The Cross-Border Mergers Directive

On 27 June 2008, legislation implementing the provisions of Directive 2005/56/EC on cross-border mergers (the Act) was enacted \( \text{(Bulletin of Acts 2008, 260/261)} \). The Act entered into force on 15 July 2008. Dutch limited liability companies \( (a \ BV \ or \ NV) \) are now permitted to enter into statutory mergers with limited liability companies set up under the laws of another member state of the EU or European Economic Area.

Over the past few years, cross-border mergers involving \( BVs \) or \( NVs \) have occasionally taken place. In the absence of implementation legislation, these mergers were mainly based on a number of European Court decisions that indicated that a complete prohibition on cross-border mergers – as under the Dutch Civil Code – could be seen as a violation of the EU Treaty. The Dutch legislator did not at the time share that view, but this did not prevent actual practice in effecting cross-border mergers (mostly between companies within the same group) in anticipation of implementation. Now that the Directive has been implemented, the uncertainty over whether statutory cross-border mergers involving \( BVs \) or \( NVs \) are allowed has come to an end.

One of the main characteristics – and advantages – of a statutory merger, whether national or cross-border, is that all assets and liabilities of the disappearing company are acquired by the surviving company under universal transfer of title, avoiding the need to comply with any specific local transfer requirements. In principle the same goes for any contract entered into by the disappearing company.

Re-organisations and acquisition and finance structures

The statutory merger is widely used in intra-group re-organisations. The Act makes it possible to extend its use to cross-border re-organisations. Moreover, it facilitates the structuring of acquisition and finance structures involving \( BVs \) and other EU companies, such as the Luxembourg limited liability company \( (a \ Sarl) \).

M&A tool

The cross-border merger can be used as an extra tool for companies to acquire full control over another company. An advantage of the statutory cross-border merger, compared with a public offer, is the lower threshold of shareholder support: a simple majority vote by the general meeting of shareholders will often be sufficient to adopt the resolution to merge. In the case of a public offer, the bidder will need 95 per cent of the target’s share capital to be able to squeeze-out the minority shareholders.

The target company’s shareholders will become shareholders of the surviving company upon completion. However, under the Act, a minority shareholder who has voted against the merger and has asked the target company for compensation within one month of the date on which the resolution to approve the merger is passed has a cash-out right. In this case, the shareholder can force the target company to acquire its shares for cash, as indicated in the merger proposal.
The shareholder may reject the cash offered and ask the relevant court to appoint an independent expert to determine the appropriate cash compensation. To avoid delays in completing the merger, the Act further provides for a so-called accelerated procedure in this respect. The surviving company will then have to declare that it will accept the expert’s advice on how much the compensation should be.

Employee participation

A statutory cross-border merger can be registered with the commercial register – and become effective – only if the merging companies have complied with their obligations over ‘employee participation in the context of the Directive’, which is in short defined as the influence that employees (or their representatives) may have over the election or appointment of members of (non-)executive board(s). For example, if a BV or NV adheres to the large-company regime (structuurregime), the works council has the statutory right to make recommendations in respect of one-third of the total number of members of the supervisory board.

If the surviving company is located in the Netherlands, the employee participation system contained in local, ie Dutch, law will apply to the merger. If, however, (i) at least one of the merging companies in the six months before publication of the merger proposal employed on average more than 500 employees and is subject to an employee participation system or (ii) employee participation rules apply to one of the merging companies and the surviving company is not governed by the large-company regime, a specific cross-border employee participation system will be triggered. This system requires, among other things, that a special negotiating body be set up, composed of employees of the participating companies. This body should try to negotiate with the merging companies’ management an agreement on employee participation rights in the surviving company. If no agreement is reached within six months, an extension of another six months is possible or, if the shareholders of the merging companies decide so, the ‘rules of reference’ may become applicable. These are the standard rules of employee participation that are provided for in the Directive. It could also be that no cross-border employee participation system applies to the surviving company – for example, if none of the merging companies applied an employee participation system before the merger.

Finally, besides the above rules, a BV or NV involved in a cross-border merger may also have to comply with local information and consultation obligations towards its works council(s) and/or trade union(s).

Tax aspects

A statutory cross-border merger whereby a BV or NV is merged into a foreign company entails the transfer of the assets and liabilities of the disappearing company at fair market value. Any gains that arise are taxable with corporate income tax (the maximum rate being 25.5 per cent), whereby the exemptions that would normally be available to a corporate tax payer, such as the participation exemption under which capital gains on qualifying participations (generally, participations of at least 5 per cent), apply as well. A roll over, however, is available if it can be established that there are business reasons for the merger and the assets and liabilities that are transferred by way of the merger will become part of an existing permanent establishment of the surviving company in the Netherlands or that arises in the Netherlands as a consequence of the transfer of the assets and liabilities. In this case, existing loss carry overs of the disappearing company may be taken over by the surviving company.

If the disappearing company holds real estate in the Netherlands – this may include shares in companies predominantly holding real estate in the Netherlands – real estate transfer tax (at 6 per cent) is due as a consequence of the merger. A waiver or exemption of such tax may, however, be available.

Distributions made by a Dutch company are subject to dividend withholding tax at the rate of 15 per cent. A reduction or refund may be available if the distribution is made to a parent company within the EU, under double tax treaties, or to exempt institutions within the EU. The statutory merger of a BV or NV into a foreign company does not give rise to a – deemed – distribution to the existing shareholders of available earnings or earnings that arise as a consequence of the merger. Consequently, an existing dividend withholding tax claim will disappear in this case.
In general, a statutory merger has as a consequence for the shareholders of the disappearing BV or NV that they will have to recognise any gain in the shares. Shareholders resident in the Netherlands are generally taxable on the gain if they hold their shares as a business asset or, if they are individuals, if they hold a substantial interest (generally, alone or with certain relatives, an interest in the disappearing company of at least 5 per cent). However, a roll over is available. The gain is exempt for corporate shareholders that are entitled to the participation exemption.

In the case of a statutory merger of a foreign company into a BV or NV, there is a step-up in the tax basis of the assets and liabilities that are acquired by the Dutch company. The merger, however, may create a claim for Netherlands dividend withholding tax purposes, because there will be no step-up for the purposes of this tax. So, to the extent that there are earnings, hidden reserves and goodwill in the disappearing company, they will come under a claim of Netherlands dividend withholding tax.