ALERT MEMORANDUM

Belgium Implements the EU Mobility Directive

June 13, 2023

On June 6, the Belgian law transposing the EU Mobility Directive[1] ("**Belgian Mobility Law**") was published.[2] This new law introduces a number of notable changes to the rules on cross-border mergers, de-mergers and conversions involving a Belgian company. Significantly delayed beyond the European transposition deadline of January 31, 2023, most provisions of the Belgian Mobility Law will enter into effect on June 16, 2023 with the other provisions entering into effect on June 30, 2023, or December 15, 2023.

In the absence of harmonized rules on cross-border reorganizations, the Court of Justice of the European Union (CJEU) had developed case-law based on the freedom of establishment protected under the Treaty on the Functioning of the European Union (TFEU) which intended to enable cross-border mobility for EU companies. However, cross-border mobility for EU companies has remained difficult in practice as rules differed between Member States, making the process burdensome and complex to navigate. With the Mobility Directive, the European legislator adopted harmonized rules to facilitate cross-border movement in the EU, while being attentive to the interests of (minority) shareholders, creditors and employees.

Belgium already had modern and detailed rules on cross-border reorganizations and thus it remains to be seen whether, from a Belgian perspective, the Mobility Directive will achieve its primary objective, or whether the changes mandated by the Mobility Directive will actually make cross-border reorganizations more difficult to implement in Belgium.

In this Alert Memorandum, we highlight the key provisions of the Belgian Mobility Law and offer practical considerations and takeaways for companies contemplating a cross-border reorganization into or out of Belgium.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

Brussels

Marijke Spooren
+32 2 2872075
mspooren@cgsh.com

Jan-Frederik Keustermans
+32 2 287 2187
jkeustermans@cgsh.com

Kasper Theunissen
+32 2 287 2108
ktheunissen@cgsh.com

Lene Verhaegen
+32 2 287 2051
lverhaegen@cgsh.com

[1] 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 de-mergers.
[2] Available at http://www.ejustice.just.fgov.be/eli/wet/2023/05/25/2023042154/staatsblad. The most extensive changes are to Books 12 and 14 of the Belgian Code of Companies and Associations ("BCCA"), with more limited changes to Books 5 and 7 of the BCCA, the Code of Private International Law (on conflicts of laws rules) and the Judicial Code.

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Overview of selected key changes

- Shareholders opposing the cross-border reorganization are granted a cash out right. In essence, this gives dissenting shareholders the right to exit the company in return for a cash compensation.
- Shareholders are given additional tools to challenge the exchange ratio of the reorganization.
- Sufficient creditor protection becomes a condition to completion of the reorganization and a minimum three months' waiting period applies between announcement and completion of the reorganization to ensure creditors have sufficient time to exercise their rights.
- The reorganization proposal may be published on the company website.
- Cross-border and domestic conversions are approved with a 75% majority (lowered from 80%).
- The notary is entrusted with a strengthened gatekeeper function, involving additional checks to be performed and broader investigation rights.
- A sister-sister merger and de-merger by separation are introduced, two new types of reorganization transactions.
- Employees will benefit from increased protection, including a standstill obligation in respect of existing employee participation rights.

I. RECAP OF THE MOBILITY DIRECTIVE AND MAIN REORGANIZATION TRANSACTIONS

A. Mobility Directive

Despite helpful CJEU case-law based on the freedom of establishment protected under the TFEU, cross-border mobility for EU companies has remained quite difficult to implement in practice. Prior to the Mobility Directive, only cross-border mergers were expressly regulated and harmonized at European level.[3] Many Member States thus did not have specific rules on cross-border reorganizations, and even reorganizations involving companies of Member States which had specific cross-border reorganization procedures were often complicated by misalignment or incompatibilities between the various national legal systems.

This situation gave rise to legal uncertainty for companies and their shareholders, employees, creditors and other stakeholders in the context of cross-border corporate reorganizations, which the Mobility Directive aims to resolve.

B. Typology of reorganization transactions

The Mobility Directive covers three main (cross-border) reorganization transactions, *i.e.* mergers, de-mergers and conversions. *See* Annex A for schematic examples of each type of cross-border reorganization.

A cross-border merger is a transaction between an acquired (disappearing) and an acquiring (surviving) company whereby the participating companies are

[3] First by Directive (EU) 2005/56/EC of the European Parliament and of the Council of October 26, 2005 on cross-border mergers and then by Directive (EU) 2017/1132 of the of the European Parliament and of the Council of June 14, 2017 relating to certain aspects of company law.

subject to the laws of different jurisdictions. As a result of the merger, all assets and liabilities of the acquired company transfer to the acquiring company by operation of law. In exchange, the shareholders of the acquired company receive shares in the acquiring company (in accordance with a pre-defined exchange ratio) and possibly a cash payment. Following completion of the merger, the acquired company is dissolved without going into liquidation.

A cross-border de-merger is a transaction whereby all assets and liabilities of a de-merged company transfer to certain other companies by operation of law, resulting in the dissolution of the de-merged company, whereby the participating companies are subject to the laws of different jurisdictions. In exchange, the shareholders of the de-merged company receive shares in the acquiring companies (again, in accordance with a pre-defined exchange ratio) and possibly a cash payment. Following completion of the de-merger, the de-merged company is dissolved without going into liquidation.

A possible variation to this, is a cross-border partial de-merger, pursuant to which only part of the assets and liabilities of the de-merged company transfer to one or more acquiring companies (in exchange for which the shareholders of the de-merged company receive shares in the acquiring company or companies and possibly a limited cash payment) and the de-merged company continues to exist.

In a reorganization through cross-border conversion, a company will essentially move its seat to another jurisdiction. This will result in a conversion of the legal form under which the company is registered. The relevant company will continuously retain its legal personality in the process.

II. SCOPE OF APPLICATION OF BELGIAN MOBILITY LAW

The Belgian Mobility Law has a broader scope of application than that of the Mobility Directive: it applies to cross-border reorganizations irrespective of whether the participating foreign companies are established in another EU member state or a non-EU jurisdiction. Nevertheless, the Belgian legislator has, contrary to its usual practice, not proceeded with a general "gold-plating" of the rules stemming from the Mobility Directive and, accordingly, the rules applicable to purely Belgian domestic reorganizations have not been significantly amended. Going forward, there will be several key differences between domestic and cross-border reorganizations under Belgian law.

In addition, whereas the European rules only relate to cross-border de-mergers that involve the formation of one or more new companies, the Belgian Mobility Law goes one step further and applies the same rules to cross-border de-mergers pursuant to which the de-merging company transfers assets and liabilities to one or more existing companies.

