



HOW TO MOVE YOUR COMPANY ACROSS BORDERS

BE UNSTOPPABLE

BUREN

LEGAL | TAX | NOTARY

This memorandum highlights from a Dutch corporate law perspective some key characteristics of a cross-border conversion of Dutch private limited liability companies (B.V.'s), both inbound as well as outbound.

Conversion in this case means that the legal form and the jurisdiction which laws govern such company are changed, while this entity continues to exist (i.e. without dissolution and/or liquidation) and retains its legal personality. The conversion of a Dutch private limited liability company into a company that shall be governed by the laws of another jurisdiction is hereinafter referred to as an outbound conversion and the reverse situation is hereinafter referred to as an inbound conversion. For the ease of reading this memorandum, a private limited liability company that is governed by the laws of a member state of the European Union (an “**EU Member State**”) and to be converted into a private limited liability company that is governed by the laws of another EU Member State, one of those EU Member States being the Netherlands, forms the central point of departure in this memorandum. In case a legal entity is to be converted into another type of legal entity, one of those legal entities being governed by the laws of the Netherlands, e.g. a (public) limited liability company (referred to in the Netherlands as a *naamloze vennootschap*: N.V.), the below applies *mutatis mutandis* to a large extent but some parts may be different (e.g. an (additional) auditor’s statement may be required).

The current Dutch legislation does not provide for the conversion of a Dutch private limited liability company into a foreign equivalent or *vice versa*. However, according to case law of the European Court of Justice and more specifically the judgement of the European Court of Justice of December 16th, 2008, Case C-210/06 (*Cartesio Oktató és Szolgáltató bt*) (the “**Cartesio Case**”), the judgement of the European Court of Justice of July 12th, 2012, Case C-378/10 (*VALE Építési kft*) (the “**Vale Case**”) and the judgement of the European Court of Justice of October 25th, 2017, Case C-106/16 (*Polbud – Wykonawstwo*) (the “**Polbud Case**”), a limited liability company that is governed by the laws of an EU Member State, may ‘migrate’ (meaning a conversion or transfer of its corporate seat) to another EU Member State whereby the national laws which govern the relevant company will additionally be changed, and such company may be converted into a legal form governed by the laws of the EU Member State to which it migrates. Furthermore, there is an official provisional draft of

the legislative proposal regarding the implementation of a regulation for cross-border conversions of companies with a share capital as published for public consultation in the Netherlands on January 31st, 2014 (the “**Provisional Draft**”).

The Provisional Draft, *inter alia*, pertains to the cross-border conversion of a company with share capital that is established under the laws of the Netherlands into a company with share capital that shall be governed by the laws of a different EU Member State or the laws of a different member state of the European Economic Area, and *vice versa*, as well as the conversion of a company with share capital that is established under the laws of the Netherlands into a company governed by the laws of the public bodies of Bonaire, Sint Eustatius or Saba and *vice versa*. It provides for a set of rules in relation to cross-border conversions. Although it is still a preliminary draft of a legislative proposal, compliance with the Provisional Draft is already common practice.



Outbound cross-border conversions

A company with share capital that is established under the laws of the Netherlands, that intends to cross-border convert itself into a company with share capital that shall be governed by the laws of another EU Member State, should (solely from a Dutch corporate law perspective already) take the following steps into account, assuming, *inter alia*, that:

- a) the company has not been declared bankrupt, it has not been granted suspension of payment, none of the assets of the company are restricted as referred to in section 2:334jj paragraph 6 as included in section I under C of the Provisional Draft, and/or in case a resolution to dissolve the company has been adopted no distribution has taken place as part of its liquidation procedure;
- b) the shares in its capital have not been encumbered (e.g. with a right of pledge);
- c) no depository receipts have been issued for shares in its capital; d) it does not have any employees in the Netherlands nor has it established a works council;
- d) it does not have any employees in the Netherlands nor has it established a works council;
- e) the management board of the company intends to limit (i) the number of documents that need to be drafted, and (ii) the involvement of third parties (e.g. auditors), to the extent allowed under Dutch laws;
- f) no creditors and/or shareholders oppose to the conversion; and
- g) it does not concern a listed company.

Step plan

1. Drafting a cross-border conversion proposal in which the management board of the company (the “**Management Board**”) proposes to convert the company.
2. Drafting a declaration of the shareholder(s) of the company (the “**Shareholder(s)**”) in which the Shareholder(s) approve(s) that no written explanation to the cross-border conversion proposal shall be drafted.
3. Drafting supervisory board resolutions to approve the cross-border conversion (proposal), if applicable.
4. Drafting a declaration of the Management Board stating, *inter alia*, that no significant changes in the circumstances have occurred since the execution of the cross-border conversion proposal.
5. Drafting the notarial record of the general meeting in which shall be resolved to, *inter alia*, (i) convert

the company, (ii) amend its articles of association and (iii) authorize each managing director and/or each employee of Buren to execute the notarial deed of conversion and amendment to the articles of association of the company. Further, the Shareholder(s) herein confirm(s) (i) to waive their rights (if any) pursuant to section 2:334uu as included in section I under C of the Provisional Draft, (ii) that the one month waiting period as set forth in section 2:334vv paragraph 1 as included in section I under C of the Provisional Draft shall not be taken into account and (iii) that no securities (*zekerheden*) or guarantees (*waarborgen*) shall be provided for.

