least three months. In

that case, only certain minimum information (including a reference to the website) needs to be filed and published.

- The board of directors must prepare a report on the proposed restructuring. Regarding the legally required minimum content of this report, a distinction should be made between:

    - the legally required minimum information for shareholders and holders of profit-sharing certificates (such as cash compensation on exit, shareholder rights and actions); and

    - the legally required minimum information of for employees (such as the impact on labour relations, material changes in terms of employment conditions or place of work and the impact of such changes on subsidiaries)

  The board may choose to separate this information into two separate reports.

  Subject to the consent of all shareholders and holders of profit shares, the report may be waived as far as the information to shareholders is concerned. As for the information for employees, waiver is possible only if all employees of the companies and subsidiaries concerned are members of the board of directors.

  This information must be notified to employee representatives no later than six weeks before the date of the decision on restructuring. The legislation also contains further information obligations towards shareholders and holders of profit-sharing certificates.

- The auditor of each company concerned must also prepare a report in which he must comment, inter alia, on the relevance and reasonableness of the exchange ratio (where applicable) and the monetary compensation granted to shareholders or holders of profit-sharing certificates exercising their exit right. This report can be waived subject to unanimity of shareholders and holders of profit-sharing certificates.

- Longer waiting period for cross-border restructurings

    - At least three months should elapse between the filing of the proposal and the decision on cross-border restructuring by the competent body whereas previously it was only six weeks. For national restructurings, the six-week period is maintained.

    - The new legislation also extends the protection period during which creditors whose claim is certain but not yet due can request security. From now on, it will be three months from the date of publication of the proposal in the Annexes to the Belgian Official Gazette. A period of two months will remain applicable for national restructurings.

    - Since the competent body will only be able to decide on the cross-border restructuring after the expiry of the protection period, the decision will only be taken more than three months after the proposal has been filed. In practice, the period between deposit of the proposal and expiry of the protection period could easily be 15 weeks.

- Voting rights for holders of non-voting shares and profit-sharing certificates - new majority requirement for cross-border conversion

  - The new legislation explicitly provides that non-voting shares will have voting rights in cross-border demergers (as was already the case in cross-border merger and cross-border conversion).

  - Holders of profit certificates will also have voting rights in decisions on cross-border restructuring (one vote per profit certificate) subject to two limitations: (i) the total number of votes attached to profit certificates cannot be more than half the total number of votes attached to shares and (ii) when voting, profit certificates cannot be counted for more than 2/3 of the votes cast by shares.

  - Any cross-border restructuring will now require a three-fourths majority of the votes cast. The current four-fifths majority requirement for cross-border conversions will thus be amended.

- Exit right for shareholders and holders of profit-sharing certificates

One of the most striking innovations concerns the exit right for shareholders and holders of profit shares if the company remaining after restructuring is not governed by Belgian law.

This exit right only exists for the benefit of shareholders and holders of profit-sharing certificates who have already notified their dissenting vote and their intention to exercise their exit right before the general meeting deciding on the restructuring and who actually participate in the general meeting and exercise their dissenting vote and exit right there. They have the right to exit upon receipt of the cash consideration mentioned in the merger, demerger or conversion proposal (which they can also contest, if necessary). They can receive their payment only after satisfaction of creditors who manifested themselves under the legal protection procedure but are in any case entitled to compensation within two months of the cross-border restructuring taking effect. Their shares will be destroyed. This monetary compensation does not constitute a distribution and is therefore not subject to net asset or liquidation tests. In the case of cross-border demergers, each acquiring company will be jointly and severally liable to pay the monetary compensation (but only to the extent of the net assets acquired)

In cross-border mergers and demergers, shareholders who have not given prior notice of their intention to exercise their exit right but (i) notify no later than the general meeting that they do not agree to the exchange ratio, (ii) vote against it during the general meeting and (iii) have this recorded as such may request a payment in cash before the president of the company court, acting in summary proceedings, within 30 days of the general meeting.

- Increasing importance of the notary's role

The new legislation assigns a central role to the notary acting in the context of a cross-border restructuring. Prior to the decision on cross-border restructuring by the competent bodies of the

companies concerned, the acting notary will have to provide a certificate without which the cross-border restructuring will not be possible.

The companies concerned will have to attach certain legally required information with the application for the certificate. This includes information on the restructuring proposal, reactions and opinions on this proposal, the number of employees as well as tax certificates indicating whether the companies have outstanding tax debts (including social security contributions).

If, based on the information provided, the notary considers that legal formalities have not been properly complied with and/or certain information is missing and/or creditors who have claimed additional security or other guarantee have not received satisfaction, the notarial certificate will have to be refused. However, if necessary, the notary may grant a regularisation period of maximum two months.

The new legislation also explicitly states that the notary must also refuse the certificate if he finds that the cross-border restructuring was set up "*for unlawful or fraudulent purposes leading to or aimed at evading or circumventing Union or national law, or for criminal purposes*."

b) National mergers, demergers and conversions

The impact of the new legislation on purely national mergers, demergers or conversions is rather limited:

- the possibility of making the draft terms of merger or demerger available via the website of the companies concerned (subject to the filing and publication of certain minimum identifying information) also exists for national mergers/demergers; and

- adaptation of quorum and majority rules for national conversions:

    - attendance quorum: the quorum at the first meeting remains at ½ of the capital (or total issued shares in a non-capital company) but the new legislation adds that a second meeting can validly decide regardless of the number of shareholders present or represented; and

    - majority: henceforth, a majority of three-quarters of the votes cast will suffice.

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When will the new legislation come into force?

The new legislation enters into force, for most of its provisions, 10 days after its publication in the Belgian Official Gazette and will therefore apply to all (cross-border) restructurings for which the proposal is filed after that date.

Some provisions will not enter into force until later (30 June 2023 or 15 December 2023) for technical reasons.

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