III. KEY CHANGES

A. Cash-out right dissenting shareholders

The introduction of a cash-out right for shareholders who oppose the cross-border merger, de-merger or conversion is undoubtedly one of the most important novelties introduced by the Mobility Directive.[4] The regime seems inspired by "U.S.-style" stockholder appraisal rights as well as the national laws of certain EU member states which already provided for cash-out rights, such as the Netherlands.

i. Scope of application

The Belgian legislator has opted for a limited scope of application of the cash-out right, while remaining within the boundaries of the Mobility Directive:

— The cash-out right only applies in the context of cross-border reorganizations where the acquiring company is incorporated outside of Belgium and where it concerns not a purely Belgian domestic reorganization.

— The cash-out right only applies to dissenting shareholders or holders of profit sharing

[4] *See* new Artt. 12:116/1 BCCA (cross-border merger), 12:137 BCCA (cross-border de-merger) and 14:25/1 BCCA (cross-border conversion).

certificates.[5] Holders of other types of securities (*e.g.*, holders of subscription rights or bondholders) are not granted a cash-out right.[6]

ii. How to exercise the cash-out right

The Belgian Mobility Law has made it relatively burdensome for dissenting shareholders to exercise their cash-out right. The dissenting shareholder must take no less than three separate actions:

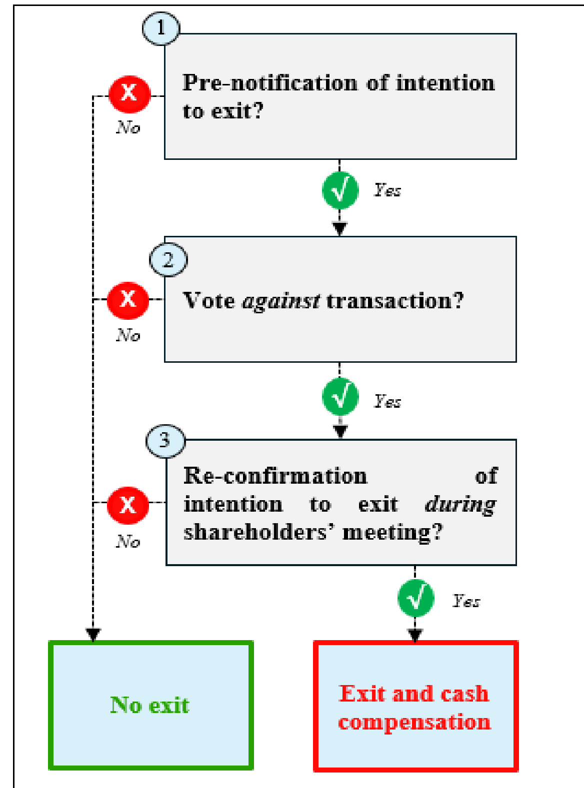
— First, the dissenting shareholder needs to *pre-notify* the company of its intention to exercise the cash out right. This should enable the merged, de-merged or converting company to calculate the maximum cash-out costs of the cross-border reorganization, as they will have been made aware of the possible maximum number of shareholders to be cashed out in case the reorganization proceeds. This also means that shareholders who have not pre-notified their intention to cash-out cannot change their mind later on.

— Second, the dissenting shareholder must *vote against* (in person or by proxy) the proposal for the cross-border reorganization at the relevant shareholders' meeting. A shareholder who has not voted or who has abstained from voting on the cross-border reorganization cannot cash out.

— Third, the dissenting shareholder must, during the relevant shareholders' meeting, *formally re-confirm* the exercise of its cash-out right.

The Belgian legislator, therefore, seems to be discouraging shareholders from exercising the cash-out right by making it procedurally quite burdensome. the Mobility Directive indeed allowed more flexibility.

Schematically, the process looks as follows:



iii. Valuation and implementation

Shareholders exercising their cash-out right will be entitled to receive a cash amount equal to the value of their shares as determined in the reorganization proposal. The reference date for the valuation is the date immediately prior to the announcement of the transaction. As shareholders will generally only exercise their right when they believe that the reorganization does not offer them fair value, this raises potentially difficult questions on valuation and, more specifically, on the amount of the cash consideration.

a. Process

It will be up to the boards of directors of the companies involved in the reorganization to set the appropriate

[5] In this Alert Memorandum, we refer to "shareholders" which, for these purposes, includes holders of profit sharing certificates unless expressly indicated otherwise.
[6] Dissenting bondholders are treated as third-party creditors who fall within the scope of the revised creditor protection mechanism (*see* section III.C below). Subscription rights holders should rely on the protection offered by article 5:59 or 7:71 BCCA, respectively, unless otherwise provided in the terms and conditions governing the subscription rights.

proposed cash compensation for exiting shareholders. The reorganization proposal must set forth the cash compensation and the corresponding board reports should elaborate on the valuation and the valuation methods used. The statutory auditor will assess in a separate report the adequacy of the cash compensation and whether appropriate valuation methods have been used.

Focus – Possibility to challenge valuation

Shareholders who wish to make use of their cash-out right, but do not agree with the cash compensation offered by the company, can challenge the proposed cash compensation in front of the President of the Enterprise Court in summary proceedings. The claim must be launched against the company within one month after the vote on the reorganization. If the litigating shareholders are successful, they may obtain an additional cash compensation. The additional compensation will not be available to shareholders who did not join the litigation.

b. Cash-out funded by the company

The Belgian legislator chose to have the cash compensation for the exiting shareholders funded by the company, rather than the remaining shareholders. This raises a number of interesting questions, in particular because the company will be faced with an outflux of cash if many shareholders decide to exit. This may give rise to potential solvency and liquidity concerns for the company's remaining shareholders and its creditors.

— Nevertheless, the typical net asset and liquidity tests[7] and share buyback rules[8] do not apply to the possible cash outflow in connection with the cash-out right. In the BV/SRL, the default rules on exit and exclusion against the company's assets[9] are also excluded in the context of a cross-border reorganization. Although neither the Belgian Mobility Law, nor the explanatory memorandum clarify the reasoning for such exclusion, this has presumably been done to avoid conflicting outcomes depending on the procedural avenue chosen by individual dissenting shareholders or the company (*i.e.,* in the context of a cross-border reorganization, neither the shareholders, nor the company can claim to rely on default procedures for exit against the company's assets that the articles of association of a BV/SRL may provide for).[10]

— To mitigate possible adverse consequences for the company's creditors, the Belgian Mobility Law specifies that there can be no payment towards the exiting shareholders as long as the creditors who have requested additional security or another form of guarantee have not received such assurances (unless their claim has been paid or rejected in court, *see* section III.C below). The creditors are, however, not automatically notified of shareholders intending to exercise their cash-out right. Creditors may therefore not be fully aware of the potential adverse impact of the cash-out right on their position, although diligent creditors should request the relevant information from the company.

