


CORPORATE AND M&A

## The Mobility Directive finally implemented into Irish law

*Cross-border conversions and divisions of Irish limited liability companies now possible*

6 MIN READ





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In a radical change to Irish and EU company law, it is now possible for all Irish limited liability companies to migrate to other European Economic Area (EEA) countries while retaining their legal personality, and also to be divided into two or more companies across different EEA countries.

The European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the **Mobility Regulations**) were signed into law on 24 May 2023 by Minister for Enterprise, Trade and Employment, Simon Coveney, and have, for the most part, taken effect from that date (with a small number of provisions taking effect on 26 May 2023). The Mobility Regulations transpose Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions (known as the **Mobility Directive**) into Irish law. The original deadline for transposition was 31 January 2023, but Ireland is not the only Member State which was late in implementing the Mobility Directive.

In snapshot, the Mobility Regulations (in line with the Mobility Directive) update the existing law and processes in Ireland relating

to cross-border mergers (**CBMs**), and introduce novel procedures into Irish law known as cross-border conversions (**CBCs**) and cross-border divisions (**CBDs**), thereby greatly expanding the legal toolkit which can be used for structuring migrations, separations, consolidations and re-organisations of limited liability companies across the EEA.

Ireland's previous regulations in this area, the European Communities (Cross-Border Mergers) Regulations 2008 (which exclusively dealt with CBMs), are revoked in their entirety by the new Mobility Regulations, save that such regulations will continue to apply with respect to any CBM where common draft terms were filed with the Companies Registration Office (**CRO**) before 24 May 2023.



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### Cross-border conversions (CBCs)

The introduction of CBCs will allow Irish companies with limited liability to migrate and change their registered office to other countries in the EEA without changing their legal personality. Similarly it will allow other EEA limited liability companies to migrate to Ireland and become Irish limited liability companies. This radical change can be traced back to the decision of the European Court of Justice in the Polbud-case (C-106/16), in which it was held that the transfer of the registered office of a company (with the consequent change in applicable company law) falls within the scope of the fundamental EU freedom of establishment.

With the exception of the somewhat cumbersome existing process available to the Societas Europaea (SE) company type, it has not previously been possible for an Irish limited company to change jurisdiction in this manner. Traditionally, international transfers or migrations have been effected using CBMs or simple asset transfers, which

have often been complex given the need to actually transfer assets, liabilities, contracts and employees between entities across jurisdictions. In a CBC there are no such transfers, as the company retains the same legal personality, and so a CBC will be a far more straightforward and less disruptive way for a company to change jurisdiction.

The process set out in the Mobility Regulations for a CBC in many ways mirrors the existing process for approval and implementation of a CBM in Ireland. The governing documents for the process will be a draft terms of conversion and directors' explanatory report (for members and employees), which shall be drawn up by the board of directors of the converting company. As is the case with CBMs, a filing with the CRO, as well as publication in the CRO Gazette and a single daily newspaper in Ireland, will be required. Employees and members will have inspection rights over a period of at least six weeks prior to the general meeting to approve the CBC.

Statutory safeguards are provided to creditors whose claims pre-date the publication of the CBC, which will include a

right to apply to court (over a three-month period post-publication) for additional safeguards (over and above those provided by the legislation and the draft terms of conversion) when they can show that their claims would be at stake as a result of the CBC. The CBC must be approved by the members of the converting company by way of special resolution at a physical shareholder meeting.

