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The Mobility Directive: Implementation of EU procedures for cross-border mergers, conversions and divisions

Directive (EU) 2019/2021 of the European Parliament and of the council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (the “**Mobility Directive**”), is due for transposition on 31 January 2023. The Directive amends the existing procedure for cross border mergers and introduces for the first time an EU harmonised framework available to in-scope companies for cross-border conversions and divisions.

The Mobility Directive recognises freedom of establishment as one of the fundamental principles of EU law and, to ensure that this freedom is adequately protected, a need to change the law was acknowledged to continue to foster competition and growth within the EU without internal borders.

In the past, the lack of a unified EU legal framework for cross-border mergers, conversions, and divisions (“**Cross-Border Operations**”) has resulted in legal uncertainty. In addition, the varying levels of protection afforded to individuals in different member states has led to complexity around the execution of Cross-Border Operations. Thus, the Directive aims to codify and harmonise the procedure for Cross-Border Operations. It aims to promote the rights of companies to undertake Cross-Border Operations while ensuring its members, creditors and employees are provided a uniform level of protection throughout the EU.

Before a Cross-Border Operation can be finalised, it must hold up to the legal scrutiny of the competent authority (e.g., court, notary or tax or financial authority appointed as such by the member state) of both the departing, and destination, member states of the company. It is expected that the High Court will act as the competent authority in Ireland, as the authority presently responsible for approving cross-border mergers under Directive (EU) 2017/1132 (the “**2017 Directive**”).

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Companies In Scope

Limited liability companies which have its principal place of business, registered office, or central administration located in the EU fall within the scope of the Mobility Directive and can avail of the Mobility Directive's framework for Cross-Border Operations.

New and Enhanced Procedures

Mergers

The Mobility Directive builds upon existing rules already in place, under the 2017 Directive, for cross-border mergers and introduces further protections for creditors, employees and shareholders.

Conversions

The Mobility Directive enables in-scope companies to convert the legal form under which they are registered in a departure Member State into a legal form of the destination Member State. Similar to the above, the same protections for creditors, employees and shareholders will apply.

Divisions

In-scope companies can also avail of either a full, or partial, division under the Mobility Directive, i.e. the transfer of all assets and liabilities to two or more companies or the transfer of part of its assets and liabilities to one or more companies. Similar to the above, the same protections for creditors, employees and shareholders will apply.

Closer Scrutiny by Competent Authorities

The departing member state competent authority must ensure the Cross-Border Operation holds up to legal scrutiny. Its function is to guarantee that all procedures are followed, and protections granted. The competent authority has three months to assess an application and decide whether or not to issue a pre-operation certificate and its decision must be made in a "*fair, objective and non-discriminatory manner*". If it has a doubt as to the bone fides of the Cross-Border Operation and it is unclear if it is being undertaken for fraudulent, or criminal purposes, or evasion of the law, it may be granted a further maximum period of three months to allow it to investigate any suspected criminal, fraudulent or abusive acts. In assessing the application for a pre-operation certificate, the competent authority should investigate the company's background with regard to matters such as creditors, court proceedings, taxes, and compliance with applicable laws and can consult an independent expert, where necessary.

Conclusion

The introduction of the Mobility Directive is a very welcome development. The Mobility Directive addresses several difficulties relating to private limited company Cross-Border Operations, highlighted by the Court of Justice of the European Union in recent years, which were seen as barriers to freedom of establishment. The resulting harmonisation of the framework throughout the EU will provide greater mobility for companies along with more

certainty on the formalities and procedures to be followed to successfully conclude Cross-Border Operations. The transposition of the Mobility Directive in Ireland, however, has yet to be implemented. We look forward to updating you further when it has been transposed.

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