

Corporate News: Mobility Directive soon to be transposed in Germany and Luxembourg

THE MOBILITY DIRECTIVE AIMS AT CREATING A COMMON LEGAL FRAMEWORK FOR CROSS-BORDER CONVERSIONS AND AMENDS THE REGIME APPLICABLE TO CROSS-BORDER MERGERS AND DIVISIONS

Executive Summary

- The Mobility Directive EU 2019/2121 (**Mobility Directive**) aims to harmonise cross-border conversions and amends the regime applicable to cross-border mergers and divisions. Its transposition was due on **31 January 2023**.
- Germany and Luxembourg are currently in the final stages of adopting the relevant national laws. In Germany, the Law on the Implementation of the Mobility Directive (**UmRUG**) is expected to enter into force in February. In Luxembourg, the draft bill n°8053 is currently in parliamentary consultation and precise adoption and publication dates are not yet scheduled.
- As of 2023, companies envisaging corporate restructurings should prepare for a new regime applicable to mergers, migrations and conversions. While Luxembourg will apply the changes proposed by the Mobility Directive only to cross-border restructurings within the Directive's intended scope, Germany has opted to extend its reform to national conversions as well.
- While strengthening the interests of shareholders, creditors and employees, the Mobility Directive will negatively affect intra-group restructurings and increase the administrative and time burden for companies.

While aligning procedures within the European Union, the Mobility Directive and its transposition still falls short of providing harmonised solutions for non-EU countries, e.g. the United Kingdom.

I. BACKGROUND

The Mobility Directive marks the end of cross-border conversions based on established jurisprudence of the European Court of Justice (ECJ). Having enabled cross-border conversions within the EU in the first place, the procedures applicable to intra-EU conversions based on the ECJ's far-reaching case law remained fragmented and strongly dependent on the varying requirements of the Member States involved. Adopted in 2019, the Mobility Directive aimed to strengthen the right of limited liability companies to convert, merge or split across borders, with an emphasis on the protection and interests of their employees, creditors and shareholders.

II. NEW EU FRAMEWORK FOR CROSS-BORDER CONVERSIONS

1. Scope

The Mobility Directive applies only to conversions of **limited liability companies** which are not subject to liquidation, insolvency proceedings or preventive restructuring measures. Partnerships are generally excluded from the scope.

The Directive regulates **cross-border conversions within the European Union**. The term "*cross-border conversion*" is defined as an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State and transfers at least its registered office to the destination Member State, while retaining its legal personality.



Conversions or migrations from or to a **non-EU country** are generally not covered by the Mobility Directive. Consequently, some EU Member States are expected to uphold restrictions on conversions involving third countries. Non-EU companies depending on a cross-border conversion can work around these restrictions by on-boarding first to EU Member States without such restrictions (e.g. Luxembourg) and continuing their migration from there to the desired EU destination state.

2. Procedure

The Mobility Directive introduces the following steps applicable to cross-border conversions of limited liability companies, largely based on the procedures applicable to cross-border mergers and divisions:

- a) The administrative or management body of the company draws up the **draft terms of conversion** outlining the particulars of the conversion. These draft terms shall be published together with a notice to stakeholders (i.e. employees, shareholders and creditors of the converting company).
 - b) The administrative or management body further provides a **conversion report** to the shareholders and employees, where applicable, explaining and justifying the legal and economic aspects of the conversion and its implications for future business. The shareholders may agree to waive the report.
 - c) The company is required to comply with employee information, consultation and participation rights, where applicable.
 - d) An **independent expert** examines and reports on the draft terms of conversion, unless such a report is waived by the shareholders.
 - e) No earlier than one month following the publication of the draft conversion terms, the general meeting of the company resolves on the conversion. The required majority to be determined by the departure Member State may range between two thirds and 90% of the represented voting rights and may not be higher than the majority required for cross-border mergers in that Member State.
- f) The completion of the conversion steps in the departure Member State will be certified by a **pre-conversion certificate**. The competent authority to be designated by the Member States shall not issue the certificate if it determines that the conversion has been set up for abusive, fraudulent or criminal purposes. The authority may generally take up to three months for its assessment. In exceptional cases, this period may be prolonged. This requirement of a check for fraud, abuse or criminal motives by a designated authority is also newly introduced to the cross-border merger and division procedures.
 - g) The pre-conversion certificate will be automatically transmitted to the competent authority of the destination Member State. The competent authority in the destination Member State shall ensure that the relevant provisions of national law concerning the incorporation and registration of companies are complied with.
 - h) Following approval by the competent authority of the destination Member State, the company will be registered in the destination Member State and de-registered in the departure Member State.
 - i) The law of the destination Member State determines the date of effectiveness. For a period of three months following the publication of the draft conversion terms, creditors may apply for **adequate safeguards**. Additionally, creditors whose claims pre-date the draft terms may continue to instigate proceedings in the departure Member State for two years after the effective date.

