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BELGIAN LAW TRANSPOSING THE EUROPEAN MOBILITY DIRECTIVE REGARDING CROSS-BORDER MERGERS, DEMERGERS AND CONVERSIONS

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The Belgian law of 25 May 2023 implementing the EU Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 regarding cross-border conversions, mergers and divisions, also called the "Mobility Directive", has been published on 6 June 2023.

The Mobility Directive updates the rules governing cross-border mergers and introduces new rules for cross-border demergers and conversions. In a nutshell, the Mobility Directive aims at safeguarding the interests of shareholders, but also other stakeholders such as creditors and employees, in the context of such cross-border operations.

The new law modifies books 12 and 14 of the Belgian Code of Companies and Associations, as well as certain provisions of the Code of Private International Law and of the Judicial Code.

QUICK OVERVIEW:

Employees right to information and ability to express their observations through their representatives or by themselves is confirmed and expanded. Creditors will be able to request additional guarantees beyond what was initially provided in the draft merger proposal, and may submit the matter to the President of the competent Company Court if they are unsatisfied with the initial guarantees.

Shareholders and holders of profit-sharing certificates who expressed their opposition to the cross-border operation will be entitled to receive an exit fee if the company arising from the operation is a foreign entity.

They can challenge the value of the exit fee provided for in the draft merger proposal before the President of the competent Company Court. Similarly, shareholders and holders of profit-sharing certificates unsatisfied with the exchange of shares can submit the matter to the President of the competent Company Court to file a request for a cash compensation.

MOST SIGNIFICANT FUTURE CHANGES:

1. A more comprehensive report duty on the company:

This report duty includes detailed information about the operation, which shall be included either in the published draft terms of merger or in other reports, such as:

- Shareholders and holders of profit-sharing certificates[1] must be informed of the legal and economic aspects of the cross-border operation, as well as the assets and liabilities of the companies to be merged, the proposed exit fee and the methods used to calculate it, the proposed share exchange ratio and the methods used to determine the share exchange ratio;
- Employees must also be informed of the implications of the cross-border operation on their employment relations, the potential significant changes in the applicable employment conditions and the location changes of the company;
- Creditors must be provided with information on the guarantees they shall be offered with regards to their claims, such as securities or pledges.

2. Observations on the draft terms of merger:

Shareholders and holders of profit-sharing certificates, creditors, and employees will be able to submit observations on the planned operation for a period of three months but no later than five working days before the date of the shareholders' meeting voting on the cross-border merger.

3. New majority and quorum rules are set for the shareholders' meeting voting on the cross-border merger:

a. Quorum: half of the capital (or shares for companies without capital) and half of the holders of profit-sharing certificates, which will have a voting right in shareholders' meetings voting on cross-border mergers.

b. Majority: the proposed cross-border merger must be approved by three quarters of the voting shareholders and holders of profit-sharing certificates. It is to be noted that, if there are several classes of shares, the shareholders' meeting may only deliberate and decide validly if the above-mentioned quorum and majority conditions are met in each class.

4. New right of withdrawal and exit fees:

When the company resulting from the cross-border merger will be a foreign company, shareholders and holders of profit-sharing certificates of the Belgian company to be merged will have the option to withdraw from the company. They can exercise this option by (i) informing the company of their disapproval of the draft merger proposal prior to the shareholders' meeting and stating their intention to vote against it, (ii) effectively voting against it during the shareholders' meeting and (iii) utilising their withdrawal right during the same shareholders' meeting.

In this case, they shall receive a compensation in the form of an exit fee, as established in the draft merger proposal and evaluated by the auditor, taking into account the potential market price of the shares in the merging companies prior to the announcement of the merger proposal, or the value of the companies, excluding the effects of the proposed merger, as defined

[1] This report is not required for companies with a sole shareholder and without any holder of profit-sharing certificate, or in case of waiver of all shareholders and holders of profit-sharing certificates.

according to generally recognised valuation methods. The compensation must be paid after the creditors received the guarantees they required or after the claims were reimbursed, but at the latest two months after the effective date of the merger.

In the case that the shareholders or holders of profit-sharing certificates use their withdrawal right but are not satisfied by the exit fee, they will be entitled to bring the matter to the President of the Company Court at the registered office of the merging company, sitting in summary proceedings, no later than a month after the date of the shareholders' meeting voting on the cross-border transaction. Such proceedings do not exempt the company to pay the compensation as provided for in the draft merger proposal.

Upon the cross-border merger taking effect in accordance with the applicable laws of the jurisdiction governing the resulting entity arising from the merger, the shares or certificates held by the withdrawing shareholder or holder of profit-sharing certificates shall be cancelled.

5. New right for shareholders unsatisfied with the exchange of shares:

Shareholders who (i) have not exercised their withdrawal rights (ii) have indicated that they are not satisfied with the exchange of shares proposed by the company at the latest at the shareholders' meeting, and (iii) have voted against the cross-border merger at the shareholders' meeting and have had their disapproval transcribed as such in the minutes of the shareholders' meeting, shall be entitled to bring the matter to the President of the Company Court at the registered office of the merging company, sitting in summary proceedings, for payment in cash, within thirty days of the date of the shareholders' meeting called to decide on the cross-border merger.

With the consent of the shareholder, the cash payment may be replaced by an allocation of shares in the acquiring company or by any other remuneration in kind.

6. Additional rights for creditors unsatisfied with securities and guarantees:

Creditors unsatisfied by the guarantees they were granted shall be entitled to require other guarantees and securities as long as they formulate their demand in writing to the merging company and to the notary mentioned in the draft merger proposal. The company shall decide whether to reimburse the creditors or to grant the required guarantees. In the case that the company refuses to reimburse the creditors or grant the guarantees, the most diligent Party shall be entitled to bring the matter to the President of the Company Court at the registered office of the merging company, who shall determine whether the initial guarantees granted in the draft terms of merger were sufficient or not. If the President of the Company Court judges that more guarantees need to be granted, the company must comply and offer the guarantees in the deadline fixed by the President of the Company Court. In case of non-compliance, the claims will become immediately due and payable.

7. Additional duties for the notary:

Upon receipt of the draft terms of merger, the notary must issue a certificate stating that all formalities have been complied with. This certificate must be issued no later than two months after receipt by the notary of all legally required documents, such as the common draft merger proposal, the reports, the observations and remarks of the shareholders, employees and creditors. If the transaction has complex aspects, this period may be extended, the notary having to inform the company before the end of the initial period.

The notary will refrain from issuing the certificate if it is determined that the necessary actions and formalities preceding the cross-border merger have not been completed. Likewise, if creditors still require further securities or any other guarantees, and their claims have not been rejected by a legally enforceable court decision, the notary will withhold the certificate and notify the company of the reasons behind this decision. In this case, the notary may, at his own discretion, grant a period for regularisation. Such period may not exceed two months.

Also, the certificate will not be issued if the notary establishes that a cross-border merger has been carried out for abusive or fraudulent purposes leading to or intended to circumvent EU or Belgian law or for criminal purposes. In making this assessment, the notary must take into account all relevant facts and circumstances of which he has become aware, and has the opportunity to consult the Federal Public Service Finance to guide him throughout his assessment.

TIMING

The new law will enter into force on 16 June 2023.

Mergers, demergers and transformations whose draft has been filed with the clerk of the competent Company Court at the latest on the day of the entry into force of the law will remain under the scope of the current applicable provisions of the Companies and Associations Code.

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Simont Braun conducted a thorough evaluation of the implications of these modifications on future cross-border transactions within our jurisdiction.

Our Corporate team remains readily available to assist you should you require further information | corporate@simontbraun.eu

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