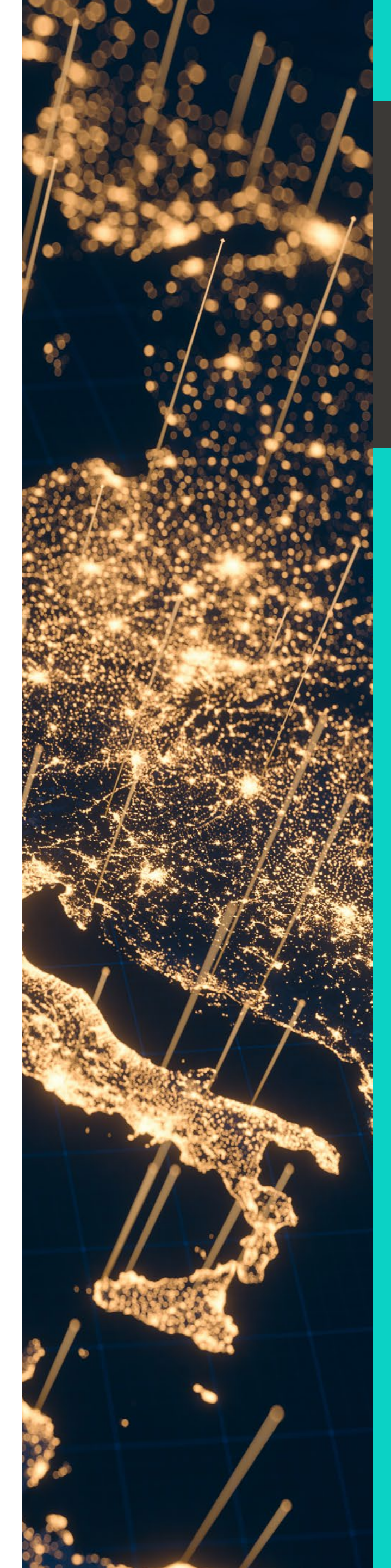
The Irish High Court will be responsible for certifying compliance by an Irish converting company with "pre-conversion requirements", with creditors of the company having a right to be heard in court. Final approval of a CBC and completion of the CBC (including incorporation requirements in the destination Member State) will be a matter for the competent authority in the destination Member State. Again this will be the High Court in Ireland in the case of a CBC into Ireland.

The national laws of the departure Member State will govern the CBC process up until the point that a pre-conversion certificate is issued by the competent authority in the departure Member State. The national laws

of the destination Member State will then govern the remainder of the process.

In the case of Irish companies regulated by the Central Bank of Ireland (CBI) who wish to carry out a CBC, it will be necessary for such companies to inform the CBI in relation to a proposed CBC at least 90 days prior to the general meeting. Where the CBI issues a written response, it will be necessary for that response to be exhibited to the Irish High Court during the application for a pre-conversion certificate.

The CBC is likely to be a very popular mechanism for use in international group restructurings, tax re-domiciliations and migrations of head offices of regulated businesses. A&L Goodbody LLP is already advising a number of its clients in relation to the CBC process (for both inward and outward CBCs) and we are likely to be the first firm in Ireland to implement this novel process for a regulated company.





## Cross-border divisions (CBDs)

The introduction of CBDs will allow Irish companies with limited liability to be separated (or de-merged) in a number of different ways across EEA jurisdictions. There will be three different types of CBD:

1. **Full division** – an Irish company, on being dissolved, transfers all of its assets and liabilities to two or more newly formed EEA companies. Shareholders of the Irish company being divided are compensated with an issue of shares in the new companies (with an additional cash payment also possible).
2. **Partial division** – an Irish company, which remains in existence, transfers part of its assets and liabilities to two or more newly formed EEA companies. Shareholders of the Irish company are compensated with an issue of shares in the new companies and/or an issue of further shares in the Irish company (with an additional cash payment also possible).

3. **Division by separation (creating new subsidiaries)** – an Irish company which remains in existence, transfers part of its assets and liabilities to two or more newly formed EEA companies (which will be its subsidiaries). Shares in the newly formed EEA companies are issued to the Irish company being divided (rather than the shareholders of such company).

It will also be possible for new Irish companies to be formed (as resultant companies) by way of CBDs carried out by limited liability companies in other EEA Member States.

Again these processes are likely to be popular in the context of intra-group EEA re-organisations and post-acquisition group rationalisations. The three potential structures will give practitioners a good range of options when it comes to structuring a CBD. The options available are far more flexible than what exists currently in the Companies Act 2014 for a domestic division in Ireland, where the company being divided must always be dissolved. The fact that the Irish company being divided in a CBD can remain in existence in the case of

a partial division or a division by separation is likely to be a popular feature, where, for example, a single line of business or branch in an EEA jurisdiction needs to be separated from an Irish company and moved into a company in another EEA jurisdiction.