— To address liquidity concerns, the company benefits from a payment term of up to two months as of the completion of the cross-border reorganization to pay the cash compensation to exiting shareholders. If need be, the company could procure additional sources of financing during such time. Pending the two-month period, exiting shareholders are considered ordinary creditors which may, again, discourage shareholders from making use of the

[7] For instance, Artt. 5:142, 5:143 and 7:212 BCCA.
[8] For instance, Artt. 5:145 and 7:215 BCCA.
[9] Art. 5:154 BCCA.
[10] More fundamentally, the cash-out right provided for by the Belgian Mobility Law indeed stems from EU law (the Mobility Directive) and the Belgian procedure of exit and exclusion against the company's assets in the BV/SRL cannot trump these EU rules. Interesting questions may arise in practice however, for instance if a cross-border reorganization is announced while a procedure for exit or exclusion of certain shareholders of a BV/SRL is already separately on-going.

cash-out right.

c. Cancellation of shares of the exiting shareholder

The shares of the exiting shareholders will be cancelled simultaneously with the completion of the cross-border reorganization. At that point, the existing shareholders will cease to be shareholders of the company, even if the payment of the cash compensation itself occurs only at a later date.[11]

Focus – Minimum cash condition

To avoid excessive cash outflow for the company in connection with the exercise of the cash-out right, companies should consider including (additional) conditions precedent that must be fulfilled for the reorganization to proceed. One could for example imagine a condition stipulating a maximum number of shares that can be cashed out (so that, in excess of such threshold, the reorganization will be deemed to not have been approved) or – inversely – that the transaction only proceeds in case the compan(y)(ies) involved have a minimum level of liquidity available to them immediately after paying out all the exiting security holders.[12] A similar condition has become commonplace in (U.S.) de-SPAC transactions, referred to as the "minimum cash condition".

B. Right to challenge the exchange ratio

Another new feature introduced by the Mobility Directive is the right for dissenting shareholders[13] who did not exercise their cash-out right to challenge the proposed exchange ratio.[14]

Similar to the cash-out right, a shareholder who wants to challenge the exchange ratio needs to jump through a couple of hoops. The shareholder must: (i) inform the company of its disagreement with the exchange ratio before the vote on the shareholders' meeting; (ii) vote against the transaction; (iii) confirm during the shareholders' meeting, again, that they do not agree with the exchange ratio; and (iv) not exercise its cash-out right.

A shareholder who has complied with these requirements can launch a claim in front of the President of the Enterprise Court in summary proceedings to formally dispute the exchange ratio and seek an additional payment in cash (or additional shares in the acquiring company or even another compensation in kind if the shareholders agrees to that) to be paid by the disappearing or acquiring company.

Again, the Belgian legislator has conceived the right to challenge the exchange ratio quite narrowly and made it procedurally burdensome to exercise. There is also no automatic right for other shareholders to benefit from any additional compensation obtained by the dissenting shareholders who have successfully challenged the exchange ratio. This could lead to peculiar results, in particular when the compensation is paid in kind through the issuance of additional shares only to the successful litigating shareholder(s), thereby diluting all other (non-litigating) shareholders.

[11] The relevant provisions (Artt. 12:116/1, §1 *in fine*, 12:137, §1 *in fine*, and 14:25/1 *in fine*) oddly enough do not refer to a cancellation of profit sharing certificates.

[12] In other words, the transaction only proceeds in case (i) shareholders holding in the aggregate less than X% of the shares exercise their cash-out right or (ii) the company will have at least X amount of available cash after making all the cash-out payments.

[13] Notably, profit sharing certificate holders do not have the option to challenge the exchange ratio proposed by the board of directors.

[14] Only for cross-border mergers and de-mergers because there is, of course, no exchange ratio in the context of a cross-border conversion.

A few takeaways and key questions around "fair" valuation

- The recitals to the Mobility Directive specify that the "*cash compensation should be equivalent to the value of [the] shares*" and that the valuation of those shares should be based on "*generally accepted valuation methods*".[15] The appropriate valuation will thus need to be determined on a case-by-case basis, taking into account the sector, activities and lifecycle stage of the company concerned.

- A company could consider introducing in its articles of association which valuation method should be used by the board of directors to calculate the cash-out right. For instance, in the context of the general exclusion ("*uitsluiting" / "exclusion*") and exit ("*uittreding" / "retrait*") procedures, a judge is, in principle, bound by formulas or other price determination mechanisms set forth in the articles of association or shareholders' agreement, unless these would lead to a "manifestly unreasonable" price.[16] While the Belgian legislator has not replicated these principles in Book 12 and 14 of the BCCA with respect to the cash-out right, judges might take such formulas or other price determination mechanisms into account, at least to the extent they are considered "reasonable".

- As mentioned, the reference date for the valuation is the date immediately prior to the announcement of the transaction. In other words, the valuation of the acquired company should not take the impact of the reorganization itself into account. Therefore, the company could conceivably apply an "illiquidity discount" to reflect that the shareholders, prior to the reorganization giving rise to the cash-out right, may not have had an opportunity to monetize their shares.[17]

- If the company is listed, the (unaffected, pre-announcement) stock price will be the most obvious point of reference to calibrate the cash-out right. That being said, this is also the scenario in which the cash-out right will be least relevant as shareholders of listed companies usually have ample liquidity opportunities.

- In most other instances, there will be no independent valuation readily available so that the acquired company will need to be valued for the specific purpose of the cross-border reorganization, which implies a significant additional step (and costs) in cross-border reorganizations. Even if the reorganization is part of a broader sale transaction, the valuation for the cash-out right will probably be different from the valuation of the overall sale transaction as the latter will most likely be specific to the transaction (*e.g.*, taking into account expected synergies).

C. Creditor protection mechanism in cross-border reorganizations

The Belgian Mobility Law brings certain noteworthy changes to creditor protection mechanisms in the context of cross-border reorganizations.

Most importantly, sufficient creditor protection has become a closing condition precedent to any cross-border reorganization. Indeed, the Belgian notary cannot issue the mandatory pre-closing certificate as long as creditors who have successfully requested additional security did not yet receive such security.[18]

[15] The explanatory memorandum mentions that the board could opt for valuation of the shares at book value, but it also immediately adds the shareholders can object against such valuation.
[16] Artt. 2:67 and 2:69 BCCA.

