The EU Mobility Directive in Ireland

New options for cross-border corporate structuring

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Headline summary

- New regulations to facilitate cross-border corporate mobility are transposed into Irish law.
- The regulations facilitate two new types of cross-border operation between EEA states: cross-border conversion and cross-border division.
- Cross-border conversions permit a company to move its incorporation and registered office from one EEA state to another.
- Cross-border divisions facilitate cross-border demergers, hive-downs and spin-outs.
- The existing forms of cross-border merger are extended to facilitate sister-sister mergers and absorption of multiple subsidiaries.
- Procedures for cross-border operations mostly mirror existing rules for cross-border mergers, with a handful of key differences.
- More effective protections are made available for creditors and shareholders, increasing the risk of challenge.
- EU-wide anti-abuse provisions introduce an element of execution risk and may undermine the legal certainty of cross-border operations.

1. New options for cross-border structuring

Irish limited liability companies can now take advantage of EU law corporate procedures to migrate to other EEA states or divide into two or more companies in different EEA states.

The Irish regulations transposing the EU Mobility Directive ((EU) 2019/2121) revoke existing Irish rules on cross-border mergers and introduce new and updated procedures for cross-border conversions, cross-border mergers and cross-border divisions (**cross-border operations**).

The European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the **Irish Mobility Regulations**) came into full effect on 26 May 2023, substantially after the transposition deadline of 31 January 2023.

2. **Cross-border conversion – facilitating corporate migration**

   While the concept of a corporate division is familiar from domestic law (Chapter 4 of Part 9 and Chapter 17 of Part 17 of the Companies Act 2014), cross-border conversion is something new – it permits a company to move its incorporation and registered office from one EEA state to another using a conversion process modelled on the existing process for EU cross-border mergers.

   The new statutory basis resolves a handful of uncertainties surrounding the use of an EU cross-border merger to achieve an equivalent effect:

   - the company resulting from a cross-border conversion retains its legal personality; and
   - TUPE regulations will not apply to a cross-border conversion (though existing rights of employees to information and consultation and rights of employee participation will apply where applicable).

3. **Cross-border division – facilitating demergers, spin-outs and hive-downs**

   Corporate divisions are familiar from Irish domestic law. However, the types of division are extended to include divisions in which the original dividing company continues in existence and is not dissolved.

The available types of division for Irish companies under the Irish Mobility Regulations are:

- **full division –** an operation whereby an Irish dividing company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more recipient EEA companies, in exchange for the issue to the members of the dividing company of securities or shares in the recipient companies and, if applicable, a cash payment;
- **partial division –** an operation whereby an Irish dividing company transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the members of the dividing company of securities or shares in the recipient EEA company or companies, in the dividing company, or in both and if applicable, a cash payment; and
- **division by separation –** an operation whereby an Irish dividing company transfers part of its assets and liabilities to one or more recipient EEA companies, in exchange for the issue to the dividing company of securities or shares in the recipient company or companies.

Where the dividing company is incorporated in another EEA state, an Irish recipient company may be formed or incorporated by way of a cross-border division carried out in that EEA state.

4. Cross-border mergers – updated structures

The forms of cross-border merger that are familiar from existing law are slightly tweaked by the Irish Mobility Regulations:

- **merger by absorption –** an operation whereby, on being dissolved and without going into liquidation, a company transfers all of its assets and liabilities to a company that is the holder of all the shares or other securities representing the capital of the first-mentioned company;

- **merger by acquisition –** either:

  (a) an operation in which a company acquires all the assets and liabilities of one or more other companies that is or are dissolved without going into liquidation in exchange for the issue to the members of that company or those companies of shares or other securities in the first-mentioned company representing the capital of that company, with or without a cash payment; or

  (a) an operation in which a company acquires all the assets and liabilities of one or more other companies that is or are dissolved without going into liquidation without the issue of any new shares by the first-mentioned company, where one person holds directly or indirectly all of the shares in the merging companies or the members of the merging companies hold their shares and other securities in the same proportion in all merging companies; and

- **merger by formation of a new company –** an operation in which two or more companies, on being dissolved without going into liquidation, transfer all of their assets and liabilities to a company that they form (the new company) in exchange for the issue to their members of shares or other securities representing the capital of the new company, with or without a cash payment.

The second limb of the definition of "merger by acquisition" is new. For all practical purposes, this form supersedes merger by absorption on the basis that:

- it can be done by more than one transferor company at a time; and

- it benefits from simplified formalities, including an exemption from the requirement to hold a general meeting, that previously only applied to mergers by absorption.

