Cross-border reorganisations within the EU
Taxlab 2017

Agenda

- About Deloitte Legal 3
- Introduction 7
- Cross-border reorganisations 11
  - Transfer of seat 12
  - Mergers 14
  - Demergers 16
  - SE & SCE 18
- Brexit implications 21
About Deloitte Legal
About Deloitte Legal

Deloitte Legal works as a law firm within Deloitte having the same project approach and methodology as other Deloitte functions

1700 Legal professionals worldwide across 4 major disciplines

We deliver Deloitte branded integrated legal services in 73 countries and through other Deloitte functions and/or trusted relationships with high quality legal practices can serve clients in 150 countries

Services provided by Deloitte Legal
Capabilities & Services (Deloitte Legal Global)

Corporate and M&A
- Corporate law
- Corporate compliance
- Corporate reorganizations and entity reduction programs
- National and cross-border mergers
- Shareholder agreements
- Family protocols
- Acquisitions, divestures and joint-ventures
- Private equity and venture capital
- Legal purchaser and vendor due diligence
- Post-merger integration activities and legal entity reduction

Commercial
- Legal and contractual framework of supply chain management and distribution networks
- Restructuring business functions and outsourcing
- Real estate including acquisition, disposal and portfolio management
- Intellectual property rights including registration, protection and defense
- Unfair competition and antitrust
- Litigation in all fields of business law, including white collar crime
- Bankruptcy, insolvency and corporate restructuring
- Statutory and regulatory compliance

Employment Law and Pension
- Individual employment law
- Relationships with worker representative bodies
- Labor law issues in restructuring and cross-border mergers
- National and international social security law
- Pensions & benefits
- Estates & trusts
- Using our network we can provide comprehensive solutions to global employment of employees (including migration)

Regulated Industries
- Regulatory requirements
- Reorganizations and restructurings
- Transacting with public sector entities

Tax Controversy
- Tax audit strategy and consulting
- Tax controversy lifecycle management
- Dispute resolution
Engaging Deloitte Legal brings you an unique combination of benefits that no traditional lawfirm can provide in terms of:

- Global footprint & synergy with other Deloitte functions;
- Centralized project management;
- Consistent quality & methodology;
- Integrated technology enabled solutions;
- Uniform fee-structures and efficient engagement procedures.
Cross-border reorganisations

An introduction
Drivers of cross-border reorganisation

01. Synergies and business strategy
02. Reducing organization costs
03. Minimizing of regulatory compliance
04. Tax Planning
05. Business-friendly environment
06. Global political issues
Cross-border reorganisation, before and after

**Traditional Holding Structure**

- European Holding
- Separate legal entities
- Each with their own corporate / directors’ responsibilities

**Single European Company**

- Single European Company
- Branch structure / no separate legal entities
- Central (legal) management / centralization of legal responsibilities
- Alignment with operating structure

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Terminology

Corporate M&A

Common law vs Civil law
Different legal concepts of common law and civil law countries

Ancillary jurisdictions
Jurisdictions that are part of, or linked to, a MS but have their own legal system

Seat theories
Real seat theory (head office) and incorporation theory (statutory seat)

Entity reduction
Traditional holding structures are most of the time costly and too complex

Delaware effect
Race to the bottom or race to the top?

Reorganisation
Cross-border mergers, demergers (divisions), transfer of seat (conversion)

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Cross-border reorganisations

Transfer of seat, mergers and demergers/divisions
Transfer of seat

Overview

Inbound and outbound transfer of seat
- Inbound – situation of the host MS, when a company moves its seat from another MS into the jurisdiction of the host MS
- Outbound – situation of the home MS, when a company moves its seat outside the jurisdiction of the home MS

Examples
- Centros (1999), Uberseering (2002), Inspire Art (2003),
- Cartesio (2009) and Vale (2012)

Pitfalls
- Real seat vs incorporation seat theory
- Absence of clear common rules (for now)
- May be time-consuming and costly

Expectations
- Preliminary draft (NL) for cross-border transfer of seat
- Plans for a directive on transferring a companies’ registered office
Transfer of seat

I) Preliminary draft (NL)

Pros
- New title 7A to the Dutch Civil Code for (cross-border) transfer of seat
- Procedures for inbound and outbound transfers
- More protection for stakeholders (i.e. creditors, minority shareholders)
- New legal framework for domestic conversions

Cons
- Legislation will only apply to the Netherlands; other MS still have other or no legislation
- Legislation will only apply to private limited companies
- Preliminary draft dates from 2014; still not implemented!

II) Directive on transferring a companies’ registered office

- Harmonization for different seat theories?
- Harmonization for procedures?
- Commission Work Programme 2017: to be expected in Q3-4 2017
Mergers

Overview

Cross-border merger
- Harmonized and non-harmonized mergers
- EU vs EEA, Switzerland, ancillary jurisdictions
- Legal benefits

Examples
- Sevic (2005)
- Practice examples

Pitfalls
- Different MS - Different procedures
- Merger procedures in different MS may differ in time and complexity
- Common law
- Not all assets are automatically transferred!