Furthermore, a three month waiting period applies between the date of publication of the reorganization proposal and the date of the shareholder vote (*i.e.*, the earliest possible completion date)

The cross-border proposal will also need to include information on the additional security (*e.g.*, guarantees or pledged collateral) that will, following the reorganization, be offered to creditors of the company. If not satisfied with the security offered in the reorganization proposal, creditors can request additional security from the company during a period of three months as of the publication of the cross-border reorganization proposal in the Belgian Official Gazette.[19] The company can then decide to either grant the additional security, pay the creditor's claim (after applying a discount) or challenge that additional security is required, in which event the case will be referred to the President of the Enterprise Court. The President will either require that the company provides additional security or decide that this is not required in light of the security already provided and/or the solvency of the (acquiring) company.

Lastly; other related novelty is that creditors will have the right to comment on the full content of the cross-border reorganization proposal.

Focus – Increased content requirements for reorganization proposals

The information to be included in proposals related to cross-border reorganizations has been expanded. For instance, the proposal must now refer to the cash compensation offered to shareholders wishing to cash out, the security offered to creditors, the expected consequences of the reorganization for employment and whether the company has received subsidies or grants in the five years preceding the reorganization if the acquiring company is not governed by Belgian law.[20] Relatedly, corresponding board and auditor reports will also have to be more elaborate under the new regime.

D. Corporate formalities

i. Publication of the reorganization proposal

Under the old regime, the company had to file the reorganization proposal with the registry of the Enterprise Court for publication in the Belgian Official Gazette, with a six-week waiting period between the filing date and the date of the vote on the transaction.

The Belgian Mobility Law allows for an alternative form of publication of the proposal, on the company's website, together with a publication in the Belgian Official Gazette of, among others, a hyperlink to the company website. This change applies to cross-border and domestic reorganizations alike.

[17] This "illiquidity" discount is expected to be greater in companies with shares subject to transfer restrictions (including pre-emptive rights).
[18] Under the prior regime for cross-border reorganizations, the creditor protection mechanism came into play post-transaction. In particular, creditors had the right to request additional security within two months *after* completion of the transaction, which is less favorable for creditors for obvious reasons. This has remained the applicable regime for domestic reorganizations as in such scenario, the rights of creditors are typically less affected.
[19] The relevant notary should simultaneously be informed of any such request for additional security.
[20] This is tied to the EU Foreign Subsidies Regulation (2022/2560) and the need for disclosure in that regard. On the EU Foreign Subsidies Regulation, *see* Cleary Gottlieb Alert Memorandum of July 13, 2022.

Focus – Online publication

Although the option to publish the proposal on the company's website undoubtedly is a step forward and seem intuitively appealing, we question whether this option will be popular in practice, in particular in the context of domestic transactions. Indeed, in domestic reorganizations, the moment as of when the six-week waiting period will commence will depend on the method chosen by the company for publication of the reorganization proposal:

— Full proposal in Belgian Official Gazette: As is currently the case, if the full reorganization proposal is published in the Belgian Official Gazette, the six-week waiting period starts as of the date of filing of the proposal with the registry of the Enterprise Court (as evidenced by the registry's stamp of receipt).

— Proposal on company website: By contrast, and oddly enough, if the company decides to make the proposal available on its website, the company will still need to publish a hyperlink to its website in the Belgian Official Gazette and the six-week waiting period will only starts as of the date of publication of the hyperlink in the Belgian Official Gazette. Since one can expect one to two weeks between filing the registry of the Enterprise Court and actual publication in the Belgian Official Gazette, this second option represents an additional delay in the timeline towards completion of the reorganization, in addition to creating uncertainty about the exact start date of the waiting period.

ii. Required majorities at EGMs

The Belgian Mobility Law lowers the required majority for shareholders to approve a domestic and cross-border conversion from 80% to 75% of the votes cast during the meeting.[21]

Another change is that holders of non-voting shares will be allowed to vote on the cross-border reorganization, with one vote per share.[22] This was already the case with respect to cross-border mergers and cross-border conversions, but following the Belgian Mobility Law, holders of non-voting shares will also be allowed to vote on cross-border de-mergers.

Similarly, holders of profit sharing certificates will also have the right to vote on the cross-border reorganization, with one vote per profit sharing certificate. This was already the case for domestic and cross-border conversions, but has now been extended to also include cross-border mergers and de-mergers.

iii. Strengthened gatekeeper function for notary in cross-border reorganizations

The Belgian Mobility Law significantly reinforces the "gatekeeper" function assigned to Belgian notaries in the context of cross-border reorganizations.

Belgian notaries were already required to deliver (as applicable) a pre-merger, pre-de-merger or pre-conversion certificate which confirms that the relevant formalities required from a Belgian law perspective to complete the reorganization have been completed. Yet, following the entry into force of the Belgian Mobility Law, obtaining the pre-reorganization certificate may become more difficult in practice, since both the documents that need to be provided to the notary and

[21] Because the Mobility Directive provides that the required majority for approval of a cross-border conversion may not be higher than the required majority for approval of a cross-border merger (which, under Belgian law, is 75%). The Belgian legislator then decided to also lower the required majority for domestic conversions to 75%.
[22] Artt. 5:47 and 7:57 BCCA.

the checks the notary needs to perform have been significantly expanded.

Additional documents to be provided include all comments submitted by or on behalf of the shareholders, profit sharing certificate holders, creditors or employees on the reorganization proposal, information on subsidiaries of the companies involved and their geographic location, as well as certificates from the Belgian tax and social security authorities with respect to potential unpaid taxes or outstanding social security contributions (although the requirement to also submit such tax and social security certificates will enter into force at a later date—*see* section "*Focus – Entry into force*").

With respect to the checks to be done by the notary,[23] the notary will be required to verify, among others, that the reorganization is not "*set up for unlawful or fraudulent purposes leading to or aimed at the circumvention of EU or national law, or for criminal purposes*". In making this assessment, the notary should consider "*all relevant facts and circumstances, including indicative factors*". The notary also needs to confirm that the relevant employee participation rights and creditor protection procedures have been respected. The notary can request information from each relevant government authority and can, if need be, consult an independent expert.

In terms of timing, the notary has two months as of receipt of all the required documents to issue the certificate,[24] extendable up to two additional months to take into account new information provided to the notary after receipt of the initial documents or for further investigation. If the notary determines that certain formalities have not been complied with, he or she may grant the company up to two months to rectify the situation. If the notary determines that the cross-border reorganization is set up for unlawful or fraudulent purposes, he or she may not issue the required pre-reorganization certificate.

