Strelia

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Belgian Mobility Act: Opportunities for Cross-border Restructurings

On May 25, 2023, Belgium enacted the **Mobility Act**, which transposes Directive (EU) 2019/2121 (the **EU Mobility Directive**). The EU Mobility Directive creates a comprehensive framework for corporate cross-border restructurings. It builds on the foundations of the 2005 Directive on cross-border mergers.

The Belgian Mobility Act applies to restructurings as from June 16, 2023. It has a broader scope of application than the EU Mobility Directive, as it also applies to cross-border restructurings outside the European Economic Area. The Mobility Act amends the relevant provisions that govern cross-border restructurings, which can be found in Book 12 of the Belgian Code of Companies and Associations (**BCCA**).

Restructurings under the BCCA are becoming increasingly prevalent. In an M&A context, they offer numerous advantages, such as universal transferability, tax neutrality, and reduced majority-vote requirements for a listed company compared to a takeover bid.

That is reason enough to make the Mobility Act our featured topic in this Corporate Series. We'll discuss the harmonized framework for three main types of cross-border restructurings, two new distinct restructuring types, enhanced stakeholder protection, and the increased role of the notary within the framework of the pre-closing certificate issuance.

Harmonized Framework - Three Main Types of Cross-border Restructurings

The EU Mobility Directive establishes a legal framework for three main types of cross-border restructurings: (i) cross-border merger (*grensoverschrijdende fusie/ fusion transfrontalière*): a transaction between an acquired 'disappearing' and an acquiring 'surviving' company, whereby the companies concerned are governed by the laws of different jurisdictions (ii) cross-border demerger (*grensoverschrijdende splitsing / scission transfrontalière*): a transaction in which all assets and liabilities of a demerged company are transferred to other designated companies by operation of law, resulting in the dissolution of the demerged company, whereby the companies concerned are governed by the laws of different jurisdictions and (iii) cross-border conversion (*grensoverschrijdende omzetting / transformation transfrontalière*): a transaction in which a company relocates its corporate seat to another jurisdiction, resulting in the conversion of the company type under which it is incorporated.

Two New Types of Restructurings

The EU Mobility Directive also introduces two new types of restructuring: a cross-border demerger by separation (*splitsing door scheiding / scission par separation*) and a sister-sister merger (*zusterfusie / fusion entre sœurs*). In the first type, a company transfers part of its assets and liabilities to one or more recipient companies. In return, the demerged company receives shares in the recipient company or companies. This type of restructuring is similar to a transaction whereby a company contributes a branch of its activity (*inbreng van bedrijfstak/apport de branche d'activités*) to company. The difference between a cross-border demerger by separation and a contribution of a branch of activity is that in the former, the assets and liabilities do not have to constitute a branch of activity, which would make way for cherry-picking. Unfortunately, the Mobility Act does not provide for cross-border demergers by separation for national restructurings. In the second type of restructuring, the sister-sister merger, a one person holds directly or indirectly all the shares in the merging companies or several persons hold shares in the merger companies in the same proportion. The latter procedure aims to simplify intra-group transactions. It is also available for national restructurings.

Enhanced Stakeholder Protection

Following the footsteps of the EU Mobility Directive, the Belgian Mobility Act has strengthened the interests of various stakeholders, including shareholders, creditors, and employees.

Shareholders

Shareholders (and holders of profit-sharing certificates) who would become shareholders of a foreign company after the cross-border merger, de-merger or conversion and who disagree with this transaction have certain rights. They can exit the company under certain conditions: (i) they must have expressed their intention to exit the company before the vote, (ii) they vote against the transaction at the general meeting, and (iii) they have recorded the previous points in the minutes of the general meeting. In the event the exit right is used, the mechanism of exit against a company's assets (*uittreding lastens het vermogen/démission à charge du patrimoine*) of the cooperative company (*CV/SC*) and the limited liability company (*BV/SRL*) are not applicable. The shareholders can also seek additional compensation by bringing summary proceedings at the Court of Enterprises or challenge the share-exchange ratio (if applicable).

Creditors

Within three months from the date when the restructuring proposal was published in the annexes to the Belgian State Gazette, creditors who are not satisfied with the guarantees outlined in the merger, demerger, conversion proposal have the right to demand additional guarantees. This right applies only to claims that are certain but not yet due or for which a legal or arbitral action has been brought against the company. The transaction cannot be effective and the notary cannot issue the pre-closing certificate (see below) until the creditors are satisfied (unless the court dismisses the claim). In national restructurings, the situation differs because the creditors can seek protection only after the transaction has been completed.

Employees

Like national restructurings, employees must be informed and consulted about the cross-border transactions insofar as the company has employee representative bodies. The EU Mobility Directive has extended the existing procedures regarding employee participation to all cross-border operations, which led to the amendment of Collective Bargaining Agreement No. 94 of 29/04/2008. If the process of informing and consulting the employees is not adhered to, the notary cannot issue the pre-closing certificate (see below). Employees also benefit from a standstill obligation in respect of existing employee participation rights.

Increased role of the Notary

After the appropriate corporate bodies approve the restructuring, the authorized person or body in each country must confirm the lawfulness of the transaction. In Belgium, this would be a notary. The notary's assessment involves a formal review, which entails examining the internal and external lawfulness of prior actions and formalities, completion of creditor proceedings, and the process of informing and consulting employees (if applicable). The notary must also carry out an anti-abuse review. This means that the notary must refuse to issue the certificate if the transaction is designed for unlawful or fraudulent purposes that lead to or intend to evade or circumvent EU or national law. Upon refusal, the notary can grant a regularization period of up to 2 months. The certificate must be issued within 2 months (extendable by two months) from when the notary has received the relevant documents. Given that the notary has the power to block the transaction, coordination with the notary should be thoroughly discussed in advance.

Gisèle Rosselle
Partner
gisele.rosselle@strelia.com

Céderic Devroey
Senior Associate
cederic.devroey@strelia.com

Théotime Liesenborghs
Associate
theotime.liesenborghs@strelia.com