Cross-border mergers: A possibility in Belgium since 26 June 2008?

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Cross-border mergers are henceforth governed by Belgian law. The Omnibus Act of 8 June 2008 (the "Act"), transposing into national law Directive 2005/56/EC of 26 October 2005 (the "Directive"), entered into force on 26 June of this year.

A cross-border merger is an operation by which a company established in a Member State of the European Union (the acquired or combined company) transfers to another company established in another Member State (the combining or acquiring company or the company resulting from the merger) the totality of its assets and liabilities in return for the allocation to the shareholders or members of the former company, that is those of the acquired company, of shares in the acquiring company and, if applicable, a cash payment. A Belgian company can thus henceforth be acquired by a French company, for example, and vice versa.

Before the entry into force of the Act, scepticism abounded as to the possibility to carry out a cross-border merger of companies, notwithstanding the adoption in 2004 of the Belgian Code of Private International Law, which provides that in the case of a merger of legal entities, each participating legal entity shall be governed by the law of the country to which it is subject prior to the merger. Furthermore, the European Court of Justice confirmed, in its *Sevic* judgment of 13 December 2005, the principles of the free movement of companies and freedom of establishment by authorising a cross-border merger (in this case, a German company acquired a Luxembourg company), but the effects of such a merger remained uncertain.

The Act now provides specific rules with respect to cross-border mergers and has inserted a new section in this regard in the Company Code. The statutory provisions that will determine the tax consequences of a cross-border merger are currently being prepared.

The companies participating in a cross-border merger are subject to various formalities. This article does not describe all of these formalities, only several important new developments that distinguish the formalities applicable to domestic (national) mergers from those applicable to cross-border mergers.

The scope of application of the Act is wider than envisaged by the Directive. The Act applies to all corporate forms that are able to merge at the national level, while the Directive only refers to limited-liability companies with share capital. A limited partnership under Belgian law (*gewone commanditaire vennootschap / société en commandite simple*), for example, can thus lawfully merge with a foreign company if the national law governing the latter so permits.

The Belgian legislature adopted the option provided for by the Directive to allow the compensation granted to the shareholders of the acquired company to consist of, aside from shares in the resulting company, a cash payment in excess of 10% of the nominal value or, in the absence thereof, of the accounting par value of the securities or shares of the company resulting from the merger; however, such a cash payment in excess of 10% is currently not allowed in the case of a purely domestic merger.

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 with respect to the arrangements for the involvement of employees in the definition of their participation rights (see below). The publication mentioning the filing of the draft terms of cross-border merger must contain certain information from the terms themselves, while the notice of publication for a domestic merger need only mention the fact that a draft merger plan has been filed with the clerk of the relevant commercial court.

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, among other things, the appropriateness, terms and conditions of the cross-border merger, its consequences for the companies' members, creditors and employees and the share-exchange ratio proposed to calculate the number of shares in the acquiring company to be issued to the members or shareholders of the acquired company.

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 request an appointment. In practice, it will be necessary to ensure the coordination of Belgian law with the statutory provisions applicable abroad. All members of the companies involved can however decide not to require an expert's report, while such a waiver is not possible in the context of a merger between two Belgian companies.

Finally, the last new development to be discussed herein pertains to the preparation and issuance by the notary of a pre-merger certificate, in which the notary attests to the fact that all acts required for the merger to take effect have been lawfully completed, both from an internal and external point of view. If the statutory requirements have not been met, the notary must refuse to issue the certificate. There is no similar obligation for a purely domestic merger.

In conclusion, the cross-border merger will undoubtedly constitute an important tool to encourage cooperation between companies from different Member States and will contribute to the development of freedom of establishment within the single market.

The terms and conditions for employee participation must be determined in the event of a cross-border merger

Some European countries (for example, Germany and the Netherlands) grant employees certain rights to participate in the management of their company, such as the right to appoint representatives to the board of directors/management committee or to oppose the appointment of members of the management organ. Belgian law does not provide for a similar system of employee participation. It was thus necessary to ensure the protection of employees benefitting from participation rights in the acquired company when the company resulting from the merger will be a Belgian entity.

The Act provides in this regard that the draft terms of cross-border merger must contain information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the merger are determined. The conditions and procedures to be followed are those set forth in Directive 2001/86 of the Council of 8 October 2001 supplementing the Statute for a European company (SE) with regard to the involvement of employees and in Council Regulation (EC) No 2157/2001 of the same date. This subject is governed by Collective Bargaining Agreement No 94, concluded within the National Labour Council on 29 April of this year (the "CBA").

In sum, the management organs of the companies participating in the merger must, as soon as possible after publication of the draft terms of cross-border merger, begin negotiations with the employee representatives of each company. A special negotiating body representing the employees of the participating companies, for the purposes of these negotiations, shall be formed, in order to reach a written agreement with the competent organs of the companies concerned as to the conditions governing employee participation within the company resulting from the merger. If an agreement is not reached within a period of one year following the first meeting of this special negotiating body, and in other circumstances which are not discussed here, the standard rules for participation (alternative provisions) provided for in the CBA must be applied.

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