

HEUSSEN

NEWSLETTER

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CORPORATE LAW DEVELOPMENTS

EU Directive on cross-border legal mergers implemented

On 15 July 2008 the legislative proposal for the implementation of Directive 2005/56/EC of the European Parliament and the Council on cross-border mergers of public and private limited liability companies (the Tenth Company Directive) entered into force. The purpose of the Tenth Company Directive, which was adopted on 26 October 2005, is to facilitate cross-border mergers of limited liability companies within the European Union and European Economic Area.

According to the Tenth Company Directive, cross-border mergers have the following effects:

- the disappearing companies cease to exist;
- all assets and liabilities of the disappearing companies are transferred to the acquiring company by operation of law; and
- the shareholders or members of the disappearing companies become shareholders or members of the acquiring company.

The Tenth Company Directive applies only to cross-border mergers between public and private *limited liability companies*. As a result, the Dutch implementation of the Tenth Directive only allows Dutch NVs and BVs to merge with limited liability companies from another Member State. Other Dutch legal entities, such as a Dutch co-operative, cannot take part in a cross-border legal merger under the new legislation. A European Cooperative Society (SCE) with its seat in the Netherlands, however, is treated as a Dutch limited liability company and can merge with a limited liability company from another Member State.

The Tenth Directive explicitly states that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The procedure and formalities that apply to a cross-border merger whereby a Dutch company is the acquiring or disappearing company are very similar to those which apply to national legal mergers between Dutch companies. The procedure that must be followed includes the preparation and filing of a merger proposal and a management report explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the merger for the shareholders, creditors and employees. In addition, an auditor's report concerning the proposed cross-border legal merger must be prepared, unless this requirement has been waived by all shareholders of each of the merging companies.

An interesting new feature is the introduction of the possibility for minority shareholders to opt for compensation in cash only in stead of shares in the acquiring company. This possibility does not exist for minority shareholders in domestic legal mergers between Dutch companies. The reason for introducing this option is that as a result of a cross-border legal merger, a minority shareholder of a disappearing Dutch company may end up becoming a shareholder in a foreign company against his wishes. Based on the new legislation, a minority shareholder may now choose to cease being a shareholder and be compensated in cash. A cash compensated exit requires an agreement between the minority shareholder and the disappearing company as to the amount of the compensation that will be paid to the minority shareholder. The amount of the compensation should equal the market value of the relevant shares.

If you have any questions regarding the above, please get in touch with Jacques Verasdonck (+31(0)20-312 2819 or jacques.verasdonck@heussen-law.nl) or Juliette Schueler (+31(0)20-312 2814 or juliette.schueler@heussen-law.nl).

More flexibility with regard to capital maintenance rules applicable to Dutch public limited liability companies (NVs or *naamloze vennootschappen*)

On 11 June 2008 the legislative proposal for the implementation of Directive 2006/68/EC amending the Second Company Law Directive 77/91/EEC entered into force. The purpose of the new rules is to create

more flexibility on various aspects of the capital maintenance rules applicable to Dutch NVs.

The most important changes relate to the following three aspects:

- repurchase of shares
- financial assistance
- contributions in kind (non-cash).

Repurchase of shares

Until the new legislation entered into force, an NV (together with its subsidiaries) could not repurchase more than 10% of its issued share capital. Under the new rules, at least one share must be held by a person other than the NV and other than for the account of the NV or one of its subsidiaries. A listed NV, however, may (itself or through its subsidiaries) repurchase shares up to a maximum of 50% of its issued share capital. The abolishment of the 10% limit gives NVs more flexibility to restructure their equity. The 10% limit remains applicable with regard to listed and non-listed NVs acquiring shares in their own capital other than as a result of a repurchase of shares, for example as a result of a legal merger or other acquisition under universal title.

Under the new legislation it is no longer required that the articles of an NV explicitly permit an acquisition by the NV of shares in its own issued share capital. As required under the old legislation, the general meeting of shareholders of an NV must authorise the management board to repurchase the shares. With regard to non-listed NVs the maximum period for which such authorisation remains valid has, however, been extended from 18 months to five years. For listed NVs, the maximum period of 18 months still applies.

Financial assistance

Under certain conditions, an NV and its subsidiaries are under the new law permitted to grant a loan to a third party to enable such third party to acquire shares in the issued share capital of the NV. The management board of the NV must resolve to grant the loan, which resolution is subject to the prior approval of the general meeting of shareholders of the NV. The shareholders' approval requires a majority of at least two-thirds of the votes cast at a general meeting of shareholders if less than 50% of the issued share capital is represented at the meeting. If the NV is listed, the shareholders' approval requires a 95% majority of the votes cast at a general meeting of

shareholders.

In addition, the following conditions must be complied with:

1. the loan, including interest to be paid and the security to be provided to the NV, must be granted on fair market terms;
2. the equity of the NV less the amount of the loan may not be less than the paid and called-up part of the NV's share capital together with the reserves which must be maintained by law or under the NV's articles; in other words, the NV must have sufficient freely distributable reserves;
3. the creditworthiness of the third party, or third parties in case of a multiparty transaction, must be meticulously investigated;
4. if the loan is granted for the purpose of (a) the subscription to newly issued shares, or (b) the acquisition of shares held by the NV in its own share capital, the price for which such shares are subscribed to or acquired must be fair.

In view of the prior shareholders' approval to be obtained, the management board must prepare and file a report stating the reasons for granting the loan, the NV's interest in granting the loan, the terms of the loan, the price for which the shares will be subscribed or acquired and the risks related to the loan with regard to the liquidity and solvency of the NV.

It remains prohibited for an NV and its subsidiaries to provide collateral, guarantee the price, otherwise act as surety or otherwise bind itself jointly and severally with or for third parties for the purpose of the subscription or acquisition by third parties of shares in the NV's share capital or of depository receipts issued therefor.

Contributions in kind

Under the new legislation, the paying up of shares in kind upon or after incorporation of an NV has been facilitated. Under certain conditions, it is no longer required to prepare and file a description of the contribution and to obtain an auditor's certificate as to the value of the assets to be contributed. In summary, no description and auditor's certificate are required if the contribution relates to:

1. transferable securities or money-market instruments;
2. assets other than cash or the assets referred

- to under (i) above, the value of which has been recently determined by an independent expert from one of the EU member states;
3. assets other than cash or the assets referred to under (i) above, the value of which can be derived from adopted and audited annual accounts (or consolidated accounts) for the last financial year preceding the contribution.

Instead, a declaration (and, if the contribution is made in exchange for shares issued by an existing NV, also an announcement) setting out certain details of the assets to be contributed must be filed with the trade register.

A description and auditor's certificate will, however, still be required if prior to the contribution it becomes apparent that the value of the relevant assets has changed substantially.

It is also no longer necessary to prepare a description and obtain an auditor's certificate in case of an acquisition (other than in exchange for shares issued) by the NV of assets described under (i) through (iii) above which belonged to an incorporator one year before incorporation of the NV or thereafter and the acquisition is made before the expiry of two years after the registration of the NV with the trade register (the so-called *Nachgründung* situation).

If you have any questions regarding the above, please get in touch with Tim Schreuders (+31(0)20-312 2818 or tim.schreuders@heussen-law.nl) or Martijn Koot (+31(0)20-312 2815 or martijn.koot@heussen-law.nl).