



## EU Mobility Directive: promoting company mobility and the freedom of establishment within Member States

### Introduction

The European Union (EU) has introduced Directive (EU) 2019/2121 (the **Mobility Directive**) amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, which was due for transposition by the EU Member States by 31 January 2023. Although Cyprus, along with several other EU Member States, has yet to transpose the Mobility Directive into national law, it is expected to do so by the end of 2023.

### Scope

The Mobility Directive provides a harmonised legal framework for companies to convert, merge and divide across borders, while at the same time providing adequate protection for stakeholders such as members, employees and creditors.

Its objective is to foster economic growth and effective competition for companies by removing the barriers to the exercise of their freedom of establishment, thus improving the functioning of the internal market.

## Key changes of the Mobility Directive

Below we provide an overview of the key changes of the Directive:

- Introduction of a harmonised legal framework for cross border divisions\* and conversions
- Amendment of the existing rules on cross-border mergers
- Assurance of public disclosure and transparency
- Enhancement of the protections for stakeholders such as members, employees and creditors
- Introduction of provisions to allow for electronic filings
- Introduction of new rule on anti-abuse allowing for closer scrutiny by competent authorities.

\*("cross-border conversion", "cross-border merger" or "cross-border division" are collectively referred to as a **cross-border operations**).

### Cross-border operations

#### (a) Cross-border conversions

A "cross-border conversion" involves 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.<sup>1</sup>

As a result, the company that results from the cross-border conversion (**Converted Company**), retains its legal personality, its assets and liabilities, and all its rights and obligations, whether these arise from contracts, acts or omissions or otherwise, including any rights and obligations arising from contracts of employment or from employment relationships.<sup>2</sup>

The effect of the cross-border conversion procedure is similar to that of the procedure for the transfer of the registered office provided for in sections 354A-354IH of the Companies Law, Cap.113.

#### (b) Cross-border divisions

A "cross border division" involves either:

- (i) a "full division" under which a company on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if applicable, a cash payment; or

---

<sup>1</sup> Article 86b.

<sup>2</sup> Paragraph (47) of the preamble of the Mobility Directive.

- (ii) a “partial division” under which a company transfers part of its assets and liabilities to one or more companies in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies, in the company being divided or both, and, if applicable, a cash payment; or
- (iii) a “division by separation” under which a company transfers part of its assets and liabilities to one or more companies in exchange for the issue to the company being divided of securities or shares in the recipient companies.<sup>3</sup>

A “recipient company”<sup>4</sup> is a company newly formed in the course of a cross-border division.

Accordingly, the Mobility Directive does not provide a harmonised framework for cross-border divisions under which a company transfers assets and liabilities to existing companies. This was a conscious decision taken by the EU Commission as it was considered that allowing for existing companies to be recipient companies would prove to be a complex procedure, requiring the involvement of authorities from several Member States and entailing additional risks.<sup>5</sup>

### (c) Cross-border mergers

The Mobility Directive has extended the definition of 'merger' to also include an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without triggering a requirement for the issuance of any shares by the acquiring company to its shareholder(s).

This is on the condition that, one person holds directly or indirectly all the shares in the merging companies, or the members of the merging companies hold their securities and shares in the same proportion in all merging companies.<sup>6</sup>

In general, the Mobility Directive builds upon existing rules for cross-border mergers, already in place under the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (**Company Law Directive**), and aims to further protect creditors, employees and shareholders and introduces a number of key updates to the existing cross-border merger regime.

### Public Disclosure

The Mobility Directive introduces provisions that aim at ensuring that certain cross border operation documentation is disclosed and made publicly available in the register of the respective Member State(s), at least one (1) month before the date of the General Meeting.<sup>7</sup>

---

<sup>3</sup> Article 160b.

<sup>4</sup> *Ibid.*

<sup>5</sup> Paragraph (8) of the preamble of the Mobility Directive.

<sup>6</sup> Article 119(2)(d)

<sup>7</sup> Article 86g (1) (conversions), Article 123 (1) (mergers) and Article 160g (1) (divisions).

