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Corporate update: the Mobility Directive has come into effect in Ireland

Insights - 13/06/2023

The Mobility Directive

The Mobility Directive has come into effect in Ireland but what does this mean for Irish limited liability companies? In dealing with limited liability companies within the European Union (the EU), the Mobility Regulation:

1. provides for the first time, a harmonised, streamlined regime for cross-border conversions and divisions
2. amends the existing legislation relating to cross-border mergers

Ultimately, the Mobility Directive along with the Mobility Regulation will facilitate group companies within the EU, to restructure when required as part of companies' life cycles.

The new legislation

The Directive (EU) 2019/2121 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**), was brought into effect in Ireland on 26 May 2023 by way of the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the **Mobility Regulation**).

Cross-border conversions

A cross-border conversion involves the relocation of a company to another EU member state. The company will change its legal form to one which exists in the destination member state, without losing its legal personality.

The company will be required to prepare a governing document (named the common terms of conversion), which must set out the aims and rationales of the conversion. A directors' explanatory report, which may include a members' and employees' report, is required, subject to exemptions. Further, there is a requirement i) for a notice to be published, informing members, creditors and employees of the terms, and to invite comments on the proposed merger (unless exempted) and ii) that creditors can apply for safeguards and file a claim in the Irish Courts. Notably, a new rule to avoid an abuse of process has been introduced. Where the Irish High Court, on considering the grant of a pre-merger certificate, must consider whether the conversion is being carried out for abusive or fraudulent purposes. If there is any suspicion, the Irish High Court can extend its decision process by three months.

The measures in the above paragraph are essential, where applicable, so that the interests of concerned parties of the company, namely employees, members and creditors are involved in the process and their rights are protected.

Ultimately, following further steps including a members' resolution and an Irish High Court application (which seemingly can occur online), on conversion, the company will retain its assets, liabilities, members and employees, and only the company's form and location will have changed.

Cross border mergers

An EU cross-border merger mechanism having been in place for some time, facilitated the following:

1. merger by acquisition
2. merger by formation

- merger by absorption

The Mobility Regulation has introduced the following fourth option:

1. a merger between companies having the same ownership.

This allows a cross-border merger to occur, where one company is dissolved without going into liquidation, transferring its assets and liabilities to the acquiring company, without the issue of any new shares by the acquiring company. This is permitted only where either i) the merging companies are owned by the same person or ii) the members of the merging companies hold their securities and shares in the same proportion in all merging companies.

This new fourth option, further simplifies cross-border mergers for group companies within the EU, especially without the requirement to issue new shares, which is required for a merger by acquisition and merger by formation.

As with cross-border conversions above, the Mobility Regulation has implemented changes relating to cross-border mergers, to provide further protection to creditors, employees and members. It is also apparent that the Irish High Court application can occur online.

Cross-border divisions

The Mobility Regulation provides for either a i) full or ii) partial division whereby the assets and liabilities of a company are transferred to 2 or more newly incorporated companies. The process and protections are closely similar to that set out above, in respect of conversions and mergers.

Conclusion

The transposition of the Mobility Regulation will facilitate a straightforward conversion or merger of companies within the EU into Ireland. In achieving a more streamlined process, the Mobility Regulation also ensures the protection of employees, creditors and shareholders of Irish private limited companies.

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