Given the broad manner in which the relevant test is formulated ("*aimed at the circumvention of EU or national law*"), it will be interesting to see how notaries will interpret their strengthened gatekeeper function. It would be advisable to carefully pre-wire the reorganization transaction with the notary at an early stage to avoid unexpected hiccups and delays to the maximum extent possible.

E. New types of reorganization

i. Cross-border de-merger by separation

The Mobility Directive has introduced two new types of reorganizations, the first of which is the "de-merger by separation".[25] As a result of a de-merger by separation, the de-merged company transfers part of its assets and liabilities to one or more recipient companies by operation of law. In exchange, the de-merged company itself (not the shareholders of the de-merged company) receives shares in the recipient company or companies. Importantly (and perhaps somewhat unfortunately), the Belgian legislator has provided for this new de-merger option only in the context of cross-border de-mergers, not domestic operations.

The fact that the de-merged company itself receives shares in the recipient company or companies is a key difference with the partial de-merger where shares in the recipient company or companies are issued to the shareholders of the de-merged company. The de-merger by separation is, therefore, more akin to a contribution of a line of business, except that the contribution of a line of business procedure requires that

[23] *See* Recitals 35 and 36 of the Mobility Directive, which seem to have heavily inspired the Belgian legislator: "*The assessment should also take into account relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those negotiations were triggered by reaching four fifths of the applicable national threshold.* […] *The competent authority may consider that if the cross-border operation were to result in the company having its place of effective management or place of economic activity in the Member State in which the company or companies are to be registered after the cross-border operation, that would be an indication of an absence of circumstances leading to abuse or fraud*".
[24] Artt. 12:117, 12:138 and 14:26 BCCA.
[25] Art. 160b(4)(c) Mobility Directive; Art. 12:8, 3° BCCA.

the assets and liabilities being contributed form a unit that, from a technical and operational point of view, can carry out an autonomous activity and is able to operate through its own means. As a result, all assets and liabilities related to that line of business automatically transfer by operation of law (*i.e.*, no "cherry picking" of assets or liabilities). There is no such requirement in the context of the "de-merger by separation".

One could thus expect, assuming both types of transactions receive comparable tax treatment in the jurisdictions involved, that complex cross-border reorganizations, especially group-internal restructurings, will in the future more often be structured as a de-merger by separation rather than as a contribution of a line of business or partial de-merger. At least from a corporate perspective, the de-merger by separation offers significantly more flexibility.

The remainder of the procedure for a de-merger by separation is relatively similar to that for a contribution of a line of business, although the disclosure and reporting requirements for a contribution of a line of business are less expansive.

See Annex B for a schematic example of a cross-border de-merger by separation.

ii. Sister-sister merger

The Belgian Mobility Law has also introduced a new type of merger: the "sister-sister merger", which can be used if one person directly or indirectly holds all the shares in the merging companies or if the shares in the merging companies are held in the same proportions by the same shareholders.[26]

As a result of the sister-sister merger, the acquired company or companies will transfer all their assets and liabilities to another company by operation of law, with the acquired company or companies being dissolved without going into liquidation and without the acquiring company issuing any new shares.

The sister-sister merger is subject to a simplified regime if one person directly or indirectly holds all the shares in the merging companies[27] and should therefore facilitate group-internal reorganizations. For merging companies in which the shares are held in the same proportions by the same shareholders, the simplified regime does not apply.

Indeed, in cases where the merging companies only have one shareholder, the simplified regime is justified because there is no need to introduce specific rules to protect minority shareholders, whereas such rules may still be appropriate in case the merging companies have minority shareholders (even if they hold their shares in the merging companies in the same proportions).

See Annex B for a schematic example of a sister-sister merger.

F. Employee participation rights, information and consultation

In addition to introducing stronger rules to protect minority shareholders and creditors, the Mobility Directive also strengthens the rights of employees in the context of cross-border reorganizations.

Most importantly, under the new regime (provided for under Belgian law by Collective Bargaining Agreement no. 94/1) there will be a standstill obligation with respect to employee participation rights. Companies will need to make sure that at least the same level of employee participation continues to exist after the cross-border reorganization. For instance, if a German company (as disappearing company) would enter into a cross-border merger with a Belgian company (as acquiring company), the German rules on employee participation (*e.g.*, board representation in the supervisory board of an AG with more than 500 employees) would need to be recreated at the level of the Belgian acquiring company.

Employees information and consultation obligations have also been noticeably reinforced.

[26] Art. 119(2)(d) Mobility Directive; Art. 12:7, 2° BCCA.

[27] For example, the disclosure in the merger proposal is more limited and the board and statutory auditor of the acquired company will not have to draw up any reports. In addition, the shareholders' meeting of the acquired company will not have to vote on the sister-sister merger.

G. Territorial Scope of Application "Claw Back" Rules

The Belgian Mobility Law also brings some additional exceptions to the principle contained in the Belgian Code of Private International Law that Belgian judges in principle have jurisdiction over corporate reorganization transactions only with respect to companies with registered seat in Belgium.[28] The goal of these additional exceptions is to protect (former) shareholders, creditors and other stakeholders against suddenly being faced with a requirement to pursue their claims against the company via foreign courts whereas their claims arose when the company was still registered in Belgium. In this scenario, the claimant had the legitimate expectation that their claim would be resolved in front of Belgian courts.

The additional exceptions introduced by the Belgian Mobility Law provide that a Belgian judge continues to have jurisdiction even if the company's registered seat is no longer in Belgium following a cross-border reorganization with respect to:

— liability claims against directors related to decisions or conduct prior to the effective date of the cross-border reorganization (*i.e.*, when the relevant company had its registered seat in Belgium – in such instances, Belgian law (including the cap on directors' liability) would also apply to the relevant conduct).

— litigation brought by creditors whose debt claim existed prior to the date of publication of the proposal on the cross-border reorganization, provided the litigation is initiated by the creditors within two years after completion of the cross-border reorganization.

— claims from (former) shareholders and holder of profit sharing certificates who have exited the company, using their cash-out right, with respect to the amount of the cash compensation to be received or with respect to the payment of such cash compensation.

Focus – Entry into force

The new rules introduced by the Belgian Mobility Law will apply to all transactions (whether domestic or cross-border) for which the reorganization proposals are filed with the registry of the Enterprise Court after June 16, 2023, i.e., 10 days after publication of the Belgian Mobility Law in the Belgian Official Gazette. For long-planned reorganizations, which may have been in the works for several months, this relatively sudden entry into force may be unsettling (especially for cross-border reorganizations, where the legal framework is significantly amended).