This limb also facilitates what are sometimes referred to as "sister-sister" mergers between two or more subsidiaries of a common holding company.

5. Procedures for cross-border operations

The procedures to implement cross-border operations have elements in common:

(i) **Draft terms –** Each operation is initiated by the directors of the Irish participating company or companies adopting draft terms setting out prescribed information on the cross-border operation and the participating companies.

(ii) **Directors' explanatory report –** The directors of each Irish company must draw up a report for the company's members and employees explaining (and in certain cases justifying) the proposed operation.

From a timing perspective, the requirement to produce a directors' explanatory report includes the requirement to make it available to members/employees for a statutory period of six weeks prior to the general meeting to approve the operation.

The directors' explanatory report requirement can now be waived in full by the members of a company that has no employees (on the basis that the section for members can be waived by the members and the section for employees is not required where the company and its subsidiaries have no employees).

(iii) **Expert's report –** Where required, this report is drawn up by an auditor on the proposed cash compensation to members (and in the case of mergers and divisions, the proposed share exchange ratio). This report can be waived by the members of the merging companies.

(iv) **Registration and publication of draft terms –** The draft terms must be filed at the CRO, accompanied by:

(a) a copy of the draft terms; and

(b) a notice informing the company's members, creditors and employee representatives that they may submit comments concerning the draft terms no later than five working days before the date of the general meeting to approve the cross-border operation.

A notice must be published in the CRO Gazette and in a national daily newspaper (reduced from publication in two national daily newspapers) at least 30 days before the date of the general meeting.

(v) **General meeting –** After the waiting periods for registration/publication and the directors' explanatory report (if relevant) have elapsed, the members of the company may approve the cross-border operation by special resolution passed at a general meeting.

Companies can no longer substitute a resolution in writing for a physical meeting. However, exemptions from the requirement to hold general meetings apply in respect of cross-border mergers by acquisition in the following circumstances:

(a) for acquiring companies, if certain additional publication and inspection requirements are satisfied; and

(b) for companies being acquired, in the case of a wholly-owned subsidiary being acquired by its parent (see paragraph 4 above).

(vi) **Application for a pre-conversion/pre-division/pre-merger certificate –** Each Irish company must apply to the High Court for a certificate to certify its compliance with each of the foregoing requirements (a **pre-operation certificate**). This application may be completed online, without any requirement to appear in person before the court.

While the scope of the High Court's discretion to refuse an application for a pre-operation certificate remains limited, the new requirement for the court to conduct an examination for anti-abuse purposes should also be considered. This requirement is discussed in more detail at paragraph 7 below.

Pre-operation certificates must be obtained in each other EEA jurisdiction that is relevant to the transaction (i.e. the jurisdictions of any other merging or dividing companies). Ireland is unusual in requiring court approval of the pre-operation certificate. In the case of most other EEA jurisdictions, the relevant issuing authority is a notary.

(vii) **Court examination –** Full examination of the legality of the cross-border operation is carried out in the destination jurisdiction – i.e. the jurisdiction of the resulting company. This means that examination by the Irish High Court will be required only in cases of inbound cross-border conversions, mergers and divisions. For outbound operations, the other relevant EEA state(s) will be the venue for the legal examination.

In the case of Irish inbound cross-border operations, the High Court is responsible for examining the legality of the operation and the procedures that have been followed (including confirmation that each participating company has received an appropriate pre-operation certificate under its law of incorporation). The court order will state the effective date of the cross-border operation and is conclusive evidence of its completion (though note the proviso described in paragraph 7 below).

Employee participation rights are preserved in the Irish Mobility Regulations in nearly identical terms to the revoked cross-border merger regulations. Since Irish companies typically do not provide for employee board representation, these provisions will only apply in an inbound operation where at least one of the non-Irish participating companies operates an employee participation system.

An Irish company that is regulated by the Central Bank of Ireland (the **CBI**) that intends to participate in a cross-border operation is now obliged to inform the CBI at least 90 days prior to the general meeting. Where the CBI issues a written response, the response must be exhibited to the High Court as part of the application for a pre-operation certificate.

6. New protections for creditors and shareholders

Creditors enjoy enhanced statutory protections under the Irish Mobility Regulations. The draft terms for each cross-border operation must state “any safeguards offered to creditors, such as guarantees or pledges”. A dissatisfied creditor can apply to the High Court for enhanced safeguards within three months of the relevant CRO filing.

Previously creditors in outbound cross-border mergers had a right to be heard only as part of legal scrutiny in the successor jurisdiction. The new rules provide creditors with a local venue to challenge the operation.

