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Brussels to the Point

e-Newsletter



Brussels to the Point December

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Cross-border mergers: new rules on the notification of the foreign companies register

By Anne Tilleux

On 10 September 2010, new rules on the notification of the foreign companies register in the case of a cross-border merger were adopted by means of a royal decree, published in the Belgian State Gazette on 18 October 2010.

As indicated in our September 2008 issue, a cross-border merger is an operation by which a company established in a Member State of the European Union (the "target company" or the "acquired company") transfers to another company established in another Member State (the "acquiring company") the totality of its assets and liabilities in return for shares in the acquiring company and, if applicable, a cash payment.

Cross-border mergers are regulated in Belgium by the Omnibus Act of 8 June 2008 (the "Act") which transposes into national law Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (the "Directive").

The companies participating in a cross-border merger must fulfil various formalities. For instance, the management organs of the participating companies must prepare common draft terms of cross-border merger. These draft terms must contain various items of information, including information about arrangements for employee involvement. The draft terms must be filed with the clerk of the competent commercial court in Belgium and an extract therefrom published in the annexes to the *Belgian State Gazette*.

The management organs of the participating companies must moreover prepare for their members or shareholders a special report explaining and justifying, from a legal and economic point of view, the appropriateness, terms and conditions of the cross-border merger, its consequences for the companies' members, creditors and employees, and the proposed share-exchange ratio.

A special report on the draft terms of cross-border merger must also be prepared by the auditor of each company (or, in the absence of an auditor, by an external accountant or accounting expert). The companies can however decide to jointly appoint an independent expert who shall prepare a single report for both participating companies. In this case, the two companies must petition the president of the competent commercial court to approve their choice of expert or to appoint an expert. The

members or shareholders of both participating companies can however decide not to require an expert's report.

The extraordinary general meeting called to approve the merger must be held before a notary, who must attest that all (internal and external) formalities required for the merger to take effect have been lawfully completed.

Once the cross-border merger has been approved, each company's registration with the relevant companies register must be updated.

If a Belgian company is acquired by a foreign company, the Belgian company's registration with the Crossroads Enterprise Database must be deleted and the registration of the company resulting from the merger must be updated with the foreign companies register.

If the company resulting from the merger is a Belgian company, its registration with the Crossroads Enterprise Database must be updated in order to reflect the changes brought about by the merger (e.g., capital increase), while the acquired company's registration with the foreign companies register must be deleted.

The Royal Decree of 10 September 2010 inserted a new article (Article 21*bis*) in the royal decree implementing the Company Code to provide that when the company resulting from the merger is a Belgian company, the clerk of the relevant Belgian commercial court (or the competent Belgian notary in the event of an electronic filing) shall inform the foreign companies register of the fact that the company resulting from the merger is effectively registered in Belgium and therefore that the foreign company's registration should be stricken. A specific form - the "Notification Form III concerning the registration of a company resulting from a cross-border merger" - must be used in this respect.

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