The process for implementing a CBD in the Mobility Regulations closely mirrors the processes for a CBM and CBC (as described previously). The common draft terms of cross-border division will be the governing document here, and again there will be a directors' explanatory report for members and employees of the company being divided. Again, the Irish High Court will be responsible for scrutinising the part of the process concerning the Irish company being divided and issuing a pre-division certificate. Competent authorities in the EEA Member State(s) of the resultant companies shall be responsible for final scrutiny and approval of the completion of the CBD, which again will be the Irish High Court where the resultant company is Irish.

In all cases, a CBD will involve at least three entities, and so, in many cases, implementation of a CBD will involve (and

require legal advice in respect of) three separate EEA jurisdictions. In practice we think CBDs will be used less frequently than CBMs or CBCs, as commercial reasons for doing a CBD may not arise as often. Nonetheless, the CBD will provide valuable additional structuring options for international re-organisations.



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## Changes with respect to cross-border mergers (CBMs)

The Mobility Directive has not radically changed the law on CBMs. It will still be possible for an Irish limited liability company to carry out (either as transferor or successor company) any of the following existing three types of cross-border merger with a limited liability company (or companies) in another EEA Member State:

1. **cross-border merger by absorption** – a merger of a wholly owned subsidiary (which is dissolved) into its direct parent company
2. **cross-border merger by acquisition\*** – a merger of one or more transferor companies (which are dissolved) into a successor company in exchange for the issuance of shares in the successor company to the shareholders of the transferor company(ies), with or without a cash payment

3. **cross-border merger by formation of a new company** – a merger of one or more transferor companies (which are dissolved) into a newly formed successor company in exchange for the issuance of shares in the newly formed successor company to the shareholders of the transferor company(ies), with or without a cash payment

\* A new variation of the merger by acquisition has been introduced, which will not require an issuance of shares. This new form of CBM can be undertaken where a single person directly or indirectly holds all the shares in the merging companies or where the members of the merging companies hold their shares in the same proportion in all merging companies. This new type of CBM is likely to be very popular in intra-group re-organisations and rationalisations, where previously the mandatory requirement to use a share exchange ratio and issue shares in a merger by acquisition has often caused unwanted complexity and unforeseen issues (including in some cases the triggering of regulatory change in control processes).



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### The below is a summary of some of the key changes introduced to the CBM regime:

01

The introduction of a new, simpler type of merger by acquisition without a share issuance (as described overleaf).

02

Creditors of Irish transferor companies will now have statutory protections, including an ability to apply to court for additional safeguards over a three-month post-publication inspection period, and a right to be heard in court on applications by Irish transferor companies for pre-merger certificates. Previously, creditors of Irish transferor companies had limited statutory protection and no standing to appear in court.

03

The recitals to the Mobility Directive confirm that Transfer of Undertakings (Protection of Employment) (TUPE) requirements need to be complied with where there are transferring employees in a CBM (a point which was previously uncertain).

04

Directors' explanatory reports can now be waived in full by members of merging companies where there are no employees.

05

Employees of merging companies will now enjoy a longer six-week pre-general meeting inspection right.

06

Members of merging companies who vote against a CBM will have a right for their shares to be bought out.

07

It will be necessary for Irish merging companies which are regulated by the CBI to give at least 90 days notice to the CBI.

08

Applicants will not be required to appear in person before the High Court (which we expect will be addressed by continued use of remote hearings).

### How can we help?

Since the introduction of CBMs into Irish law in 2008, A&L Goodbody LLP has advised on some of the highest profile and most complex cross-border mergers in Europe, including numerous cross-border mergers involving major Irish insurance companies, credit institutions and other regulated businesses.

In particular we were the first firm to implement a cross-border merger for a regulated client, the XL Group, back in 2008. We are likely to be the first firm to implement a CBC for a regulated client in 2023, as we are already advising a number of regulated clients on implementing this novel process (for both inward and outward CBCs).

As such we are uniquely placed to continue to advise and assist our clients in implementing CBMs, and also to guide our clients through implementing the novel CBC and CBD processes.



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## Resources



[Directive \(EU\) 2019/2121 on Cross-Border Conversions, Mergers and Divisions](#)

[READ MORE](#)



[S.I. No. 233/2023 - European Union \(Cross-Border Conversions, Mergers and Divisions\) Regulations 2023](#)

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