As an exception to the above, the requirement that the company needs to submit a tax and social security certificate to the notary for purposes of obtaining the required pre-reorganization certificate in the context of cross-border reorganizations will only enter into force on a later date still to be determined via royal decree (and at the latest on December 15, 2023).

Finally, certain specific technical rules that require changes and cross-border integration of governmental administrative functions (e.g., rules relating to communication between the Belgian Crossroads Bank for Enterprises and other EU company registers) will enter into force as of June 30, 2023.

[28] The Belgian Code of International Private law already contained one exception allowing Belgian judges to resolve on directors' liability claims (launched by persons other than the company or its shareholders) if the main establishment of the company is located in Belgium, whereas the registered seat is located outside of the EU and the company only has a "formal" connection with such country.

IV. CONCLUSION AND PRACTICAL TAKEAWAYS

As mentioned, Belgium already had modern and detailed rules on cross-border reorganizations on the books. Implementing cross-border reorganizations in or out of Belgium will following the Belgian Mobility Law require more time and will become more formalistic. The law mostly reinforces the rights of the various stakeholders (shareholders, employees, creditors, including the Belgian tax authorities) in the context of cross-border reorganizations, without making it easier – as such – to implement reorganizations from a purely Belgian perspective.

However, it also remains to be seen whether it will actually be more difficult for Belgian companies to engage in cross-border reorganizations in practice. The Mobility Directive brings uniform rules throughout the EU for cross-border reorganizations, including – notably – in EU member states that did previously not yet have rules on cross-border reorganizations. Engaging in cross-border reorganizations may therefore become easier with respect to certain EU member states as a result of the Mobility Directive, whereas it may become more difficult with respect to other EU member states.

In any event:

— The newly introduced cash-out right and right to challenge the exchange ratio will likely introduce interesting dynamics in cross-border reorganizations, especially where the shareholder base of the disappearing company is vocal. Dissenting minority shareholders may seek to put pressure on the board of directors by rallying support for their position and enticing other (minority) shareholders to either exercise their cash-out right or to challenge the exchange ratio offered. Shareholders now certainly have strong(er) tools to challenge cross-border reorganizations they disagree with.

— The position of the company's creditors has been considerably improved. Previously, creditor protection was an *ex-post* consideration with creditors being able to request additional security only after the transaction had taken place. Now creditor protection will become a pre-closing condition in cross-border reorganizations and creditors will have a period of at least three months before completion of the transaction to exercise their rights.

— The strengthened gatekeeper function of the notary in cross-border reorganizations represents a new and additional hurdle for which a new practice will need to develop. The criteria to be assessed by the notary are broadly formulated and – if not interpreted sufficiently narrowly – may lead to increased legal uncertainty.

— The Belgian legislator has decided to not fully align the rules applicable to cross-border reorganizations with the rules applicable to domestic transactions. While it is understandable that there should be different standards applicable to domestic and cross-border reorganizations (with the former generally assumed to have a less profound impact on the position of shareholders, creditors, employees and other stakeholders), this does mean that going forward there will be an important divergence between the respective rules applicable to domestic and cross-border reorganizations.

— As is often the case with a new legal framework, it remains to be seen how all of these new requirements and procedures will be used (by shareholders and their advisors) and interpreted (by the courts) in practice. Upon a first reading of the Belgian Mobility Law, there are, however, a few uncertainties arising from unclear drafting or apparent missing cross-references that may lead to uncertainty in practice. When Belgian companies will effectively engage in cross-border reorganizations under the new legal framework, additional questions will undoubtedly arise.