This introduction was made to enhance the transparency of the cross-border operations, in order to ensure that the registers of the Member States involved, contain the necessary information from other registers about the companies involved in those operations,<sup>8</sup> but also to allow all stakeholders' legitimate interests to be considered in the procedure governing a cross-border operation.<sup>9</sup>

## Enhanced protective measures for members, employees and creditors

### (a) Members – exit and right to cash compensation

Similar to the provisions of the Company Law Directive, the administrative or management body of the company involved in the cross-border operation shall, in addition to the necessary draft terms of the cross-border operation, draw up a report for members and employees (either one joint report or separate reports), explaining and justifying the legal and economic aspects of the cross-border operation (**Report**).<sup>10</sup>

As far as members are concerned, the Report should include<sup>11</sup>:

- the cash compensation and the method used to determine the cash compensation;
- the implications of the cross-border operation for members; and
- the rights and remedies available to members in accordance with the respective article of the Mobility Directive relevant to the cross-border operation.

In the case of a cross-border merger or cross-border division, the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable, should also be included.

Any members of a company who voted against the approval of the draft terms of the cross-border operation, have the right to dispose of their shares for adequate cash compensation.<sup>12</sup>

Any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered has not been adequately set, are entitled to claim additional cash compensation before the competent authority or body mandated under national law, subject to the respective time limit established by each Member State.<sup>13</sup>

Furthermore, in the case of a cross-border merger or cross-border division, members who did not have or did not exercise the right to dispose of their shares, but who consider that the share-exchange ratio

---

<sup>8</sup> Paragraph (46) of the preamble of the Mobility Directive.

<sup>9</sup> Paragraph (12) of the preamble of the Mobility Directive.

<sup>10</sup> Article 86e (1) (conversions), Article 124 (1) (mergers) and Article 160e (1) (divisions).

<sup>11</sup> Article 86e (3) (conversions), Article 124 (3) (mergers) and Article 160e (3) (divisions).

<sup>12</sup> Article 86i (1) (conversions), Article 126a (1) (mergers) and Article 160i (1) (divisions).

<sup>13</sup> Article 86i (4) (conversions), Article 126a (4) (mergers) and Article 160i (4) (divisions).

set out in the draft terms of the cross-border operation is inadequate, have the right to dispute that ratio and claim a cash payment.<sup>14</sup>

### **(b) Employees – information, consultation and participation rights**

As far as employees are concerned, the Report should include<sup>15</sup>:

- the implications of the cross-border operation for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;
- any material changes to the applicable conditions of employment or to the location of the company's places of business; and
- how the factors set out in points (a) and (b) affect any subsidiaries of the company.

Members States have an obligation to ensure that the rights of employees to be informed and consulted in the context of cross-border operations are fully respected. The information and consultation of employees in the context of cross-border operations should be carried out in accordance with the applicable European legal framework.<sup>16</sup>

Accordingly, the Mobility Directive strengthens the information and consultation requirements towards employees, who need to be adequately informed and who are provided with the opportunity to express an opinion on the cross-border operation.

As far as employee participation is concerned, the Mobility Directive enhances the existing regulations applicable to cross border mergers by applying them to cross-border conversions and divisions as well. Such regulations aim to ensuring that employee participation is not unduly prejudiced as a result of the cross-border operation by allowing for the exercise of such participation rights and safeguarding that any negotiation between the company and its employees is being carried out in line with the procedure provided in applicable European legislation.<sup>17</sup>

### **(c) Protection of creditors – opposition right**

The Mobility Directive aims to ensure that Member States provide for an adequate system of protection of the interests of creditors whose claims antedate the disclosure of the draft terms of the cross-border operation, and which have not fallen due at the time of such disclosure.<sup>18</sup>

Creditors who are dissatisfied with the safeguards offered in the draft terms of the cross-border operation, may apply, within three (3) months of the disclosure of the draft terms of the cross-border operation, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly

---

<sup>14</sup> Article 126a (6) (mergers) and Article 160i (6) (divisions).

<sup>15</sup> Article 86e (5) (conversions), Article 124 (5) (mergers) and Article 160e (5) (divisions).

<sup>16</sup> Article 86k (conversions), Article 126c (mergers) and Article 160k (divisions).

<sup>17</sup> Article 86l (conversions), amended Article 133 (mergers) and Article 160l (divisions).