Expectations
- Internet consultation 2014
- Amendment on cross-border merger directive in Q3-4 2017
Mergers
Amendement on CBMD

A need for a amended directive?

- Absence of clear standards for Inter-agency communications
- Obstacles to safeguard stakeholders
- Needs for a fast track
- Gaps and potential inconsistencies
- Respondents acknowledge the need for further harmonization

Internet consultation

- Simplify procedures
- Prevent abuse for tax, social or legal reasons
- More stakeholder protection

Committee on legal affairs

- Commission Work Programme 2017: to be expected in Q3-4 2017

Directive?
Demergers (divisions)

Overview

Cross-border demergers
- Only non-harmonized demergers; no EU directive
- Few MS have legal framework for cross-border demergers
- Legal benefits

Examples
- Practice examples

Pitfalls
- (Im)possibility? Sevic (2008)?
- Different MS – Different or no procedures

Expectations
- Internet consultation 2014
- New EU directive on cross-border demergers in Q3-4 2017
Demergers (divisions)

Directive on cross-border demergers

Need for a Directive?
- Bech-Bruun Lexidale Study
- Study for the Juri Committee
- Internet consultation 2014

Committee on legal affairs
- Harmonization on procedures
- Harmonization on stakeholder protection
- Clear and common rules for accounting issues

Directive?
- Commission Work Programme 2017: to be expected Q3-4 2017
- Domestic initiatives on cross-border demergers?
Merger, Demerger and Transfer of seat
SE and SCE

• What is an SE (European Company) and a SCE (European Cooperative Society)?
• Were not very popular, but there is increase in use
• 79 SEs have changed their registered office over the 2004 – 2014 period

Examples
• Allianz SE, BASF SE, Porsche Automobil Holding SE, Swiss RE
• Airbus Group N.V., Christian Dior S.A., Schneider Electric SA and LVMH (Louis Vuitton Moët Hennessy) S.A. have announced their intention to transform into an SE

Pitfalls
• National law still applies to regulatory supervision, tax, accounts, and insolvency matters
• Extensive labour law protection measures
• Complex set of articles of association

Expectations
• Directive for a SUP
Overview: legal process and formalities (de)merger

1. **Filing and publication** of the joint (de)merger proposal

2. **Preparation of**
   -Joint (de)merger proposal
   -(De)merger report
   -Intermediary financial statements, if needed
   -Auditor’s report

3. **Board of directors**
   -Approving the joint (de)merger proposal and (de)merger report
   -Adopting financial statements, if needed
   -Convening the EGM

4. **Approval of the (de)merger**: Extraordinary General Meeting (EGM) before notary
   -Submission of (de)merger documentation to registered office
   -Sending convocation notices to the shareholders

5. **Constatation deed**: passed in country of the absorbing company (in Belgium obtained from notary public)

6. 2 month **creditor protection period**

**Information to shareholders**: (de)merger documentation to be made available at least 1 month prior to the EGM

6 – 8 weeks **waiting period**

**Obtaining pre-(de)merger certificates**

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Suggested timescale (de)merger

**Ramp-up phase (1 week)**
- On-board team
- Meet key stakeholders
- Develop basic project infrastructure
- Review key milestones
- Develop "plan for a plan"
- Hold core team kick-off event

**Information gathering and due diligence phase (2-3 months)**
- Gather detailed information on entities
- Identify legal issues (e.g., anti-assignment)
- Analyse detailed rules, documents, and procedures for legal activities

**Planning and drafting phase (2-3 months)**
- Detailed planning and project design
- Develop project plan and governance structure
- Identify key risks and dependencies

**Implementing phase (6-12 months)**
- Report on due diligence items
- Logistics planning for implementation
- Draft legal documents

**Post-completion and wrap-up phase (1 month)**
- Execute project plan
- Submissions, legal publicity, hearings
- Discussions with external authorities

**Key milestones**
- Information gathering complete
- Draft Project Plan issued
- Key dependencies understood
- Key stakeholders identified and engaged

**Kick-off meeting**
- Most deliverables drafted
- Detailed understanding of tax implications

**PMO**
- On-board team
- Meet key stakeholders
- Develop basic project infrastructure
- Review key milestones
- Develop "plan for a plan"
- Hold core team kick-off event

**Legal**
- Gather detailed information on entities
- Identify legal issues (e.g., anti-assignment)
- Analyse detailed rules, documents, and procedures for legal activities

**Tax**
- Detailed tax information-gathering and analysis
- Ascertain where tax rulings required

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Cross-border reorganisations
Brexit implications
Brexit Implications

A vote to leave

Unprecedented action. Exiting will require a series of reforms, yet to be decided

An end for the UK as part of the internal market, and the freedom of establishment

Article 50 of Lisbon Treaty would trigger a 2 year transition period. An extension would require unanimous approval

The UK could enter into bilateral agreement to access the internal market in line with model adopted by Switzerland

Negotiations of Trade Agreements within transition period

Brexit could trigger a new referendum on Scottish independence

An uncertain future
Brexit implications

Considerations

- End of freedom of establishment
- Cross-border restructuring Implications
- SE and SCE
- Mobility Employees
- Tax Implications
- Snowball effect

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