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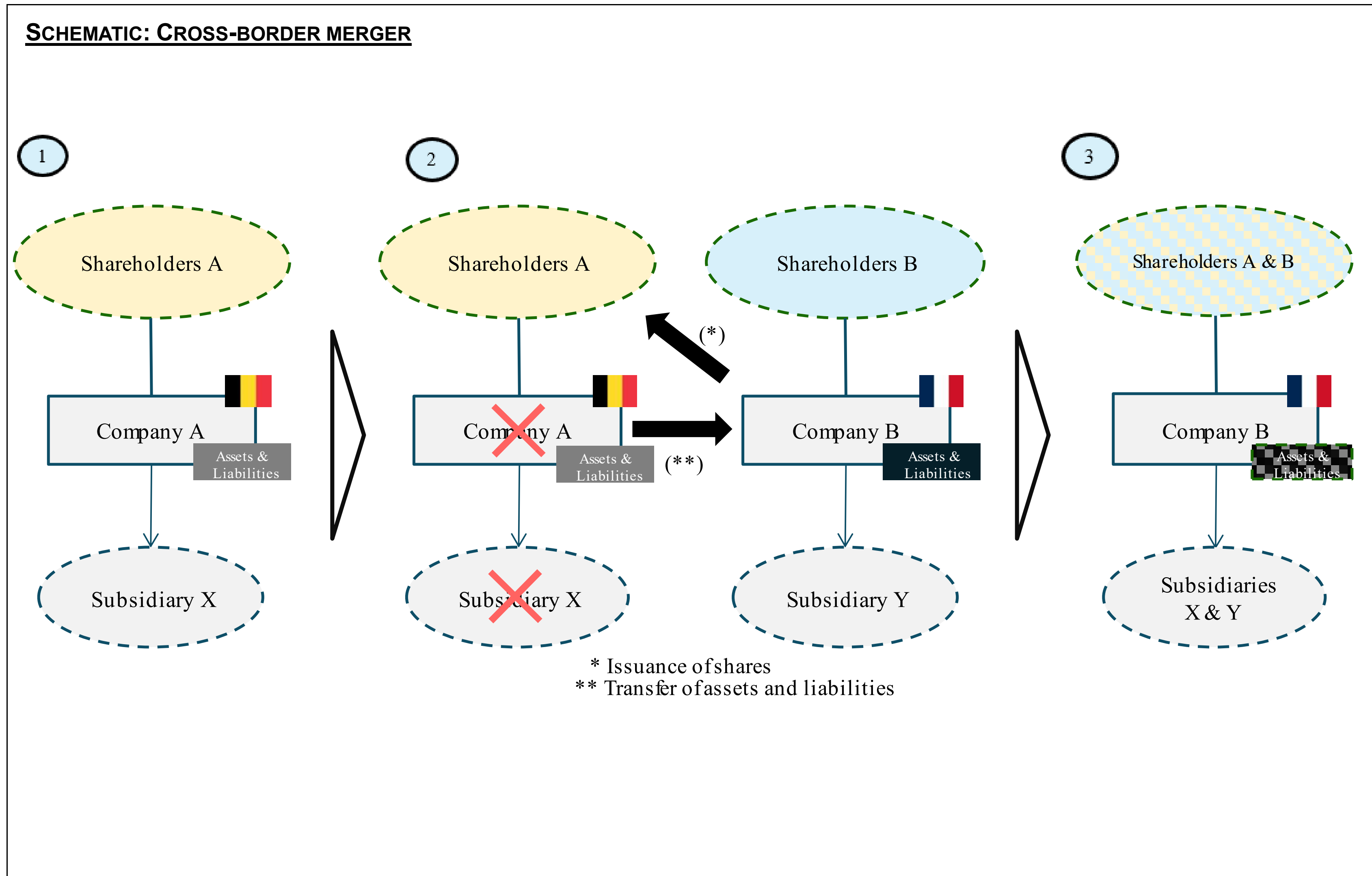
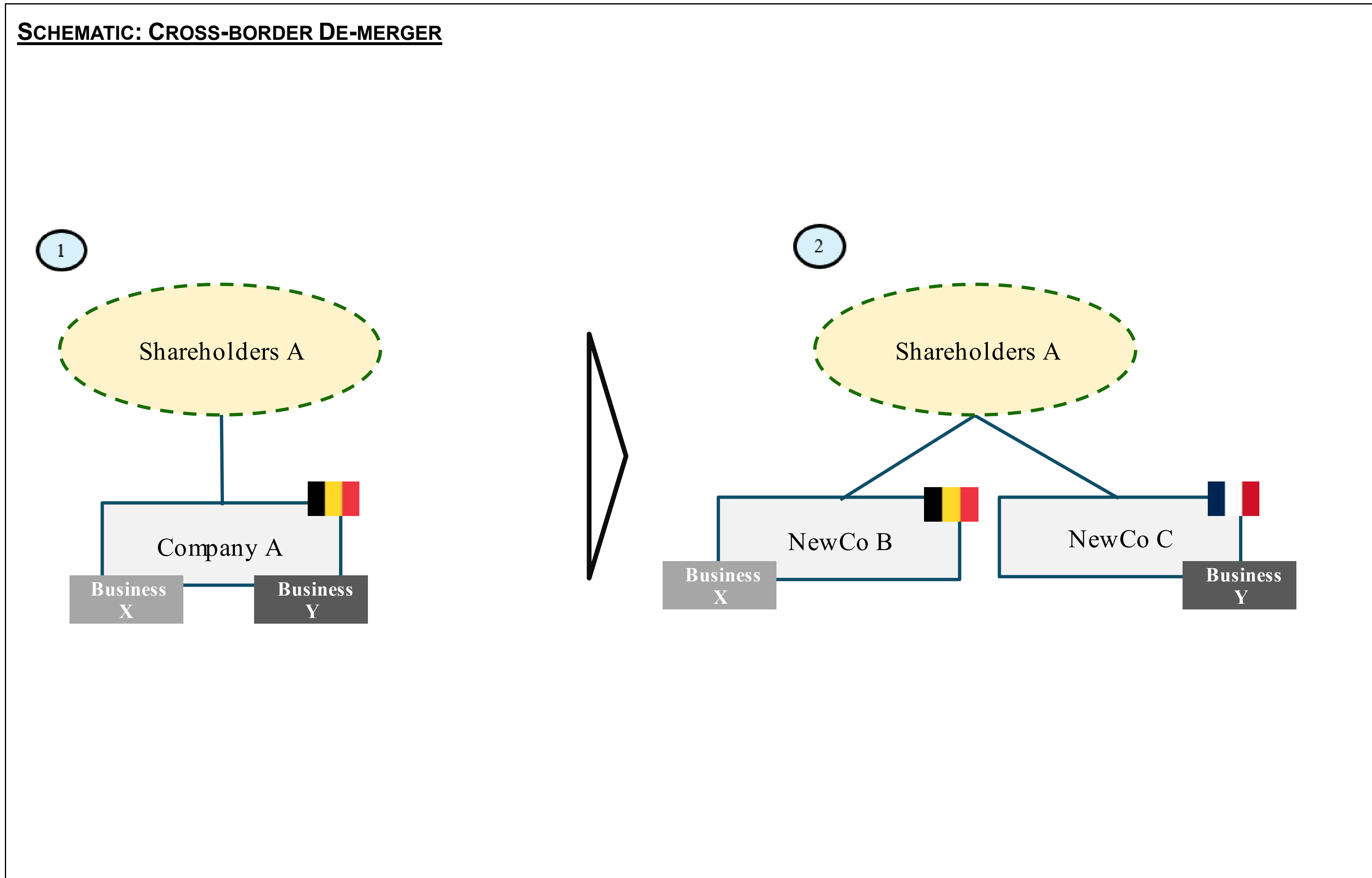
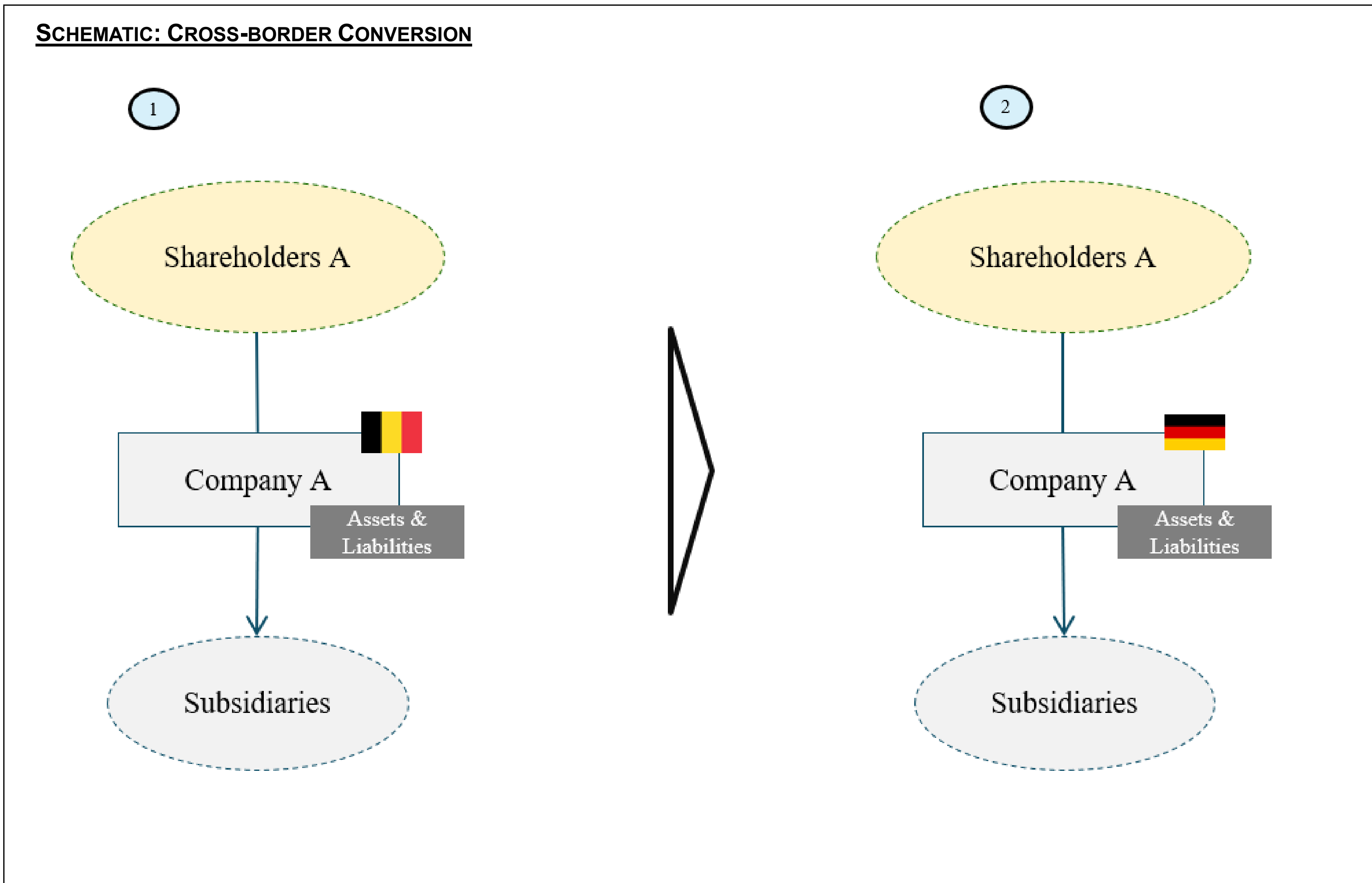
CLEARY GOTTLIEB