<sup>18</sup> Article 86j (1) (conversions), Article 126b (1) (mergers) and Article 160j (1) (divisions).

demonstrate that, due to the cross-border operation, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company.<sup>19</sup>

The safeguards are conditional on the cross-border operation taking effect.<sup>20</sup>

With respect to cross-border conversions, creditors also have the right to file a claim in the departure Member State for a period of two (2) years after a cross-border conversion has taken effect. The aforesaid two-year protection period, should be without prejudice to national law determining the limitation periods for claims or to jurisdiction rules arising from European Union or national law or from a contractual agreement.<sup>21</sup>

### Scrutiny of the legality of the cross-border operation

The competent authorities of the Member States scrutinising the legality of the cross-border operations and assessing the application for a pre-operation certificate, should consider whether the cross-border operation is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

If the competent authority has serious doubts indicating that the cross-border operation is set up for the aforementioned purposes and considers that the assessment requires additional information to be considered or additional investigative activities to be performed,<sup>22</sup> it may extend the standard three-month assessment period by a maximum three months.<sup>23</sup>

This new introduction of closer scrutiny by the competent authority guarantees legal certainty and ensures that all procedures are followed, and all protections are granted. It further guarantees that a decision on the approval of a cross-border operation is taken in a fair, objective and non-discriminatory manner and on the basis of all relevant elements required by EU and national law.<sup>24</sup>

### Electronic filings

In an effort to provide for an appropriate level of transparency, the Mobility Directive promotes the use of digital tools and processes by requiring Member States to ensure that certain procedural steps can be completed fully online.

Specifically, all documents disclosed to the relevant authorities, as well as the pre-operation certificates, shall be shared through a system of interconnections of registers.

### Conclusion

The Mobility Directive represents a significant advancement in promoting greater company mobility within EU Member States by providing a harmonised legal framework for cross border operations and thus removing any uncertainties resulting from the unaligned and incompatible procedures of different Member States.

---

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Article 86j (4).

<sup>22</sup> Article 86m (8) (conversions), new Article 127 (8) (mergers) and Article 160m (8) (divisions).

<sup>23</sup> Article 86m (10) (conversions), new Article 127 (10) (mergers) and Article 160m (10) (divisions).

<sup>24</sup> Paragraph (10) of the preamble of the Mobility Directive.

While there are concerns about increased complexity and administrative burdens deriving from the procedures introduced by the Mobility Directive, the directive is an important milestone for cross-border reorganisations in the EU.

## Authors



**Natalie Kyprianou**

Director

Hadjianastassiou, Ioannides LLC (member of the Deloitte Legal network)

Email: [nkyprianou@deloitte.com](mailto:nkyprianou@deloitte.com)



**Elita Papademas**

Senior Associate

Hadjianastassiou, Ioannides LLC (member of the Deloitte Legal network)

Email: [epapademas@deloitte.com](mailto:epapademas@deloitte.com)

© 2023 Hadjianastassiou, Ioannides LLC

This communication contains information which is confidential. It is exclusively to the intended recipient(s). If you are not the intended recipient(s), please: (1) notify the sender by forwarding this email and delete all copies from your system and (2) note that disclosure, distribution, copying or use of this communication is strictly prohibited. Any erroneous disclosure, distribution or copying of this email communications cannot be guaranteed to be secure or free from error or viruses.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, its global network of member firms, and their related entities (collectively, the "Deloitte organisation"). DTTL (also referred to as "Deloitte Global") and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) to learn more.

Hadjianastassiou, Ioannides LLC is a Deloitte Legal practice in Cyprus. Deloitte Legal means the legal practices of DTTL member firms, their affiliates or their related entities that provide legal services. The exact nature of these relationships and provision of legal services differs by jurisdiction, to allow compliance with local laws and professional regulations. Each Deloitte Legal practice is legally separate and independent, and cannot obligate any other Deloitte Legal practice. Each Deloitte Legal practice is liable only for its own acts and omissions, and not those of other Deloitte Legal practices. For legal, regulatory and other reasons, not all member firms, their affiliates or their related entities provide legal services or are associated with Deloitte Legal practices.

Hadjianastassiou, Ioannides LLC is a private lawyers' limited liability company registered in Cyprus (Reg. No. HE227297), regulated by the Cyprus Legal Council and the Cyprus Bar Association ([www.cyprusbarassociation.org](http://www.cyprusbarassociation.org)) (CBA Reg. no. 22). List of board members is available at our registered office.