6. Drafting (a) power(s) of attorney from the Shareholder(s) to each employee of Buren to, *inter alia*, attend and vote at the general meeting, if desired.
7. Drafting (an) authority statement(s) in relation to the aforementioned power of attorney, if applicable.
8. Drafting the notarial deed of conversion and amendment to the articles of association of the company, which contains the articles of association as they will read after effectuation of the conversion.
9. Drafting a legal opinion to be executed by a lawyer admitted to the bar of/civil-law notary in the jurisdiction the laws of which shall govern the company after the conversion stating, *inter alia*, that the articles of association as included in the (draft) notarial deed of conversion and amendment to the articles of association are in compliance with that jurisdiction.
10. Drafting a notarial statement which includes, *inter alia*, that the procedural requirements have been complied with for all resolutions which are required under the (corporate) laws applicable in the Netherlands and the articles of association of the company, for the effectuation of the cross-border conversion, and that in all other respects the (corporate) laws applicable in the Netherlands have been complied with in relation to the cross-border conversion;
11. Execution of the aforementioned declaration(s) of the Shareholder(s).
12. Execution of the aforementioned supervisory board resolutions, if applicable.
13. Execution of the cross-border conversion proposal by the Management Board.
14. Filing the aforementioned declaration(s) of the Shareholder(s) and the cross-border conversion

- proposal with the Dutch trade register of the Dutch Chamber of Commerce.
15. Filing the aforementioned declaration(s) of the Shareholder(s) and the cross-border conversion proposal at the office of the company.
 16. Collect statements from the Management Board and the Dutch Chamber of Commerce that the respective filings occurred.
 17. Announcing the filings in a Dutch daily and nationally distributed newspaper as well as in the Dutch Government Gazette.
 18. Filing the adopted (and audited, if required) annual accounts of the company in relation to its past financial year(s).
 19. Collect a statement from the Dutch Chamber of Commerce that the aforementioned declaration(s) of the Shareholder(s) and the cross-border conversion proposal have been deposited with the Dutch trade register for two months.
 20. Collect a statement of non-opposition from the Dutch court, stating it has not received any objections to the cross-border conversion.
 21. Execution of the aforementioned power(s) of attorney, if applicable. Legalization of the signature(s) and having the document provided with an apostille may be required.
 22. Execution of the aforementioned authority statement(s), if applicable.
 23. Execution of the aforementioned declaration of the Management Board.
 24. Execution of the aforementioned notarial record of the general meeting (the resolution to convert the company has to be adopted by at least two/ third of the votes cast representing more than half of the issued capital).
 25. Execution of the aforementioned legal opinion by a lawyer admitted to the bar of/civil-law notary in the jurisdiction the laws of which shall govern the company after the conversion.
 26. Execution of the aforementioned notarial deed of conversion and amendment to the articles of association of the company before one of Buren's civil-law notaries.
 27. Execution of the aforementioned notarial statement.
 28. The company will have to be registered in the relevant trade register of the inbound jurisdiction (often a so-called certificate of continuance is issued by the Registrar of the inbound jurisdiction).
 29. Upon receipt of proof of registration in the inbound jurisdiction, Buren shall request the

Dutch Chamber of Commerce to deregister the company from the Dutch trade register and to issue a statement to that effect. Often such statement together with a true copy of the Dutch notarial deed need to be presented to the foreign Registrar after which a permanent certificate of continuance is issued.

The cross-border conversion shall take effect in the manner and on the date determined by the laws of the inbound country. From a Dutch corporate law perspective the cross-border conversion shall enter into force at the same time by making use of a condition precedent in the notarial deed of conversion and amendment to the articles of association which is executed before one of Buren's civil-law notaries. An outbound cross-border conversion does not end the existence of the company from a Dutch corporate law perspective.

Inbound cross-border conversions

When a limited liability company that is governed by the laws of another EU Member State intends to convert itself into a Dutch private limited liability company, certain requirements set forth by the laws of the outbound jurisdiction shall have to be taken into account. In addition, certain requirements pursuant to the laws of the Netherlands are to be complied with. Assuming an insolvency procedure as referred to in EU Regulation No. 1346/2000 has not been opened in relation to the company, the following (additional) steps are to be taken into account from a Dutch corporate law perspective.