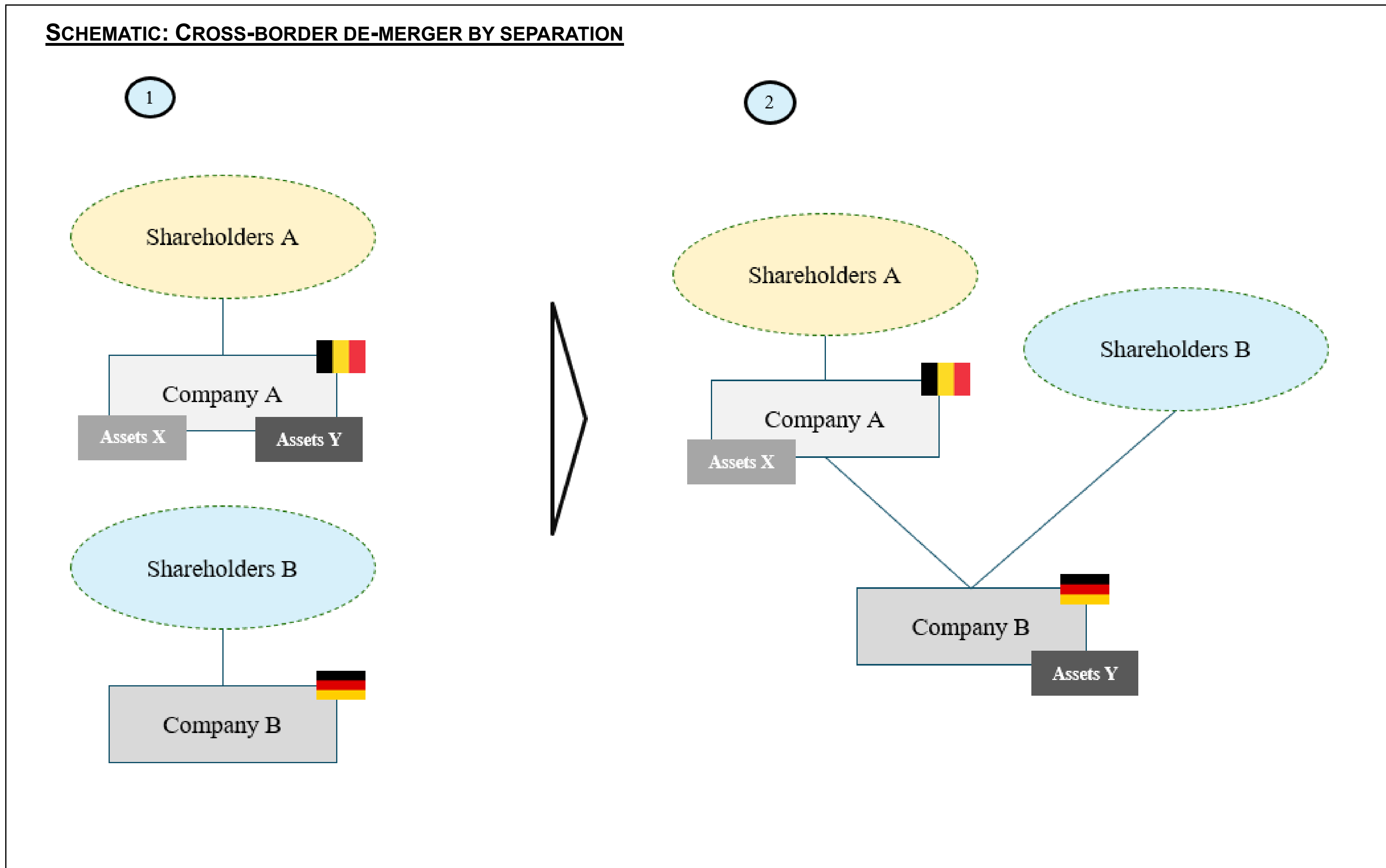
ANNEX A: SCHEMATICS




SCHEMATIC: CROSS-BORDER DE-MERGER
1
Shareholders A
Company A
Business X
Business Y
2
Shareholders A
NewCo B
NewCo C
Business X
Business Y


SCHEMATIC: CROSS-BORDER CONVERSION
1
Shareholders A
Company A
Assets & Liabilities
Subsidiaries
2
Shareholders A
Company A
Assets & Liabilities
Subsidiaries

ANNEX B: SCHEMATICS



SCHEMATIC: SISTER-SITER MERGER