3. Protection of third-party interests

The Mobility Directive focuses strongly on the protection of stakeholders considered most at risk of being marginalised by fraudulent or abusive intent:



- a) **Employees** have the right to be informed and consulted and the participation of their representatives in negotiations and on the board of their company must be ensured.
- b) **Creditors** who are not satisfied with the protection offered by the company benefit from harmonised rights of recourse.
- c) **Shareholders** who voted against the approval of the draft terms have a right to exit and receive cash compensation. Member States may decide to extend this right to other shareholders as well.

III. SPOTLIGHT ON GERMANY

In Germany, the Mobility Directive will be transposed by the Law on the Implementation of the Transformation Directive and Amendment of Other Laws (*Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze, UmRUG*), which is expected to be promulgated on 10 February 2023 and enter into force the following day. The *UmRUG* primarily implements the requirements of the Mobility Directive and amends the German Transformation Act to this effect (*Umwandlungsgesetz, UmwG*).

The scope of the *UmRUG* is limited to **corporations** (*Kapitalgesellschaften*), notably the joint stock corporation (*Aktiengesellschaft*), the partnership limited by shares (*Kommanditgesellschaft auf Aktien*) and the limited liability company (*Gesellschaft mit beschränkter Haftung*). Cross-border conversions of **partnerships** (*Personengesellschaften*), such as limited partnerships (*Kommanditgesellschaft, KG*) and GmbH & Co. KGs, are not governed by the *UmRUG*.

The *UmRUG* brings in the following changes in particular:

- The terms of conversion shall contain a specific minimum information requirement for the protection of creditors, shareholders and employees. Shareholders, creditors and works councils may submit comments on the

conversion proposal to the company up to five days prior to the planned approval.

- Creditors of the converting company have a claim to adequate safeguards if the fulfillment of their claim is at risk as a result of the cross-border conversion.
- Shareholders who do not consider an offered cash settlement to be appropriate may request a judicial review in appraisal proceedings under the German Act on Appraisal Proceedings (*Spruchverfahrensgesetz, SpruchG*).
- The German Transformation Act will also be amended with respect to conversions within Germany.

In Germany, the competent authority responsible for determining whether a merger, division or conversion is intended for abusive, fraudulent or criminal purposes will be the competent registration court (*Registergericht*).

IV. SPOTLIGHT ON LUXEMBOURG

In the Grand Duchy of Luxembourg, draft bill n°8053 proposes to transpose the Mobility Directive by amending, among others, the Luxembourg law of 10 August 1915 on commercial companies (**Companies Act**). The draft bill revises the sections of the Companies Act relevant for mergers, divisions and conversions by introducing a general section applicable to national and cross-border restructurings outside the scope of the Mobility Directive, e.g. involving non-EU companies or EU partnerships, and a special section dedicated to the rules imposed by the Mobility Directive.

The Luxembourg legislator has emphasised its intention to **enable corporate restructurings**. Consequently, it is introducing the possibility of mergers and divisions for the special limited partnership (*société en commandite spéciale*) and is implementing the most burdensome requirements under the Mobility Directive, such as the abuse and fraud check, only to the public limited liability company (*société anonyme, S.A.*), the partnership limited by shares (*société en commandite par actions, SCA*) and



the private limited liability company (*société à responsabilité limitée, S.à r.l.*).

In Luxembourg, the competent authority responsible for determining whether a cross-border merger, division or conversion is intended for abusive, fraudulent or criminal purposes will be the notary.

V. TRANSITIONAL REGIME

Companies aiming to benefit from the current, less burdensome regime applicable to cross-border mergers, divisions and conversions will have to act quickly.

In Germany, the day following the promulgation of the law (i.e. most probably a date in February) will be the cut-off date: Companies that have drawn up the merger or division plan or resolved on the conversion before such date and have filed for registration of the transformation before 31 December 2023 still fall under the previous regime.

In Luxembourg, companies that have published the merger, division or conversion plan on the first day of the month following the entry into force of the law, which is yet to be adopted (i.e., 1 March 2023 or even later), will still fall under the current regime.

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