Step plan

1. Drafting a Dutch notarial deed of conversion and amendment to the articles of association.
2. Drafting a resolution to execute the aforementioned Dutch notarial deed and authorization of /power of attorney to each employee of Buren to execute the aforementioned Dutch notarial deed. Taking into account that at the time this resolution shall be adopted and the authorization/power of attorney is granted, the company is still governed by the laws of the outbound jurisdiction, the laws of that jurisdiction apply to (the requirements of) that resolution and authorization/power of attorney.
3. Drafting a legal opinion stating, *inter alia*, that the aforementioned resolution and authorization/ power of attorney are in compliance with the laws of the outbound jurisdiction and each employee of



Buren is authorized to execute the aforementioned Dutch notarial deed.

4. Drafting a certificate of good standing.
5. Drafting (a) data card(s) for the managing director(s) of the company after entering into effect of the cross-border conversion (provided the managing director(s) is/are natural persons).
6. Collecting a true copy of the passport and a recent utility bill/bank statement evidencing the residing address of each managing director of the company after entering into effect of the cross-border conversion (provided the managing director(s) is/are natural persons), and/or a recent extract from the trade register where a corporate entity is registered, provided that a managing director (of the company after entering into effect of the cross-border conversion) is a corporate entity. The same applies *mutatis mutandis* in case the company shall have a sole shareholder after entering into effect of the cross-border conversion.
7. Collecting a written declaration of the judicial, administrative or other authorized authority, designated for that purpose by the EU Member State of departure, from which it appears that all acts and formalities required prior to the cross-border conversion under the laws of the outbound jurisdiction have been complied with.
8. In case the company is converted into a (public) limited liability company that shall be governed by the laws of the Netherlands (i.e. a *naamloze vennootschap*, N.V.), a statement of an auditor as referred to in section 2:393 paragraph 1 of the

Dutch Civil Code (*Burgerlijk Wetboek*) from which it appears that the equity capital (*eigen vermogen*) of the company on a day within five (5) months prior to the entering into effect of the cross-border conversion at least equaled the issued and paid-up capital, is required and to be issued.

9. Execution of the aforementioned data card(s), if applicable.
10. Execution of the aforementioned resolution and authorization of/power of attorney to each employee of Buren to execute the aforementioned Dutch notarial deed.
11. Execution of the aforementioned legal opinion by a lawyer admitted to the bar of/civil-law notary in the outbound jurisdiction.
12. Execution of the aforementioned certificate of good standing.
13. Execution of the aforementioned notarial deed of conversion and amendment to the articles of association before one of Buren's civil-law notaries.
14. Registration of the company and its managing director(s) as well as its sole shareholder (if applicable) with the Dutch trade register at the Dutch Chamber of Commerce.
15. Preparation of a (shareholders') register of the company, to be signed by its Management Board.

In general, the cross-border conversion shall enter into effect on the (calendar) day following the day during which the notarial deed of conversion and amendment to the articles of association is executed before one of Buren's civil-law notaries.



Miscellaneous

There may be no urgent reasons of public interest which oppose to an inbound or outbound conversion. Also, there are several conditions that a company may have to comply with in order to be able to cross-border convert itself, depending on the facts and circumstances of a particular company. As soon as the provisions included in the Provisional Draft are included in the Dutch Civil Code (i.e. the Provisional Draft entered into force), each Shareholder that voted against the outbound conversion and each holder of non-voting shares may (within one month after the general meeting adopted the resolution to cross-border convert the company) request the Dutch Enterprise Chamber of the Court of Appeal in Amsterdam to rule that the company is obligated to take over its share(s). Until the provisions included in the Provisional Draft are included in the Dutch Civil Code (i.e. the Provisional Draft entered into force), the company can voluntarily offer such Shareholder(s) to repurchase share(s).

On April 25th, 2018 the European Commission presented a directive (COM(2018)241) to codify cross-border conversions by amending directive 2017/1132, regulating and harmonizing certain corporate law matters. This directive is currently subject to discussion in the European Parliament and may result

in a more complex process if it survives the legislative procedure and enters into force at some point in time. Initiating any envisaged cross-border restructurings encompassing cross-border conversions prior thereto may therefore be advised.

For the avoidance of any doubt, we note that in the aforementioned Polbud case the European Court of Justice ruled that a local condition pursuant to which deregistration from a trade register is only possible in case of liquidation and dissolution, is contrary to the supranational freedom of establishment (which is supreme over national laws). In addition, the European Court of Justice ruled that it is not required to actually move the company's economic activities to the inbound jurisdiction.

Key contacts



Paul Deloo

Partner
p.deloo@burenlegal.com
T +31 (0)20 333 8393



Leon Handjes

Associate
l.handjes@burenlegal.com
T +31 (0)20 333 8395