This right is enhanced in the case of outbound conversions, which provide creditors with a right to institute proceedings against the converting company in the State within two years of the effective date of the conversion. This right is “without prejudice to any jurisdiction rules under the law of the European Union, the law of the State or a contract.”

Creditor protections in cross-border divisions are a particular policy concern, given the prospect that a company could implement a division for the purpose of transferring unwanted liabilities (such as tort claims) to a recipient company located in a more congenial jurisdiction, with a view to winding up the latter and protecting the assets of the former (a manoeuvre referred to in US bankruptcy practice as the “Texas two-step”).

In this regard, the Irish Mobility Regulations reflect the following protections, derived from the Mobility Directive:

“Where a creditor of the dividing company does not obtain satisfaction from the company to which the liability is allocated, the other recipient companies, and in the case of a partial division or a division by separation, the dividing company, shall be jointly and severally liable with the company to which the liability is allocated for that obligation… However, the maximum amount of joint and several liability of any company involved in the division shall be limited to the value, at the effective date, of the net assets allocated to that company.”

This provision is likely to be tested in an EU cross-border insolvency before long. The attitude adopted by courts to the maximum liability limit referred to above may be a key factor in deciding whether a cross-border division provides an effective insolvency shield for valuable (and growing) assets in a dividing company.

The fact that Ireland (like most other Member States) decided not to implement an optional provision to require directors’ solvency statements in cross-border divisions may be relevant here – though the anti-abuse provisions summarised in paragraph 7 also require consideration.

Shareholders enjoy similar protections to challenge the applicable cash compensation or share exchange ratio. However, since cross-border operations are, with limited exceptions, carried out as intra-group operations, these protections are expected to be of limited relevance in practice.

7. Anti-abuse provisions

An application to the High Court for a pre-operation certificate now involves anti-abuse scrutiny. The Irish Mobility Regulations state as follows:

"The Court shall not issue a pre-[operation] certificate … where it determines that the proposed cross-border [operation] is being carried out –

(a) for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of the law of the European Union or the law of the State, or

(b) for criminal purposes."

The Regulations set out a procedure, derived from the Mobility Directive, for the High Court's assessment of the relevant facts and circumstances and consultation with an independent expert if needed. The three-month deadline for the court to carry out its examination can be extended by a further three months if the court needs more time to make its determination.

This provision may prompt concern among companies considering participating in a cross-border operation that the objective of benefiting from more favourable tax or regulatory treatment in another EEA state amounts to an "abusive purpose". Since Ireland is a relatively tax-advantaged jurisdiction with favourable regulation and an open economic outlook, these concerns are unlikely to be material in Irish scrutiny of outbound operations. In reality, hostile scrutiny is more likely to arise in another EEA jurisdiction on an inbound transaction to Ireland.

In this regard, it is worth noting that the CJEU decision in the Polbud case (C-106/16) – the case that initiated the scramble to deliver a statutory basis for cross-border corporate migration – included the following statements:

"40 … it must be observed that, as the Court has previously held, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse …"

"63 ... the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty …"

Older authorities, such as the National Grid Indus case (C-371/10), emphasise the latter point with respect to tax compliance:

"84 However, the mere fact that a company transfers its place of management to another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty …"

Nevertheless, the hostility of EU bodies to "letter-box" companies and "aggressive tax planning" is apparent from various official publications, including the preparatory materials and impact assessments for the Mobility Directive itself. It remains to be seen what standards will be applied by the Irish High Court and authorities in other EEA states in assessing compliance with the anti-abuse provision.

In a similar vein, it should be noted, that the validity of a cross-border operation that has taken effect is now expressly qualified by "the power of the State to impose any measures or penalties under the law of the State after the effective date, including in relation to criminal law, the prevention and combatting of terrorist financing, social law, taxation and law enforcement."

The breadth of the latter exception (to be mirrored in other EEA jurisdictions) may prompt concerns that it can be operated in a protectionist manner by an EEA state to defend its domestic tax base or regulatory perimeter.

8. Conclusion

The Mobility Directive introduces novel procedures into Irish law that are likely to prove useful in the rationalisation of complex multinational groups.

Cross-border conversions represent a radical departure, permitting the migration of companies across borders while ensuring continuation of legal personality. Cross-border divisions provide flexible new means to facilitate cross-border demergers, hive-downs and spin-outs via a single corporate operation.

However, these new freedoms come packaged with features that have the potential to be applied in a protectionist manner, frustrating operations aimed at securing the advantages of favourable tax or regulatory treatment in another EEA state. These provisions introduce an element of execution risk and have the potential to undermine the legal certainty of cross-border operations.

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